Fordham International Law Journal

Volume 7, *Issue* 1 1983 *Article* 3

Undocumented Aliens' Right to Medicaid After Plyler v. Doe

Laurie McGinnis*

*

Undocumented Aliens' Right to Medicaid After Plyler v. Doe

Laurie McGinnis

Abstract

In this Note, the constitutionality of the federal Medicaid citizenship provision and state citizenship provisions enacted pursuant thereto is addressed. The constitutionality of the state Medicaid citizenship provisions is examined under the equal protection standards applicable to undocumented children. The constitutionality of the citizenship provisions of Title XIX, and the federal regulations adopted pursuant thereto, is examined. The constitutionality of the state citizenship provisions under the Supremacy Clause is addressed. Finally, this Note examines the unique position of pregnant undocumented aliens and their citizen offspring.

UNDOCUMENTED ALIENS' RIGHT TO MEDICAID AFTER *PLYLER V. DOE*

INTRODUCTION

In *Plyler v. Doe*,[1] the Supreme Court held that a Texas statute[2] authorizing local school districts to deny enrollment in their public schools to undocumented alien children[3] violated the Equal Protec-

---

1. 457 U.S. 202 (1982).

2. TEX. EDUC. CODE ANN. § 21.031 (Vernon 1972 & Supp. 1982). Section 21.031 provides in pertinent part that:

> (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 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.
>
> (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.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

Id.

3. The term "undocumented alien" is used herein in place of the term "illegal alien," to refer to all aliens who cannot prove that they are legally in the United States, but who are not under order of deportation. This includes, for example, "aliens who do not have actual possession of proper entry papers due to loss or theft of their entry visa as well as aliens who are eligible for permanent residence status but have not applied for this status." Note, *Equal Protection for Undocumented Aliens*, 5 CHICANO L. REV. 29, 29 n.1 (1982) (quoting Letter from Mexican American Legal Defense Fund to Hon. Evelle J. Younger (Sept. 5, 1978)) [hereinafter cited as Note, *Equal Protection*]. The term "illegal alien" more aptly refers to aliens who have entered the United States illegally and are under order of deportation. *Id.* The Census Bureau has used the term "illegal alien" more broadly to refer to aliens who are *deportable* because they violated the statutes regarding entry to the United States or because they violated the terms of their admission after being admitted legally. The term encompasses, therefore, those who "entered without inspection," "visa abusers" or "overstayers," and "fraudulent entrants." Siegal, Passel & Robinson, U.S. Bureau of the Census, Preliminary Review of Existing Studies of the Number of Illegal Residents in the United States, *reprinted in* SELECTED READINGS ON U.S. IMMIGRATION POLICY AND LAW 5, 5 n.1 (1980) (emphasis added) [hereinafter cited as *Census Report*].

The former definition is preferable to that used by the Census Bureau because the question of deportability is not resolved until a formal finding is made under federal immi-

tion Clause[4] of the fourteenth amendment.[5] Citing Supreme Court precedent that recognized undocumented aliens' due process rights, the Court reasoned that the fourteenth amendment was designed to

---

gration statutes. *See generally* 8 U.S.C. § 1252 (1976 & Supp. V 1981). Prior to such a finding, an undocumented person may have defenses to expulsion under the Immigration and Nationality Act. *See* Federation for Am. Imm. Reform (FAIR) v. Klutznick, 486 F. Supp. 564, 573-74 n.12 (D.D.C. 1980). *See generally* Schey, *What the Texas School Case Really Means*, 5 IMM. J. 3 (1982). In addition, an undocumented person may be residing in the United States with the formal or inchoate permission of the Immigration and Naturalization Service (INS). *See* Holley v. Lavine, 553 F.2d 845, 849 (2d Cir.), *cert. denied*, 435 U.S. 947 (1977) (undocumented alien residing in the United States under "color of law" by virtue of the fact that the INS had issued a formal letter to the effect that deportation procedures had not been instituted for humanitarian reasons); St. Francis Hosp. v. D'Elia, 71 A.D.2d 110, 119-20, 422 N.Y.S.2d 104 (1979) (undocumented alien residing in United States under "color of law" after expiration of nonimmigrant visa while application for immigrant visa pending); Papadopoulos v. Shang, 67 A.D.2d 84, 87, 414 N.Y.S.2d 152 (1979) (undocumented alien residing in United States under "color of law" after denial of permanent residence application while awaiting a ruling on deferred status). For the law regarding illegal entry, see Immigration and Nationality Act, § 1251, 8 U.S.C. § 1325 (1976). *See also* 8 U.S.C. § 1251 (1976 & Supp. V 1981) (definition of deportable alien); 8 U.S.C. § 1252 (1976 & Supp. V 1981) (deportation proceedings).

4. *See* U.S. CONST. amend. XIV, § 1. The fourteenth amendment guarantees that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

5. *See* 457 U.S. 202, 230 (1982). The *Plyler* Court applied the intermediate level of scrutiny to undocumented children, and indicated that for undocumented adults, the rational relation test would be appropriate. *See* 457 U.S. at 218-24. *See also infra* notes 76-86 and accompanying text. Some courts before *Plyler* recognized the equal protection rights of undocumented aliens. *See* Holley v. Lavine, 529 F.2d 1294 (2d Cir.), *cert. denied*, 426 U.S. 954 (1976); United States v. Barbera, 514 F.2d 294, 296 n.3 (2d Cir. 1975); United States v. Otherson, 480 F. Supp. 1369 (S.D. Cal. 1979); Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W.2d 635, 637 (Tex. Civ. App. 1972). *But see* Alonso v. California, 50 Cal. App. 3d 242, 249 n.3, 123 Cal. Rptr. 536, 540 n.3 (1975), *cert. denied*, 425 U.S. 903 (1976); Bastas v. Board of Review, 155 N.J. Super. 312, 382 A.2d 923 (App. Div. 1978). Undocumented aliens have been recognized as having other legal rights. *See* Williams v. Williams, 328 F. Supp. 1380 (D.V.I. 1971) (access to divorce court); Martinez v. Fox Valley Bus Lines, 17 F. Supp. 576 (N.D. Ill. 1936) (right to bring a negligence action); Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W.2d 635 (Tex. Civ. App. 1972) (right to receive workmen's compensation benefits).

Legal aliens have been afforded equal protection of the law since Yick Wo v. Hopkins, 118 U.S. 356 (1886). *See also* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 n.7 (1947); Truax v. Raich, 239 U.S. 33 (1915). Legal aliens are a suspect class in equal protection analysis; statutes which burden them are subject to strict scrutiny under the Equal Protection Clause. Mathews v. Diaz, 426 U.S. 67 (1976); Sugarman v. Dougall, 413 U.S. 634 (1973). For a discussion of this test, see *infra* notes 64-66 and accompanying text.

guarantee equality under the law to all persons physically within the territorial jurisdiction of a state.[6]

The principle of the Equal Protection Clause is that statutes cannot create classifications affording different treatment to persons who are similarly situated.[7] The extent to which persons are construed as being similarly situated varies with the level of scrutiny the Supreme Court applies to the classification in the statute at issue.[8] The significance of the *Plyler* decision, therefore, lies not so much in the Court's recognition of undocumented aliens' right to equal protection as in its application of a meaningful standard of scrutiny to the classification in the Texas statute.

The *Plyler* Court did not apply the traditional "toothless scrutiny" associated with its review of economic and social welfare legislation.[9] Instead, it applied the more recently contrived "intermediate level" of scrutiny.[10] As a result, *Plyler* creates doubt as to the constitutionality of numerous federal and state statutes that condition eligibility for government assistance on citizenship or legal status (citizenship provisions),[11] at least insofar as they affect undocumented children. Such statutes presently exclude between

---

6. *See Plyler*, 457 U.S. at 210 (citing Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); *Yick Wo*, 118 U.S. at 369 (1886)). The *Plyler* Court also cited Mathews v. Diaz, 426 U.S. 67, 77 (1976), stating that *Mathews* "clearly held" that illegal aliens are protected by the fifth amendment from invidious discrimination by the federal government. *Plyler*, 457 U.S. at 210. The statement in *Mathews* referred to by the *Plyler* Court was dictum, however, because *Mathews* upheld a residency requirement over a due process claim by a legally resident alien. 426 U.S. at 87.

7. *See Plyler*, 457 U.S. at 216; Tigner v. Texas, 310 U.S. 141, 147 (1940); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See also* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949) (discussing classification under the Equal Protection Clause).

8. *Tigner*, 310 U.S. at 147 (1940).

9. *See Plyler*, 457 U.S. at 224. *See also infra* notes 50-63 and accompanying text (discussing the standard of review in rational relation tests).

10. *Plyler*, 457 U.S. at 224. *See infra* notes 76-86 and accompanying text.

11. *See, e.g.*, Food Stamp and Food Distribution Program, 7 U.S.C. § 2015(f) (Supp. V 1981); Grants to States for Old-Age Assistance, 42 U.S.C. § 302(b) (1976 & Supp. V 1981); Aid to Families with Dependent Children, 42 U.S.C. § 602(a)(33) (Supp. V 1981) [hereinafter cited as AFDC]; Grants to States for Medical Assistance Programs, 42 U.S.C. § 1396a(b) (1976 & Supp. V 1981) [hereinafter cited as Medicaid]; Grants to States for Aid to the Blind, 42 U.S.C. § 1202(b) (1976); Grants to States for Aid to Permanently and Totally Disabled, 42 U.S.C. § 1352(b) (1976) [hereinafter cited as APTD]; Supplemental Social Security Income for the Aged, Blind and Disabled, 42 U.S.C. § 1382c(a)(1)(B) (1976).

three and twelve million[12] undocumented persons from government assistance programs that provide support to indigent citizens and

---

12. Estimates of the number of undocumented aliens present in the United States have varied considerably due to the obvious difficulty in obtaining an accurate estimate. Alien Children Educ. Litig., 501 F. Supp 544, 575 (S.D. Tex. 1980), *aff'd*, 457 U.S. 202 (1982); Doe v. Plyler, 458 F. Supp. 569, 578 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982). For estimates of the number of undocumented aliens in the United States, see *Plyler*, 457 U.S. at 218-19 n.17 (citing *Joint Hearings Before the Senate Subcomm. on Immigration and Refugee Policy and House Subcomm. on Immigration, Refugees and International Law*, 97th Cong., 1st Sess. 9 (1981) (testimony of William French Smith, Attorney General)) (three to six million); Hewlett, Coping with Illegal Immigrants, *reprinted in* HOUSE COMM. ON FOREIGN AFFAIRS, SENATE COMM. ON FOREIGN RELATIONS, 97th Cong., 2d Sess., Twenty-Second Mexico-United States Interparliamentary Conference 77 (Joint Comm. Print May, 1982) (four to six million with an annual net inflow of 500,000); *Census Report*, *supra* note 3, at 9 (below six million as of 1978). Such low estimates have been criticized elsewhere as "practically snatched out of the air." Federation for Am. Imm. Reform (FAIR) v. Klutznick, 486 F. Supp. 564, 567 n.6 (D.D.C. 1980). In 1980, the New York Times reported the number at ten million with two million more arriving each year. N.Y. Times, Jan. 16, 1980, at A1, *cited in* Note, *Equal Protection*, *supra* note 3, at 30 n.6. *See also Plyler*, 457 U.S. at 242 n.2 (Burger, C.J., dissenting) (citing Christian Sci. Monitor, May 21, 1982, at 22, col. 4) (twelve million present).

The presence of this substantial number of undocumented aliens in the United States is due primarily to the availability of employment and the failure of the federal government to enforce the immigration laws. *Plyler*, 457 U.S. at 242 n.1 (Burger, C.J., dissenting); *The Knowing Employment of Illegal Immigrants: Hearings on Employment Sanctions Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 11 (1981) (statement of Malcolm Lovell, Jr., Under Secretary, U.S. Dep't of Labor) ("[T]here is . . . universal consensus that this flow of aliens into the United States is principally a labor market phenomenon . . . . [I]llegal immigration is primarily a movement of workers who are pushed out of their Third World countries and pulled into our labor market by the strong disparities between the wages and employment opportunities.").

The employment available to undocumented aliens is frequently provided at low wages and under substandard conditions by employers seeking to evade laws passed for the protection of the American worker. W. FOGEL, MEXICAN ILLEGAL ALIEN WORKERS IN THE UNITED STATES 95 (1979). Abusive labor practices have been reported by a Congressional committee conducting hearings on undocumented aliens:

> Without employer sanctions, such employers have been free to hire illegals, to pay them less than prevailing wages for long hours of work, to subject them to unsafe working or housing conditions, and to fire them at will, sometimes by notifying INS when their work was done and their paychecks were due.

Id. at 24. Former Secretary of Labor Ray Marshall stated that:

> Undocumented workers are subject to blackmail of every conceivable sort. If they complain to their employers about their paltry wages and their unsafe working conditions, they run the risk of being turned into the Immigration Service. As a result they live a kind of half-life. They live among us but they live in fear, outside the protection of basic laws.

Wash. Star, Apr. 24, 1977, at A2, col. 3, *quoted in* Catz, *Regulating the Employment of Illegal Aliens: De Canas and Section 2805*, 17 SANTA CLARA L. REV. 751, 755 n.24 (1977). *See*

documented aliens.[13] Title XIX of the Social Security Act[14] (Title XIX or federal Medicaid statute) is among the most important of these assistance programs because of the potentially catastrophic effects of denying medical assistance to undocumented aliens.[15]

In this Note, the constitutionality of the federal Medicaid citizenship provision and state citizenship provisions enacted pursuant thereto is addressed. In Part I, those provisions are set forth and explained.[16] In Part II, the constitutionality of the state Medicaid citizenship provisions[17] is examined under the equal protection standards applicable to undocumented children.[18] In Part III, the constitutionality of the citizenship provisions of Title XIX, and the federal regulations adopted pursuant thereto, is examined.[19] The constitutionality of the state citizenship provisions under the Supremacy Clause[20] is addressed in Part IV.[21] Finally, Part V examines the unique position of pregnant undocumented aliens and their citizen offspring.[22]

This Note concludes that under the intermediate level of scrutiny applied to undocumented children in *Plyler*, state statutes that exclude children from Medicaid eligibility on the basis of their undocumented status are in violation of the Equal Protection

---

also Illegal Aliens: A Review of Hearings Conducted During the 92d Congress Before Subcomm. No. 1 of the House Comm. on the Judiciary, 93d Cong., lst Sess. 12 (1973); W. FOGEL, *supra* at 90-94 (1979) (citing North & Houstoun, The United States Labor Market: An Exploratory Study (1975) (prepared for the Employment and Training Division, U.S. Dep't of Labor, Washington, D.C.)) (Although the average wage for illegal aliens in manufacturing approximates that prescribed by federal law, conditions under which undocumented aliens work are "inexcusable by U.S. standards."); Buck, *The New Sweatshops: A Penny for Your Collar, reprinted in* SELECTED READINGS ON U.S. IMMIGRATION POLICY AND LAW 34-38 (1980) (describing an estimated 4500 New York garment factories in which undocumented aliens work under conditions which violate minimum wage, overtime, child labor, and health and safety laws). *See generally* Note, *Chinatown Sweatshops: Wage Law Violations in the Garment Industry*, 8 U.C.D. L. REV. 63 (1978).

13. *See, e.g., supra* note 11.
14. 42 U.S.C. §§ 1396-1396p (1976 & Supp. V 1981).
15. *See infra* notes 110-25 and accompanying text.
16. *See infra* notes 28-47 and accompanying text.
17. For examples of state Medicaid citizenship provisions, see *infra* note 47.
18. *See infra* notes 48-157 and accompanying text.
19. *See infra* notes 158-86 and accompanying text.
20. U.S. CONST. art. VI.
21. *See infra* notes 187-97 and accompanying text.
22. *See infra* notes 199-210 and accompanying text.

Clause.[23] Because the Constitution prohibits Congress from eliciting state participation in a jointly-funded program that authorizes the states to violate the Equal Protection Clause,[24] the citizenship provision of Title XIX should not be construed as authorizing the exclusion of undocumented children from Medicaid.[25] The state statutes which exclude undocumented children, therefore, may also be in violation of the Supremacy Clause because they exclude persons made eligible for receipt of benefits under Title XIX.[26] Finally, regardless of the equal protection rights of undocumented aliens, a pregnant undocumented alien should be able to qualify for assistance under the Medicaid statute to ensure that the equal protection rights of her child, as a citizen of the United States, are protected.[27]

I. *ELIGIBILITY UNDER THE MEDICAID STATUTE*

Title XIX of the Social Security Act[28] provides for allocation of federal matching funds to state medical assistance programs that have been approved by the Secretary of Health and Human Services (the Secretary).[29] Approval is granted following a state's compliance with the requirements enumerated in Title XIX and the federal regulations adopted pursuant thereto.[30] Assuming a state

---

23. *See infra* notes 48-157 and accompanying text.

24. Graham v. Richardson, 403 U.S. 365, 382 (1971); Shapiro v. Thompson, 394 U.S. 618, 641 (1969).

25. *See infra* notes 158-86 and accompanying text.

26. *See infra* notes 187-97 and accompanying text.

27. *See infra* notes 199-210 and accompanying text.

28. 42 U.S.C. §§ 1396-1396p (1976 & Supp. V 1981).

29. *Id.* The Department of Health, Education and Welfare has been redesignated the Department of Health and Human Services. 20 U.S.C. § 3508 (1978 & Supp. V 1981).

Participation in the Medicaid program is optional. HEALTH CARE FINANCING ADMINISTRATION, DEP'T OF HEALTH, EDUCATION AND WELFARE, DATA ON THE MEDICAID PROGRAM: ELIGIBILITY SERVICES, EXPENDITURES 2 (1978). All states, except Arizona, have Medicaid programs, as do the District of Columbia, Puerto Rico, Guam and the Virgin Islands. *Id.*

30. 42 U.S.C. § 1396 (1976 & Supp. V 1981). *See* Harris v. McRae, 448 U.S. 297, 301 (1980); Rosado v. Wyman, 397 U.S. 397, 427 (1969) (Douglas, J., concurring); Becker v. Blum, 464 F. Supp. 152, 155 (S.D.N.Y. 1978); Becker v. Toia, 439 F. Supp. 324, 327 (S.D.N.Y. 1977). *See also* Arthur C. Logan Mem. Hosp. v. Toia, 441 F. Supp. 26 (S.D.N.Y. 1977) (upon determining that a state is not complying with an approved Medicaid plan, the Secretary may withold federal payments but cannot compel compliance); Vetter v. Poland, 72 A.D.2d 776, 421 N.Y.S.2d 398 (1979) (state bound by federal regulations in administering Medicaid program; in case of conflict, federal regulations control).

program has been approved by the Secretary, medical assistance is available to persons who meet certain eligibility standards.

A. *Eligibility Based on Need*

Title XIX provides for certain mandatory medical care and services to two groups of individuals, commonly known as the "categorically needy."[31] The first group[32] consists of people receiving assistance under Title IV's Aid to Families with Dependent Children[33] or Federal Payments for Foster Care and Adoption Assistance,[34] or Title XVI, Supplemental Security Income for the Aged, Blind and Disabled.[35] The second group is composed of people the state has opted to cover, and who, though not actually receiving cash assistance under a federal program, have income and resources that are low enough to qualify for such assistance.[36] States also have the option of providing coverage to other persons who meet the following requirements: (1) qualification as categorically

---

31. *See* 42 U.S.C. § 1396a(a)(10)(A) (1976 & Supp. V 1981). The services that must be provided to this group are: inpatient hospital services, outpatient hospital services, other laboratory and x-ray services, skilled nursing home services and home health care services for individuals aged 21 or over, early and periodic screening, diagnosis and treatment for individuals under 21, family planning services, physician's services (whether furnished in the office, the patient's home, a hospital or elsewhere), and services furnished by a nurse-midwife. 42 U.S.C. § 1396d(a)(1)-(5), (17) (1976 & Supp. V 1981). In addition, states may provide other services at their option, including but not limited to drugs, eyeglasses, private duty nursing, intermediate care facility services, inpatient psychiatric care for the aged and persons under 21, physical therapy and dental care. 42 U.S.C. § 1396d(a)(6)-(16), (18) (1976 & Supp. V 1981).

32. *See* 42 U.S.C.A. § 1396a(a)(10)(A)(i) (West Supp. 1982).

33. 42 U.S.C. §§ 601-615 (1976 & Supp. V 1981).

34. 42 U.S.C. §§ 670-676 (Supp. V 1981).

35. 42 U.S.C. §§ 1381-1385 (1976 & Supp. V 1981). This program was implemented on January 1, 1974, replacing the Grants to States for Aid to the Blind, 42 U.S.C. §§ 1201-1206 (1976 & Supp. V 1981), Grants to States for Old-Age Assistance, 42 U.S.C. §§ 301-306 (1976 & Supp. V 1981), and APTD, 42 U.S.C. §§ 1351-1355 (1976 & Supp. V 1981) programs. Social Security Act, Pub. L. No. 92-603, § 303(a), (b), 86 Stat. 1484 (1972). These latter programs are still operative in Guam, Puerto Rico and the Virgin Islands. *Id.*

36. 42 U.S.C.A. § 1396a(a)(10)(A)(ii) (West Supp. 1982). The second group of categorically needy includes, but is not limited to, those who are not receiving assistance under a cash assistance program, but who meet the income and resources requirements of the state plan for such benefits, those who would meet the income and resource requirements of the applicable program if their work-related child care costs were paid from their earnings rather than by a state agency, and those who would be eligible to receive aid under the applicable program if the state plan coverage were as broad as allowed by federal law. *Id.*

needy, except that their income and resources are not low enough, and (2) insufficient income and resources to meet medical care costs.[37] This group is commonly known as the "medically needy."

B. *Eligibility Based on Citizenship*

In addition to the above-mentioned eligibility requirements, the federal Medicaid statute includes a citizenship provision.[38] Under that provision, the Secretary may not approve any state plan that imposes a residence requirement excluding residents of the state or a citizenship requirement excluding citizens of the United States.[39] The federal regulations accompanying this provision make coverage of citizens and documented aliens mandatory.[40] They provide that a state Medicaid plan must provide Medicaid to otherwise eligible residents of the United States who are either citizens or aliens lawfully admitted to the United States or permanently residing in the United States under color of law.[41]

---

37. 42 U.S.C. § 1396a(a)(10)(C)(ii) (1976 & Supp. V 1981). Medical services provided to this group need not be as extensive as those provided to the mandatory group, but must include certain minimal services, such as ambulatory services for children under 18 and individuals entitled to institutional services, and prenatal care and delivery services for pregnant women. 42 U.S.C. § 1396a(a)(10)(C)(iii) (Supp. V 1981). See *supra* note 31 for mandatory services.

38. 42 U.S.C. § 1396a(b) (1976 & Supp. V 1981). Section 1396a(b) provides that:

> The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes, as a condition of eligibility for medical assistance under the plan—
>
> (1) an age requirement of more than 65 years; or
>
> (2) any residence requirement which excludes any individual who resides in the State; or
>
> (3) any citizenship requirement which excludes any citizen of the United States.

Id.

39. *Id.*

40. 42 C.F.R. §§ 435.402, 436.402 (1982). Section 435.402 provides in full that:

> The agency must provide Medicaid to otherwise eligible residents of the United States who are—
>
> (a) Citizens; or
>
> (b) Aliens lawfully admitted for permanent residence or permanently residing in the United States under color of law, including any alien who is lawfully present in the United States under section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act.

Id. § 435.402. Section 436.402 is identical and applies to eligibility in Guam, Puerto Rico and the Virgin Islands. *Id.* § 436.402.

41. *Id.* An undocumented alien is entitled to Medicaid coverage under the federal regulations if he is found to be residing in the United States under "color of law." St. Francis

The present federal Medicaid statute and regulations do not by their terms prevent a state from including undocumented aliens in its Medicaid program.[42] However, the regulation which preceded the present eligibility regulation articulated an intent to exclude undocumented aliens from coverage,[43] and the present regulations[44] contain an express statement that no policy or substantive changes were intended by the recodification.[45] Consequently, mandatory

---

Hosp. v. D'Elia, 71 A.D.2d 110, 422 N.Y.S.2d 104 (1979); Papadopoulos v. Shang, 67 A.D.2d 84, 414 N.Y.S.2d 52 (1979). *See* Holley v. Lavine, 553 F.2d 845 (2d Cir.), *cert. denied*, 435 U.S. 947 (1977) (undocumented alien residing in United States under color of law entitled to AFDC benefits).

42. *See supra* notes 38, 40.

43. 45 C.F.R. § 248.50 (1974). As originally incorporated into the Code of Federal Regulations, the Citizenship and Alienage provisions of the federal Medicaid regulations specified that, as a condition of approval, a state plan may not exclude an otherwise eligible citizen of the United States. 36 Fed. Reg. 3872 (1971). Subsequently, this section was amended in order to implement the Supreme Court's directive in Graham v. Richardson, 403 U.S. 365 (1971), which held that states may not condition eligibility of resident aliens for welfare benefits on a durational residency requirement. Notice of Proposed Rulemaking, 37 Fed. Reg. 11,977 (1972). The revision published in the first Notice of Proposed Rulemaking provided that "[a] State plan under Title XIX of the Social Security Act may not exclude an otherwise eligible individual on the basis that he is not a citizen, or because of his alien status." *Id.* In response to comments received after the first Notice of Proposed Rulemaking, the second such Notice said that a state plan "must exclude any individual who is not lawfully in this country." Notice of Proposed Rulemaking, 38 Fed. Reg. 16,911 (1973). As enacted, the revision of section 248.50 explicitly adopted the language excluding undocumented aliens, providing, in part:

> A State plan under title XIX of the Social Security Act shall include an otherwise eligible individual who is a resident of the United States *but only if he is either (a) a citizen or (b) an alien lawfully admitted* for permanent residence or otherwise permanently residing in the United States under color of law . . . .

45 C.F.R. § 248.50 (1974) (emphasis added). The preamble to section 248.50 provided in part that:

> Requiring inclusion of illegal aliens, or leaving the matter to State option would be inconsistent with title III of Pub. L. 92-603, which establishes a Federal program of Supplemental Security Income for the Aged, Blind, and Disabled (SSI) that excludes aliens not lawfully residing in this country. Accordingly, the regulations as proposed on June 27, 1973, are hereby adopted.

38 Fed. Reg. 30,259 (1973).

45 C.F.R. § 248.50 (1974) was later recodified without alteration as 42 C.F.R. § 448.50 (1977) in order to bring together in a single chapter the three major programs of the Health Care Financing Administration. 42 Fed. Reg. 52,827 (1977). 42 C.F.R. § 448.50 was the immediate predecessor regulation to 42 C.F.R. §§ 435.402, 436.402 (1982).

44. 42 C.F.R §§ 435.402, 436.402 (1982).

45. 43 Fed. Reg. 45,176 (1978). *See also* Calkins v. Blum, 511 F. Supp. 1073, 1079 n.3 (N.D.N.Y. 1981), *aff'd*, 675 F.2d 44 (2d Cir. 1982) (stating that no changes were intended by the recodification).

exclusion of undocumented aliens remains in the regulations despite the change in language.[46] A number of states have enacted statutes under Title XIX that expressly exclude undocumented aliens from eligibility.[47] As a result of the *Plyler* ruling, the constitutionality of these statutes is questionable.

II. *APPLICATION OF* PLYLER *TO STATE MEDICAID STATUTES*

A. *The Standards of Review*

In determining the constitutionality of statutes challenged on equal protection grounds, the Supreme Court has traditionally in-

---

46. At least one state court has so held. *See* Monmouth Med. Center v. Kwok, 183 N.J. Super. 494, 444 A.2d 610 (App. Div. 1982).

47. *See, e.g.*, N.Y. Soc. Serv. Law § 131-k (McKinney 1983), which provides in pertinent part that:

> 1. Any inconsistent provisions of this chapter or other law notwithstanding, *an alien who is not lawfully admitted for permanent residence or not otherwise permanently residing in the United States under color of law shall be ineligible for aid to dependent children, home relief or medical assistance.*
>
> 2. An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because he is an alien unlawfully residing in the United States or because he failed to furnish evidence that he is lawfully residing in the United States shall be immediately referred to the United States immigration and naturalization service, or the nearest consulate of the country of the applicant or the recipient for such service to take appropriate action or furnish assistance.

Id. (emphasis added). The California Medicaid [hereinafter cited as Medi-Cal] eligibility provision, Cal. Welf. & Inst. Code § 14,005 (West Supp. 1984), provides, in pertinent part, that: "The health care benefits and services specified in this chapter . . . shall be provided under this chapter to any person who is a resident of this state and is made eligible by the provisions of this article." *Id.* The California Attorney General has interpreted the above section to authorize a county to provide nonemergency health care services under Medi-Cal to an undocumented alien upon his certification, under penalty of perjury, that he is in the country legally and is entitled to remain indefinitely, or that he is not under order of deportation, or that he is married to a person not under order of deportation. 62 Op. Cal. Att'y. Gen. 70, 76-77 (1979). However, a county may require, as a condition to providing medical assistance under Medi-Cal, that all applicants complete Medi-Cal application forms. *Id.* The county may refuse to provide nonemergency health care to persons who refuse to provide necessary information, including address, personal identification, or a social security number. *Id.* Although undocumented aliens may be able to provide this information, they obviously could not certify to legality of presence without risk of criminal prosecution for perjury. *See id.* Moreover, fear of deportation is usually sufficient to keep undocumented aliens from seeking medical care, especially in counties that have instituted policies requiring

voked one of two standards of review, commonly referred to as the "rational relation test"[48] and the "strict scrutiny test."[49] Under the rational relation test, a challenged classification will be upheld so long as it is rationally related to a legitimate state interest.[50] Thus, in *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*,[51] the Court held that a statute requiring railroads to pay attorneys' fees in certain suits denied the railroads equal protection.[52] The Court explained that the statute could not satisfy the rational relation test because it did not "rest upon some difference [between railroad companies and other companies] which bears a reasonable and just relation to the [purpose of the] act in respect to which the classification is proposed."[53] The Court noted that railroad companies could be separately classified if a statute were based on a characteristic that sets railroad companies apart from other companies, such as the peculiar safety hazards presented by railroads.[54]

In the early 1900's, the Supreme Court invalidated numerous economic and social welfare statutes for failure to satisfy the rationality requirement of the Equal Protection Clause.[55] After 1937,

---

anyone seeking medical assistance who cannot prove legal status to be turned over to the INS. *See infra* notes 111-12 and accompanying text.

48. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 591 (2d ed. 1983) [hereinafter cited as CONSTITUTIONAL LAW]; Fox, *Equal Protection Analysis: Laurence Tribe, The Middle Tier, and the Role of the Court*, 14 U.S.F.L. REV. 525, 526 n.3 (1980).

49. *See* CONSTITUTIONAL LAW, *supra* note 48, at 591; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1000 (1978); Fox, *supra* note 48, at 526 n.4.

50. New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam); Dandridge v. Williams, 397 U.S. 471, 485 (1970).

51. 165 U.S. 150 (1897), *discussed in* Leedes, *The Rationality Requirement of the Equal Protection Clause*, 42 OHIO ST. L.J. 639, 642 (1981).

52. *Id.* at 155.

53. *Id.*

54. *Id.* at 157-58.

55. *See, e.g.*, Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32 (1928) (Kentucky statute providing for mortgage recording fee and tax classifications violates equal protection); Nixon v. Herndon, 273 U.S. 536 (1927) (Texas statute precluding blacks from voting in Democratic primary violates equal protection); Truax v. Corrigan, 257 U.S. 312 (1921) (Arizona statute exempting former employees from injunctive restraint for tortious injuries to the business of employers violates equal protection).

During the same period, the Supreme Court used the Due Process Clause to examine state statutes regulating economic and social life. *See, e.g.*, Bunting v. Oregon, 243 U.S. 426 (1917) (Oregon statute regulating men's working hours in certain professions upheld); Muller v. Oregon, 208 U.S. 412 (1908) (Oregon statute regulating women's working hours upheld); Lochner v. New York, 198 U.S. 45 (1905) (New York statute regulating bakers' hours violates equal protection).

however, the Court became highly deferential to Congress in the socioeconomic sphere, upholding legislation under the rational relation test with virtually no review of equal protection guarantees.[56] Since that time, statutory classifications have typically been invalidated "only if no grounds [could] be conceived to justify them."[57]

In recent decisions, the Supreme Court has indicated that the pendulum may be swinging back to a more meaningful examination of statutory classifications under the rational relation test.[58] In *Schweiker v. Wilson*,[59] the Court examined a classification in a welfare program that treated residents in public institutions differently depending on whether they received Medicaid funds.[60] Although the Court upheld the classification, it stated that the scrutiny it applied was "not a toothless one."[61] The Court relied on legislative history indicating that Congress had an identifiable legislative purpose for enacting the classification.[62] Thus, the Court applied a standard of review stricter than merely upholding the statute on any conceivable basis, as it had done in prior cases.[63]

The Supreme Court uses the strict scrutiny test when a challenged classification adversely affects a group of persons based on what the Court considers "suspect" criteria.[64] The Court also ap-

---

56. This deference to the federal government in social welfare and economic legislation gained momentum with the Supreme Court's approval of New Deal legislation. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (Agricultural Adjustment Act); United States v. Darby, 312 U.S. 100 (1941) (Fair Labor Standards Act); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (National Labor Relations Act). Limited scrutiny of social welfare and economic legislation reached a peak during the Warren era. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

The post-1937 period also marked the Supreme Court's retreat from the substantive use of the due process clause. *See* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) (state labor law upheld); United States v. Carolene Prod. Co., 304 U.S. 144 (1938) (federal statute regulating milk products upheld); West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (state minimum wage law upheld).

57. McDonald v. Board of Elections Comm'rs, 394 U.S. 802, 809 (1969).

58. For a discussion of this trend, see Leedes, *supra* note 51.

59. 450 U.S. 221 (1981).

60. *Id.* at 224-25.

61. *Id.* at 234 (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)). *See also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 439 (1982) (Blackmun, J., concurring).

62. *See Wilson*, 450 U.S. at 235-37.

63. *See supra* notes 56-57 and accompanying text.

64. Plyler v. Doe, 457 U.S. 202, 216 (1982). The Court has labeled the following as suspect classifications: race, *see* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Cooper v. Aaron, 358 U.S. 1 (1958); Bolling v. Sharpe, 347

plies strict scrutiny when the right infringed by a statutory classification is considered "fundamental" by the Court.[65] Under strict scrutiny, such a classification will be invalidated unless the government demonstrates that it is necessary to promote a compelling state interest.[66]

During the past fifteen years, the Supreme Court has developed an intermediate test. Under this standard of review, classifications are upheld if they are found to be substantially related to the achievement of important government objectives.[67] The Court has applied intermediate scrutiny to classifications based on gender[68]

U.S. 497 (1954); Brown v. Board of Ed., 347 U.S. 483 (1954); national origin, *see* Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); and alienage, *see* Mathews v. Diaz, 426 U.S. 67 (1976); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969). For a discussion of the current status of alienage classifications, see *infra* notes 70-71 and accompanying text.

65. Plyler v. Doe, 457 U.S. at 216-17. Fundamental rights have been held to include the following: freedom of association, *see* Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958); the right to vote, *see* Harper v. Virginia Bd. of Elects., 383 U.S. 663, 670 (1966); Carrington v. Rash, 380 U.S. 89, 96 (1965); the right to interstate travel, *see* Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969); and the right to privacy in certain matters relating to one's personal life, *see* Roe v. Wade, 410 U.S. 113, 152-53 (1973) (abortion); Loving v. Virginia, 388 U.S. 1, 12 (1967) (freedom of choice in marital decisions); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (sterilization).

66. *Plyler*, 457 U.S. at 216-17; *Shapiro*, 394 U.S. at 627. *See also* Korematsu v. United States, 323 U.S. 214, 216 (1944) (Restrictions curtailing civil rights of a racial group are "subject . . . to the most rigid scrutiny" but "[p]ressing public necessity may sometimes justify their existence.").

67. Craig v. Boren, 429 U.S. 190, 197 (1976). The Supreme Court has also stated this test as requiring that a classification be "substantially related to a *legitimate* state interest." *See* Pickett v. Brown, 51 U.S.L.W. 4655, 4657 (U.S. June 6, 1983) (emphasis added); Mills v. Habluetzel, 456 U.S. 91, 99 (1982).

It has been suggested that the Supreme Court applies intermediate scrutiny to classifications which, while not based on suspect criteria, distinguish groups based on "sensitive" criteria. *See* L. TRIBE, *supra* note 49, at 1090. This would explain the use of intermediate scrutiny for classifications based on gender, since four out of nine justices have stated that gender should be labeled a suspect criteria. *See* Frontiero v. Richardson, 411 U.S. 677 (1973). Classifications based on illegitimacy may also be described as somewhat sensitive because, in the Supreme Court's words, such statutes are "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *See* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

68. *See* Orr v. Orr, 440 U.S. 268 (1979) (alimony); Craig v. Boren, 429 U.S. 190 (1976) (drinking age); Frontiero v. Richardson, 411 U.S. 677 (1973) (armed service benefits); Reed v. Reed, 404 U.S. 71 (1971) (executors of estates).

and illegitimacy.[69] In addition, since classifications based on alienage are upheld more often than other suspect criteria,[70] it has been suggested that the Supreme Court's examination of such statutes is based on an intermediate level of scrutiny.[71] It has also been suggested that the Supreme Court applies an intermediate standard of review to classifications that implicate rights which, while not fundamental, are considered by the Court to be of special importance.[72] These includes the ability to receive subsistence benefits in the form of food stamps,[73] the right to obtain employment in a major section of the economy,[74] and the right to obtain higher education at an affordable tuition.[75]

B. *Application of the Intermediate Test to Medicaid for Undocumented Children*

In *Plyler*, the Supreme Court did not apply strict scrutiny, stating that undocumented children are not a suspect class[76] and education is not a fundamental right.[77] Instead, the Court applied

---

69. *See* Pickett v. Brown, 51 U.S.L.W. 4655 (U.S. June 6, 1983) (statute of limitations for support actions); Mills v. Habluetzel, 456 U.S. 91 (1982) (same); United States v. Clark, 445 U.S. 23 (1980) (survivor's benefits); Lalli v. Lalli, 439 U.S. 259 (1978) (inheritance); Trimble v. Gordon, 430 U.S. 762 (1977) (inheritance); Mathews v. Lucas, 427 U.S. 495 (1976) (insurance benefits); Jimenez v. Weinberger, 417 U.S. 628 (1974) (disability benefits); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 677 (1973) (financial assistance); Gomez v. Perez, 409 U.S. 535 (1973) (child support); Levy v. Louisiana, 391 U.S. 68 (1968) (wrongful death actions).

70. *See* CONSTITUTIONAL LAW, *supra* note 48, at 592.

71. *See* L. TRIBE, *supra* note 49, at 1052-56. *See also* Fox, *supra* note 48, at 532. While it has been asserted by Justice Rehnquist that the Supreme Court applies strict scrutiny to alienage classifications, Trimble v. Gordon, 430 U.S. at 780-81 (Rehnquist, J., dissenting), there is some disagreement in the Court as to whether every alienage classification is subject to strict scrutiny. *Compare* Toll v. Moreno, 458 U.S. 1, 19-24 (1982) (Blackmun J., concurring) (that aliens may be constitutionally denied political rights is an exception to the general strict scrutiny standard applicable to classifications based on alienage) *with id.* at 38-42 (Rehnquist, J., dissenting) (Supreme Court cases upholding statutes excluding aliens from political rights indicates the demise of aliens as a suspect class). *See also* CONSTITUTIONAL LAW, *supra* note 48, at 686-88 (defining three categories of alienage cases, each subject to a different standard of review).

72. *See* L. TRIBE, *supra* note 49, at 1090.

73. *See* United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); United States Dep't of Agric. v. Murry, 413 U.S. 508 (1973).

74. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976).

75. *See* Vlandis v. Kline, 412 U.S. 441, 459 (1973) (White, J., concurring).

76. 457 U.S. at 219 n.19.

77. *Id.* at 221.

the intermediate test and held that the classification excluding undocumented children from public education could not be considered rational "unless it further[ed] some substantial goal of the State."[78]

In justifying its application of intermediate scrutiny, the Court noted that education is a benefit of special importance because of its "pivotal role" in sustaining our democratic heritage.[79] The Court stated that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[80]

The *Plyler* Court also relied on the fact that the Texas statute imposed its discriminatory burden on children based upon their undocumented status, a legal characteristic over which they have no control.[81] In view of the Supreme Court's application of the intermediate test to gender and illegitimacy classifications, it may be argued that intermediate scrutiny applies to classifications which are based on the "status of birth" of the group affected.[82] Since undocumented status is not truly a status of birth, depending as it does on the child's illegal presence in the country, the *Plyler* Court may have chosen to rely on the particular combination of education and undocumented status in order to strike the Texas statute under the intermediate test.[83]

The *Plyler* Court, however, relied heavily on the rationale of its illegitimacy decisions.[84] The Court quoted its decision in *Weber*

---

78. *Id.* at 224. Unlike undocumented children, undocumented adults are present in the United States as a result of their own unlawful conduct. *Plyler*, 457 U.S. at 219. Therefore, citizenship provisions in state Medicaid statutes, as applied to undocumented adults, would probably be examined by the Supreme Court under the rational relation test. Under the limited scrutiny given to statutes in the area of social welfare and economic legislation, *see supra* notes 50-63 and accompanying text, it is likely that the Court would find that withholding medical assistance from undocumented adults is rationally related to a state's interest in preserving the fiscal integrity of its Medicaid program. *See infra* notes 102-07 and accompanying text.

79. *Id.* at 221.

80. *Id.*

81. *Id.* at 220.

82. *See id.* at 246 (Burger, C.J., dissenting); Soberal-Perez v. Schweiker, 549 F. Supp. 1164, 1173 n.15 (E.D.N.Y. 1982), *aff'd*, 717 F.2d 36 (2d Cir. 1983).

83. *See* 457 U.S. at 244 (Burger, C.J., dissenting).

84. *See* Trimble v. Gordon, 430 U.S. 762, 770 (1977) (Illinois statute distinguishing between legitimate and illegitimate children for purposes of intestate succession); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (statute distinguishing between legitimate and illegitimate children for purposes of workmen's compensation). *See also* Lalli

v. Aetna Casualty & Surety Co.,[85] stating that " 'imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as an unjust—way of deterring the parent.' "[86] Arguably, the common element relied upon in *Plyler* was the culpability of the affected group. If the Supreme Court remains faithful to this reasoning, intermediate scrutiny would seem to be appropriate for all classifications that burden undocumented children, since they are not responsible for their undocumented status.

If, on the other hand, the Supreme Court were to rely on the combination of undocumented status and the benefit at issue, the Court will have "opened the door to the creation of a hierarchy of government benefits with the level of scrutiny varying depending on the importance of the benefit."[87] The inadvisability of such a ranking has been explicitly recognized by the Supreme Court in at least one case.[88] In other cases, the Supreme Court has implicitly recognized its limited judicial review by applying the rational relation test to uphold classifications relating to welfare[89] and public housing.[90] In these cases, the Court found no basis for applying strict scrutiny to statutory classifications which did not affect fundamental constitutional rights or employ suspect criteria.[91] How-

---

v. Lalli, 439 U.S. 259 (1978) (intestacy statute distinguishing between legitimate and illegitimate children for purposes of intestate succession).

85. 406 U.S. 164 (1972).

86. *Plyler*, 457 U.S. at 220 (quoting *Weber*, 406 U.S. at 175).

87. *Plyler*, 457 U.S. at 248 (Burger, C.J., dissenting).

88. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). In *Rodriguez*, the Supreme Court stated that by attempting to rank the importance of the interests affected by a statute for the purpose of determining what level of scrutiny to apply, the Court "would have gone 'far toward making this Court a "super-legislature." ' [The Court] would, indeed, then be assuming a legislative role and one for which the Court lacks both authority and competency." *Id.* at 31 (quoting Shapiro v. Thompson, 394 U.S. 618, 655, 661 (1969) (Harlan, J., dissenting)).

The *Rodriguez* Court further stated that its power was limited to recognizing fundamental rights which are "explicitly or implicitly guaranteed by the Constitution." *Id.* at 33-34.

89. *See* Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970). Justice Marshall, dissenting in *Dandridge*, took the position that the rational relation test, while well-suited to economic regulation, should not be applied to the interests of the poor in basic subsistence. 397 U.S. at 517-22 (Marshall, J., dissenting).

90. *See* James v. Valtierra, 402 U.S. 137 (1971).

91. *See Jefferson*, 406 U.S. at 535; *James*, 402 U.S. at 137; *Dandridge*, 397 U.S. at 471.

ever, there is ample evidence that the Court regularly employs some ranking system with respect to benefits conferred by statutes.[92]

In determining whether the Supreme Court would apply the intermediate standard of review to undocumented children in the case of state Medicaid statutes, it is worth noting that, in a prior case, the Court espoused the view that medical care is a "basic necessity of life"[93] and quoted from a lower court case which recognized that higher education is less important in comparison.[94] If the Court did choose to rank the importance of medical care, it should arguably apply the intermediate test to state Medicaid statutes because of the relative importance of medical care.[95]

State interests which may be proffered to justify the exclusion of undocumented children from Medicaid include preservation of the fiscal integrity of the state Medicaid program, deterrence of an influx of undocumented aliens into the United States, deterrence of undocumented aliens from immigrating to a particular state to utilize Medicaid services, and protection of residents who have contributed to the community by payment of taxes. It is submitted that none of these state interests withstand intermediate scrutiny.

1. *Preservation of the Fiscal Integrity of the State Medicaid Program*

The Supreme Court has recognized that states have an interest in limiting their expenditures to preserve the fiscal integrity of their

---

92. *See supra* notes 72-75 and accompanying text. *See also* Vlandis v. Kline, 412 U.S. at 458-59 (White, J., concurring in judgment). Justice White observed:

> [I]t is clear that we employ not just one, or two, but, as my Brother Marshall has so ably demonstrated, a "spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause." . . . [I]t must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations.

Id. (citations omitted) (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting)).

93. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 259 (1974).

94. *Id.* at 260 n.15 (quoting Starns v. Malkerson, 326 F. Supp. 234, 238 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971) (quoting with approval Kirk v. Board of Regents, 273 Cal. App. 2d 430, 440, 78 Cal. Rptr. 260 (Ct. App. 1969), *appeal dismissed*, 396 U.S. 554 (1970))).

95. *See supra* notes 93-94 and accompanying text.

assistance programs.[96] Under the intermediate test, however, a state cannot accomplish this purpose by distinguishing between persons whose cost to the assistance program is similar.[97] In *Plyler*, for example, the Court held that Texas could not justify the exclusion of undocumented children from its schools by showing that barring a certain number of children would improve the quality of education.[98] The state was required to justify the classification by demonstrating that undocumented children were the appropriate target for exclusion.[99] An arbitrary choice was impermissible; undocumented children had to be distinguishable from citizens and documented alien children in terms of educational cost and need.[100] The *Plyler* Court found that because a child's illegal status did not affect the cost of education, it was not an appropriate classification for the purpose of saving cost.[101]

In his dissent in *Plyler*, Chief Justice Burger argued that since a state has a legitimate interest in preserving its fiscal resources, it is rational for a state to exclude persons illegally present from eligibility for benefits the state provides to those who are lawfully present.[102] Since he agreed that undocumented aliens are entitled to equal protection,[103] the Chief Justice was taking issue with the Court's decision to apply the intermediate standard of review.[104] Under the rational relation test, less of a "rational relation" is necessary between the statutory classification and the state interest.[105] Since the Supreme Court has typically held classifications invalid under the rational relation test only if they were "based on reasons *totally unrelated* to the pursuit" of legitimate state inter-

---

96. Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

97. *Plyler*, 457 U.S. at 229.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 229.

102. *Id.* at 250 (Burger, C.J., dissenting). The Chief Justice was joined in dissent by Justices White, Rehnquist and O'Connor. *Id.* at 242.

103. *Id.* at 243 (Burger, C.J., dissenting). Chief Justice Burger stated: "I have no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment *applies* to aliens who, after their illegal entry into this country, are indeed physically 'within the jurisdiction' of a state." *Id.*

104. *See id.* at 248.

105. *See supra* notes 50-63 and accompanying text.

ests,[106] Chief Justice Burger's contention was that the state's interest in saving money was alone sufficient to justify the classification under the rational relation test.[107]

It is submitted, however, that the same state interest proffered to justify state Medicaid statutes would not satisfy the intermediate test. Undocumented aliens as a group may represent a greater cost to the Medicaid program than many citizens and documented aliens. However, it is unclear to what extent the conditions under which such persons live makes them distinguishable, in terms of cost to the program, from citizens and documented aliens who are also indigent and live under substandard conditions. Citizenship provisions justified on the ground of saving Medicaid funds are arguably "underinclusive."[108] By excluding too many people who are similarly situated in terms of the purpose of the law, the classification fails to adequately describe the group the state is attempting to target.[109]

Moreover, providing indigent undocumented aliens with the means of detecting communicable diseases early has been shown to be cost-effective as a means of reducing the incidence of communicable disease community-wide.[110] Consequently, it is likely to result in a decreased use of Medicaid by eligible citizens and documented aliens. In 1977, Orange County, California, instituted a policy that required indigents to apply for Medicaid before being treated.[111] Anyone who refused to apply or could not prove legal status was to be reported to the Immigration and Naturalization Service.[112] Undocumented aliens were sufficiently frightened of deportation to

---

106. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969) (emphasis added). *See supra* notes 55-57 and accompanying text.

107. *See Plyler*, 457 U.S. at 250 (Burger, C.J., dissenting).

108. For a discussion of the concept of underinclusiveness, see CONSTITUTIONAL LAW, *supra* note 48, at 588-89.

109. *Id.*

110. *See infra* notes 111-15 and accompanying text.

111. Dallek, *Health Care for Undocumented Immigrants: A Story of Neglect*, 14 CLEARINGHOUSE REV. 407, 413 (1980).

112. *Id.* The rationale behind such policies is to discourage undocumented aliens from seeking services for which the state is not reimbursed by the federal government. *Health and the Environment: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 206 (1981) (statement of Hon. Henry A. Waxman, Chairman, discussing similar policy in Los Angeles County) [hereinafter cited as *Hearings on Health*].

stay away from outpatient clinics. Within eighteen months, the county experienced a 57% increase in extrapulmonary tuberculosis, a 47% increase in salmonellosis, a 14% increase in infectious hepatitis, a 53% increase in rubella and a 153% increase in syphillis.[113] Other studies have confirmed the view that when undocumented aliens do not receive proper health care, the risk of communicable disease is greater for all persons.[114] Since the danger is not limited to those without Medicaid coverage, it is logical that the exclusion of undocumented aliens from Medicaid coverage results in increased use of Medicaid by those among whom undocumented aliens live and work.[115]

If a court found that excluding undocumented children from Medicaid coverage did substantially further a state's interest in

---

113. *Id.* at 258 (statement of John E. Huerta, Associate Counsel, Mexican American Legal Defense and Education Fund). A commission that studied this policy stated the problem as follows:

> When poverty dominates one's life, a chronic cough could mean tuberculosis; a series of intestinal symptoms may mean shigella or salmonella. When recourse to proper medical services is made difficult or even curtailed, either on account of the undocumented immigrant's fear of deportation or by reason of public policy excluding them from service, the undocumented person tends to let the matter lie. Understandably, conditions will only get worse, possibly requiring the emergency services that the county by contract must provide without question. Hence, what was a simple condition requiring relatively small expense becomes a large matter adversely affecting all taxpayers.

Report on the Task Force on Public General Hospitals of the American Public Health Association, The Economic Impact of Undocumented Immigrants on Public Health Services in Orange County 57 (1978), *quoted in* Dallek, *supra* note 111, at 413.

114. *See, e.g., Medical Treatment of Illegal Aliens: Hearing Before the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 72 (1977) (statement of Jim Bates, Chairman, San Diego County Bd. of Supervisors) [hereinafter cited as *Hearings on Medical Treatment*]. Moreover, a statement prepared on behalf of the Los Angeles County Health Alliance revealed that treating undocumented aliens solely for communicable diseases would not alleviate the problem:

> Nominally exempting communicable disease treatment from the requirement of Medi-Cal application will not save this county from epidemics. Many contagious tuberculosis sufferers, for example, do not recognize their chronic coughs as a symptom of communicable disease, but continue to live and work side by side with the rest of us. *Their TB would only be detected and treated in the course of their seeking non-emergency care for some other ailment.* The American Lung Association has estimated that 300 cases per year of contagious tuberculosis will go undetected and be allowed to spread throughout this county as a result of the Board's prospective policy.

Hearings on Health, *supra* note 112, at 254 (emphasis added).

115. *See Hearings on Health*, *supra* note 112.

preserving its Medicaid funds, it could still find that this interest is undercut by a corresponding increase in cost at the local level. Local governments often must by law provide emergency care to all persons, including undocumented aliens.[116] They thus bear the burden of treating undocumented aliens for emergency conditions which arise as a result of the lack of treatment at earlier stages of illness. For example, in 1980, the Bexar County Hospital District in San Antonio, Texas, increased the cost of a clinic visit for out-of-county residents.[117] Within one month there was a 44% decline in outpatient visits,[118] and later a 21.3% increase in emergency room visits.[119] Emergency room care was two to three times more expensive than outpatient care.[120] Similarly, a 1971 Medicaid co-payment experiment in California that imposed a one dollar charge on certain Medicaid beneficiaries for the first two visits to a doctor resulted in a significant decrease in physician utilization, including selected preventive and diagnostic services.[121] A study of the program demonstrated its cost-*ineffectiveness*: the result was an additional cost to California of U.S.$1,228,150.[122] These findings have been confirmed by studies of similar policies instituted elsewhere.[123]

---

116. *See, e.g.*, N.Y. PUB. HEALTH LAW § 2805-b (McKinney 1976); UTAH CODE ANN. § 17-5-61 (1953).

117. Dallek & Parks, *Cost-Sharing Revisited: Limiting Medical Care to the Poor*, 14 CLEARINGHOUSE REV. 1149, 1151 (1981).

118. *Id.* (citing San Antonio Express, Apr. 5, 1980).

119. *Id.* at 1151-52.

120. *Id.* at 1152.

121. *Id.* at 1151. Pap smears and urinalyses were among the services most often sacrificed. *Id.*

122. *Id.* at 1151-52 (citing Roemer, Hopkins, Carr & Gartside, *Copayments for Ambulatory Care: Pennywise and Pound Foolish*, 13 MED. CARE 466 (1975) [hereinafter cited as Roehmer, Hopkins]. *See also* Helms, Newhouse & Phelps, *Copayments and the Demand for Medical Care: The California Experience*, 9 BELL J. ECON. 192-208 (1978), *cited in* Dallek & Parks, *supra* note 117, at 1152 (confirming findings of Roehme, Hopkins, *supra*).

123. *See* Chavkin, *Florida Medicaid Reform: Less Is Not Always Cheaper*, 14 CLEARINGHOUSE REV. 324, 325 (1980) (citing FLORIDA DEP'T OF HEALTH AND REHABILITATIVE SERVS., MEDICAID REFORM: A COMMITMENT TO BETTER HEALTH CARE IN THE 80'S FOR FLORIDA'S NEEDY) (Florida law excluding most preventive care from Medicaid coverage resulted in delayed treatment ultimately requiring expensive institutional or emergency care). *See also* Dallek, *supra* note 111, at 413 (citing LOS ANGELES COUNTY DEP'T OF HEALTH SERVS., DRAFT REPORT TO THE BOARD OF SUPERVISORS 12 (1978)) (reporting on a study of the effects of denying certain health services to undocumented immigrants in Los Angeles County), stating that:

> [T]here are few alternative sources of care available to these people. A survey of 120 private hospitals in this area . . . identified only seven hospitals which indicated

In order to avoid this unnecessary cost and health risk, many counties have extended some health services to the public on an almost no-questions-asked basis.[124] The result is that the entire burden of undocumented aliens' health care is placed on local governments.[125]

In sum, since the costs of excluding undocumented aliens from Medicaid coverage seem to outweigh the savings, citizenship provisions should not be found to be substantially related to this state interest.

2. *Deterrence of an Influx of Undocumented Aliens into the United States*

The power to control immigration is exclusively a federal concern.[126] Consequently, a state cannot ordinarily use this ground to justify a statute that burdens aliens.[127] However, in *Plyler*, the Supreme Court held that a state may constitutionally attempt to deter unlawful immigration if a "traditional state concern" is implicated.[128] The Court cited two examples of traditional state concerns that justify intrusion into the historically federal area of deterring immigration: (i) impairment of the state's economy and (ii) impairment of the state's ability to provide some important service.[129]

The *Plyler* Court found that illegal entrants posed no threat to either of these state concerns.[130] Rejecting the assertion that undocumented aliens are a significant burden on the state's economy, the Court found that, to the contrary, undocumented aliens underuti-

---

ability to accept additional patients who were undocumented aliens without insurance or clear ability to pay. *In short, many of the patients will get sicker, and some of those will need later emergency care (which the county must by law provide).* Others will die or will be unable to function effectively.

Id. (emphasis added). Similarly, the Supreme Court in Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974), rejected the state of Arizona's attempt to justify a durational residency requirement for receipt of Medicaid benefits on the grounds of fiscal savings, stating that "the County's claimed fiscal savings may well be illusory. The lack of timely medical care could cause a patient's condition to deteriorate to a point where more expensive emergency hospitalization (for which no durational residency requirement applies) is needed." *Id.* at 265.

124. *Hearings on Medical Treatment, supra* note 114, at 72.

125. *See id.*

126. *See* De Canas v. Bica, 424 U.S. 351, 354 (1976). *See also Plyler*, 457 U.S. at 228.

127. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263-64 (1974).

128. 457 U.S. at 228 n.23.

129. *Id.*

130. *Id.* at 228.

lize public services while they contribute their labor and taxes to the economy.[131] In addition, although the Court did not define what it meant by "important services,"[132] it did find that undocumented children did not impair the state's ability to provide high quality education because "in terms of educational cost and need [they are] 'basically indistinguishable' from legally resident alien children."[133] Similarly, as the statistics previously cited demonstrate, providing Medicaid benefits to undocumented aliens does not impair the state's ability to provide that service.[134] Therefore, under the reasoning of *Plyler*, a state has no legitimate interest in deterring immigration by excluding undocumented children from Medicaid.

Moreover, even assuming a legitimate state interest in deterring unlawful immigration, it is submitted that excluding undocumented children from Medicaid is not substantially related to that state interest. In *Plyler*, the Court stated that charging tuition was a " 'ludicrously ineffectual attempt to stem the tide of illegal immigration,' "[135] because "[v]irtually all of the undocumented persons who come to this country seek employment opportunities,"[136]

---

131. *Id.* (citing Alien Children Educ. Litig., 501 F. Supp. 544, 570-71 (S.D. Tex. 1980), *aff'd*, 457 U.S. 202 (1982; Doe v. Plyler, 458 F. Supp. 569, 578 (E.D. Tex. 1979), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982)). Such findings have been confirmed by more recent studies. *See infra* notes 154-55 and accompanying text.

132. *See Plyler*, 457 U.S. at 228 n.23.

133. *Id.* at 229 (quoting Alien Children Educ. Litig., 501 F. Supp. at 583 & n.104; Doe v. Plyler, 458 F. Supp. at 589).

134. *See supra* notes 96-125 and accompanying text.

135. 457 U.S. at 228 (quoting Doe v. Plyler, 458 F. Supp. at 585). *See also* Harrell v. Tobriner, 279 F. Supp. 22, 29 n.12 (D.D.C. 1967) (quoting Kasius, What Happens in a State Without Residence Requirements, in Residence Laws: Road Block to Human Welfare 19-20 (1956)) (finding that protecting the state against an influx of people seeking public welfare is not rationally related to a residency requirement because " 'to assume that people are influenced to move or not to move according to the availability of help on a relief basis is to misunderstand the dynamics of human behavior.' "). *See also* Smith v. Reynolds, 277 F. Supp. 65, 68 (E.D. Pa. 1967) (proof that deletion of residence requirement for receipt of public welfare would not result in an influx of destitute relief seekers was accepted by both sides).

136. *Plyler*, 457 U.S. at 228 n.24 (citing Doe v. Plyler, 628 F.2d 448, 460-61 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982)). *See also* Alien Children Educ. Litig., 501 F. Supp. at 578; Doe v. Plyler, 458 F. Supp. at 585. The District Court in Doe v. Plyler stated that "the undisputed testimony to this effect at trial is supported by every source this court has consulted." *Id.* at 578 n.11 (citing Catz & Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 295 (1977)).

rather than education. Similarly, in light of the finding that virtually no undocumented aliens seeking entry into a state are motivated by the availability of government benefits, withholding medical assistance cannot substantially further the avowed purpose of deterring immigration.

3. *Deterrence of Undocumented Aliens From Immigrating to a State to Utilize Medicaid Services*

State citizenship provisions enacted for the purpose of deterring undocumented aliens from immigrating to a state solely to gain access to Medicaid are arguably unconstitutionally "overinclusive."[137] An overinclusive distinction fails to adequately describe the target group that the state is attempting to distinguish by drawing within its scope too many unintended individuals.[138] Statutes need not be perfectly drawn to exclude only those persons whose exclusion furthers the state purpose.[139] However, in cases in which the Supreme Court has utilized the intermediate level of scrutiny to examine overinclusive state statutes, it has required the states to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of applicability.[140] In *Trimble v. Gordon*,[141] the Supreme Court examined the constitutionality of an Illinois statute prohibiting illegitimate children from taking from their fathers by intestate descent.[142] The Court struck down the statute on the ground that it was too broadly drawn, excluding illegitimate children whose inheritance rights could be recognized without jeopardy to the state's interest in the orderly settlement of estates.[143] In the Court's words: "Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate . . . . The reach of the statute extends well beyond the

---

137. For a discussion of the concept of "overinclusiveness," see CONSTITUTIONAL LAW, *supra* note 48, at 589.

138. *Id.* at 588.

139. *Id.*

140. *See* United States v. Clark, 445 U.S. 23, 31 (1980); Trimble v. Gordon, 430 U.S. 762, 770-71 (1977); Jimenez v. Weinberger, 417 U.S. 628, 636 (1974).

141. 430 U.S. 762 (1977).

142. *Id.* at 763.

143. *Id.* at 770-71.

asserted purposes."[144] Similarly, in *Jimenez v. Weinberger*,[145] the Court struck down a provision of the federal Social Security Act[146] that limited illegitimate children's eligibility for disability benefits.[147] The Court stated that while the prevention of fraud is a legitimate goal, it does not necessarily follow "that the blanket and conclusive exclusion of [the affected] subclass of illegitimates is reasonably related to the prevention of spurious claims."[148]

Applying this reasoning to the exclusion of undocumented children from Medicaid, it appears that the citizenship provisions are similarly overinclusive. "Virtually all" undocumented aliens come to the United States for employment.[149] Presumptions about the motivation of a few others do not justify a total statutory exclusion of undocumented children for the purpose of deterring immigration. "The reach of the statute extends well beyond the asserted purposes."[150]

4. *Protection of Residents Who Have Contributed to the Community by Payment of Taxes*

States have defended durational residency requirements for receipt of welfare and medical services on the ground that such services are made available by the past tax contributions of residents and that they should not have to "share" these limited resources with new residents.[151]

The Supreme Court has stated that the preferential treatment of long-time residents because of their past tax contributions to the community is an impermissible state objective under the Constitution as a burden on the fundamental right to interstate travel.[152] It

---

144. *Id.* at 772-73.

145. 417 U.S. 628 (1974).

146. 42 U.S.C. § 416(h)(3)(B) (1965) (current version at 42 U.S.C. § 416(h)(3)(B) (1976)).

147. *Id.*

148. 417 U.S. at 636. *See also* United States v. Clark, 445 U.S. 23, 31 (1980).

149. *Plyler*, 457 U.S. at 228 n.24 (citing Doe v. Plyler, 628 F.2d 448, 460-61 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982)).

150. *Trimble*, 430 U.S. at 772-73.

151. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 266 (1974) (health care); Shapiro v. Thompson, 394 U.S. 618, 632-33 (1969) (welfare). *See also* Vlandis v. Kline, 412 U.S. 441, 450 n.6 (1973) (tuition rates for in-state versus out-of-state students).

152. *Maricopa*, 415 U.S. at 266; *Vlandis*, 412 U.S. at 450 n.6; *Shapiro*, 394 U.S. at 632-33.

is unclear whether undocumented aliens have a constitutional right to interstate travel.[153] If they do not, citizenship provisions which exclude undocumented children on this ground would not be subject to strict scrutiny because they do not burden any fundamental right. However, even under intermediate scrutiny, this state interest appears insufficient. Most undocumented aliens do pay a significant share of total tax revenue. One recent study has confirmed that undocumented aliens contribute more to a state's coffers in taxes than they take out in services.[154] The study found that in 1982, the state of Texas and six major localities took in at least U.S. $162,000,000 from undocumented aliens while spending at most U.S.$132,000,000 on them for services.[155] And, as the district court in *Doe v. Plyler*[156] noted in reference to undocumented aliens, "it is impossible to live in a state such as Texas without paying consumer taxes, and nearly impossible to work without paying Social Security

153. There have been recurring differences within the Supreme Court as to the source of the right to interstate travel. United States v. Guest, 383 U.S. 745, 759 (1966). The Supreme Court has stated that the origin of the right may be "within the privileges and immunities clause of the Fourteenth Amendment or within the term liberty in the due process clause." Edwards v. California, 314 U.S. 160, 163 (1941). Justice Douglas has expressed the view that the "right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment." *Id.* at 178 (Douglas, J., concurring). If the right to interstate travel derives from the Privileges and Immunities Clause, undocumented aliens have no claim to that right because that provision protects citizens of the federal government. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 52-53 (1873). If, on the other hand, its source is the Due Process Clause, undocumented aliens may fall within its protection. *See* Plyler v. Doe, 457 U.S. 202, 210 (1982) (reaffirming the Supreme Court's recognition of undocumented aliens' due process rights). The Court has stated, however, that the right to interstate travel "is quite independent of the Fourteenth Amendment." *Guest*, 383 U.S. at 759-60 n.17.

The Supreme Court has on numerous occasions recognized the unconstitutionality of durational residency requirements as a burden on the right to interstate travel. In one such case, the Court recognized that undocumented children may be subject to a bona fide residency requirement as a condition to their admission to public school, and in the same discussion reiterated the unconstitutionality of durational residency requirements. Martinez v. Bynum, 103 S.Ct. 1838, 1841-42 (1983). The Court may have been implying that durational resident requirements would also be unconstitutional as to undocumented children, and that they enjoy the right to interstate travel.

154. N.Y. Times, Nov. 15, 1983, at A17, col. 1.

155. *Id.*

156. 458 F. Supp. 569 (E.D. Tex. 1979), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982).

157. *Id.* at 578.

taxes."[157] Consequently, there appears to be no rational basis for distinguishing between undocumented aliens and other residents.

III. *APPLICATION OF* PLYLER *TO THE FEDERAL MEDICAID STATUTE*

A. *The Citizenship Provision of Title XIX*

Congress' broad power to legislate with regard to aliens stems from the constitutional provision allowing Congress to govern the entry and conduct of aliens.[158] The Supreme Court has recognized that the judiciary must exercise deference when it reviews federal legislation that affects aliens.[159] However, Congressional power to legislate in this area is not without limitation.[160] Where a jointly-funded assistance program is involved, Congress is not empowered to authorize the states to violate the Equal Protection Clause.[161]

In *Graham v. Richardson*,[162] the Supreme Court ruled on the constitutionality of Arizona[163] and Pennsylvania[164] statutes that im-

---

158. U.S. CONST. art. I, § 8. This section provides in pertinent part that "Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization." *Id.*

159. *See* Fiallo v. Bell, 430 U.S. 787 (1977) (federal immigration act provision excluding illegal alien child and natural father from special immigration status held constitutional by reason of the political character of alien legislation); Mathews v. Diaz, 426 U.S. 67 (1976) (federal legislation classifying aliens for receipt of welfare benefits constitutionally permissible under federal government's broad power over immigration and naturalization); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (state statute barring issuance of commercial fishing licenses to certain resident aliens preempted by federal government's broad constitutional power over what aliens shall be admitted, the period they may remain, regulation of their conduct before naturalization and the terms and conditions of their naturalization); Hines v. Davidowitz, 312 U.S. 52 (1941) (state alien registration statute preempted by federal legislation enacted under the Immigration and Naturalization power); Truax v. Raich, 239 U.S. 33 (1915) (state statute excluding aliens from private employment preempted by federal power to control immigration). *But see Hines*, 312 U.S. at 76 (1940) (Stone, J., dissenting) (federal government's acts with respect to aliens must be in pursuance of a constitutionally granted power, not a general police power over aliens lawfully admitted).

160. *See* Graham v. Richardson, 403 U.S. 365, 382 (1971).

161. *Graham*, 403 U.S. at 382. *See also* Shapiro v. Thompson, 394 U.S. 618, 641 (1969) (Congress is without the power to authorize a state statute governing receipt of AFDC benefits that violates the equal protection rights of new residents); Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (Congress's power under section 5 of the fourteenth amendment does not permit Congress to enact a voter registration statute violating the equal protection rights of citizens).

162. 403 U.S. 365 (1971).

163. ARIZ. REV. STAT ANN. § 46-233 (Supp. 1970-71) (amended 1972).

164. PA. STAT. ANN. tit. 62, § 432(2) (Purdon 1968) (amended 1973).

posed a one-year durational residency requirement on aliens for receipt of benefits under the Grants to States for Aid to the Permanently and Totally Disabled program[165] (APTD). Arizona defended its statute on the ground that Congress authorized a residency requirement for aliens. It relied on the APTD provision directing the Secretary not to approve any plan excluding any citizen of the United States.[166] The Supreme Court disagreed with this interpretation, holding that the provision did not authorize a residency requirement for aliens, but merely directed the Secretary not to exclude citizens.[167] The Court also examined the legislative history of the federal statute, and determined that there was no clear indication of Congressional intent to authorize the imposition of a durational residency requirement on aliens.[168] The Court stated, however, that the citizenship provision of the APTD statute "appear[ed] to have its roots in identical language of the . . . Social Security Act of 1935 as originally enacted."[169] The legislative history of that Act stated that "a State may if it wishes, assist only those who are citizens."[170] Although this statement appears to evi-

---

165. 42 U.S.C. §§ 1351-1355 (1950) (current version at 42 U.S.C. §§ 1351-1355 (1976 & Supp. V 1981)).

166. *Graham*, 403 U.S. at 380. Section 1352(b) provides in pertinent part that:

> The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes, as a condition of eligibility for aid to the permanently and totally disabled under the plan-
>
> . . . .
>
> (2) Any citizenship requirement which excludes any citizen of the United States.

42 U.S.C. § 1352(b) (1950) (current version at 42 U.S.C. § 1352(b) (1976)).

167. *Graham*, 403 U.S. at 381-82. Similarly, in Shapiro v. Thompson, 394 U.S. 618 (1968), the Supreme Court ruled on the constitutionality of state statutes that conditioned the receipt of welfare benefits under the jointly-funded AFDC program on a one-year residency requirement. *Id.* One of the grounds on which the states defended the restrictions was that Congress had expressly instructed the Secretary not to approve any plan that imposed an eligibility requirement denying aid to a resident of one year. *Id.* at 638-39. As in *Graham*, the Supreme Court rejected the defense of implicit Congressional authorization, finding that the federal legislation did not by its terms require one-year residency but "merely direct[ed] the Secretary . . . not to disapprove plans submitted by the States because they include such a requirement." *Id.* at 639.

168. *Graham*, 403 U.S. at 381.

169. *Id.*

170. *Id.* at 365 (quoting H.R. REP. No. 615, 74th Cong., 1st Sess. 18 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 29 (1935)).

dence Congress' intent to authorize a restriction on aliens, the Court minimized its significance by observing that the eligibility provision of the original Social Security Act was enacted prior to *Takahashi v. Fish & Game Commission*.[171] In *Takahashi*, the Court rejected the concept that a state could condition the receipt of certain "privileges" on citizenship.[172] The *Graham* Court reasoned that the legislative history should be interpreted as expressing Congress' understanding of the law as it existed prior to *Takahashi*.[173]

In light of *Graham*, state citizenship provisions that mandate the exclusion of undocumented aliens can be interpreted as not having been authorized by Congress. On its face, the citizenship provision of Title XIX[174] does not authorize such a restriction,[175] and Congress gave no clear indication in the legislative history that it intended to exclude undocumented aliens from eligibility.[176] Furthermore, the *Graham* Court determined that the APTD provision and the original Social Security Act provision had the same origin.[177] Since the citizenship provision of Title XIX is identical to these provisions,[178] it is reasonable to assume that it also had its origin in the Social Security Act provision. Therefore, the *Graham* Court's construction of the APTD provision[179] should apply to the Medicaid citizenship provision. If state citizenship provisions are determined to be unconstitutional insofar as they exclude undocumented children, as is suggested by Part I of this Note,[180] the statement of Congressional intent in the original Social Security Act

---

171. *Id.* at 381 (citing Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948)).

172. 334 U.S. at 420-21. The "public-interest doctrine" rejected in *Takahashi* allowed states to distinguish between constitutional "rights" and "privileges" in dispensing governmental benefits, the latter of which could be made dependent on citizenship. *Id.*

173. 403 U.S. at 382. The Court cautioned that federal statutes should be interpreted constitutionally whenever possible. *Id.* at 382-83.

174. 42 U.S.C. § 1396a(b) (1976 & Supp. V 1981).

175. *See supra* note 38-42 and accompanying text.

176. *See, e.g.*, S. REP. No. 404, 89th Cong., 1st Sess. 82; *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 1943, 2023.

177. *See* 403 U.S. at 381.

178. *Compare* 42 U.S.C. § 1352(b) (1950) (current version at 42 U.S.C. § 1352(b) (1976)), 42 U.S.C. § 302(b) (1935) (current version at 42 U.S.C. § 302(b) (1976 & Supp. V 1981)), *and* 42 U.S.C. § 1202(b) (1935) (current version at 42 U.S.C. § 1202(b) (1976)) *with* 42 U.S.C. § 1396a(b) (1976 & Supp. V 1981).

179. 403 U.S. at 381. *See supra* notes 167-73 and accompanying text.

180. *See supra* notes 76-157 and accompanying text.

should logically be read as expressing Congress' understanding of the law as it existed prior to *Plyler*.

This construction of Title XIX's citizenship provision is in accordance with the traditional legal principle that "statutes should be construed whenever possible so as to uphold their constitutionality."[181] If state citizenship provisions cannot constitutionally exclude undocumented children, the Title XIX citizenship provison should not be construed to authorize state citizenship provisions that exclude undocumented children.

B. *The Federal Regulations*

As previously discussed, the current federal regulations mandate the exclusion of undocumented aliens.[182] Moreover, Congress reenacted the citizenship provision of Title XIX in substantially the same form as the original, thus arguably showing implicit approval of the agency's interpretation.[183] If the Supreme Court found that state citizenship provisions excluding undocumented children violate the Equal Protection Clause, however, the interpretation given to the federal statute by the Department of Health and Human Services would require a finding that both the regulations and the federal Medicaid statute violate the Equal Protection Clause insofar as they exclude undocumented children.[184] However, because Congress reenacted the citizenship provision prior to the *Plyler* decision,[185] the regulations may properly be held invalid as inconsistent with a constitutional interpretation of the provision.[186]

---

181. *See Graham*, 403 U.S. at 382-83.

182. *See supra* notes 40-46 and accompanying text.

183. When Congress shows its approval of an agency's interpretation by reenacting the statute in substantially the same form after it has been interpreted by the agency entrusted with its enforcement, courts generally import deference to the interpretation of the statute by the agency. United States v. Cerecedo Hermanos y Compañia, 209 U.S. 337, 339 (1908) ("[T]he reenactment by Congress, without change, of a statute which had previously received long-continued executive construction, is an adoption by Congress of such construction.").

184. *See supra* notes 76-157 and accompanying text.

185. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 808 (1981) (current version at 42 U.S.C. § 1396a(b) (1976 & Supp. V 1981)).

186. There are two other applicable rules of regulatory construction, "contemporaneousness" and "long-continuedness." Note, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398 (1941). "Contemporaneousness" refers to the judicial rule to the effect that "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions

IV. *THE CONSTITUTIONALITY OF STATE MEDICAID STATUTES UNDER THE SUPREMACY CLAUSE*

The Supreme Court has repeatedly held that unless a federal statute or its legislative history clearly authorizes the exclusion of a class of persons from a jointly-funded assistance program, a state eligibility provision that excludes persons eligible for assistance under federal standards is invalid under the Supremacy Clause.[187] In *Townsend v. Swank*,[188] for example, the Court ruled on the constitutionality of the eligibility requirement of the Illinois Aid to Families with Dependent Children (AFDC) statute.[189] Under the Illinois statute, dependent children eighteen to twenty years of age who attended high school or vocational training were eligible for benefits under the program, but those who attended a college or university were not eligible.[190] Section 406(a)(2)(B) of the Social Security Act, however, defined "dependent child" for purposes of the AFDC

---

into effect, is entitled to very great respect." Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827). The original Medicaid citizenship provision was adopted in February, 1971, 36 Fed. Reg. 3872 (1971) (codified at 45 C.F.R. § 248.50 (1972)), six years after the adoption of the Medicaid statute, for the purpose of codifying prior HEW policy. *See* Notice of Proposed Rulemaking, 35 Fed. Reg. 8780 (1970). Although the HEW policy may have been adopted contemporaneously with the statute, in the event that state citizenship provisions are held unconstitutional, sustaining it would be inconsistent with a constitutional interpretation of the statute. *See supra* notes 76-157 and accompanying text. In such a case, a court would be unlikely to follow the contemporaneousness doctrine. *See* Bingler v. Johnson, 394 U.S. 741, 750 (1969) (quoting Commissioner v. South Tex. Lumber Co., 333 U.S. 496, 501 (1948)) (Internal Revenue regulations promulgated contemporaneously with the Internal Revenue Code " 'must be sustained unless unreasonable and plainly inconsistent with the revenue statutes [and] . . . should not be overruled except for weighty reasons.' "). The "long-continuedness" rationale would give weight to a regulation deemed to have Congressional approval by virtue of its long-continued use without substantial change. Helvering v. Winmill, 305 U.S. 79, 83 (1938). This rationale does not seem persuasive in the present instance because the very reason for an altered intrepretation is the *Plyler* holding. *See* 457 U.S. 202 (1982).

187. Carleson v. Remillard, 406 U.S. 598 (1972); Townsend v. Swank, 404 U.S. 282 (1971); King v. Smith, 392 U.S. 309 (1968). *See also* Burns v. Alcala, 420 U.S. 575, 578 (1975); New York Dep't of Social Servs. v. Dublino, 413 U.S. 405, 421-22 (1973).

If it is determined that a class of persons is eligible to receive benefits under a federal program, all participating states must grant benefits to the class. *Alcala*, 420 U.S. at 589 (Marshall, J., dissenting). If it is determined that a class is not eligible under federal standards, federal financing would not be available for that purpose. *Id.*

188. 404 U.S. 282 (1971).

189. Illinois Public Aid Code, ILL. REV. STAT. ch. 23, § 4-1.1 (1967).

190. *Id.*

program to include children under the age of twenty-one who were also students regularly attending a school, college, university or vocational or technical institution.[191] The Supreme Court found that the Illinois statute violated the Supremacy Clause, holding that neither the language of the AFDC statute nor its legislative history supported the view that Congress authorized Illinois to vary the eligibilty requirements to exclude persons otherwise eligible who were attending a college or university.[192] The Court noted that to the contrary, Congress expressed the intent that aid was to be furnished to all eligible individuals,[193] further indicating Congress' intent to withhold the discretion to vary AFDC eligibility requirements from federal standards.[194] The Court held that a state eligibility standard that excludes persons eligible for assistance under the federal standard violates the Supremacy Clause unless Congress has clearly authorized the exclusion.[195]

As has been discussed previously, if it is found that the states cannot constitutionally exclude undocumented children from Medicaid coverage, Title XIX's citizenship provision should be interpreted as not authorizing their exclusion.[196] Moreover, the federal Medicaid statute contains a provision instructing the states to furnish Medicaid to "*all eligible* individuals."[197] By analogy to *Townsend*, state citizenship provisions that exclude undocumented children made eligible by federal standards should be held invalid under the Supremacy Clause.

V. *PREGNANT UNDOCUMENTED ALIENS*

A child born in the United States of undocumented parents is a citizen.[198] A pregnant undocumented alien is in a unique position

---

191. U.S.C. § 606(a)(2)(B) (1965) (current version at 42 U.S.C. § 606(a)(2)(B) (Supp. V 1981)).

192. *Townsend*, 404 U.S. at 287-91. The *Townsend* Court relied on King v. Smith, 392 U.S. 309 (1968), in support of its holding. 404 U.S. at 286. In *King v. Smith*, the Alabama regulation at issue defined "parent" for purposes of the AFDC program to include an unrelated man cohabitating with the mother of a child who was otherwise eligible, thus defeating the child's right to benefits. 392 U.S. at 313. The Court found that the state restriction denied assistance to children made eligible by the Federal program. *Id.* at 333.

193. *Townsend*, 404 U.S. at 285.

194. *Id.* at 286.

195. *Id.*

196. *See supra* notes 158-81 and accompanying text.

197. 42 U.S.C. § 1396a(8) (1976) (emphasis added).

198. U.S. CONST. amend. XIV, § 1.

because if she is denied access to medical care because of her undocumented status, her child, upon birth, is denied equal access to the postpartum medical care received by citizens and documented aliens under Medicaid.[199] Such an inequitable result contradicts Supreme Court precedent holding that a child cannot be penalized for the status of its parents.[200] This analysis suggests that a pregnant undocumented alien in labor should be admitted to a hospital in the United States as a Medicaid patient for the limited purpose of assuring that the newborn citizen's rights are protected.

Further support for admitting an undocumented alien in labor into a hospital as a Medicaid patient can be found in the reasoning of the Southern District of New York in *Ruiz v. Blum*.[201] In *Ruiz*, the Court held that day care services under New York's AFDC program could not be denied to a native born citizen on the ground that his mother was an undocumented alien.[202] The Court held that the child is the "primary beneficiary" of these services, despite the fact that the mother also benefits from them.[203] The Court based its reasoning on "the simple fact that day care service 'is care . . . which is provided to a child.' "[204] Similarly, the newborn child of an undocumented alien is arguably the primary beneficiary of medical care provided to its mother at the time of its birth. Because such a child is a citizen at birth, it should not be denied the postpartum care available to other citizens and documented aliens based on its mother's undocumented status.

Whether Medicaid should pay for services to pregnant women during the course of pregnancy is a more difficult issue because the Supreme Court has held that an unborn child is not a "person" for fourteenth amendment purposes.[205] Consequently, an unborn child

---

199. For discussion of mandatory and optional medical services, see *supra* notes 31, 37.

200. *See* Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762, 770 (1977); Weber v. Aetna Casualty & Surety Corp., 406 U.S. 164, 175 (1972).

201. 549 F. Supp. 871, 876 (S.D.N.Y. 1982).

202. *Id.*

203. *Id.*

204. *Id.* (quoting N.Y. ADMIN. CODE tit. 18, § 416.1 (1979)).

205. Roe v. Wade, 410 U.S. 113, 158 (1973). *See also* Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1972); McGarvey v. Magee-Women's Hosp., 340 F. Supp. 751 (W.D. Pa. 1972); Byrn v. New York City Health & Hosps. Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972). *Cf.* Keeler v. Superior Court, 2 Cal. 3d 619, 87 Cal. Rptr. 481, 470 P.2d 617 (1970) (unborn fetus is not a "human being" within the meaning of homicide statute); State v. Dickenson, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971) (unborn fetus is not a

can make no claim to equal protection under the law.[206] Assuming that the undocumented mother could be constitutionally excluded from eligibility, the unborn child would have no claim to an equal protection violation based on discrimination against it prior to birth.[207]

However, the Supreme Court's rationale for holding that unborn children are not persons under the fourteenth amendment is not persuasive when applied to medical care. In *Roe v. Wade*, the Court indicated that it was so holding in order to avoid the difficulties that would result if a fetus were held to have due process rights under the abortion laws.[208] The Court pointed to the difficulties in statutes that permit abortion procured or attempted by medical advice for the purpose of saving the life of the mother.[209] If the fetus is a person who is not to be deprived of life without due process of law, the mother's condition could not be the sole factor in determining the legality of an abortion.[210] The same problems do not exist with respect to statutes discriminating against unborn persons with respect to pre-natal care. There is consequently no similar justification for not recognizing the equal protection right of the unborn child, at least for certain important benefits such as Medicaid.

"person" within meaning of vehicular homicide statute). *But see* Cheaney v. State, 259 Ind. 138, 285 N.E.2d 265 (1972) (opinion affirming conviction under statute prohibiting abortion based partly on right of the unborn child).

206. *See* Roe v. Wade, 410 U.S. at 158.

207. *See id.*

208. *Id.* at 157-58 n.54.

209. *Id.*

210. *Id.* As the Supreme Court in Roe v. Wade explains:

> [N]either in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception . . . for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the . . . exception appear to be out of line with the Amendment's command?
>
> There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. [I]n Texas, the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion [in Texas] . . . is significantly less than the maximum penalty for murder . . . . If the fetus is a person, may the penalties be different?

Id. See also Abele v. Markle, 351 F. Supp. 224, 228-29 (D. Conn. 1972).

CONCLUSION

The Supreme Court in *Plyler* extended the use of the intermediate level of scrutiny.[211] The *Plyler* Court applied the intermediate test in favor of undocumented children because of their unaccountability for their illegal status. The Court also stressed the pivotal role of the right of which they were deprived.[212] The *Plyler* analysis suggests that, in future cases, courts will be required either to test all statutes that burden undocumented children under intermediate scrutiny, or to weigh the importance of government benefits in their determination of whether to apply the intermediate test. If the Supreme Court follows the latter approach, it is difficult to perceive how medical assistance, or other basic welfare benefits, can be denied undocumented children.

Laurie McGinnis

---

211. Plyler v. Doe, 457 U.S. 202 (1982).
212. *Id.* at 224.