FREE EDUCATION FOR UNDOCUMENTED ALIENS: WHAT ARE THE STATE'S INTERESTS?

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I. INTRODUCTION

Prior to 1975, Texas law mandated that a free public education be provided to "all children,"[1] and this provision had been interpreted as specifically including undocumented alien children.[2] However, in 1975, the Texas Legislature perceived that a growing number of undocumented immigrants in the state was making it increasingly difficult for many financially troubled school districts to provide free public education to these alien children without adversely affecting the quality of education for all.[3] In an attempt to minimize this perceived adverse impact on educational quality and finances, the Texas Legislature amended section 21.031 of the Texas Education Code to prohibit the use of state funds for the education of persons who are not either United States citizens or "legally admitted aliens."[4]

Since its passage, however, the amended section 21.031 has been challenged four times, thrice successfully. The Texas courts upheld the

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1. TEX. EDUC. CODE ANN. § 21.031 (Vernon 1972).
2. TEX. ATT'Y GEN. OP. NO. H-586 (April 18, 1975).
3. 4 CHICANO L. REV. 61, 62 n.11 (1977).
4. TEX. EDUC. CODE ANN. § 21.031 (Vernon 1975) states:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
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> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

statute when it was first challenged, in *Hernandez v. Houston Independent School District*,[5] but implementation of the statute has since been enjoined in three separate federal court actions. *Doe v. Plyler*[6] upheld a district court injunction[7] preventing the Tyler Independent School District from requiring undocumented alien students to pay a tuition fee. *In re Alien Children Education Litigation*[8] summarily affirmed a statewide injunction against the Texas Commissioner of Education[9] on the basis of *Doe v. Plyler*. The State of Texas has appealed these decisions to the United States Supreme Court. Finally, in *Boe v. Wright*,[10] a preliminary injunction against the enforcement of section 21.031 in the Dallas Independent School District was affirmed. Disposition of this last case will await the Supreme Court's decision in *In re Alien Children Education Litigation*.

In the latter three contests of section 21.031, the federal courts have found the proferred interests of the Texas Legislature insufficient. With a final decision pending in the United States Supreme Court, it would be both informative and timely to explore the validity of the claims that can be made on behalf of the State in support of this statute. Its proponents maintain that there are important concerns underlying the statute that merit attention irrespective of the ultimate resolution of the constitutional question. Thus, while we recognize the arguments concerning the applicability of constitutional and international law, our purpose here is to isolate and identify the State's claimed interests apart from equal protection or treaty consequences.[11] Identification of the interests at stake does not make them lawful, and a person recognizing the arguments we make here could, nevertheless, conclude that the application of equal protection to opposing interests outweighs the purposes of the statute. Even so, examining the arguments is essential to that determination.

The claimed interests of the State of Texas fall into four broad categories. First, the statute allows Texas to avoid conflict between its own laws and federal immigration policy by eliminating state-funded free education as an immigration "pull factor." Second, the statute ensures that State education officials will not participate in the violation

5. 588 S.W.2d 121 (Tex. Civ. App.—Austin 1977, *writ ref'd n.r.e.*).
6. 628 F.2d 448 (5th Cir. 1980).
7. Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978).
8. 501 F. Supp. 544 (S.D. Tex. 1980).
9. A panel of 5th Circuit judges stayed the injunction without an opinion.
10. 648 F.2d 432 (5th Cir. 1981).
11. While we feel that Texas has made credible arguments in these cases concerning construction of equal protection and international agreements, this textual construction would not by itself resolve the constitutional questions since they depend ultimately upon the weights of competing interests. Such analysis is beyond the scope of this article. *See* Hernandez v. H.I.S.D., 558 S.W.2d 121 (Tex. Civ. App.—Austin 1977, *writ ref'd n.r.e.*).

of federal law. Third, there are a number of education interests at stake. Finally, there is a broader political concern: the protection of a federal system in which the national and state governments each defer to the other's appropriate role.

This article first examines the context in which the State's interests and the opposing interests arise. By context, we mean the statute itself as interpreted by State regulations, the identity of the opposing interests, and applicable federal law, in terms of equal protection and international agreements. The article then explains the four categories of State interest in greater depth. A final section contains the authors' conclusions.

II. THE CONTEXT OF THE DISPUTE

A. Texas Education Agency Regulations

It is often supposed that section 21.031 imposes an absolute barrier to free public education of illegal immigrants.[12] That supposition, however, is erroneous. The statute has been interpreted by regulations promulgated by the Texas Education Agency (TEA)[13] designed to admit even technically unlawful entrants as liberally as possible, consistent with basic State interests. The regulations provide that the performance of one of a number of acts, or the possession of any one of more than a dozen possible documents, makes one "legally admitted" within the meaning of the statute, irrespective of the legality of initial entry. One acceptable way of complying, for example, is to make application for lawful admission to the Immigration and Naturalization Service.[14] Since anyone can make such an application, there is literally no one who cannot become "legally admitted" within the meaning of the statute. Proponents of the law view the TEA's liberal regulations as a strong factor supporting its constitutionality. Opponents argue that the regulations do not produce this result in practice.

B. The Interests Opposing the Statute

Since section 21.031 does exclude some illegal immigrants from free public education, it must be recognized even by proponents of the law that there are interests opposing it. The most emotionally compelling are those of the excluded children, who are denied the tools necessary to make their way in society on an equal basis. In addition, there

12. This assumption, in fact, underlies the decisions of each of the lower federal courts that has considered § 21.031. None has recognized the significance of the regulations.

13. Tex. Educ. Agency, Rule 226.13.90.020, 5 Tex. Admin. Reg. 521 (1980).

14. *Id.*

are interests of society as a whole in avoiding the perpetuation of an uneducated class of people, in preventing the attendant potential problems of crime, welfare and like societal burdens that some infer would be created, and in ensuring against a perception of discrimination.

C. Federal Law: Equal Protection and International Agreements

It is not our purpose to resolve the conflict between the competing positions on either equal protection or international treaties. These arguments about construction of governing law do, however, form part of the context within which the interests of the State are to be weighed, and therefore are worth bearing in mind while considering these interests.

1. Equal Protection

Litigation over section 21.031 has produced a number of different positions of the parties concerning the application of equal protection.[15] Since the Equal Protection Clause, unlike the Due Process Clause, applies only to persons "within [the] jurisdiction" of a State, an argument can be made that equal protection is not applicable at all, although due process is.[16] That result has actually been reached, for example, in the case of aliens released pending deportation hearings.[17] An intermediate position is that equal protection does apply, with the State required to prove a "rational basis" for the classification.[18] Finally, it can be argued that "heightened scrutiny" requires the State to demonstrate a "compelling interest" supporting the statute. This position, which is advocated by most opponents of the law, could be reached either by finding that a fundamental right is in question or that

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15. *Doe* held that aliens illegally within the territorial boundaries of the United States are entitled to equal protection of the laws, 628 F.2d at 454, and that § 21.031 fails to pass even a "rational basis" standard. 628 F.2d at 458.

16. Due process applies to "any person," while equal protection is owed by a state only to any "person *within its jurisdiction*." U.S. CONST. amend. XIV (emphasis added). A strict "physical territory" application of this language, while appropriate for due process, would lead to absurd results for equal protection. It would mean that an absent United States citizen, traveling abroad, would not be entitled to equal protection, while an illegally present immigrant would have rights to all entitlements for which heightened scrutiny has been held applicable. This result can be avoided by recognition that the relevant difference between the absent, traveling American citizen and the unlawful immigrant is not physical presence or absence. Rather, it is the existence of a lawful relationship between the State and the individual, creating correlative obligations. This argument supports the views of those who favor § 21.031 and of those who believe equal protection is inapplicable.

17. Leng May Ma v. Barber, 357 U.S. 185 (1958); Kaplan v. Tod, 267 U.S. 228 (1925).

18. This position was apparently taken by the Fifth Circuit in Doe v. Plyler, 628 F.2d 448, 458, although the court did not expressly so state.

a suspect class is defined.[19]

2. International Agreements

There are also conflicting positions over the applicability of international agreements concerning education. Plaintiffs in *In re Alien Children Education Litigation* argued that certain treaty obligations of the United States have invalidated section 21.031 under the Supremacy Clause of the United States Constitution.[20] Specifically, they asserted that Article 47 of the amended charter of the Organization of American States[21] was a self-executing treaty provision that required that all children in the United States be provided a free elementary education.[22] The plaintiffs also contended that the signing of various international treaties[23] constituted acts of foreign relations that displaced inconsistent state law.[24]

The courts have thus far not accepted this reasoning. The district court in *In re Alien Children Education Litigation* agreed with the proponents of section 21.031 that Article 47 does not contain "the kind of promissory language which confers rights in the absence of implementing legislation."[25] Therefore, the treaty clause is not self-executing and does not invalidate inconsistent state laws.[26] The court also concluded that Texas' denial of a free public education to undocumented children

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19. This position was taken by the district courts in both Doe v. Plyler, 458 F. Supp. 569, 580, and In re Alien Children Educ. Litigation, 501 F. Supp. 544, 564.

The arguable "fundamental right" concerns education. Since San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1974), holds that equality of education is not a fundamental right, the argument is unclear at present. The district courts avoided the *Rodriguez* holding, distinguishing "equality" of education from "access to" education, and held the latter to be fundamental. The Fifth Circuit declined to base its holding on this reasoning. *Cf.* Ambach v. Norwich, 441 U.S. 68 (1979) ("access to education is not guaranteed by the Constitution") (dictum).

The "suspect classification" argument considers the statute as alienage or ethnicity discrimination. Since the statute classifies on the basis of "legally admitted" status, these arguments have found little acceptance.

20. 501 F. Supp. at 590.

21. Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847. Article 47 provides, in part:

> The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education, on the following bases:
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> a) Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge;
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> b) Middle-level education shall be extended progressively to as much of the population as possible, with a view to social improvement.

22. 501 F. Supp. at 589.

23. U.N. CHARTER arts. 55, 56; Universal Declaration of Human Rights, art. 26, G.A. Res. 217, U.N. Doc. A/810 (1948); Protocol of Buenos Aires, *supra* note 21, art. 47.

24. 501 F. Supp. at 590.

25. *Id.*

26. *Id.*

is not an impermissible interference with the federal power to conduct foreign relations.[27] Finally, the court determined that the right to education has not acquired the status of customary international law,[28] and therefore has not become a part of domestic law under *The Paquete Habana*.[29]

III. STATE INTERESTS

Having thus summarized important competing positions on the construction of governing law, we turn to the interests of the State that are claimed to support section 21.031—beginning with the asserted purpose of avoiding conflict with federal immigration policy.

A. Immigration

Federal law authorizes 270,000 ordinary immigrants per year, in addition to 50,000 refugees.[30] For 1981, the refugee number has been increased to 217,000, of whom 168,000 will be from Indochina alone.[31] Over and above these numbers, an estimated 763,000 Cubans and Haitians were admitted in 1980.[32] Asylum is another, separate category for which there is no numerical limit.[33] This lawful immigration is part of a great tradition. The United States has always held out a hand to the tired and the persecuted, and it is still doing so today.

However, Cubans are placed in armed camps surrounded by barbed wire. Haitians are interdicted in leaky boats and deported unless they can produce evidence that they are politically persecuted. To the embarrassment of the United States, Canada has asked that immigrants from El Salvador be deported to Canada rather than back to the fear of death at home.

In short, proponents of section 21.031 argue that criminally illegal immigration by those whose need is not as great is lessening the ability of this nation to absorb genuine refugees, including politically persecuted peoples. Texas has an interest in ensuring that its laws do not frustrate the policy of the United States, and proponents of the statute argue that this purpose supports section 21.031.[34]

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27. *Id.* at 594.
28. *Id.* at 596.
29. "International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." 175 U.S. 677, 700 (1900).
30. 8 U.S.C. 1151, 1157 (1980).
31. 45 Fed. Reg. 68,365 (1980).
32. Rabinove, *Toward an Immigration Policy*, COMMENTARY, Feb. 1981, 55.
33. *Id.*
34. For a general treatment of the problem of undocumented immigration, *see* Salinas

1. Education as a Pull Factor Increasing the Volume of Illegal Immigration

The major inducement for illegal immigration to the United States has been the promise of employment. Indeed, this is the sole factor that brings many undocumented aliens to this country. Often, only the head of the family will immigrate and will send some of his earnings back to his family.[35] Those workers who come to the United States without their families would not be affected by a law such as Texas', and thus such a law by itself could not put an end to illegal immigration into this country.

Work is not, however, the only factor affecting the motivation to immigrate. One's decision to take a certain job is not influenced solely by the wages available, but also by working conditions, fringe benefits, and any disadvantages, dangers, or stigma. One of the considerations facing a person who contemplates moving his entire family to the United States is the prospect of a free public education for his children. Clearly, people are often willing to relocate because of factors dealing with the education of their children. Because of their perceptions about educational quality, many parents in metropolitan areas in this country have been eager to move from one district to another—the major pull factor being a perceived higher quality of education.[36]

Beyond the universal appeal of a quality education, education in general has been identified as a significant inducement to illegal entry by the Domestic Council on Illegal Aliens. In a 1976 report, the Domestic Council described the causes of immigration as "an international push-pull," stating that employment is the main pull factor, but that, in addition, "social and demographic factors such as educational facilities . . . are involved."[37] Employment as a motivation "is enhanced by better opportunity for schooling and education for [aliens] and their children."[38] The Domestic Council recommended the removal of secondary pull factors such as education.[39] The Texas statute here at issue effectively eliminates education as a pull factor for illegal immigration, and is therefore in line with this national authority.

Experts in the field have been unable to measure precisely the inducement to immigration provided by education. Nevertheless,

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& Torres, *The Undocumented Mexican Alien: A Legal, Social and Economic Analysis*, 13 HOUS. L. REV. 863 (1976).

35. A. CORWIN, IMMIGRANTS AND IMMIGRATION 69 (1978).

36. *See generally* L. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT'S DECISIONS ON RACE AND THE SCHOOLS (1976).

37. Brief for Appellant at 17, 19-20.

38. *Id.* at 19.

39. *Id.* at 20.

legislative judgments on the effect of an inducement or deterrent upon human behavior must necessarily be sustained upon much less than actual proof when such proof is unattainable. Such legislative judgments have been upheld even when rewards or deterrents were severe, when they operated in sensitive constitutional areas, and when they affected children.[40] The fact that Texas has chosen to implement its goal of lessening the incentive for illegal immigration by a means that would merely decrease, rather than eliminate such immigration, should not cast doubt on the legislature's motive, as the Court of Appeals in *Doe v. Plyler* suggested.[41] Rather, a state legislature should be free to take partial steps in dealing with problems, as it sees fit[42] since "[t]he efficacy of legislation is not the province of the judiciary."[43] The Texas Legislature, as Judge Reavley, concurring in *Boe v. Wright*, points out, could have thought the elimination of a state-created inducement to illegal immigration more important than the elimination of other incentives such as those provided by the private sector, *e.g.*, employment.[44] If Texas has deemed it more important to avoid an incentive created by its own laws and with the public's money, the courts should treat that decision with deference and assume that neither a fundamental right nor a suspect class is involved.[45]

Many problems have no simple legislative solutions. Any given problem may have several "causes," each of which needs to be separately addressed. It may be that a major cause (in this case, employment) is impractical to address without collateral harms or disproportionate application of resources. *Dandridge v. Williams*[46] holds that a court may not require a legislature to adopt the result of a balancing of competing social concerns that the court thinks best, based on the limited sort of evidentiary predicate of a judicial proceeding. The tendency toward such judicial decision-making can be seen in the district court's opinion in *In re Alien Children Education Litigation*.[47]

40. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970) (subsistence to children can be reduced to prevent unquantifiable inducement to childbearing although not the only or even the "major" inducement); Gregg v. Georgia, 428 U.S. 153 (1976) (severe increase in criminal penalty for deterrence purposes is justifiable, even though the quantum, or even the existence, of the deterrent effect is not provable and is found only through deference to the legislative judgment).

41. 628 F.2d at 461.

42. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Dandridge v. Williams, 397 U.S. 471, 485 (1970).

43. Boe v. Wright, 648 F.2d at 438 (Reavley, J., concurring).

44. *Id.* at 439.

45. City of New Orleans v. Dukes, 427 U.S. at 303.

46. 397 U.S. at 482.

47. 501 F. Supp. 544.

There the court made a number of factual conclusions about the effectiveness of education as a pull factor, based upon evidence that relatively few adults who immigrate unlawfully bring children with them. However, the court failed to consider the certainty that its decree would increase the percentage of aliens who will bring their families in the future, thereby increasing the level of unlawful entry.

2. Alternatives: Anti-Employment Laws and Related Legislation

Besides making Texas unable to eliminate the educational inducement, certain arguments against the Texas statute could also have negative implications for other attempts by the State to avoid impeding federal immigration policy. For example, while the district court in *In re Alien Children Education Litigation* followed the arguments of opponents of section 21.031 and suggested an anti-employment law as a potentially acceptable control,[48] such a law would be inconsistent with that court's own reasoning. The district court held that access to education is a fundamental right to which undocumented aliens are entitled.[49] It would seem, however, that access to employment is more clearly a candidate to be treated as a fundamental right. The Supreme Court has stated, "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] amendment to secure."[50] Thus, an anti-employment law might fail under the district court's rationale, just as section 21.031 did.

There are additional constitutional difficulties confronting a law restricting employment of undocumented workers under the district court's rationale. First, such a law is less likely than is the Texas education statute to qualify as the "least onerous alternative," for it would drive resident undocumented aliens underground in order to find work, subjecting them to greater exploitation by employers. Second, while the district court correctly rejected the argument that the Texas education statute was ethnically motivated and thus involved a suspect class,[51] such an argument could be more persuasively advanced against an anti-employment law. Employers in doubt about the immigration status of legally present Hispanics could easily refuse to hire them, thereby producing ethnically-based discrimination. Section 21.031 presents no such difficulty. Third, an anti-employment law would also

48. *Id.* at 579 n.88.
49. *Id.* at 564.
50. Truax v. Raich, 239 U.S. 33, (1915).
51. 501 F. Supp. at 574.

run afoul of the district court's reasoning that a law impacting on children would be constitutionally infirm,[52] because such a law would mean that the children of undocumented aliens, while receiving a free public education, could receive no support if their parents could not work. It would also mean that, after receiving a court-ordered public education, the children could not be employed in the United States because of acts of their parents committed when they were children—an unreasonable result which section 21.031 avoids.

An anti-employment law would also suffer from a number of practical deficiencies not presented by the Texas education statute. The General Accounting Office (GAO) has concluded that an anti-employment law would be unworkable unless accompanied by a national identification card system, which the GAO labels "drastic" and which would likely be politically unacceptable.[53] To avoid penalizing employers who acted in good faith in the belief that they were employing persons lawfully admitted, an anti-employment law would require a high *mens rea* standard, which would make enforcement difficult. It is likely that such a law would be widely ignored, thereby creating disrespect for the law in those instances wherein the law was unenforced and violators went unpunished. In states having such laws, such as California, nonenforcement has reached almost comical proportions.[54]

We do not mean to take the position here that a law sanctioning employers from hiring undocumented aliens would be unconstitutional. Instead, our point is that such a law, even though suggested as an alternative by the opponents of section 21.031 and by several district courts, is inconsistent with the *In re Alien Children Education Litigation* district court's own reasoning, and that it is not at all clear that section 21.031 is less humane or less likely to achieve its purpose than an anti-employment law would be.

B. Avoiding State Involvement in Federal Crime

Section 21.031 rests, in part, on the theory that the State of Texas should be allowed to avoid complicity in the commission of a federal crime. Federal law prohibits the immigration or entry of unauthorized persons into the United States[55] and also prohibits certain acts related to the transportation and harboring of illegal entrants.[56] These laws

52. *Id.* at 573.
53. Houston Chronicle, Dec. 2, 1980, § 1, at 1, col. 1.
54. California Rural Legal Assistance recently won back pay and reinstatement for illegal immigrants who were fired after having been hired in violation of the State's criminal law, a holding that can only subject the law to ridicule and have no positive effects. *Id.* Dec. 17, 1980, § 1, at 9, col. 2.
55. 8 U.S.C. §§ 1325, 1326 (1976).
56. 8 U.S.C. § 1324(a) (1976).

cover minors who enter with their parents, without knowledge of these criminal provisions.[57] Since these federal statutes do not distinguish between children and adults, the courts have stated that undocumented children are "legally culpable" even if not "morally" at fault.[58] The harboring of a minor is thus a crime, just as is the harboring of an adult.

A state officer who knowingly furnishes shelter to an illegal entrant is engaged in conduct prohibited by the federal harboring statute, which makes it unlawful to facilitate either entry or presence.[59] These acts are not limited to clandestine sheltering, but include acts done openly.[60] The offense need not be related at all to the actual entry, but can consist, for example, of furnishing shelter long after entry has been consummated.[61] The basic test is the relationship between the conduct and the furtherance of the unlawful presence.[62] Moreover, the statute is designed to be "broadly inclusive" rather than restrictive, and the courts have emphasized that it reaches harboring committed "in any place."[63] A broad construction of "in any place" presumably would include a building, such as a public school building. The statute excepts employment from its terms, but that is the only exception it provides, and, in particular, there is no exemption for state government officials.[64] Nor does the fact that the aid given would be proper and lawful if the recipient had entered legally prevent it from being a crime.[65]

It appears unlikely that any such state official would ever be successfully prosecuted under this theory because the attitude of the Justice Department ensures nonprosecution. Knowledge of illegal entry would be difficult to prove, and the creation of an *ad hoc* exception would be likely. Nevertheless, one need not find a prosecutable violation to argue that the State, as a matter of policy, should refrain from *de facto* complicity in illegal activity. The demoralizing effect of state participation in illegality is aggravated by the knowledge of every

57. 8 U.S.C. § 1101(a) (illegal entry includes any coming into the United States "whether voluntary or otherwise").

58. Doe v. Plyler, 458 F. Supp. 569, 582 (E.D. Tex. 1978).

59. 501 F. Supp. at 564.

60. United States v. Acosta De Evans, 531 F.2d 428 (9th Cir. 1976) (furnishing of living quarters held to be "harboring").

61. United States v. Cantu, 557 F. 2d 1173 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978).

62. United States v. Moreno, 561 F.2d 1321 (9th Cir. 1977).

63. United States v. Cantu, 557 F.2d at 1180 (harboring outside, in the open air); *see also* United States v. Castillo-Felix, 539 F.2d 9 (9th Cir. 1976) (acts committed outside of the country are included, owing to a broad interpretation of "in any place").

64. 8 U.S.C. § 1324(a) (1976).

65. United States v. Gonzales-Hernandez, 534 F.2d 1353 (9th Cir. 1976).

Texas schoolchild that official ignorance of the immigration quota exists in the schools themselves, carried out by state officers on the orders of the federal courts. The *Alien Children* district court observed,

> A quota is set without much deliberation because all know it will be effectively disregarded. The border is no barrier and employers are hospitable. Those who promote lawlessness by ignoring the laws are held largely blameless.[66]

This result follows naturally from government participation in the violation of law. Proponents of section 21.031 would argue that one of the ironies of the district court's reasoning is its encouragement of the same "lawlessness" that it rightly deplored.

The effect of governmental participation in lawbreaking was addressed early in Justice Brandeis' famous dissent in *Olmstead v. United States*.[67] From that case and others[68] came the exclusionary rule applied in criminal cases. The rule has had devastating costs, most of which are borne by the arbitrarily defined class of future victims of criminal activity. Yet the exclusionary rule stands as a symbol for the principle that a state not only may, but must, avoid even *de facto* participation in illegal activity.

The federal courts that have struck down section 21.031 have suggested that they would prefer a law punishing private employers to the law in question here.[69] But private employment does not involve state complicity in lawbreaking, while an offer of a free public education as required by the federal courts involves active, *de facto* state complicity in a federal crime. For these reasons, proponents of the statute argue that Texas' interest in avoiding *de facto* criminal complicity by implementing section 21.031 is at least as great as that underlying the exclusionary rule. Opponents, on the other hand, consider the State's purpose in this regard insufficient to withstand equal protection analysis.

C. Education Interests

A number of public education interests are involved in the arguments for a law forbidding the education of undocumented alien children at public expense. These interests include school financing, desegregation, bilingual education, the need to educate the electorate, residency, and the autonomy of local school districts.

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66. 501 F. Supp. at 549.
67. 277 U.S. 438 (1928).
68. Mapp v. Ohio, 367 U.S. 643 (1961); Wong Sun v. United States, 371 U.S. 471 (1963); United States v. Wade, 388 U.S. 218 (1967).
69. *See, e.g.*, In re Alien Children Education Litigation, 501 F. Supp. at 579 n.88.

1. Public School Financing

While there is no indisputable estimate of the undocumented alien population in the United States, estimates of the number of undocumented Hispanic children presently residing in Texas range between 80,000[70] and 20,000.[71] In passing section 21.031, the state was concerned with the impact that educating these children would have on state and local resources. This financial impact would not be distributed evenly throughout the state, but would be felt most heavily in large metropolitan school districts and in the relatively small districts near the border.[72] In districts such as Dallas, the high cost of living has already forced the school district to increase its use of local funds to pay higher teacher salaries.[73] In Brownsville, where an influx of documented aliens has created a problem of overcrowding in the schools, local funds are stretched to the limit because state funds may not be used for construction.[74] An increase in students due to the admittance of undocumented children would strain these local problems further and thus decrease the quality of education that is available in these areas.[75] It would also mean that available state funds must be stretched to accommodate more students, placing even more of the burden of school financing on local resources.

Proponents of section 21.031 argue that judgments concerning the use of state and local funds should be made by the legislative branch and not by the courts. As the Fifth Circuit admitted in *Doe v. Plyler*, "It is not within the expertise of this Court to decide the wisest way to handle the complex problems of financing a public school system."[76] Thus it was wrong for the district court in *In re Alien Children Education Litigation* to find, as it did, that Texas "can afford" to educate undocumented children because of a projected surplus in the state's budget,[77] and then to base its decision, in part, upon that fact. It is the legislature that must face the reality of distributing a finite amount of

70. *Id.* at 576.
71. *Id.* at 577.
72. *Id.* at 580.
73. *Id.*
74. *Id.* at 575.
75. At the time *Boe v. Wright* was heard, the Dallas Independent School District faced an enrollment of 8,700 Spanish-speaking students requiring bilingual education, while the district also faced a shortage of bilingual teachers. The district was also having difficulty recruiting qualified bilingual teachers. The injunction granted against § 21.301 would bring a projected enrollment of 2,000 to 5,000 undocumented alien children from Mexico into the Dallas schools, 99% of whom would require bilingual education. This influx of students would cause a certain decline in the quality of education for Spanish-speaking citizens and legal resident aliens. *See* Boe v. Wright, 648 F.2d at 437.
76. 628 F.2d at 459.
77. 501 F. Supp. at 580.

public monies among a seemingly infinite number of worthy and essential concerns. The federal courts can easily mandate that a single cause receive a certain amount of the state's attention while not considering that others may thereby have to go without. Likewise, the federal executive branch may enter into treaties containing aspirational clauses providing for free elementary education[78] and the "eradication of illiteracy and expansion of educational opportunities for all,"[79] without considering the limitations of state resources. Only legislatures have both the will and the means to make the necessary hard choices, and their determination of public policy in the disbursement of state funds should be treated with deference.

The United States Supreme Court, in *Shapiro v. Thompson*,[80] has recognized the valid interest of the State "in preserving the fiscal integrity of its programs."[81] The court found that a state may legitimately attempt to limit its expenditures for public education, provided that it "may not accomplish such a purpose by invidious distinctions between classes of its *citizens*."[82] Texas' section 21.031 involves persons who are not citizens and who have not applied for lawful admittance. Proponents view it, therefore, as falling within the area of valid state measures allowed by the Supreme Court in *Shapiro v. Thompson*. Opponents counter by arguing that the State has conserved resources by an invidious discrimination.

2. Desegregation

The tendency of undocumented immigrants to arrive and settle in specific areas of cities increases ethnic concentration, thereby making desegregation more difficult. Since the decision of where to settle results from private choice rather than from state effort or coercion, this sort of racial isolation may not be remediable through the Constitution. Nevertheless, besides adding to the difficulty of the overall desegregation process, an increase in one-race schools is logically the kind of pattern that the State would have a strong interest in avoiding. The State Legislature might have concluded that it could further this interest by section 21.031.

Another phenomenon making desegregation more difficult is that of rapid population shifts. With the populations of Texas' large cities and southern border towns changing rapidly, school districts in these

78. Protocol of Buenos Aires, *supra* note 21.
79. *Id.* art. 31.
80. 394 U.S. 618 (1969).
81. *Id.* at 633.
82. *Id.* (emphasis added).

areas may find the positions of ethnic groups being switched within a relatively short period of time.[83] When a school district is under close scrutiny as to the number of one-race schools within it, these population shifts make the task of minimizing racial concentration more difficult. These shifts will be increasingly influenced by unlawful immigration if section 21.031 is struck down.

Even slight shifts can cause great harm to desegregation efforts. For example, a continuing decline in Anglo enrollment in the Houston Independent School District in 1980 has forced HISD to undertake a transfer policy which sets independent quotas for minority to majority transfers. These quotas are necessary because in 1980 HISD experienced a two percent decline in Anglo population, and "desegregation experts believe than when Anglo enrollment at a school dips below 35 percent, other Anglos tend to leave."[84] The result is felt most severely by Black children who must endure lengthy bus rides to reach integrated schools. When a relatively small shift can so impede desegregation, shifts of a magnitude that would cause the two current largest minorities to exchange places would create an even greater impediment. Such shifts would be accelerated by illegal immigration.

Furthermore, the courts deciding this issue have failed to take the future into account. The cumulative effect of federal decisions on the condition of the public schools may be more pronounced than the current results would indicate. Proponents of section 21.031 point out that, historically, illegal immigration has fluctuated widely, and that judicial extension of social benefits may well induce a new and more intense wave of illegal immigration. While it is as impossible to accurately estimate future immigration as it is to determine the current undocumented population, proponents of the statute argue that this difficulty should mean greater, not lesser, deference to legislative determinations, rather than judicial orders cast in the concrete of a constitutional holding. Opponents regard these arguments as speculative and unduly pessimistic, and they argue that desegregation concerns cannot be addressed by excluding a class, even an illegally present class, from free public education.

3. Bilingual Education

Admission of undocumented children to the public schools will strain bilingual education in Texas. There is already a shortage of

83. *HISD Declining White Enrollment Hurts Integration Plan, Chief Says*, Houston Chronicle, Oct. 4, 1980, § 1, at 13, col. 2.

84. *Id.*

bilingual teachers[85]—brought about by a number of existing circumstances. A bilingual teacher must possess all of the qualifications required of other teachers and must be fluent in both languages, including terminology in mathematics, history, science, and the like. Since bilingual education is relatively new in the history of education, training programs have not had long to develop, and persons already possessing the required abilities are able to obtain higher pay elsewhere. It is also difficult to recruit bilingual teachers because bilingual education has become politicized by federal intervention in the form of regulation of the intimate details of the program.[86]

Coinciding with these events is a decision ordering Texas to quadruple the number of grades in which bilingual education is provided.[87] The addition of undocumented students, when resources are already stretched to the limit, would harm such programs, perhaps irrevocably, for legally present children. The record shows that undocumented children cost nearly half again as much as the average Texas pupil to educate, but even that fact is not the point. Further stretching present resources can only mean that more bilingual teachers will perceive the task demanded of them as unreasonable. Opponents recognize this present problem, but they argue that it is temporary and that it can be solved by infusion of resources.

4. Educating the Electorate to Perpetuate the Democracy

In a democracy, one of the most important functions of education is to perpetuate the democracy through an informed electorate. In *Boe v. Wright*, Judge Reavley concluded that "Texas' interest in educating the electorate is clearly frustrated in this case."[88] The concurrence of Chief Judge Clark and Judge Reavley in *Boe* indicates that had *Doe v. Plyler* originally been decided by their panel of the Fifth Circuit, an opposite result would have been reached. *Doe v. Plyler* does not address the need for an educated electorate. The court failed to recognize that this need would not be served by its suggestion of an anti-employment law. As Judge Reavley stated:

> [The Texas Legislature] could reasonably have concluded that it should not dilute its limited resources [for educating the electorate] by providing free public education to illegal aliens who can never—absent some form of amnesty—become

85. 501 F. Supp. at 581.
86. Stancill, *Bilingual Education Regulations Attacked*, Houston Chronicle, Sept. 10, 1980, § 1, at 8, col. 1.
87. Unites States v. Texas, 506 F. Supp. 405 (E.D. Tex. 1981) (Justice, J.).
88. 648 F.2d 432, 437 (5th Cir. 1981).

> citizens, exercise the franchise, or serve in the armed forces of the United States.[89]

Proponents of section 21.031 argue that the State's interest is made even more poignant by TEA regulations, which means that the illegal immigrants for whom the electorate was thus sacrificed in *Doe v. Plyler* are those who have not applied for the right to stay.

5. Residency

The Texas statute is analogous to university tuition rates determined according to a student's lawful residency status. In *Vlandis v. Kline*,[90] the Supreme Court upheld the right of a state to distinguish between those entitled to a free public education from those not so entitled by the relationship of the student to the state.[91] The court recognized that a state may determine this relationship by a reasonable durational residency test, or by consideration of such factors as voter registration, vehicle registration, and driver licensing.[92]

In the proponents' view, Texas' enactment of section 21.031 is supported by the reasoning of *Vlandis v. Kline*. Undocumented immigrants are not, and do not claim to be, lawful Texas residents. They cannot obtain many of the indicia of sufficient relationship to the State mentioned in *Vlandis*. The criminal nature of their presence in Texas creates a stronger case than was presented in *Vlandis*, which concerned an irrebuttable presumption of nonresidency for certain students. Finally, the TEA has promulgated guidelines that would legitimize the free public education of many undocumented children by reference to factors designed to measure their relationship to the state.[93] The regulations would allow those aliens who merely apply for citizenship or residence in the United States to attend school. An attempt to comply with these regulations is an indication that the immigrant has some allegiance to state law, and this allegiance constitutes the minimum relationship necessary for Texas to provide a free public education to the alien. Since the state has a legitimate interest in making its provision of services depend upon an individual's having some minimum level of relationship with the state, *Vlandis v. Kline* appears to support Texas' position in this case.

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89. *Id.* at 436. Furthermore, the legislature could have concluded that it was undesirable for the electorate to become segregated on *de facto* wealth grounds, as it would be when the "dilution" caused financially able parents to choose private schools.

90. 412 U.S. 441 (1973).

91. *Id.* at 453, 454.

92. *Id.* at 454.

93. Tex. Educ. Agency, Rule 226.13.90.020, 5 Tex. Admin. Reg. 521 (1980).

6. Autonomy of Local School Districts

It is vital that schools remain under local control. Local control necessarily entails local accountability, which ensures that acts of local officials reflect the popular will. Local control also assures that public preferences are communicated to those officials whose own expressions help to shape popular opinion in the community. This proximity "increases accountability by increasing access."[94] Because of their remoteness (indeed, because of their very nature), federal courts lack accountability to popular preferences.

Justice Powell, dissenting in *Columbus Board of Education v. Penick*,[95] recognized the danger to public education posed by the federal courts. There he wrote that "wholesale substitution of judicial legislation for the judgments of elected officials and professional educators derogates the entire process of public education."[96] Proponents of section 21.031 argue that federal court intervention in striking down the section is of the type that, in Justice Powell's words, "typif[ies] intrusions on local and professional authorities that affect adversely the quality of education."[97]

When parents perceive that public school boards do not have sufficient control of their tasks to provide quality education, those parents with the means to do so will take their children out of the public schools and embrace private education.[98] They find ample cause in the basic human desire to possess control over one's own destiny. Justice Powell finds this exodus to be "in substantial part a natural reaction to the displacement of professional and local control that occurs when courts go into the business of restructuring and operating school systems."[99]

Federal intervention is nearly always benevolently motivated, and great courage is required to refrain from it when perceived "injustice" can be "righted." Ironically, though, the cumulative weight of such intervention is most debilitating to the poor, to minorities, and to others deserving of the law's protection. Justice Powell cites a marked decline in the quality of public education when substantial elements of the population abandon the schools.[100] As public school enrollment becomes increasingly limited to those who cannot afford to go elsewhere

94. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 854 (1979).
95. 99 S. Ct. 2941 (1980).
96. *Id.* at 2990.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*

or who are indifferent to its quality, "the net effect is an overall deterioration in public education, the one national resource that traditionally has made this country a land of opportunity for diverse ethnic and racial groups."[101] Opponents, while implicitly recognizing the ultimate limits of federal judicial authority, do not consider that those limits are exceeded by the mandating of free public education for undocumented aliens, because they regard such relief as a natural court function under the circumstances.

D. Federalism Interests

Federalism issues that arise in the controversy over section 21.031 involve basic problems of state or federal exercise of power as well as the narrower problem of a state trying to administer a federally-created classification.

1. State Authority Over Education

Just as the federal decisions striking down section 21.031 derogate local authority over public education, they arguably do the same to state authority. In mandating how the state must administer its public schools, the federal courts exercise power in an area traditionally governed by the state. Proponents of section 21.031 argue that federal decisions on undocumented immigrant education in Texas undermine the ability of the state to exercise its plenary power over education, thereby blurring the line between federal and state power and leaving little of the state's "separate and independent existence."[102]

This federal intrusion into a traditional state function has a demoralizing effect on state legislators and education officials as they see their efforts to provide effective education undermined. This awareness may also cause the state to restructure the way in which it arranges its affairs. Moreover, other state programs may be adversely affected, since budget cutting may be necessary in other areas if the state is to comply with the court's order in the field of education.

Proponents of section 21.031 regard the case of *National League of Cities v. Usery*[103] as applicable to this discussion. *Usery* held that to

101. *Id.* at 2991.

102. Coyle v. Smith, 221 U.S. 559, 580 (1911).

103. 426 U.S. 833 (1975). *Usery* was narrowed by the later decision in Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. 2352 (1981), but *Hodel's* three-part test does not alter the result in this case. The order in these education cases affects the "State as [a] State," covers "indisputable" areas of state sovereignty, and "directly impairs" the States' "structuring" of "integral operations"—assuming, that is, that the *Usery* rationale is applicable at all.

the extent that the federal regulations there displaced the states' abilities to structure "integral operations" (specifically, employer-employee relationships) in areas of traditional governmental functions, they were not within the authority granted Congress by the Constitution.[104] The Court also held that Congress could not exercise its authority "so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[105] In so holding, the Court sought to prevent Congress from using its power in a way that would impair the states' "ability to function effectively in a federal system."[106]

The Court's concern also pertains to the issue of undocumented immigrant education in Texas. As did the federal regulation involved in *Usery*, the federal court's order here displaces the state's ability to structure integral operations (public school enrollment) in an area (education) that is a traditional state governmental function. Likewise, any holding that treaties calling for free elementary education, such as the amended O.A.S. Charter,[107] do in fact invalidate inconsistent state law, would have the same effect. Proponents of section 21.031 emphasize that this particular form of federal intervention requires the state's officers to violate the criminal law in the state's own schools. The requirement that state officers commit acts constituting the elements of a criminal violation seems particularly difficult to justify as an "impairment" of the state's "integrity."

While *Usery* involved a congressional enactment and not a court order, the Tenth Amendment's reservation of plenary power over education to the states pertains to federal judicial, as well as legislative, power,[108] because the Tenth Amendment speaks in terms of the "United States," not merely the "Congress." Education is certainly as much a traditional governmental function as was police and fire protection in *Usery*, and it is just as essential to the independent existence of the State.[109] While this interest is difficult to evaluate, and may not suffice to overcome a strong equal protection challenge, it does, in the view of proponents, have some weight.

2. State Administration of Federally-Created Classifications

No single constitutional provision is absolute in the sense that it

104. *Id.* at 852.
105. *Id.* at 855.
106. Fry v. United States, 421 U.S. 542, 547 n.7 (1975).
107. Protocol of Buenos Aires, *supra* note 21.
108. Percy, *National League of Cities v. Usery: The Tenth Amendment is Alive and Doing Well*, 51 TUL. L. REV. 95, 106 (1976).
109. *See* 426 U.S. at 855, n.20. This also applies to the extent that education is provided by local governmental units, which derive their authority and power from their respective States.

can be extended so as to obliterate another. The Equal Protection Clause is part of a complete Constitution, and it was never intended to supersede the federal immigration and naturalization power contained in the same Constitution or to invalidate distinctions made as a result of it. Texas does not have authority to reclassify persons contrary to federal immigration law, but must honor the distinctions already made by Congress in this respect. For example, it must not discriminate invidiously against those the federal government has chosen to admit into this country. For the same reasons, it can be argued that the Equal Protection Clause of the Fourteenth Amendment was never intended to force a state to reward the eluding of the federal immigration authority, as the courts here would have it do. Proponents of section 21.031 argue that all that Texas has done in this case is to shape its laws to avoid violation of federal immigration classifications, and that the federal courts, construing the Constitution as a whole, should not prohibit it from doing so.

IV. CONCLUSION

There is an alternative to an effective limited immigration policy, and that alternative is the maintenance of an open border. Such an approach has been advocated by some, and it would have certain advantages (not the least of which would be consistency). But an open border is not compelled by the Constitution, and it would have disadvantages, the seriousness of which cannot be accurately predicted.

At the opposite end of the spectrum, the United States could undertake a strenuous effort to reduce illegal immigration, using all the means at its command. Such an approach would cause other serious problems. In other words, there is no immigration policy which harms no one's interests. Indeed, whatever approach is taken, it appears likely that the issues underlying the state interests set forth above—those of inducements to the volume of immigration, respect for criminal law, education of persons lawfully present, and the federal-state balance—will be difficult ones to resolve for a long time to come.

The goal of this article has been modest. It has been to identify and give expression to state interests that might, arguably, support the exclusion from free public education of illegal immigrants who do not apply for lawful status. Articulation of these interests does not resolve the question of whether such exclusion is constitutional, desirable, or wise. Those questions depend upon one's view of the opposing interests. Consideration of the State interests is, however, an essential step in that resolution. If, for example, the United States Supreme Court

upholds the Texas statute in *Doe v. Plyler* and *In re Alien Children Education Litigation*, it is likely that the reason will be that it has considered one or more of the interests articulated here to be sufficiently important to sustain it.

If the Supreme Court should strike down the statute, analysis of the State's interests has value. Historical evaluation of the decision will demand such an analysis. More importantly, since the problems that correspond to the State interests set forth above will not disappear as a result of the decision, whatever it may be, we must understand and begin to deal with them.