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Constitutional Law - Challenging Proposition 187's Constitutionality: League of United Latin American Citizens v. Wilson

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CONSTITUTIONAL LAW—Challenging Proposition 187's Constitutionality: *League of United Latin American Citizens v. Wilson*

I. INTRODUCTION

On November 8, 1994, in response to the federal government's failure to prevent illegal immigration, the people of California voted 59% to 41% to enact Proposition 187.[1] This Proposition attempts to remedy the problems California purportedly suffers at the hands of illegal aliens.[2] The United States District Court for the Central District of California immediately issued a temporary restraining order suspending implementation of Proposition 187.[3] Subsequently, the court issued a preliminary injunction, and, in *League of United Latin American Citizens v. Wilson*,[4] the court addressed the constitutionality of Proposition 187.[5]

Sponsors of Proposition 187 boast that the initiative is socio-politically advantageous because it will assist in overcoming a statewide recession, saving California over three billion dollars a year.[6] Supporters of Proposition 187 also assert that the initiative will improve the overall quality of publicly-funded social services, health care, educational facilities, and public safety in California by preventing illegal aliens from usurping benefits from these state-funded programs.[7] Furthermore, from a legal standpoint, supporters maintain that Proposition 187 is a constitutionally permissible exercise of traditional state police power and that its incidental and indirect effects on immigration do not mandate federal preemption.[8]

Conversely, political opponents of Proposition 187 charge their adversaries with short-sightedness, arguing that California's enforcement of Proposition 187 will

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1. 1994 Cal. Legis. Serv. Proposition 187 (West). For the full text of Proposition 187, see Appendix A. Proposition 187 was enacted by referendum, and subsequently codified in: CAL. PENAL CODE §§ 113, 114, 834(b) (West Cum. Supp. 1996); CAL. WELF. & INST. CODE § 10001.5 (West Cum. Supp. 1996); CAL. HEALTH & SAFETY CODE § 130 (West Cum. Supp. 1996); CAL. EDUC. CODE §§ 48215, 66010.8 (West Cum. Supp. 1996); CAL. GOV'T CODE § 53069.65 (West Cum. Supp. 1996).

2. *See* Keith Bradsher et al., *The 1994 Elections: State by State*, N.Y. TIMES, Nov. 10, 1994, at B11, *available in* LEXIS/NEXIS, News Library, Papers File. Throughout this Note, the term "illegal alien" refers to persons residing in the United States in violation of federal immigration laws.

3. *See* Paul Feldman & Patrick J. McDonnell, *U.S. Judge Blocks Most Sections of Proposition 187; Courts: Jurist Cites Significant Constitutional Questions. Enforcement Is Delayed Pending Outcome of Lawsuit*, L.A. TIMES, Dec. 15, 1994, at A1, *available in* WESTLAW, LAT database, 1994 WL 2378251, at *1.

4. 908 F. Supp. 755 (C.D. Cal. 1995).

5. *See id.* at 755, 764.

6. *See Decision '94: Special Guide to California's Elections; Proposition 187: Is it "Sink Our State" or "Save Our State"?*, L.A. TIMES, Oct. 30, 1994, at W9, *available in* WESTLAW, LAT database, 1994 WL 2361164, at *4 [hereinafter *Decision '94*].

7. *See, e.g.*, CAL. GOV'T CODE § 53069.75 (West Cum. Supp. 1996) (abolishing local prohibitions on cooperation between the Immigration and Naturalization Service (INS) and police); *see also* Robert Suro, *Fortress America? Suddenly the Golden Door Is Closing*, WASH. POST, Nov. 6, 1994, at C3, *available in* LEXIS/NEXIS, News Library, Papers File.

8. *See* Suro, *supra* note 7, at C3. *Cf.* Michael J. Brady, *Arguing Proposition 187: Will It Stand Up in Court? Yes: No Rights Are Violated*, CAL. B.J., Jan. 1995, at 1, 16, *available in* LEXIS/NEXIS, News Library, Papers File.

lead to harmful consequences that substantially outweigh any possible benefits of the initiative.[9] Opponents contend that Proposition 187 will effectuate an increase in California's crime rate, an increase in the spread of illness, and an increase in emergency health care costs.[10] Furthermore, opponents maintain that enforcing Proposition 187 will result in a permanent class of illiterates because undocumented alien children will be deprived of a public education.[11] Therefore, opponents explain, Proposition 187 is socio-politically, economically, and morally offensive.[12]

Opponents of Proposition 187 have primarily focused their legal attacks on two areas: preemption and equal protection.[13] Opponents insist that Proposition 187 is preempted by federal law because the initiative regulates immigration, an area in which Congress has exercised its exclusive power "[t]o establish an uniform Rule of Naturalization."[14] Moreover, opponents contend that Proposition 187 directly conflicts with the federal Immigration and Nationality Act (INA).[15] In addition to Proposition 187's preemption effect, opponents assert that several provisions of Proposition 187 violate the Equal Protection Clause of the Fourteenth Amendment.[16]

Part II of this Note summarizes Proposition 187. Part III briefly describes the procedural history of *League of United Latin American Citizens v. Wilson*. Part IV discusses the federal court's opinion in *League of United Latin American Citizens*. Part IV first discusses the court's analysis of Proposition 187's severability clause. Part IV then explores the federal preemption issues which Proposition 187's verification and benefit denial provisions raise and examines the *League of United Latin American Citizens* court's three-pronged approach to these issues. Part V analyzes the *League of United Latin American Citizens* court's finding that Proposition 187's benefit denial provisions, depending on the type of benefit and the federal preemption test applied, are (1) completely valid; (2) completely invalid; or (3) invalid under certain circumstances. Part VI demonstrates how Proposition 187's benefit denial provisions raise several equal protection issues and analyzes the *League of United Latin American Citizens* court's failure to address these issues.

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9. *See Decision '94*, *supra* note 6, at W9, 1994 WL 236114, at *5.

10. *See id.* Political opponents assert that both the spread of illness and the cost of emergency care will increase because of the state's refusal of publicly-funded non-emergency medical care to thousands of illegal aliens. *See id.*

11. *See id.*

12. Apparently, California did not agree with this notion. *See supra* notes 1-2 and accompanying text.

13. *See* Erwin Chemerinsky, *Arguing Proposition 187: Will It Stand Up in Court? No: 187 Is Unconstitutional*, CAL. B.J., Jan. 1995, at 1, 16.

14. U.S. CONST. art. I, § 8, cl. 4; *see* U.S. CONST. art. VI, cl. 2 (the Supremacy Clause); *see also* Immigration and Nationality Act, 8 U.S.C. §§ 1101-1557 (1994).

15. *See* 8 U.S.C. §§ 1101-1557 (1994); *see also* Evangeline G. Abriel, *Rethinking Preemption for Purposes of Aliens and Public Benefits*, 42 UCLA L. REV. 1597, 1619-20 (1995).

16. *See* Chemerinsky, *supra* note 13, at 1, 16.

II. PROPOSITION 187

Proposition 187 commences with the general declarations of the people of California, providing for "cooperation between their agencies of state and local government with the federal government, and . . . establish[ing] a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California."[17] Although some opponents of Proposition 187 urge that the initiative's primary goals are to encourage self-deportation and to curb future illegal immigration,[18] Proposition 187 does not expressly state these objectives.[19] Proposition 187's stated objective is limited to preserving California's resources, including social services, medical care facilities, and education, by denying publicly-funded benefits to undocumented aliens.[20]

Proposition 187 has three distinct components. First, in sections 4-8, Proposition 187 imposes a duty on California law enforcement personnel,[21] publicly-funded social service[22] and health care[23] agencies, public elementary and secondary schools,[24] and publicly-funded postsecondary schools[25] to attempt to verify whether an applicant, arrestee, or attendee is residing in the United States in violation of federal immigration laws;[26] to notify persons if their status is determined to be illegal or suspected of being illegal;[27] and to cooperate with federal immigration authorities and report any suspected illegal aliens to the Attorney General of California and the federal Immigration and Naturalization Service (INS).[28] This first component of Proposition 187 is referred to as the "verification, notification, and cooperation/reporting scheme," or "verification scheme."

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17. 1994 Cal. Legis. Serv. Proposition 187 § 1 (West).

18. *See, e.g.*, Suro, *supra* note 7, at C3 (quoting Alan Nelson, co-author of Proposition 187, on his admission that the entire scheme of Proposition 187 sends a message to illegal aliens to leave the United States). Nelson did not distinguish between the objectives of Proposition 187's verification scheme and benefit denial scheme. *See id.*

19. *See* 1994 Cal. Legis. Serv. Proposition 187 § 1 (West). Had these been the express purposes of Proposition 187, federal law would have entirely preempted the Proposition because it would have been an express attempt to regulate immigration. *See* De Canas v. Bica, 424 U.S. 351, 354 (1976). When Congress acts under a constitutionally granted power, state laws which conflict with such congressional acts are preempted. *See id.* at 363; Hines v. Davidowitz, 312 U.S. 52, 62 (1941).

20. *See* 1994 Cal. Legis. Serv. Proposition 187 § 1 (West). The alleged unstated objectives of Proposition 187 are impermissible regulations of immigration, while the Proposition's express objectives are traditional areas of state police power.

21. *See id.* § 4.

22. *See id.* § 5.

23. *See id.* § 6.

24. *See id.* § 7.

25. *See id.* § 8.

26. *See id.* §§ 4(b)(1), 5(b), 6(b), 7(b), 8(b).

27. *See id.* §§ 4(b)(2), 5(c)(2), 6(c)(2), 7(e), 8(c).

28. *See id.* §§ 4(b)(3), 5(c)(3), 6(c)(3), 7(e), 8(c).

The second component of Proposition 187 includes the portions of sections 5-8 which deny publicly-funded benefits to illegal aliens.[29] These provisions prohibit illegal aliens from receiving publicly-funded social services,[30] non-emergency medical treatment at publicly-funded health care facilities (regardless of whether the illegal aliens can pay for their treatment),[31] and from attending publicly-funded elementary,[32] secondary,[33] or postsecondary schools.[34] This second component of Proposition 187 is referred to as the "benefit denial scheme."

The third component of Proposition 187, in sections 2 and 3, imposes criminal penalties on persons involved in manufacturing, distributing, and using false citizenship and alien resident status documents.[35] Proposition 187 specifically states that "[a]ny person who manufactures, distributes[,] or sells false documents to conceal the true citizenship or resident alien status of another person," *shall* be either fined $75,000 or sentenced to five years imprisonment.[36] Proposition 187 further provides that any person who uses such false documents to conceal true citizenship or resident alien status *shall* be either fined $25,000 or sentenced to five years in prison.[37] Although, these criminal provisions have undergone very little scrutiny, a discussion of their validity is beyond the parameters of this Note.

III. PROCEDURAL HISTORY OF *LEAGUE OF UNITED LATIN AMERICAN CITIZENS V. WILSON*

> "It is easy to anticipate that [Proposition 187] will ultimately wend its way to the United States Supreme Court[,]"[38] and receive Congressional attention.[39]

In response to California's enactment of Proposition 187, the public interest group, League of United Latin American Citizens, brought a class action suit against California Governor Pete Wilson and numerous other California state officials.[40] At the same time as the League of United Latin American Citizens'

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29. *See id.* §§ 5-8.

30. *See id.* § 5.

31. *See id.* § 6. This section is not narrowly tailored to deny non-emergency health care exclusively to illegal aliens who request subsidization for their treatment; rather it forces publicly-funded hospitals and other public health care providers to refuse treatment even to undocumented aliens willing to pay for their treatment.

32. *See id.* § 7.

33. *See id.*

34. *See id.* § 8.

35. *See id.* §§ 2, 3.

36. *See id.* § 2.

37. *See id.* § 3.

38. Chief Justice of the Supreme Court of New Mexico, Joseph F. Baca, Constitutional and Practical Considerations of Proposition 187, Keynote address delivered to the first Hispanic Heritage Dinner at Marquette University Law School (Feb. 17, 1995), *in* 78 MARQ. L. REV. 777, 783 (1995).

39. *See* Jason A. Dzubow et al., *Looking Back; Looking Forward: A Survey of the 103rd Congress and Projections for the 104th*, 9 GEO. IMMIGR. L.J. 195 (1995) (discussing immigrants' rights as a hot topic for the 104th Congressional session).

40. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 763-64 & nn.1, 3 (C.D. Cal. 1995) (citing to the League of United Latin American Citizens' original action, League of United Latin Am. Citizens v. Wilson, No. CV 94-7569 MRP).

suit, several other actions challenging Proposition 187's constitutionality also were filed in the state and federal courts of California.[41]

In *League of United Latin American Citizens v. Wilson*,[42] the United States District Court for the Central District of California consolidated the League of United Latin American Citizens' class action suit with four of the other previously filed actions.[43] The *League of United Latin American Citizens* plaintiffs sought to enjoin implementation of Proposition 187 and requested declaratory relief invalidating Proposition 187.[44]

On November 16, 1994, the United States District Court for the Central District of California issued a temporary restraining order suspending implementation of sections 4, 5, 6, 7, and 9 of Proposition 187.[45] On December 14, 1995, the court granted the plaintiffs' motions for preliminary injunction, enjoining the implementation and enforcement of the challenged sections.[46]

On May 1, 1995, two of the plaintiffs, the League of United Latin American Citizens and Gregorio T., moved for summary judgment. The two plaintiffs argued that the INA,[47] among other federal laws, completely preempted Proposition 187.[48] Defendants countered that federal law did not preempt Proposition 187, and, alternatively, if the court found any of Proposition 187's provisions invalid, those provisions could be severed,[49] leaving the remainder of the initiative valid.[50]

The court granted the plaintiffs' motion for summary judgment in part, and denied it in part.[51] The court held that federal law preempts Proposition 187's verification, notification, and cooperation/reporting scheme because this scheme impermissibly regulates immigration.[52] The court further found that state-granted authority of state agents to deny benefits based on the state agents' reasonable

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The League of United Latin American Citizens brought its class action

> on behalf of all persons who: (a) are required to be questioned regarding their citizenship or federal immigration status, or required to produce documentation of their citizenship or federal immigration status, pursuant to §§ 4, 5, 6, 7 and 9 of Proposition 187; (b) are rendered ineligible for public social services, health care, or education pursuant to §§ 5, 6 and 7 of Proposition 187; or are required to be reported as not having legal status or notified either to obtain legal status or leave the United States pursuant to §§ 4, 5, 6, 7, [sic] or 9 of Proposition 187.

Id. at 763 n.1.

41. *Id.* at 763-64 & nn.1, 3.

42. 908 F. Supp. 755 (C.D. Cal. 1995).

43. *See id.* at 763. In addition, the federal district court allowed various other parties, including the City of Los Angeles, the California Teachers Association, and the California Association of Catholic Hospitals, to intervene as plaintiffs in the consolidated action. *See id.* at 763 n.2.

44. *See id.* at 763.

45. *See id.* at 764.

46. *See id.*

47. 8 U.S.C. §§ 1101-1557 (1994).

48. *See League of United Latin Am. Citizens*, 908 F. Supp. at 764.

49. *See* 1994 Cal. Legis. Serv. Proposition 187 § 10 (West) (severability clause).

50. *See League of United Latin Am. Citizens*, 908 F. Supp. at 764.

51. *See id.*

52. *See id.* at 771.

suspicions directly conflicts with the INA.[53] Based on these findings, the court declared all of the verification scheme provisions (sections 4 and 9,[54] and certain portions of sections 5, 6, and 7[55]) invalid under federal preemption doctrine.[56]

The court, applying three different federal preemption tests, upheld the benefit denial scheme provisions of Proposition 187 in part and invalidated them in part.[57] The court upheld Proposition 187's denial of public social services[58] and non-emergency health care[59] under two of three federal preemption tests it applied.[60] However, under the third preemption test, the court invalidated the initiative's denial of public social services and non-emergency health care benefits in specific factual circumstances.[61] Additionally, because of an inadequate showing under the third preemption test, the court declined to decide whether the public social services and non-emergency health care benefit denial provisions were generally preempted.[62]

In contrast, the court completely upheld the initiative's denial of access to public postsecondary institutions[63] to illegal aliens under all three of its preemption analyses.[64] The court did find, however, that barring illegal alien children from elementary and secondary public schools, was valid under the first two preemption tests,[65] but preempted under the third test by the United States Supreme Court case *Plyler v. Doe*.[66]

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53. *See id.* at 770, 777 (citing 8 U.S.C. § 1252b (1994)); *see also* 8 C.F.R. § 242.1(a) (1996) (giving exclusive power to determine alien resident status to the federal Immigration Court). Additionally, state officials who have no training in determining citizenship and alien resident status are not qualified to make these threshold determinations based on their subjective intuitions, beliefs, and prejudices. *See League of United Latin Am. Citizens*, 908 F. Supp. at 770.

54. Section 4 of Proposition 187 is entitled "Law Enforcement Cooperation with INS." 1994 Cal. Legis. Serv. Proposition 187 § 4 (West). Section 9 controls "Attorney General [C]ooperation with the INS." *Id.* § 9.

55. Section 5 is entitled "Exclusion of Illegal Aliens from Public Social Services." *Id.* § 5. Section 6 is entitled "Exclusion of Illegal Aliens from Publicly Funded Health Care." *Id.* § 6. Section 7 is entitled "Exclusion of Illegal Aliens From Public Elementary and Secondary Schools." *Id.* § 7. The court struck down, as part of the verification scheme, the subsections of the above three sections which were analogous to sections 4 and 9. *See League of United Latin Am. Citizens*, 908 F. Supp. at 771-72, 773.

56. *See id.* at 771-75.

57. *See id.* at 781-82, 786.

58. *See id.* at 771-73 (section 5 valid to the extent that the state agents rely on federal determinations of immigration status, rather than making their own judgments).

59. *See id.* at 782-85 (section 6 valid to the extent that the facilities do not receive federal funds under the Hill-Burton Act, 42 U.S.C. § 291 (1994), or the Public Health Service Act, 42 U.S.C. §§ 201-300(aaa-13) (1994)). Hill-Burton Act and Public Health Service Act programs are federal programs which do not condition eligibility or access on lawful alienship or citizenship status.

60. *See League of United Latin Am. Citizens*, 908 F. Supp. at 770-71, 773, 776 (ruling on sections 5 and 6).

61. *See id.* at 780, 781-82, 783, 784-85, 787; *see also* discussion *infra* at Part IV.B.3.a.

62. *See League of United Latin Am. Citizens*, 908 F. Supp. at 780, 787.

63. *See id.* at 786 (ruling on section 8). The court also upheld sections 2 and 3, which criminalize the manufacture and use of fraudulent identification materials. *See id.* at 775, 786.

64. *See id.* at 786 (ruling on section 8).

65. *See id.* at 770, 771, 774, 776.

66. *See id.* at 774 (citing Plyler v. Doe, 457 U.S. 202 (1982)) (ruling on section 7). In *Plyler v. Doe*, the United States Supreme Court found that a Texas statute, which denied undocumented alien children the right to a public education, violated the Equal Protection Clause of the Fourteenth Amendment. 457 U.S. 202, 230

Finally, the court recognized the validity of Proposition 187's severability clause[67] and severed the invalid verification and benefit denial provisions from the valid benefit denial provisions.[68] Following the United States District Court's decision, the Ninth Circuit Court of Appeals granted the defendants' motion to consolidate and expedite appeals.[69] On July 5, 1995, the Ninth Circuit issued its opinion on the defendants' appeal of the federal court's preliminary injunctions.[70] The Ninth Circuit found that the lower court did not abuse its discretion in issuing the preliminary injunctions, and reserved a holding on the merits until a permanent injunction was appealed.[71] The Ninth Circuit further explained its "disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits."[72]

IV. DISCUSSION OF *LEAGUE OF UNITED LATIN AMERICAN CITIZENS v. WILSON*

Proposition 187 raises several constitutional issues, including federal preemption and equal protection. The federal district court addressed the issue of federal preemption, but skirted the equal protection issues by resting its decision on preemption grounds alone.[73] Furthermore, the court relied on the severability clause contained in Proposition 187 to cut out the provisions of Proposition 187 which were constitutionally objectionable while upholding the rest of the initiative.

A. *Severability*

The federal district court acknowledged Proposition 187's severability clause as provided in section 10 of the initiative.[74] This finding is important because the court severed both sections and subsections of Proposition 187.[75] The court held that Proposition 187 is severable because "each of Proposition 187's ten sections, and their respective subsections, is a distinct grammatical unit and thus is capable of being severed from the other sections and subsections without affecting the wording of any other section or rendering what remains unintelligible."[76] Because sections and subsections of Proposition 187 were unconstitutional, had the court not upheld Proposition 187's severability clause, the result would have been a complete invalidation of Proposition 187.

(1982). However, as discussed *infra* at Part VI, there are several persuasive arguments on both sides of the issue as to whether *Plyler* should or should not be extended to California's present situation.

67. *See League of United Latin Am. Citizens*, 908 F. Supp. at 776-77.

68. *See id.* at 767, 773; *see also infra* Part V.

69. *See* Gregorio T. v. Wilson, 54 F.3d 599, 600 (9th Cir. 1995).

70. *See* Gregorio T. v. Wilson, 59 F.3d 1002, 1004 (9th Cir. 1995).

71. *See id.* at 1004.

72. *Id.* at 1005 (quoting Sports Form, Inc. v. United Press Int'l, 686 F.2d 750, 753 (9th Cir. 1982)).

73. *See infra* note 198 and accompanying text.

74. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 767 (C.D. Cal. 1995). A discussion of the validity of the severable nature of Proposition 187 is beyond the scope of this Note.

75. *See generally id.*

76. *Id.* at 767.

B. *Federal Preemption of Proposition 187*

State legislation concerning immigration and naturalization cannot conflict with any federally proscribed guidelines[77] because Congress has the exclusive power "[t]o establish an uniform Rule of Naturalization . . . ."[78] Congress has exercised this "unquestionably exclusive[]" federal power to regulate immigration[79] through a series of legislative acts.[80] Congress has manifestly expressed its intent to bar states from enacting any supplemental legislation which regulates immigration by establishing a comprehensive regulatory system[81] (through the INA[82]), which governs entrance into the United States, length of stay, changes in status, and deportation.[83] Even prior to the INA's enactment, the United States Supreme Court held that states cannot "add to [or] take from the conditions lawfully imposed by Congress upon admission, naturalization, and residence of aliens in the United States or the several states."[84]

1. The *De Canas* Preemption Tests

In *De Canas v. Bica*,[85] a case involving a section of the California Labor Code which purportedly affected immigration,[86] the United States Supreme Court set forth three tests to determine whether federal law preempts a state statute concerning immigration.[87] The three tests embody traditional preemption analysis.[88] Failing any one of the three *De Canas* tests is fatal to a state immigration law.[89]

In *De Canas*, the Court held that the California Labor Code did not regulate immigration.[90] Justice Brennan, writing for the court,[91] held that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration . . . . [E]ven if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration . . . ."[92] The Court explained that section

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77. *See* U.S. CONST. art. VI, cl. 2.

78. *Id.* art. I, § 8, cl. 4.

79. De Canas v. Bica, 424 U.S. 351, 354 (1976).

80. *See, e.g.*, Immigration and Nationality Act, 8 U.S.C. §§ 1101-1557 (1994).

81. *See De Canas*, 424 U.S. at 354 (citing De Canas v. Bica, 115 Cal. Rptr. 444, 446 (1974)); *see also* Mendozo v. INS, 16 F.3d 335, 338 (9th Cir. 1994); Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983).

82. 8 U.S.C. §§ 1101-1557 (1994).

83. *See id.*

84. Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948).

85. 424 U.S. 351 (1976).

86. Section 2805(a) of the California Labor Code provided that "[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." CAL. LAB. CODE § 2805(a) (West 1971) (repealed 1988).

87. *See De Canas*, 424 U.S. at 355-58; *see also* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 768 (C.D. Cal. 1995).

88. *See De Canas*, 424 U.S. at 354-56, 357, 363; *see also League of United Latin Am. Citizens*, 908 F. Supp. at 768.

89. *See League of United Latin Am. Citizens*, 908 F. Supp. at 768.

90. *See De Canas*, 424 U.S. at 365.

91. *See id.* at 352.

92. *Id.* at 355-56.

2805(a) of the California Labor Code was well within the traditional state police power of employment regulation, whereas "regulation of immigration . . . is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[93] Although section 2805(a) may have indirectly affected immigration where the provision was intended to protect the work force and the economy, the Court found that the provision was not a regulation of immigration, and therefore not federally preempted.[94]

The first test set forth in *De Canas* is whether the statute in question is a "regulation of immigration."[95] If a state law regulates immigration, the Supremacy Clause[96] of the United States Constitution demands federal preemption.[97] Therefore, a state objective which deters illegal immigration and encourages current illegal aliens to self-deport is an impermissible regulation of immigration.[98] However, the fact that a state law *incidently* affects undocumented aliens does not necessarily mandate classification of that law as a regulation of immigration.[99]

The second *De Canas* test requires preemption of a state law if the law encroaches upon a field which Congress clearly intended to occupy.[100] Congress, through the INA, expressly intends to occupy certain areas of immigration and naturalization.[101] Conversely, Congress does not occupy areas of traditional state police power, including employment, public health care, and safety.[102]

The third test of *De Canas* questions whether the state statute "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' . . . ."[103] Put another way, a statute is preempted under the third test if it conflicts with federal law, making compliance with both state and federal law impossible.[104]

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93. *Id.* at 355.

94. *See id.* at 355-56.

95. *Id.* at 355.

96. The Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

97. *See De Canas*, 424 U.S. at 356.

98. *See id.* at 354-55.

99. *See id.* at 355 (ruling that a state law barring employers from knowingly employing illegal aliens is not a regulation of immigration).

100. *See id.* at 354-57.

101. *See supra* notes 77-84 and accompanying text. *But see De Canas*, 424 U.S. at 356-57 (ruling that Congress does not, through the INA, occupy the field of regulating alien employment).

102. *See, e.g., De Canas*, 424 U.S. at 354.

103. *Id.* at 363 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Florida Lime & Avocado Growers v. Paul, 357 U.S. 132, 141 (1963)).

104. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 768 (C.D. Cal. 1995) (citing Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Marketing and Bargaining Bd., Inc., 467 U.S. 461, 469 (1984)); *see also Florida Lime & Avocado Growers*, 373 U.S. at 142-43.

2. Federal Preemption and Proposition 187's Verification, Notification, Cooperation/Reporting Scheme

In *League of United Latin American Citizens*, the court, in applying the first *De Canas* test, readily distinguished the *De Canas* California Labor Code's tangential effects on immigration from several aspects of Proposition 187 which directly regulate immigration.[105] In *De Canas*, the Code barred employers from knowingly employing illegal immigrants residing in the United States.[106] The United States Supreme Court found that California's Labor Code did not regulate immigration, and that Congress did not occupy the field of employment of illegal aliens.[107] Conversely, the court held in *League of United Latin American Citizens* that Proposition 187's verification scheme unquestionably regulated immigration.[108] According to the court, provisions of Proposition 187 which

> require[d] state agents to question all arrestees, applicants for medical and social services, students, and parents of students about their immigration status; to obtain and examine documents relating to the immigration status of such persons; to identify "suspected" "illegal" immigrants present in California; to report suspected "illegal" immigrants to state and federal authorities; and to instruct people suspected of being in the United States illegally to obtain "legal status" or "leave the country"[109]

directly and substantially regulate immigration.[110] The court explained that "[t]he classification, notification and cooperation/reporting provisions taken together constitute a regulatory scheme designed to deter illegal aliens from entering or remaining in the United States . . . and indeed, defendants have not seriously urged any other reading."[111]

Proposition 187's verification scheme also failed the second[112] (federal occupation of a field) and third[113] (conflicting federal and state laws) tests of *De Canas*. Congress has clearly exercised its constitutional right to legislate in the area of immigration, and has occupied the field through the enactment of the INA.[114] Furthermore, Proposition 187 directly conflicts with federally proscribed immigration guidelines currently used to determine the grounds for deporta-

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105. *See generally League of United Latin Am. Citizens*, 908 F. Supp. at 769. As the court explained, "[u]nlike the statute at issue in *De Canas*, various of Proposition 187's provisions have much more than a 'purely speculative and indirect impact on immigration.' Indeed, Proposition 187's verification, notification and cooperation/reporting requirements directly regulate immigration . . . ." *Id.* (quoting *De Canas*, 424 U.S. at 355).

106. *See* CAL. LAB. CODE § 2805 (West 1983) (repealed 1988).

107. *See De Canas*, 424 U.S. at 354-56.

108. *See League of United Latin Am. Citizens*, 908 F. Supp. at 765, 768-70.

109. *See id.* at 769 (quoting 1994 Cal. Legis. Serv. Proposition 187 §§ 4(b)(2), 5(c)(2), 6(c)(2) (West)).

110. *See id.*

111. *Id.* at 765.

112. *See id.* at 775-76.

113. *See id.* at 776-86.

114. *See id.* at 775-76; *see also* Mendozo v. INS, 16 F.3d 335, 338 (9th Cir. 1994); Gonzales v. City of Peoria, 722 F.2d 468, 474-75 (9th Cir. 1983).

tion.[115] For example, INA regulations "require '[e]very proceeding to determine the deportability of an alien in the United States [to be] commenced by the filing of an order to show cause with the [Immigration Court].'"[116] Yet the verification scheme implemented by Proposition 187 requires state agents to use their own discretion and suspicions in making citizenship and resident alien status determinations that federal law expressly reserves for immigration judges.[117] This usurpation of power conferred exclusively on federal immigration judges clearly contravenes Congressional intent, and makes it impossible for state agencies to comply with both federal and state laws.[118]

Thus, the *League of United Latin American Citizens* court held that the verification scheme impermissibly regulated immigration[119] and, therefore, was preempted by the second and third *De Canas* tests for the very same reasons it was preempted by the first *De Canas* test.[120]

3. Federal Preemption and Proposition 187's Benefit Denial Scheme

Proposition 187's denial of benefits to illegal aliens can be divided into three distinct areas: (1) publicly-funded social services and non-emergency health care (sections 5 and 6); (2) public elementary and secondary education (section 7); and (3) public postsecondary education (section 8). Applying the three different *De Canas* preemption tests,[121] the *League of United Latin American Citizens* court made three separate decisions about the validity of each of the benefit denial provisions. First, the court found that Proposition 187's denial of public social services and non-emergency health care to illegal aliens (sections 5 and 6) was completely valid under the first two *De Canas* preemption tests.[122] However, under the third *De Canas* preemption test, the court both declined to decide if sections 5 and 6 were completely preempted[123] and found that, *in certain factual instances*,[124] the denial of social services and non-emergency health care *was* federally preempted.[125]

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115. *See League of United Latin Am. Citizens*, 908 F. Supp. at 777 (citing 8 U.S.C. § 1251(a) (1994); 8 U.S.C. 1252(a), (b), (c) (1994); 8 C.F.R. 242.1(a) (1996)); *see also* 1994 Cal. Legis. Serv. Proposition 187 §§ 4(a), 5(a), 6(a), 7(a), 9 (West); *De Canas*, 424 U.S. at 361-62.

116. *League of United Latin Am. Citizens*, 908 F. Supp. at 777 (quoting 8 C.F.R. § 242.1(a) (1995); 8 U.S.C. § 1252(a) (1994)).

117. *See id.*

118. *See id.* The drafters of Proposition 187 overlooked a simple means of satisfying the third *De Canas* test. They could have adopted the federal standard provided by the federal Systematic Alien Verification for Entitlements (SAVE) program network which enables state agencies, working in cooperation with the federal government, to access federal lists of persons illegally residing in the United States. *See generally* Immigration Reform and Control Act of 1986, 42 U.S.C. § 1320b-7 (1994).

119. *See League of United Latin Am. Citizens*, 908 F. Supp. at 765.

120. *See id.* at 775-79.

121. *See id.* at 768.

122. *See id.* at 770-71, 772-73

123. *See id.* at 780, 787.

124. *See infra* notes 134-141 and accompanying text.

125. *See League of United Latin Am. Citizens*, 908 F. Supp. at 780-85.

Second, while upholding Proposition 187's denial of public elementary and secondary schooling to illegal aliens (section 7) under the first two *De Canas* preemption tests,[126] the court *completely invalidated* section 7 under the third *De Canas* test.[127] Third, the court *completely upheld* the validity of Proposition 187's denial of illegal aliens' right to attend public postsecondary educational facilities (section 8) under all three of the *De Canas* preemption tests.[128]

a. Publicly-Funded Social Services and Non-Emergency Health Care

The *League of United Latin American Citizens* court jointly addressed Proposition 187's denial of publicly-funded social services (section 5) and publicly-funded non-emergency health care (section 6), using the three *De Canas* preemption tests. The court found that under the first *De Canas* preemption test (direct regulation of immigration) the denial of publicly-funded social services and non-emergency health care to illegal aliens was not intended as, and did not amount to, a direct regulation of immigration by California, to the extent that California's denial of these benefits did not involve a state determination of the legal status of persons being denied benefits.[129] So long as California's denial of publicly-funded social services and non-emergency health care under sections 5 and 6 fell within the above limitations, the court viewed these benefit denial provisions as, at most, having an indirect effect on immigration.[130] Therefore, the court found that Proposition 187's denial of publicly-funded social services and non-emergency health care was not preempted under the first *De Canas* test.[131]

The *League of United Latin American Citizens* court also found that the second *De Canas* test (congressional intent to occupy the field) did not preclude enforcement of Proposition 187's denial of public social services and non-emergency health care because

> nothing in the wording or legislative history of the INA "unmistakably confirms" an intent to oust state authority to regulate in the public benefits field, and because, as in *De Canas*, such an intent cannot be "derived from

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126. *See id.* at 770, 776.

127. *See id.* at 785-86; *see also* discussion *infra* at Part IV.B.3.b. In fact, the court only summarily analyzed section 7 under the first two *De Canas* tests because it foresaw the section's preemption under the third *De Canas* test. *See League of United Latin Am. Citizens*, 908 F. Supp. at 774, 776.

128. *See id.* at 774, 776, 786.

129. *See id.* at 771-73. The stated purpose and effect of sections 5 and 6

> [are] not solely to ensure the ouster of persons suspected of being in this country unlawfully. Rather, they have the additional purpose and effect of excluding persons from obtaining public social and health care services. To the extent that state actors deny benefits to persons based on determinations by federal authorities that those individuals are deportable pursuant to federal law, benefits denial is not a direct regulation of immigration, but rather, has only the possible indirect effect of deterring "illegal" aliens from coming to California or causing them to leave.

Id. at 771.

130. *See id.*

131. *See id.* at 771-73.

> the scope and detail of the INA . . . governing entry and stay of aliens" . . . .[132]

Due to the lack of evidence presented by the plaintiffs, the court declined to make a conclusive finding on whether Proposition 187's denial of public social services and non-emergency health care was completely preempted under the third *De Canas* test (direct conflict between state and federal law).[133] Nevertheless, the court found several factual instances where the benefit denial provisions of sections 5 and 6 did conflict with various federal laws,[134] resulting in federal preemption under the third *De Canas* test.[135] The court analyzed this conflict of laws issue in five specific contexts which were brought to the court's attention by the parties.[136] Each of the five public social services or public health programs that the court analyzed received federal funding[137] and the federal statute(s) applicable to the programs "[did] not condition eligibility on lawful immigration status."[138] Although the court only analyzed the impact that federal funding and "federal laws authorizing . . . benefits and services without reference to immigration status" had on the five programs brought to the court's attention by the parties, the court stated that the application of sections 5 and 6 would be preempted whenever a public social service or non-emergency health care program had the above two characteristics.[139]

Conversely, the court found that Proposition 187's denial of access to public social services and non-emergency health care programs that are wholly state-funded is not preempted under the third *De Canas* test because there is no conflict between the benefit denial provisions and federal law.[140] Similarly, in circumstances where federal-state cooperative programs exist and the applicable federal statutes actually condition receipt of benefits on legal alien status, the

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132. *Id.* at 776 (quoting De Canas v. Bica, 424 U.S. 351, 359 (1976)) (first alteration in original).

133. *See id.* at 780 (citing Ray v. Atlantic Richfield Co., 435 U.S. 151, 158-60 (1978)), 782, 785.

134. *See id.* at 780.

135. *See id.* at 780-81, 785.

136. The denial of access to the following federally-funded programs, which are available "regardless of immigration status," was found to be preempted by federal law and thus invalid: (1) the Woman's, Infants, and Children (WIC) program, 42 U.S.C. § 1786 (1994), *see League of United Latin Am. Citizens*, 908 F. Supp. at 780-81 & n.25; (2) child welfare services, *see League of United Latin Am. Citizens*, 908 F. Supp. at 780-81 & n.26; (3) Hill-Burton Act health care facilities, *see* 42 U.S.C. §§ 291 (1994); *League of United Latin Am. Citizens*, 908 F. Supp. at 782-83, 785; (4) Public Health Service Act community health centers, *see* 42 U.S.C. §§ 201-300(aaa-13) (1994); *League of United Latin Am. Citizens*, 908 F. Supp. at 783-84, 785.

The fifth area analyzed by the court, the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd (1994), was found not to conflict with section 6, and thus not to preempt the application of section 6's denial of public non-emergency health services. *See League of United Latin Am. Citizens*, 908 F. Supp. at 784-85 & n.34.

137. *See League of United Latin Am. Citizens*, 908 F. Supp. at 780-81.

138. *Id.* at 781 (referring to WIC program, 42 U.S.C. § 1786 (1994)).

139. *See id.* at 780, 787. The court, in fact, was skeptical that there were indeed public social service or non-emergency health care programs which were "purely state-funded." *See id.* If the plaintiffs had made a strong showing that no such facilities or services in fact existed, it is probable that the court would have completely preempted sections 5 and 6 under the third *De Canas* test.

140. *See id.* at 780, 781-82, 785.

court found that Proposition 187's denial of public social services does not conflict with federal law.[141]

b. Exclusion of Undocumented Alien Children from Public Elementary and Secondary Schools

The *League of United Latin American Citizens* court found that the first *De Canas* test (state regulation of immigration) did not preempt section 7 of Proposition 187,[142] entitled "Exclusion of Illegal Aliens From Public Elementary and Secondary Schools."[143] However, the court provided a cursory analysis, recognizing that section 7 would be preempted under the third *De Canas* test.[144] The court also perfunctorily found that section 7 was not preempted under the second *De Canas* test (federal occupation of field).[145]

In contrast, the *League of United Latin American Citizens* court found that section 7 was entirely preempted by federal law under the third *De Canas* test,[146] notwithstanding the impermissible verification scheme contained in section 7.[147] The court, relying on *Plyler v. Doe*,[148] held that federal law mandates free elementary and secondary public education to United States citizens, legal aliens, and illegal aliens.[149]

In *Plyler*, the United States Supreme Court held that a Texas statute which denied illegal immigrants access to public elementary and secondary schools violated the Equal Protection Clause of the Fourteenth Amendment.[150] The *League of United Latin American Citizens* court, without discussing in detail its rationale for applying *Plyler* to section 7,[151] rested its opinion on a broad reading of *Plyler* in order to bring section 7 of Proposition 187 within *Plyler*'s scope, thus resulting in federal preemption under the third *De Canas* test.[152]

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141. *See id.* at 782-83. The court cited the Medicaid, Food Stamps, and Aid to Families with Dependent Children (AFDC) programs as federal-state cooperative social services programs, "eligibility for which Congress has already conditioned on lawful immigration status . . . ." *Id.* at 782. Verification of immigration status for the above public social service programs is accomplished "by accessing INS information" through the federal SAVE system. *See id.* at 778; *see also* 42 U.S.C. § 13206-7 (1994); *supra* note 118.

The issue of federal-state cooperative non-emergency health care programs which have a federal eligibility prerequisite of "lawful immigration status" was not analyzed by the court. *See id.* at 782-85.

142. *See id.* at 770. The court did not conduct a separate analysis of section 7 under the first *De Canas* test, but found all of Proposition 187's benefit denial provisions valid under the first test. *See id.* at 770, 774.

143. 1994 Cal. Legis. Serv. Proposition 187 § 7 (West).

144. *See League of United Latin Am. Citizens*, 908 F. Supp. at 774.

145. *See id.* at 776. The court did not conduct a separate analysis of section 7 under the second *De Canas* test, but found all of Proposition 187's benefit denial provisions valid under the second test. *See id.*

146. *See id.* at 785.

147. *See id.* at 774.

148. 457 U.S. 202 (1982).

149. *See League Of United Latin Am. Citizens*, 908 F. Supp. at 774, 785-86 (citing Plyler v. Doe, 457 U.S. 202, 205 (1982)). The decision of the court to apply *Plyler* to section 7 was the court's alone—the "plaintiffs did not assert *Plyler* as a basis for conflict preemption of section [7] in their motions for summary judgment . . . ." *Id.* at 785 n.36.

150. *See Plyler*, 457 U.S. at 230.

151. *See League of United Latin Am. Citizens*, 908 F. Supp. at 785 & n.36.

152. *See id.* at 785 (citing *Plyler*). The validity of *Plyler*, and its application to *League of United Latin American Citizens* are examined *infra* Part VI.

Plyler's nexus to *League of United Latin American Citizens* will be examined further in the equal protection discussion below at Part VI.

c. Public Postsecondary Education

The *League of United Latin American Citizens* court summarily applied the three *De Canas* preemption tests to determine whether federal law preempts Proposition 187's bar of undocumented alien attendance at public postsecondary institutions. The court found that Proposition 187's denial of postsecondary education to illegal aliens is not a regulation of immigration under the first *De Canas* test because section 8's denial does "not amount to [a state] determination[] of who may and may not remain in this country."[153] The *League of United Latin American Citizens* court also quickly found that Proposition 187's denial of postsecondary eduction did not violate the second *De Canas* test (occupation of the field) because Congress, through the INA, had not expressed an intent to preclude state regulation of public benefits.[154] Finally, the court briefly held that section 8 did not violate the third *De Canas* test because no federal law appeared to conflict with Proposition 187's denial of public postsecondary education to aliens unlawfully residing in the United States, nor did the plaintiffs contend otherwise.[155]

V. ANALYSIS—PREEMPTION OR NON-PREEMPTION OF BENEFIT DENIAL PROVISIONS

Proposition 187's stated objective is to preserve California's resources.[156] Taking this objective at face value, the *League of United Latin American Citizens* court readily severed the provisions allegedly aimed only at preserving state resources (the benefit denial scheme) from those provisions that were express regulations of immigration (the verification scheme).[157] The court proposed that if state agencies merely administer federal determinations of citizenship and resident alien status,[158] rather than making their own determinations, the benefit denial provisions, to the extent they do not conflict with federal law, are not

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153. *League of United Latin Am. Citizens*, 908 F. Supp. at 774. The court's analysis of section 8 under the first *De Canas* test echoes the court's analysis of sections 5 and 6 under the same test. *See supra* notes 129-131 and accompanying text.

154. *See League of United Latin Am. Citizens*, 908 F. Supp. at 776 & n.14 (citing De Canas v. Bica, 424 U.S. 351, 359 (1976)). As in *De Canas*, an intent to oust state authority to regulate public benefits "cannot be 'derived from the scope and detail of the INA' . . . ." *Id.* at 776.

155. *See id.* at 786.

156. *See* 1994 Cal. Legis. Serv. Proposition 187 § 1 (West).

157. *See League of United Latin Am. Citizens*, 908 F. Supp. at 786-87. The court did not address the potential constitutional preemption issues regarding the lack of uniformity among states in relation to disparate treatment of illegal aliens residing in the United States where the United States Constitution requires a uniform system of naturalization. *See* U.S. CONST. art. I, § 8, cl. 4.

158. These determinations are accessible through the federal SAVE program. *See* 42 U.S.C. § 1320b-7 (1994); *see also supra* notes 118 and 141. SAVE verifies eligibility status for federal-state cooperative programs. *See, e.g., id.* §§ 1320b-7(b)(1), (d) (1994) (AFDC is a program which must participate in the SAVE system). AFDC is a federal program providing financial and other assistance to families, conditioned on lawful alienship status. *See id.* §§ 601-617 (1994).

preempted because they do not amount to state immigration status determinations.[159]

Careful examination of the court's partial validation of Proposition 187's benefit denial provisions reveals that the court's decision rested solely on the grounds that these provisions did not conflict with the INA to the extent that the state agencies rely on federal determinations of residency status under the federal SAVE[160] program.[161] The court's approach under the third *De Canas* test (conflicting federal and state immigration laws) partially invalidated the social services and health care provisions and completely validated the postsecondary education provision,[162] but failed to seriously consider the possibility of complete preemption of these provisions under the first *De Canas* test (direct regulation of immigration).[163]

The court should have more adequately analyzed whether denying illegal aliens public social services, health care from publicly-funded facilities, and the opportunity to attend public postsecondary schools (and elementary and secondary schools) are attempts to regulate immigration, thus giving cause for preemption under the first *De Canas* test. Instead, the court limited its address of the applicability of the first *De Canas* test to conclusions with little supportive evidence or rationale. The court found that benefit denial provisions are unenforceable to the extent that publicly-funded social service agencies and health care facilities accept federal funding conditioned on a guarantee that treatment, assistance, and/or education will be given to all persons residing in the locale of the facility.[164] If any state facilities exist that do not receive conditional, federal

159. *See League of United Latin Am. Citizens*, 908 F. Supp. at 779-80.

160. *See* 42 U.S.C. § 1320b-7 (1994).

161. *See League of United Latin Am. Citizens*, 908 F. Supp. at 779.

162. For example, the court held that the third *De Canas* test did not preempt section 8's bar of illegal aliens from public postsecondary schools because it did not conflict with the INA. *See id.* at 786. The court also found that Proposition 187's denial of public postsecondary education was not preempted under the second *De Canas* test. *See id.* at 779-80. Arguably, however, based on the circumstances under which Proposition 187 was enacted, the court could have deemed each benefit denial an attempt to regulate immigration because each benefit denial sends a blatant message to illegal aliens to leave the country. If so, the court could have allowed the defendants to present evidence on the issue, rather than summarily dismissing it.

163. *See id.* at 777-85. Perhaps the court took literally Justice Brennan's statement that "regulation of immigration . . . is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." De Canas v. Bica, 424 U.S. 351, 355 (1976). However, a literal interpretation of Justice Brennan's statement is arguably invalid. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 379 (1971) ("Alien residency requirements for welfare benefits necessarily operate . . . to discourage entry into or continued residency in the State[,]" and therefore serve to regulate immigration.).

164. *See League of United Latin Am. Citizens*, 908 F. Supp. at 780-85; *see also*, Hill-Burton Act, 42 U.S.C. § 291c(e) (1994) (requiring facilities applying for federal funding under this Act to promise to provide "a reasonable volume of services to *persons* unable to pay" (emphasis added)). The regulations clarify that "all persons" means "persons residing . . . in the facility's service area without discrimination on the ground of race, color, national origin, creed, or any other ground unrelated to an individual's need for the service or the availability of the needed service in the facility." Public Health Service Act, 42 C.F.R. § 124.603(a)(1) (1995).

The court did not specifically address whether section 8 (and section 7) would be preempted under the third *De Canas* test to the extent that the educational institutions received federal-funding and federal law did not require legal immigration status to attend. *See League of United Latin Am. Citizens*, 908 F. Supp. at 785-86. Logically, however, sections 7 and 8 would be partially or completely preempted under the third *De Canas* test

funding as described above, then those state agencies' denials of benefits to illegal aliens is permissible under the third *De Canas* preemption test.[165]

Notwithstanding the court's recognition that denying illegal aliens public social services and non-emergency health care from state-funded facilities is not preempted under the first two *De Canas* tests and only preempted in limited contexts under the third *De Canas* test (declining to decide if sections 5 and 6 were generally preempted under the third test), the court upheld these two sections in name only. For example, many publicly-funded health care facilities accept federal assistance under the Hill-Burton Act[166] and, therefore, illegal aliens will not actually be denied medical treatment based solely on their residency status. The court cleverly diffused sections 5 and 6, while circumventing troublesome inquiries under the first *De Canas* federal preemption test concerning whether state regulations denying state benefits to illegal aliens, which are clearly within the area of traditional state police power, also serve to regulate immigration.[167]

Despite the fact that the benefit denial provisions are semantically glossed to express an intent to regulate areas of traditional state police power, the question of whether they also serve to regulate immigration deserves inquiry. Arguably, all of the benefit denial provisions contained in Proposition 187 are similar to the verification scheme—regulations of immigration.[168] Denying illegal aliens the right to receive publicly-funded social services, health care, and a public education will inevitably deter illegal immigration to California and force illegal aliens presently residing in California to leave the state.

It is well settled that Proposition 187 would have been invalidated under the first *De Canas* preemption test if the Proposition's stated intent in denying benefits was to regulate immigration.[169] However, this is not the express objective of the legislation.[170] Unfortunately, because Proposition 187 arose by referendum, no

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if the state's schools received federal funding and there were no federal immigration status requirement for attendance or if *Plyler* were read to authorize access to all public schools—elementary, secondary, and postsecondary—regardless of the attendee's immigration status.

165. *See League of United Latin Am. Citizens*, 908 F. Supp. at 782-83. The denial of benefits is permissible under the third *De Canas* test only to the extent that the state agencies use the SAVE network, rather than making their own citizenship and resident alien status determinations. *See supra* note 118.

166. 42 U.S.C. § 291 (1994). *See* Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475, 1498 n.103 (1995).

167. The example given above of the court's treatment of Proposition 187's denial of publicly-funded non-emergency health care applies equally to the court's treatment of Proposition 187's denial of publicly-funded social services, and arguably to the court's treatment of Proposition 187's denial of access to elementary, secondary, and postsecondary education. However, given the court's complete preemption of Proposition 187's denial of access to elementary and secondary educational institutions, the above analysis is moot in the context of section 7.

168. Although Proposition 187's benefit denials seem free of federal regulatory characteristics, one can infer that they serve as latent regulations of immigration. For example, the sections of Proposition 187 which contain benefit denial provisions require state agents to tell illegal aliens either to obtain legal status or leave the country. *See* 1994 Cal. Legis. Serv. Proposition 187 §§ 4, 5, 6 (West). State regulation of immigration is impermissible under federal preemption principles and the first *De Canas* test. *See* De Canas v. Bica, 424 U.S. 351, 354 (1976).

169. *See De Canas*, 424 U.S. at 354 (regulating immigration is an exclusive federal power).

170. This Article presents the argument that such an objective can be implied from the surrounding facts and circumstances.

legislative history exists to assist in determining legislative intent. Nevertheless, relying on other evidence, a fact-finding body could reasonably infer that the objective underlying the verification and benefit denial schemes is to regulate the influx of immigrants into the United States, encouraging self-deportation and discouraging future illegal immigration.[171]

Although Proposition 187's benefit denial provisions govern areas of traditional state police power, this attribute does not preclude the provisions from preemption analysis. An express permissible state police power objective[172] "does not provide . . . state immunity [from federal preemption], for almost any law can be couched in terms of legitimate local concern."[173] Furthermore, no matter how vital a permissible concern is to a state, if its legislation is in any way a direct regulation of immigration, it is federally preempted.[174]

Similarly, a state statute is invalid if it is enacted in reaction to flaws in federal policy or enforcement.[175] Proposition 187 is conspicuously drafted in reaction to ineffective federal enforcement of immigration laws.[176] Sections 4, 5, and 6 require state agents to notify the person of his or her apparent illegal immigration status, and that person "*must either obtain legal status or leave the United States.*"[177] The same intent is implicit in sections 7 and 8. Section 7 requires that the parents or legal guardian of a student who "cannot establish legal status" be notified that the student may not attend school after ninety days from such notice "*unless legal status* [of the student] is established."[178] Furthermore, "[s]uch ninety day period shall be utilized to accomplish an orderly *transition to a school in the child's country of origin.*"[179] Section 8 mandates that a student who is known, determined, or suspected to be an illegal alien be notified that he

171. Alan Nelson, co-author of Proposition 187 said "[Proposition 187] sends a message to . . . illegal alien[s] that we will not tolerate their living here against the law and that they should go home." Suro, *supra* note 7, at C3. This inference is also supported by the Proposition 187 proponents' implicit dissatisfaction with federal enforcement of immigration laws. *See* 1994 Cal. Legis. Serv. Proposition 187 § 1 (West); *see also supra* notes 6-8, 18, 111 and accompanying text.

172. For example, permissible state police power objectives include health and safety. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 8.2 (5th ed. 1995); *see also De Canas*, 424 U.S. at 354 (areas of traditional state police power include employment, public health care, and safety).

173. Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 967 (1995). Manheim, an attorney, represents one of the plaintiffs in *League of United Latin American Citizens.*

174. *See De Canas*, 424 U.S. at 354-56; *see also* Henderson v. Mayor of New York, 92 U.S. 259, 271 (1875) (addressing state regulation of commerce).

175. *See* Tayyari v. New Mexico State Univ., 495 F. Supp. 1365 (D.N.M. 1980) (invalidating a Board of Regents' action barring Iranian students from a state university in response to the taking of American hostages).

176. *See* 1994 Cal. Legis. Serv. Proposition 187 § 1 (West).

177. *See id.* §§ 4(b)(2), 5(c)(2), 6(c)(2) (emphasis added); *see also* CAL. WELF. & INST. CODE § 10001.5(c)(2) (West Cum. Supp. 1996) (social service agents); *see also* CAL. HEALTH & SAFETY CODE § 130(c)(2) (West Cum. Supp. 1996) (publicly-funded health care agents); CAL. PENAL CODE § 834b(b)(2) (West Cum. Supp. 1996) ("[e]very law enforcement agency in California"). Notifying a person that he or she must leave the country based on his or her immigration status is a direct attempt to regulate immigration and is, arguably, inseparable from the benefit denial structure.

178. *See* 1994 Cal. Legis. Serv. Proposition 187 § 7(e) (West) (emphasis added).

179. *See id.* § 7(f) (emphasis added).

or she is violating federal immigration laws and that the student not be allowed to attend a public postsecondary school.[180]

The language in sections 4-8 is a conspicuous attempt to regulate immigration. If this attempt is deemed applicable to the denial of benefits, including the denial of undocumented alien children to public schools, then such provisions should also be preempted under the first *De Canas* test.[181] As one immigration scholar suggested, "[t]his badge and display of state authority has the avowed purpose and obvious practical impact [of] an order of deportation."[182]

Proposition 187's benefit denial provisions may not be limited merely to regulating traditional areas of state police power, but may impermissibly regulate immigration as well. Although not addressed by the *League of United Latin American Citizens* court, factual and legal bases exist to support the argument that Proposition 187's benefit denial provisions implicitly serve to encourage illegal aliens to "self-deport"[183] and discourage future illegal immigration. Such results might constitute unconstitutional state regulation of immigration under the first *De Canas* federal preemption test.

VI. BENEFIT DENIAL PROVISIONS: A VIOLATION OF EQUAL PROTECTION?

> [N]o State shall . . . deny to any *person* within its jurisdiction the equal protection of the laws.[184]

It is well settled that aliens lawfully residing in the United States shall be afforded equal protection under the law.[185] The Supreme Court has determined alienage to be a suspect class,[186] and therefore courts are bound to review

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180. *See id.* §§ 8(a), (c).

181. Arguably, the court in *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995), could have tied an attempt to regulate immigration to Proposition 187's denial of benefits where the state agents, upon denial of such benefits, were required to tell illegal aliens either to obtain legal status or leave the country. This would have been a simple way to invalidate sections 4, 5, 6, and 7 entirely. This can be distinguished from *Doe v. Plyler*, where, at the district court level, the court held that the Texas law did not have "either the purpose or effect of keeping illegal aliens out of the State of Texas." 458 F. Supp. 569, 575 (E.D. Tex. 1978).

182. Manheim, *supra* note 173, at 971.

183. In part, Governor Pete Wilson's campaign platform was to encourage "self-deportation." *See* George Raine, *Wilson Leads Brown in 2nd Straight Poll in a Tight Race*, SAN. FRAN. EXAMINER, Sept. 23, 1994, at A4, *available in* WESTLAW, Allnews database, 1994 WL 11604571, at *3.

184. U.S. CONST. amend. XIV, § 1 (emphasis added).

185. *See* Graham v. Richardson, 403 U.S. 365, 382 (1971) (holding that state regulations which barred distribution of public social service benefits to legal aliens, unless they have resided in the United States for a requisite number of years, violates equal protection); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948) (state denial of fishing license to lawful aliens violates equal protection); Oyama v. California, 332 U.S. 633, 640 (1948) (state denial of aliens' rights to own and transfer agricultural land violates equal protection); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (state denial of licenses in a discriminatory manner violates equal protection).

186. *See Graham*, 403 U.S. at 371-72. However, the Court has created several exceptions to strict scrutiny review of alienage-based discrimination for certain governmental employees. *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432, 447 (1982) (barring aliens from serving as probation officers); Ambach v. Norwick, 441 U.S. 68, 80-81 (1979) (barring aliens from serving as public school teachers); Foley v. Connelie, 435 U.S. 291, 292 (1978) (upholding New York statute barring aliens from serving on the state police force).

statutory discrimination against legal aliens with strict scrutiny.[187] Under the strict scrutiny standard, in order to uphold a discriminatory statute, the court must find that the discrimination is *necessary* to a compelling government interest.[188] Statutes rarely overcome the rigid requirements of strict scrutiny.[189]

Unlike aliens lawfully residing in the United States, aliens illegally residing in the United States have not been given suspect class status.[190] For this reason, statutes discriminating against illegal aliens have not been reviewed with strict scrutiny.[191] Despite the Supreme Court's attempt to address issues surrounding the applicable equal protection standards set forth in *Plyler*, the appropriate review for all statutes discriminating against illegal aliens remains unsettled.[192] Should courts review these statutes under intermediate-level scrutiny, traditional rational basis review, or even strict scrutiny?[193] To survive intermediate-level scrutiny review,[194] the government must prove that the discriminatory classification is *substantially related* to an important permissible governmental objective.[195] In order to withstand rational basis review, the government must only show that the discriminatory classification is rationally related to the governmental interest.[196]

Although the *League of United Latin American Citizens* court briefly discussed Proposition 187's denial of public elementary and secondary education to illegal aliens as a violation of the equal protection holding of *Plyler v. Doe*,[197] the court neglected to directly address whether Proposition 187's benefit denial provisions violate an illegal alien's equal protection rights under the Fourteenth

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187. *See Graham*, 403 U.S. at 382 (holding that aliens are a "suspect class," and, therefore, legal classifications based on alienage must be reviewed under strict scrutiny).

188. *See* NOWAK & ROTUNDA, *supra* note 172, § 14.3, at 601-02, 606.

189. In the last fifty-five years, no statute containing intentional racial discrimination has withstood strict scrutiny review. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-6, at 1451-52 (2d ed. 1988). Strict scrutiny review is "'strict' in theory and usually 'fatal' in fact." *Id.* (quoting Gerald Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

190. *See* Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982).

191. *See id.* at 210 (illegal aliens are not suspect because their existence in this country comes from unlawful acts). However, this may be an overstatement because there are lawfully admitted, but unlawfully present, aliens in the United States (e.g., persons who remain in the United States after the expiration of their visas).

192. *See generally Plyler*, 457 U.S. 202. The Court reviewed a state statute affecting undocumented alien children with intermediate-level scrutiny, but the rationale for application of intermediate-level scrutiny was in part because the classification dealt with "innocent children" and education. *See generally id.* at 219-24.

193. *See id.* at 219.

194. *See, e.g.*, United States v. Virginia, 135 L. Ed. 2d 735 (1996); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); *Plyler*, 457 U.S. at 217-18 & n.16; Craig v. Boren, 429 U.S. 190 (1976).

195. *See Plyler*, 457 U.S. at 229 (relying on the district court's findings that the government did not provide sufficient evidence that this classification would further a permissible state interest); Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 151 (1980).

196. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981); McGowan v. Maryland, 366 U.S. 420, 426 (1961); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 488 (1955).

Under the rational basis review level a court is extremely limited in its inquiry as to whether the discrimination *effectively* assists in reaching the government's objective; rather, a court should uphold the legislation if the discrimination could *possibly* assist in reaching the governmental objective. *See generally Clover Leaf Creamery Co.*, 449 U.S. at 466.

197. 457 U.S. 202, 230 (1982).

Amendment.[198] Because current federal law in this area is quite murky, further discussion is required.

A. *The Right to Attend Public Elementary and Secondary Schools*

> "We cannot educate every child from here to Tierra del Fuego."
> -Governor Pete Wilson[199]

The *League of United Latin American Citizens* court concluded that Proposition 187's exclusion of any child "not a citizen of the United States, an alien lawfully admitted as a permanent resident, or a person who is otherwise authorized under federal law to be present in the United States"[200] from public elementary and secondary schools directly conflicted with *Plyler*'s holding that similar discrimination violated equal protection.[201] However, the court avoided the equal protection issue and instead held that section 7 of Proposition 187, under all three *De Canas* tests, was entirely preempted by federal law.[202]

In *Plyler*, the United States Supreme Court, in a 5-4 decision, ruled that a Texas law which denied the children of illegal aliens the right to free public education violated equal protection.[203] The stated purposes of the Texas law were 1) to decrease the influx of illegal immigrants into Texas;[204] 2) to deter the presence of illegal aliens in public schools where they hinder the state's ability to provide for quality education;[205] and 3) to deter the presence of undocumented children from the Texas public schools because they are less likely than other children to remain in the state and therefore bring revenues into the state.[206]

The Court rejected strict scrutiny review of the Texas statute because undocumented aliens and their children are not a "suspect class"[207] and education

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198. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 785-86 (C.D. Cal. 1995). In analyzing Proposition 187's bar of undocumented alien children from public elementary and secondary schools, the court did not examine the merits of the equal protection issue; rather, it found that the provisions were preempted by federal law as mandated by *Plyler*. *See id.*

199. Daniel M. Weintraub & Bill Stall, *Wilson Would Expel Illegal Immigrants from Schools Politics*, L.A. TIMES, Sept. 16, 1994, at A1, *available in* WESTLAW, LAT database, 1994 WL 2345554, at *2 (quoting Governor Pete Wilson).

200. 1994 Cal. Legis. Serv. Proposition 187 § 7(a) (West).

201. *See League of United Latin Am. Citizens*, 908 F. Supp. at 774 (citing *Plyler*, 457 U.S. at 230).

202. *See id.* at 770, 776, 785-86.

203. *See Plyler*, 457 U.S. at 239 n.2. The Court reviewed the Texas law with intermediate-level scrutiny. *See id.* Justice Brennan wrote the Court's opinion. *See id.* at 205. Justices Marshall, Blackmun, and Powell filed concurring opinions. *See id.* at 230, 231, 236. Then-Chief Justice Burger filed a dissenting opinion, in which Justices White, Rehnquist (now Chief Justice), and O'Connor joined. *See id.* at 242.

204. *See id.* at 228.

205. *See id.* at 229.

206. *See id.* at 229-30.

207. *Id.* at 219 n.19. Additionally some commentators have proposed that there is an inherent contradiction in the Court's ruling that aliens are a "suspect class," while "undocumented aliens" are not, where undocumented aliens are similarly a "discrete and insular minority," United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4, and evidence suggests that they are subject to even more discrimination and abuse than documented aliens. *Cf. infra* notes 175-180 and accompanying text; Manheim, *supra* note 173, at 944.

is not a fundamentally guaranteed constitutional right.[208] The Court also rejected traditional rational basis review,[209] opting to review the Texas act under intermediate-level scrutiny.[210] After determining the proper level of review, the Court affirmed the trial court's finding that the state did not demonstrate a substantially related nexus between the discriminatory classification and the purported state objectives.[211]

In dissent, Chief Justice Burger argued that rational basis review is proper when there is no suspect classification and no denial of a fundamental right.[212] Under rational basis review, Proposition 187's section 7 could potentially survive equal protection challenges because there is a tenable nexus between the government's objective[213] and the discrimination.[214]

Unlike illegal aliens, aliens lawfully present in the United States are a suspect class.[215] "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political

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208. *See Plyler*, 457 U.S. at 223.

209. *See id.* at 230. *But see id.* at 248, 250 (Burger, C.J., dissenting) (The applicable standard of review is rational basis: "By definition, illegal aliens have no right whatever to be here, and the state may reasonably, and constitutionally, elect not to provide them with governmental services at the expense of those who are lawfully in the state.").

210. *See id.* at 230. The Court chose intermediate-level scrutiny where both innocent children and education were involved. However, "[i]s the Court suggesting that education is more 'fundamental' than food, shelter, or medical care?" *Id.* at 248 (Burger, C.J., dissenting).

211. *See id.* at 228-30 (defendants did not provide any convincing evidence that illegal aliens posed more of a financial burden on Texas than any other persons).

212. *See id.* at 248. Present Chief Justice Rehnquist and Justices O'Connor and White joined the then-presiding Chief Justice in his dissent. *See id.* at 242. Chief Justice Burger wrote that the majority used intermediate-level scrutiny in a result-oriented manner. *See id.* at 244. This suggests that *Plyler* was a decision based on politics, rather than on a firmly grounded legal foundation.

Several commentators have speculated that the current Supreme Court, if faced with the same issue, might rule that rational basis is the appropriate level of review. *Plyler* dissenting Justices Rehnquist (now Chief Justice) and O'Connor would likely sustain their position. Conservative Justices Thomas and Scalia would likely join, and one more "aye" vote from either Justice Kennedy, Justice Souter, Justice Ginsburg, or Justice Breyer is possible. *See* Larry Bumgardner and Shannon Rogers, *Taking Bets on How the Supreme Court Might Side on Proposition 187*, LOS ANGELES DAILY NEWS, Aug. 6, 1995, at V3, *available in* WESTLAW, Allnews database, 1995 WL 5414201, at *3-*6; Richard Carelli, *Few Clues Found to High Court's Proposition 187 Mood; Panel's Previous Illegal Alien Ruling Could Be Reversed*, SAN. FRAN. EXAMINER, Nov. 13, 1994, at A4, *available in* WESTLAW, Allnews database, 1994 WL 4278864, at *3-*6; Paul Feldman, *Texas Decision Affects Proposition 187 Will Pave the Way for Supreme Court to Take a Second Look*, THE FRESNO BEE, Oct. 24, 1994, at A1, *available in* WESTLAW, Allnews database, 1994 WL 9104317, at *5.

213. The implied objective of section 7 of Proposition 187 is to reserve public elementary and secondary education for persons lawfully residing in California. *See* Ken Chavez, *Wilson Wants Part of Proposition 187 Ruling Axed*, THE SACRAMENTO BEE, Dec. 1, 1995, *available in* WESTLAW, Allnews database, 1995 WL 10554471, at *2.

214. The rational basis standard has very little bite. *See* United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (The rational basis standard requires only a "plausible reason" for the classification. "It is . . . 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision . . . .'" (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)); *see also* Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955). *But see* Logan v. Zimmerman Brush Co., 455 U.S. 422, 442 (1982) (Blackmun, J., concurring) ("The State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis.").

215. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971).

processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[216] Like legal aliens, illegal aliens are also "perennial losers in the political struggle."[217] Furthermore, although both legal aliens and illegal aliens have little political power due to their inability to vote, evidence suggests illegal aliens are more often the targets of discrimination.[218] This evidence supports the position that illegal aliens deserve suspect class status and are accordingly entitled to strict scrutiny review.[219] This reasoning suggests that a court should afford regulations discriminating against illegal aliens strict scrutiny review.[220] However, a court, when faced with issues concerning the proper level of review of section 7's treatment of illegal alien children and of the constitutional status of those children, is more likely simply to adopt the majority opinion in *Plyler*, and apply intermediate-level scrutiny.

Yet, even if intermediate-level scrutiny were to be applied to section 7 of Proposition 187, the situation in California is factually distinguishable from that of Texas.[221] Therefore, if the defendants receive the opportunity on remand, after an appeal, they could introduce evidence sufficient to support the conclusion that the classification is substantially related to an important permissible governmental objective.

B. Narrowing Plyler v. Doe

The *League of United Latin American Citizens* court's interpretation of *Plyler v. Doe*'s holding that federal law "prohibits states from excluding undocumented alien children from [elementary and secondary] public schools" is arguably an overstatement of the law.[222] *Plyler* rested on an equal protection analysis, basing its holding on the lower court's finding that Texas did not present any evidence probative of the "substantial relationship" between depriving illegal immigrant children of free elementary and secondary education and preserving state resources.[223]

Conversely, California is a haven for illegal aliens. As of October 1992, 43% of the nation's illegal immigrants had settled in California, making up just under 5% of the state's overall population.[224] In California, approximately 308,000 illegal alien children are enrolled in the public schools at a cost of approximately 1.4 to 1.6 billion dollars per year.[225] Therefore, even following *Plyler*'s

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216. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

217. TRIBE, *supra* note 189, § 16-6, at 1454 (arguing that being a "perennial loser[] in the political struggle" is a factor which should be considered when determining whether a group is a suspect class).

218. *See id.*

219. *See id.*

220. *Cf.* Manheim, *supra* note 173, at 944.

221. *See* discussion *infra* Part VI.B.

222. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 774 (C.D. Cal. 1995).

223. *See* Plyler v. Doe, 457 U.S. 202, 228-30 (1982).

224. *See* REBECCA L. CLARK ET AL., THE URBAN INSTITUTE, FISCAL IMPACTS OF UNDOCUMENTED ALIENS: SELECTIVE ESTIMATES FOR SEVEN STATES ii (Sept. 1994).

225. *See* David Andrew Price, *Educating Illegal Aliens: Nation, Not State, Should Pay Tab*, THE PHOENIX GAZETTE, Nov. 16, 1994, at B7, *available in* WESTLAW, Allnews database, 1994 WL 6338831, at *2.

intermediate-level scrutiny rule, section 7 of Proposition 187 could withstand equal protection muster so long as a fact-finding body finds evidence of a substantial nexus between the classification and an important state objective. Whether it be strict scrutiny, intermediate-level scrutiny, or traditional rational basis review, California has, at least arguably, sufficient evidence to justify distinguishing Proposition 187's section 7 from *Plyler*.[226]

C. *The Right to Other Publicly-Funded Benefits*

The *League of United Latin American Citizens* court made its findings concerning the denial of public social services, public non-emergency medical care, and the right to attend public postsecondary schools on preemption grounds alone, without contemplating the several equal protection issues which Proposition 187 raises.[227] Yet these provisions implicate equal protection controversies warranting exploration.

One way of broadly interpreting *Plyler* leads to the conclusion that illegal aliens, as a class, should be afforded intermediate-level scrutiny review.[228] Applying this standard would enable a court to closely examine the purported permissible state objective[229] and possibly invalidate the benefit denial provisions upon a finding that the government did not provide evidence of a substantial relationship between the objective and the discrimination.[230]

The Supreme Court's logic regarding education as a quasi-fundamental right in *Plyler* also can be cited for the conclusion that Proposition 187's benefit denial provisions affect quasi-fundamental rights, and, therefore, should be reviewed under intermediate-level scrutiny. According to Justice Brennan, the right to a public education is quasi-fundamental because it is imperative in preventing illegal immigrants from remaining a permanent lower class.[231] Because housing, food, shelter, and medical treatment are equally imperative for survival, and also enable a person to make positive contributions to the state, these necessities should be treated as quasi-fundamental as well.[232]

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226. *But see Plyler*, 457 U.S. at 227. "Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Id.* (citing Graham v. Richardson, 403 U.S. 365, 374-75 (1971)).

227. *See League of United Latin Am. Citizens*, 908 F. Supp. at 782-84 (noting that where the benefit denial provisions conflicted with federally funded benefit programs that were conditioned on providing services to persons such as illegal aliens, the benefit denials provisions are not enforceable); *see also* Hill-Burton Act, 42 U.S.C. § 291 (1994); Public Health Service Act, 42 U.S.C. §§ 201-300(aaa-13) (1994).

228. This would not necessarily undermine Justice Brennan's distinction in *Plyler* between illegal immigrants and illegal immigrant children, 457 U.S. at 219-23, where all of the benefit denial provisions, although not expressly directed at children, would certainly affect children. Furthermore, medical care, food, and shelter are as "fundamental" as education in illegal immigrants' attempts to alleviate their permanent lower class status. *See Plyler*, 457 U.S. at 248 (Burger, C.J., dissenting).

229. In contrast, under rational basis review courts should not closely examine the effectiveness of a classification and its nexus to a permissible state interest.

230. *But see* discussion *supra* Part VI.B.

231. *See Plyler*, 457 U.S. at 222-23.

232. For completely different reasons, neither the majority nor the dissent in *Plyler* support this conclusion. *See generally id.*

The above reasoning alone warrants a finding that intermediate-level scrutiny is applicable to all of Proposition 187's benefit denial schemes. However, the *Plyler* majority, in arriving at intermediate-level scrutiny, also considered that "innocent children" felt the pinch of the Texas law.[233] Similarly, innocent children will be affected when they, or their parents, are denied non-emergency medical treatment, housing benefits, and other social services because of their illegal residence status.[234] Following this logic, the denial of social services and non-emergency medical care assists in creating a permanent lower class of illegal aliens, and also adversely affects innocent children. Therefore, the appropriate review for the benefit denial provisions in sections 5 and 6 of Proposition 187 is intermediate-level scrutiny.[235]

In sum, if a reviewing court does address the equal protection issues inherent in Proposition 187, the reviewing court's decision about Proposition 187's destiny is extremely unpredictable. Plausible arguments exist for the court's application of intermediate-level review, rational basis review, and even strict scrutiny review of Proposition 187's denial of benefits to illegal aliens.

1. Public Postsecondary Schooling

Although section 8, which denies illegal aliens the right to attend public postsecondary schools, has undergone little scrutiny, there is a viable argument that this denial may also violate equal protection. The permissible state interests for denying public postsecondary education to illegal aliens are preservation of state financial resources and maintenance and improvement of the quality of publicly-funded universities. Even under rational basis review, to pass equal protection muster, a conceivable relationship between the discriminatory classification and the governmental ends must exist.[236] Section 8's discrimination against all illegal aliens does not further either the state's interest in preserving financial resources or in preserving the educational quality of universities. If some illegal aliens are willing to finance their own education, rather than request state subsidization, then these persons would actually be contributing funds to state resources.

Furthermore, there exists no compelling argument that allowing illegal aliens to attend public postsecondary schools will hinder the quality of these schools.[237] Therefore, the claim that illegal aliens, in their quest for public

233. *See id.* at 224.

234. *But see id.* at 221 (arguing that only education is quasi-fundamental, it is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation").

235. However, this is certainly not the interpretation of *Plyler* that the majority envisioned. The Court intended to limit intermediate scrutiny review of undocumented aliens to children's rights to public elementary and secondary education because children's alien status, unlike their parents, is not volitional, *see Plyler*, 457 U.S. at 219-20 (Brennan, J.), 238-39, 240 (Powell, J., concurring), and because education is a more fundamental right than social welfare, *see id.* at 221 (Brennan, J.), 230 (Marshall, J., concurring), 231, 234, 236 (Blackmun, J., concurring).

236. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 438-42 (1982) (Blackmun, J., concurring).

237. One possible argument in support of the classification however, would be that the universities are overcrowded, making public postsecondary education a limited resource, and therefore, illegal aliens would be taking limited resources from lawful residents.

postsecondary education, are usurping state funds and thus impairing the quality of public education is tenuous at best.[238]

2. Publicly-Funded Health Care

Similar to Proposition 187's sections concerning postsecondary education, the provisions which deny publicly-funded health care are also poorly drafted.[239] There is little economic justification to deny medical treatment to persons willing to pay for their own treatment merely because of their alien residency status. Yet, Proposition 187 has this effect.[240]

VII. CONCLUSION

The only finding by the *League of United Latin American Citizens* court discussed in this Note that is *not* likely subject to scrutiny by a reviewing court is the finding that the verification scheme promulgated by Proposition 187 regulates immigration. This finding might be challenged, but the semantics of Proposition 187's verification scheme express an unquestionable intent to regulate immigration.

Although Proposition 187 was enacted by referendum, and regulating immigration is not the express intent of the initiative's benefit denial provisions, evidence exists which supports the inference that the entire initiative is a federally impermissible attempt by the people of California to regulate immigration. However, with the exception of denying children enrollment in public elementary and secondary schooling, the *League of United Latin American Citizens* court found that denying benefits to illegal aliens is a permissible state objective so long as the benefit denial provisions do not conflict with federal law.

The court may have done so because Congress has denied similar benefits to similar classes.[241] Yet, affirmative Congressional action denying federally-funded benefits to certain resident alien classes does not serve as either a legal or logical basis for concluding that a state denial of benefits does not regulate immigration. Arguably this creates room for reversing the *League of United Latin American Citizens* court's findings that as a matter of law sections 5 and 6 are not federally preempted under the first and second *De Canas* tests, and only partially preempted under the third *De Canas* test; that section 7 is only preempted under the third *De Canas* test; and that section 8 is completely valid under all three *De Canas* tests.

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238. Proposition 187 could have avoided this controversy simply by restricting the denials to persons requesting state subsidization of education expenses.

239. The drafters could have tailored Proposition 187 so that it would not deny health care to illegal aliens *procuring their own payment for treatment.* Taking this measure would have provided a stronger economic justification for the denials.

240. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 782-84 (C.D. Cal. 1995). Although, if the evidence suggested that publicly-funded hospitals were overcrowded, making them a limited resource, then such evidence would support the validity of the denials based on a preservation of state resources rationale.

241. *See, e.g.*, 42 U.S.C. § 1320b-7(b)(1), (d) (1994) (AFDC is a program which must participate in SAVE system); *see also supra* note 158.

Regarding equal protection, questions exist as to which level of scrutiny is applicable to illegal aliens. California, if afforded the opportunity, might present evidence sufficient to overcome rational basis review, and possibly even intermediate-level scrutiny. By taking advantage of *Plyler*'s characterization of education as a quasi-fundamental right and of illegal aliens and "innocent children" as quasi-suspect classes, an appellate court might validly conclude that intermediate-level scrutiny is applicable to the denial of publicly-funded social services, non-emergency health care, and education thereby allowing a court inquiry into the relationship between California's discrimination against undocumented aliens and Proposition 187's purpose.

The question remains whether the Ninth Circuit Court of Appeals on appeal, or even the Supreme Court on certiorari, will completely invalidate Proposition 187, will uphold the district court's summary judgment decree entirely, or will invalidate some and revive other sections of Proposition 187.

JOSHUA FOX[242]

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APPENDIX A

PROPOSITION 187

SECTION 1. Findings and Declaration.

The People of California find and declare as follows:

That they have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state.

That they have suffered and are suffering personal injury and damage caused by the criminal conduct of illegal aliens in this state.

That they have a right to the protection of their government from any person or persons entering this country unlawfully.

Therefore, the People of California declare their intention to provide for cooperation between their agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California.

SECTION 2. Manufacture, Distribution or Sale of False Citizenship or Resident Alien Documents: Crime and Punishment.

Section 113 is added to the Penal Code, to read:

113. Any person who manufactures, distributes or sells false documents to conceal the true citizenship or resident alien status of another person is guilty of a felony, and shall be punished by imprisonment in the state prison for five years or by a fine of seventy-five thousand dollars ($75,000).

SECTION 3. Use of False Citizenship or Resident Alien Documents: Crime and Punishment.

Section 114 is added to the Penal Code, to read:

114. Any person who uses false documents to conceal his or her true citizenship or resident alien status is guilty of a felony, and shall be punished by imprisonment in the state prison for five years or by a fine of twenty-five thousand dollars ($25,000).

SECTION 4. Law Enforcement Cooperation with INS.

Section 834b is added to the Penal Code, to read:

834b. (a) Every law enforcement agency in California shall fully cooperate with the Unites States Immigration and Naturalization Service regarding any person who is arrested if he or she is suspected of being present in the United States in violation of federal immigration laws.

(b) With respect to any such person who is arrested, and suspected of being present in the United States in violation of federal immigration laws, every law enforcement agency shall do the following:

(1) Attempt to verify the legal status of such person as a citizen of the United States, an alien lawfully admitted as a permanent resident, an alien lawfully admitted for a temporary period of time or as an alien who is present in the United States in violation of immigration laws. The verification process may include, but shall not be limited to, questioning the person regarding his or her

date and place of birth, and entry into the United States, and demanding documentation to indicate his or her legal status.

(2) Notify the person of his or her apparent status as an alien who is present in the United States in violation of federal immigration laws and inform him or her that, apart from any criminal justice precedings [sic], he or she must either obtain legal status or leave the United States.

(3) Notify the Attorney General of California and the United States Immigration and Naturalization Service of the apparent illegal status and provide any additional information that may be requested by any other public entity.

(c) Any legislative, administrative, or other action by a city, county, or other legally authorized local governmental entity with jurisdictional boundaries, or by a law enforcement agency, to prevent or limit the cooperation required by subdivision (a) is expressly prohibited.

SECTION 5. Exclusion of Illegal Aliens from Public Social Services.

Section 10001.5 is added to the Welfare and Institutions Code, to read:

10001.5. (a) In order to carry out the intention of the People of California that only citizens of the United States and aliens lawfully admitted to the United States may receive the benefits of public social services and to ensure that all persons employed in the providing of those services shall diligently protect public funds from misuse, the provisions of this section are adopted.

(b) A person shall not receive any public social services to which he or she may be otherwise entitled until the legal status of that person has been verified as one of the following:

(1) A citizen of the United States.

(2) An alien lawfully admitted as a permanent resident.

(3) An alien lawfully admitted for a temporary period of time.

(c) If any public entity in this state to whom a person has applied for public social services determines or reasonably suspects, based upon the information provided to it, that the person is an alien in the United States in violation of federal law, the following procedures shall be followed by the public entity:

(1) The entity shall not provide the person with benefits or services.

(2) The entity shall, in writing, notify the person of his or her apparent illegal immigration status, and that the person must either obtain legal status or leave the United States.

(3) The entity shall also notify the State Director of Social Services, the Attorney General of California, and the United States Immigration and Naturalization Service of the apparent illegal status, and shall provide any additional information that may be requested by any other public entity.

SECTION 6. Exclusion of Illegal Aliens from Publicly Funded Health Care.

Chapter 1.3 (commencing with Section 130) is added to Part 1 of Division 1 of the Health and Safety Code, to read:

CHAPTER 1.3. PUBLICLY FUNDED HEALTH CARE SERVICES

130. (a) In order to carry out the intention of the People of California that, excepting emergency medical care as required by federal law, only citizens of the United States and aliens lawfully admitted to the United States may receive the benefits of publicly-funded health care, and to ensure that all persons employed

in the providing of those services shall diligently protect public funds from misuse, the provisions of this section are adopted.

(b) A person shall not receive any health care services from a publicly-funded health care facility, to which he or she is otherwise entitled until the legal status of that person has been verified as one of the following:

(1) A citizen of the United States.

(2) An alien lawfully admitted as a permanent resident.

(3) An alien lawfully admitted for a temporary period of time.

(c) If any publicly-funded health care facility in this state from whom a person seeks health care services, other than emergency medical care as required by federal law, determines or reasonably suspects, based upon the information provided to it, that the person is an alien in the United States in violation of federal law, the following procedures shall be followed by the facility:

(1) The facility shall not provide the person with services.

(2) The facility shall, in writing, notify the person of his or her apparent illegal immigration status, and that the person must either obtain legal status or leave the United States.

(3). The facility shall also notify the State Director of Health Services, the Attorney General of California, and the United States Immigration and Naturalization Service of the apparent illegal status, and shall provide any additional information that may be requested by any other public entity.

(d) For purposes of this section "publicly-funded health care facility" shall be defined as specified in Section 1200 and 1250 of the Health and Safety Code as of January 1, 1993.

SECTION 7. Exclusion of Illegal Aliens From Public Elementary and Secondary Schools.

Section 48215 is added to the Education Code, to read:

48215. (a) No public elementary or secondary school shall admit, or permit the attendance of, any child who is not a citizen of the United States, an alien lawfully admitted as a permanent resident, or a person who is otherwise authorized under federal law to be present in the United States.

(b) Commencing January 1, 1995, each school district shall verify the legal status of each child enrolling in the school district for the first time in order to ensure the enrollment or attendance only of citizens, aliens lawfully admitted as permanent residents, or persons who are otherwise authorized to be present in the United States.

(c) By January 1, 1996, each school district shall have verified the legal status of each child already enrolled and in attendance in the school district in order to ensure the enrollment or attendance only of citizens, aliens lawfully admitted as permanent residents, or persons who are otherwise authorized under federal law to be present in the United States.

(d) By January 1, 1996, each school district shall also have verified the legal status of each parent or guardian of each child referred to in subdivisions (b) and (c), to determine whether such parent or guardian is one of the following:

(1) A citizen of the United States.

(2) An alien lawfully admitted as a permanent resident.

(3) An alien admitted lawfully for a temporary period of time.

(e) Each school district shall provide information to the State Superintendent of Public Instruction, the Attorney General of California, and the United States Immigration and Naturalization Service regarding any enrollee or pupil, or parent or guardian, attending a public elementary or secondary school in the school district determined or reasonably suspected to be in violation of federal immigration laws within forty-five days after becoming aware of an apparent violation. The notice shall also be provided to the parent or legal guardian of the enrollee or pupil, and shall state that an existing pupil may not continue to attend the school after ninety calendar days from the date of the notice, unless legal status is established.

(f) For each child who cannot establish legal status in the United States, each school district shall continue to provide education for a period of ninety days from the date of the notice. Such ninety day period shall be utilized to accomplish an orderly transition to a school in the child's country of origin. Each school district shall fully cooperate in this transition effort to ensure that the educational needs of the child are best served for that period of time.

SECTION 8. Exclusion of Illegal Aliens from Public Postsecondary Educational Institutions.

Section 66010.8 is added to the Education Code, to read:

66010.8. (a) No public institution of postsecondary education shall admit, enroll, or permit the attendance of any person who is not a citizen of the United States, an alien lawfully admitted as a permanent resident in the United States, or a person who is otherwise authorized under federal law to be present in the United States.

(b) Commencing with the first term or semester that begins after January 1, 1995, and at the commencement of each term or semester thereafter, each public postsecondary educational institution shall verify the status of each person enrolled or in attendance at that institution in order to ensure the enrollment or attendance only of United States citizens, aliens lawfully admitted as permanent residents in the United States, and persons who are otherwise authorized under federal law to be present in the United States.

(c) No later than 45 days after the admissions officer of a public postsecondary educational institution becomes aware of the application, enrollment, or attendance of a person determined to be, or who is under reasonable suspicion of being, in the United States in violation of federal immigration laws, that officer shall provide that information to the State Superintendent of Public Instruction, the Attorney General of California and the United States Immigration and Naturalization Service. The information shall also be provided to the applicant, enrollee, or person admitted.

SECTION 9. Attorney General Cooperation with the INS.

Section 53069.65 is added to the Government Code, to read:

53069.65. Whenever the state or a city, or a county, or any other legally authorized local governmental entity with jurisdictional boundaries reports the presence of a person who is suspected of being present in the United States in violation of federal immigration laws to the Attorney General of California, that report shall be transmitted to the United States Immigration and Naturalization Service. The Attorney General shall be responsible for maintaining on-going and

accurate records of such reports, and shall provide any additional information that may be requested by any other government entity.

SECTION 10. Amendment and Severability.

The statutory provisions contained in this measure may not be amended by the Legislature except to further its purposes by statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the voters.

In the event that any portion of this act or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect any other provision or application of the act, which can be given effect without the invalid provision or application, and to that end the provisions of this act are severable.