WITHIN THE PALE: ALIENS, ILLEGAL ALIENS, AND EQUAL PROTECTION*

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In *Plyler v. Doe*,[1] the Supreme Court ruled that a Texas statute withholding funds for the education of undocumented children from local school districts, and authorizing those school districts to deny enrollment to such children, violates the equal protection clause of the fourteenth amendment. The Court explicitly denied that undocumented aliens constitute a "suspect" class, and it denied that education is a fundamental right or interest.[2] In so doing, the Court undercut the standard grounds on which the Texas law could have been subjected to heightened judicial scrutiny. Had the Court found that the statute invoked a "suspect classification,"[3] such as race, or abridged a "fundamental right" or "fundamental interest,"[4] such as interstate travel, it would have subjected the law to "strict scrutiny," and Texas would have had the virtually impossible task of demonstrating that the statute's purpose was both "compelling" and not attainable in any way less intrusive than by the use of the disputed classification.[5] Less ambitiously, the Court might have found the classification to be "virtually suspect," as alienage has sometimes been held to be.[6] In that case, the statute would have been subject to "heightened," though not strict, scrutiny, and Texas would have had to show that its goal in the statute was "important" or "substantial," and that alternative means to achieving it were sig-

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1. 102 S. Ct. 2382 (1982).

2. *Id.* at 2398.

3. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944).

4. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 336-42 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

5. *See, e.g.*, Regents of University of California v. Bakke, 438 U.S. 265, 269 (1978).

6. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

nificantly more expensive.[7] The Court did not choose to take this route either.

Usually, when no suspect or virtually suspect classifications and no fundamental rights or interests are involved in a legislative classification, the statute is subject to the minimum level of scrutiny that is identified with the "rational basis" or "rationality" test.[8] The law will then be sustained if (1) it serves a legitimate governmental purpose, and (2) the classification invoked by the law is reasonably related[9] or is a plausible means[10] to that purpose. The rational basis test has historically been an easy test to pass.[11]

In *Plyler*, the Court framed its decision in terms of rationality. Did it apply the traditional rationality test? Did the Texas statute fail to meet even its lowly standards? What exactly are its standards? Alternatively, did the Court, as Michael Perry argues, equivocate on the term "rationality," and in fact apply a different test?[12] If so, what was the Court's standard and was it the appropriate one?

These questions arise in part out of the puzzle of the *Plyler* decision. On what basis could the Court strike down the Texas law while at the same time it seemed to undercut the grounds for doing so? A kind of schizophrenia pervades equal protection theory. On the one hand, it is widely believed that the rationality test requires very little of legislative classifications, and that almost any legislation can meet its standards. On the other hand, it is plausible to think that the rationality test must in some sense capture the essence of the principle of equal protection. Since cases involving suspect classifications or fundamental rights are exceptional, and since

7. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1054-55 (1979) (hereinafter referred to as *Modern Equal Protection*).

8. *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

9. *See, e.g.*, Vance v. Bradley, 440 U.S. 93, 97 (1979); F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

10. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections On, and Beyond, Plyler v. Doe*, 44 U. PITT. L. REV. 329, 337 (1983) (hereinafter referred to as Perry, *Equal Protection and Judicial Activism*).

11. *See* McGowan v. Maryland, 366 U.S. 420, 426 (1961); *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1077-78 (1969); Perry, *Equal Protection and Judicial Activism*, *supra* note 10, at 337. *See also* Chief Justice Burger's dissenting opinion in *Plyler*, 102 S. Ct. at 2411. He argues that "Once it is conceded—as the Court does—that illegal aliens are not a suspect class, and that education is not a fundamental right, our inquiry should focus on and be limited to whether the legislative classification at issue bears a rational relationship to a legitimate state purpose." The answer to this question, he thinks, is obvious.

12. Perry, *Equal Protection and Judicial Activism*, *supra* note 10, at 337-38.

equal protection applies in every case, either the meaning of equal protection must be embodied in the rationality standard, or there must be some other standard that expresses it. Otherwise equal protection does not have very much meaning, and the schizophrenia is an illusion. These questions propel the discussion that follows.

I.

The rationality test, as it is usually formulated, requires that the classification embodied in a statute be "reasonably related" to the (legitimate) purpose of the statute.[13] Applying the test, then, has two parts: ascertaining the statute's purpose, and determining whether the classification is reasonably related to it. (Just what "reasonably related" means we shall come to.)

What, then, was the purpose of the Texas statute? Determining legislative purpose is fraught with difficulties that are well understood. As a first approximation, let us consider the defendants' claim that

> (i) *the statute "was simply a financial measure designed to avoid a drain on the State's fisc."*[14]

The question now is whether the classification in *Plyler*—the exclusion of undocumented children from free public education—is a "plausible means" or is "reasonably related" to the goal of saving money. The answer might appear obvious: excluding undocumented children *will* save money. But this is not the end of the matter. To understand why not, consider a statute excluding green-eyed children, or the children of lawyers, or the children of convicted felons from free public education. Such laws would serve the end of saving money just as well as the Texas statute does (maybe even better). Yet surely such laws would violate equal protection. Thus there must be something over and above the plausible-means-to-end test that is required to fulfill equal protection.

What is this something? Answering this question goes to the

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13. *See Lindsley*, 220 U.S. at 78; Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949) (hereinafter referred to as Tussman and tenBroek).

Sometimes, however, the rationality test is said to require just that the statute be reasonably related to *some* legitimate governmental purpose, not necessarily that of the statute in question. *See, e.g.*, Parham v. Hughes, 441 U.S. 347, 347-49 (1979); Vance v. Bradley, 440 U.S. 93, 97 (1979); Perry, *Equal Protection and Judicial Activism*, *supra* note 10, at 338. This interpretation is subject to the same criticisms as the ones I consider here (and perhaps others as well), and I shall not take it up separately.

14. *Plyler*, 102 S. Ct. at 2389.

heart of the rationality test. A clue to the answer is this: "The typical claim that a classification fails the rationality requirement can be understood as a demand for an answer . . . to the question 'Why *me* but no one else?' "[15] Or perhaps, more appropriately, why *us* and no one else? To answer this question it is not enough to show that discriminating against you is a means to a legitimate end; it must be shown that there is some difference between you and others who might have been discriminated against that is relevant to the fulfillment of that end. If the purpose of the Texas statute is to save money, Texas must demonstrate more than that excluding undocumented children will help do it. Texas must explain why excluding undocumented children, as opposed, say, to green-eyed children, is appropriate. The rationality standard, then, imposes two distinct conditions that define what it is for a classification to be reasonably related to a purpose: the plausible-means test, and the nonarbitrariness requirement.

On its face, the exclusion of undocumented children from free public education does seem a lot less arbitrary than the exclusion of green-eyed children or even the children of convicted felons. This is no doubt because of the commonly held view that the claims of aliens in the United States, much less those who are here illegally, have less weight than those of citizens or lawful residents. This belief is unquestionably relevant to the deeper issues raised by equal protection, and we shall return to it. But here our concern is with the rationality test, which authorizes us to ask only whether there is a difference, *relevant to the purpose of the statute*, between those discriminated against by a statute and others who are not. Such a difference cannot be found when the purpose of the statute is simply to save money. Excluding any group whatever serves the purpose just as well, and there is no way of establishing a tighter connection between the purpose and one group rather than another, except in terms of the size of the group, and therefore the size of the saving. But this is clearly not what is wanted.

It becomes clear that the purpose of the Texas statute needs to be defined more carefully if we are to apply the traditional tools of equal protection analysis to the case as it has so far been described. In their classic paper, *The Equal Protection of the Laws*,[16] Tussman and tenBroek described the central problem of the rationality test

15. Perry, *Modern Equal Protection*, *supra* note 7, at 1068-69.

16. Tussman and tenBroek, *supra* note 13.

(or, as they put it, "reasonable classification") in terms of the fit of a classification to the purpose of the statute. "A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law."[17] The characteristic (and to some extent unavoidable) defects of legislative classifications are "underinclusiveness" and "overinclusiveness." A classification is underinclusive when it picks out some of those relevantly situated with respect to the purpose of the law, but leaves out others similarly situated; it is overinclusive when it picks out all (or most) of those relevantly situated with respect to the purpose of the law, but also picks out others who ought to be excluded.

No classification is perfectly reasonable, but some seem as good as one can expect given that laws must be general. A requirement that applicants for employment in a particular field perform at a specified level on an examination may serve the purpose of hiring the most qualified applicants very well. Some good candidates may be poor test-takers, and so the requirement may be somewhat underinclusive. Some unqualified candidates may be overachievers, and so the classification may be a bit overinclusive. (A classification, then, may be simultaneously under- and over-inclusive.[18]) Still, an examination may be the most feasible way to identify the best applicants.

One might think that the defect of the classification in the Texas statute is underinclusiveness: undocumented children are picked out, but others similarly situated with respect to the statute's purpose of saving money are not. But this makes sense only on the assumption that the state's aim is to save as much money as possible. If that were the goal, of course, excluding *all* children from free public education would be a simple and efficient means to achieve it. But this proposition is obviously absurd. The state has an interest in educating its residents as well as in saving money; the latter cannot be understood sensibly apart from the former.

These considerations suggest that the purpose of the Texas statute should be reformulated in a way that incorporates the state's obvious concern with education. We might say, then, that

(ii) *the statute aims to minimize a drain on the state's financial resources without significantly hampering its educational goals.*

17. *Id.* at 346.

18. *Id.* at 352.

The state, in other words, wishes to save money insofar as that is compatible with the ability to carry out its crucial educational functions.

This description does appear to reflect more accurately the Texas statute's purpose. But it does not satisfy the rationality test any better than does the earlier description. For there is still nothing in the purpose that serves to relate it to the exclusion of undocumented children, as opposed to any other children. Given that the number of children excluded is the same, the exclusion of any group whatever is equally related to the purpose of saving money, and hampers the goal of education to the same extent.

It is clear, then, that the description of the statute's purpose needs to be further refined. Perhaps it can be said that

> (iii) *the statute is intended to save money, insofar as that is compatible with crucial educational functions, by limiting free education to the state's taxpaying residents.*

That a person contributes through taxes to the governmental resources that finance education might be considered relevant to determining his eligibility (or his children's) to benefit from free education. Whatever the merits of this view, it will not serve to justify the classification in the Texas statute. Contrary to what may be a widely held view, the evidence is strong that most illegal aliens do pay taxes.[19] Furthermore, if (iii) were the aim of the Texas statute, a tighter fit between classification and purpose could be achieved by framing the statute in terms of nontaxpayers, rather than illegal aliens. This, of course, would have the effect of excluding some poor Texans from free public education—a consequence that many endorsing the Texas statute would probably find repugnant.

The motivation behind (iii), it should be apparent, was to find some characteristic possessed by illegal aliens, but not others, that

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19. *See, e.g.*, D. NORTH AND M. HOUSTOUN, THE CHARACTERISTICS AND ROLE OF ILLEGAL ALIENS IN THE U.S. LABOR MARKET: AN EXPLORATORY STUDY (1976); W. Cornelius, *Illegal Mexican Migration to the United States: Recent Research Findings and Policy Implications*, Congressional Record, July 13, 1977, H7064. J. Simon, *What Immigrants Take From, and Give to, the Public Coffers*, in U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, STAFF REPORT OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, App. D (1981). *See also* R. Conner, *Breaking Down the Barriers: The Changing Relationship Between Illegal Immigration and Welfare*, 1982 FEDERATION FOR AMERICAN IMMIGRATION REFORM. Although Conner favors tighter restrictions on illegal aliens, and disputes the claim that they under-utilize social services, he does not seriously dispute the figures on tax and social security payments. The worst he can say is that illegal aliens' behavior in this regard is "not all that heroic." *See id.* at 13.

might plausibly be part of the description of the statute's purpose. I do not think such a characteristic can be found[20]—or rather, I think the only such characteristic is that they are illegal aliens. At this point, it begins to become clear that the charge of arbitrariness cannot be avoided, and therefore the rationality test cannot be satisfied, unless the purpose of the Texas statute is described in a way that somehow makes reference to the distinction between lawful and unlawful residents. This may seem perfectly appropriate. Any realistic person knows that what is intended by the Texas statute must be understood in terms of the belief that Texas owes more to its lawful residents than to those who have no legal right to be there, and the desire to discourage illegal immigration across its borders.

In light of the above, we are led to adopt another formulation of the statute's purpose that can be found in the defendant's arguments:

> (iv) *the statute 'furthers an interest in the 'preservation of the state's limited resources for the education of its lawful residents.' "*[21]

This description seems to reflect the true purpose(s) of the Texas statute better than the others we have examined. And, unlike the others, it succeeds in satisfying the rationality test's demand for nonarbitrariness. The exclusion of undocumented children *is* a plausible *and* nonarbitrary means of preserving the state's resources for the education of its lawful residents.

Success, however, is bought at a high price, for the reason the classification and the statute's purpose are reasonably related is that they are defined in precisely the same terms. The classification at issue in *Plyler* distinguishes lawful and unlawful residents of Texas. The statute's purpose, to conserve the state's resources for its lawful residents, presupposes the distinction between lawful and unlawful residents. The rationality test is therefore satisfied tautologically.[22]

There are two ways of viewing this problem. We could say that the purpose of the Texas statute is legitimate, but that the means of achieving it have not been shown to be permissible. After all, there

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20. Even if it could, that would not make criticism of the statute impossible in terms of the rationality test. *See infra* text accompanying notes 22-24.

21. Plyler v. Doe, 102 S. Ct. 2382, 2400 (1982) (Appellant's Brief at 26).

22. This did not escape the Court's notice: "The State must do more than justify its classification with a concise expression of an intention to discriminate." *Id.* For a compelling analysis of the problems discussed here, see Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

is nothing wrong with the goal of educating the state's lawful residents; the question is only whether excluding unlawful residents is a permissible means to this end. But there is something artificial about this way of describing the problem. By the same reasoning, one could argue that there is nothing wrong with the aim of educating the state's blue-eyed children; the question is just whether the exclusion of green-eyed children is a permissible means to that end. It is more natural to say that since the distinction between lawful and unlawful residents or between blue-eyed and green-eyed children is contained in the description of purpose, the legitimacy of the purpose itself remains in question.

Sometimes, however, it will be appropriate to acknowledge that the purpose is legitimate, and question instead whether the means to achieving that purpose are permissible. One might, for example, wish to avoid the question-begging that is apparent in (iv), and, recognizing that statutes may have more than one goal, formulate the Texas statute's purposes as follows:

> (v) *the statute is designed to save money, insofar as that does not seriously impair the state's educational functions, and to discourage illegal immigration.*

Here it might seem artificial to question the legitimacy of the statute's purposes;[23] instead one demands whether the exclusion of undocumented children is a permissible means to that end.

Although the upshot, as we shall see, is the same whichever approach is adopted—the rationality test cannot determine the constitutionality of the Texas statute—it is illuminating to try to understand why one line of reasoning seems more appropriate in (iv), and the other in (v). The difference seems to be that, other things being equal, the more explicitly the distinction that is disputed in the classification is contained in the description of purpose, the more appropriate it is to question the legitimacy of the purpose; the less explicitly the distinction is contained in the purpose, the more appropriate it is to question the permissibility of the means to achieving the purpose. Thus, when the purpose is defined as in (iv), it is obvious that its legitimacy is precisely as questionable as the disputed classification, for they are framed in just the same terms. In such cases, the rationality test glaringly begs the question. When the

23. I am assuming here for the sake of argument that discouraging illegal immigration is not a purpose precluded to states by the supremacy clause. *But see infra* note 30.

purpose is defined as in (v), the terms of the purpose are not as obviously framed in the terms of the classification, and we are more inclined to ask whether excluding undocumented children is a permissible means to the end. In fact, however, the distinction between lawful and unlawful residents is as implicit in the description of purpose in (v) as it is explicit in (iv).

These cases belong to a logically distinct class, in which the statute's purpose cannot be plausibly described independently of the classification in a way that satisfies the rationality test. This problem does not always arise. When it does not arise, it is at least arguable that the rationality test is useful. In *Village of Belle Terre v. Boraas*, for example, the Court sustained a community zoning ordinance prohibiting unrelated groups of more than two people from renting a house.[24] Several different purposes were ascribed to the statute: to minimize noise, untidiness, and parking problems, to prevent rent increases, and to uphold family values. This last purpose does implicitly contain the distinction between families and non-families that is at issue, and so is vulnerable on the grounds just described. But the ordinance might be defended by citing just the other goals. Its supporters might plausibly argue that in general the kinds of people who live in group houses (students, single people, the young) are noisier and less fastidious than are families, and that rents will rise if unrelated individuals with independent incomes rather than families rent. In the *Belle Terre* case, then, the rationality test is not satisfied tautologically; it is satisfied because the terms of purpose *correlate* with the characteristics of the group at issue in the classification.

This result, it seems, is just as it should be. If the purposes of a law are legitimate, and if a classification fits them reasonably well (not perfectly, of course: some students are neat and quiet, some families are messy and noisy), isn't that just what is required to show that the law is constitutional? The example of *Belle Terre* seems to show the strengths of the rationality test.

But even in such cases, the rationality test is not completely above suspicion. For it suggests that there is a straightforward answer to the question: what is a statute's purpose? Once having ascertained that purpose there is only one simple operation left to perform to show that a statute's classification is nonarbitrary: deter-

24. 416 U.S. 1 (1974).

mining whether the classification is over- or under-inclusive. Such an analysis disguises the underlying complexity in judicial evaluation.

In *Belle Terre*, for example, since the fit between classification and purpose is not tight, one can question whether the statute's aim can be achieved in some other way that does not encroach directly on the group. Instead of a zoning ordinance, the community can adopt noise ordinances, parking regulations, and rent controls. One can demand, in other words, a better fit between classification and purpose. Now of course a better fit can be attained not only by changing the classification, but also by altering the statute's stated purposes. Sometimes the description of these purposes will empty the rationality test of meaning, as it did in (iv) and (v), and as it would if the upholding of family values were incorporated into the purpose of the Belle Terre ordinance. It is only an apparent paradox to say the fit between classification and purpose can be "too perfect."

How good a fit between classification and purpose is good enough depends on the purpose, the interests at stake in the classification, and the available alternatives. Since, unless the fit is "too perfect," there will probably always be some slack, courts must decide how much slack is acceptable. They can do this only by assessing the importance of the statute's purposes; what other means for achieving them are available; and the significance of the interests, and the available alternatives, of those burdened. This explains in part why the rationality test's very limited value has for so long escaped notice: much of the legislation falling within its purview involves economic and social policies with broad and generally innocuous purposes; the burden of the legislation must fall on someone, but often does not burden anyone in so grave a way as to be objectionable.[25] When the burdens are significant, however, it is ob-

25. In this context, there is a commonsensical and unobjectionable interpretation of the rationality test, which the Court elaborated in *Plyler*:

> A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose. 102 S. Ct. at 2394.

This informal understanding of the rationality test enables one to explain decisions that do not make sense on the stricter view of it discussed above. In Railway Express Agency v. New York, 336 U.S. 106 (1949), for example, the Court sustained a law prohibiting commercial trucks from

vious that the means employed in the statute can be questioned, even if the ends are not. To question the means is not, of course, to show them to be impermissible. Rather it is to open the way to argument. Now it is plausible that in *Belle Terre* the means were permissible, because as long as such zoning ordinances were limited in number, groups could rent houses elsewhere, and their interests in privacy, freedom of association and the like may not have been too seriously abridged. But if many communities passed such ordinances, they would have to be scrutinized more carefully.

What goes on in the name of the rationality test, then, is often difficult, complex, and unmechanical; it requires judgment as to the significance of the competing interests at stake in a law, and what the alternatives to it are.[26] At best, the rationality test is a misleading way of conceiving how courts evaluate legislation. At worst, it is an empty exercise, because (1) it is always possible, and often plausible, to describe a statute's purpose(s) so that the disputed classification satisfies the rationality test; and (2) it is always possible, and often plausible, to describe the purpose(s) so that the classification does not satisfy it.[27] (We have seen each of these possibilities exemplified with respect to *Plyler*: the descriptions in (iv) and (v) satisfy the rationality test; those in (i), (ii), and (iii) do not.) We are more concerned with (1) than with (2), since, because of a belief in judicial restraint, the rationality test is *supposed* to be an easy test to pass, and thus courts are inclined to look for a purpose that satisfies it. Such a purpose will often be easily available, since the terms of the statute itself are the most obvious source for discovering its purpose.[28] When the purpose is framed either explicitly or implicitly in these terms, the rationality test will be automatically and therefore emptily satisfied. (Even when the purpose is framed in other terms, doubt can be cast on the statute's constitutionality by questioning whether the fit between classification and purpose is tight enough,

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advertising, except for their own product. This decision can be understood in terms of the formal rationality test only by making the latter vacuous: there is no way to show self-advertising, but not other advertising, relevant to the statute's purpose, public safety, except by building the distinction into the purpose. *See* Note, *supra* note 22, at 143-44. Nevertheless, the statute may well be reasonable; an informal understanding of rationality, of the sort expressed in *Plyler*, makes it easier to understand why.

26. For more on this, see *infra* parts II and III.

27. *See* Note, *supra* note 22, at 128-32.

28. *Id.* at 128.

whether the means to the end are too burdensome, or a combination of these.)

These arguments should not be misunderstood. They do not support or refute any point of substance concerning the constitutionality of the Texas statute. Rather they show that the rationality test cannot settle the question. The description of the Texas statute's purpose will either contain the distinction between lawful and unlawful residents (explicitly or implicitly), or it will not. If it does, the rationality test is automatically satisfied; success is empty. If the description does not contain the distinction, then, since no features that might plausibly be part of the description of purpose (such as being a taxpayer) correlate with unlawful residence, the rationality test will not be satisfied. (Even if such a feature did correlate, the permissibility of the means employed by the statute, or the tightness of the fit, or both, could be questioned.)

Were it not for the fact that the traditional categories of equal protection analysis are so deeply entrenched, this conclusion should not be too surprising. Who would have expected to be able to decide a case like *Plyler* without directly confronting the question: Is it permissible (or under what circumstances is it permissible) for a state to distinguish between citizens and aliens, or between lawful and unlawful residents? But the view I am defending conflicts with the "minimalist" belief that the equal protection clause lacks substantive content. According to this conception, where neither suspect classifications nor fundamental rights or interests are involved, equal protection imposes no constraints on legislation except those presented in the rationality test.[29] If a statute abridges a right protected by some other constitutional provision, such as the first amendment, it will, of course, be objectionable for that reason. But this has nothing to do with equal protection.

Since the rationality test, which in this case is no test at all, imposes no constraints on legislation, we must conclude that in the absence of suspect classifications or fundamental interests, either the equal protection clause is mute, or else its content must be derived or inferred from other sources. The first alternative is inherently implausible. To accept it would be to admit a lacuna, an indetermi-

29. This judicially conservative view may be based partly on the idea that equality is "empty": it enjoins us to treat likes alike and unlikes unalike, but provides no criteria for likeness and difference. For a defense and elaboration of this view of equality, see Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

nacy-in-principle, in constitutional law. We are thus impelled to derive the content of the clause from other sources. But where? We can find pieces of the answer, clues to it, in an understanding of the original and central purposes of the equal protection clause: the prohibition of certain forms of racial discrimination.[30] A theory of equal protection must at least explain and make coherent why the practices the fourteenth amendment was intended to prohibit are wrong; it must explain just why race is a suspect classification. In so doing, however, it will inevitably say more. As elsewhere, the "pathological" case sheds light on the normal, or more normal. Thus, although the Court has explicitly denied that "illegal alienage" is a suspect classification (and although it can also be argued persuasively that, in spite of some of the Court's pronouncements, alienage itself is not suspect),[31] it is not pointless to look to this area of constitutional theory and decision for guidance regarding the constitutional status of aliens, legal and illegal. In understanding just why race is suspect—indeed, the paradigm of suspect classifications—we shall better understand what kinds of discrimination, and what grounds for discrimination, are impermissible. But the argument works the other way round as well, and provides further support for the substance of the equal protection clause: ultimately it is impossible to understand what is wrong with racial discrimination without a conception of the kind of treatment that *every* person may legitimately demand.

II.

What principle or principles underlie the prohibitions embodied in the equal protection clause? We might begin with the idea that blacks are not inferior, or, as it is sometimes said, are not morally inferior,[32] to whites. Elevated to the status of principle, this is the

30. *See* Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 11-21 (1977); Perry, *Modern Equal Protection*, *supra* note 7, at 1025-27.

31. *See* Karst, *supra* note 30, at 45 and Perry, *Modern Equal Protection*, *supra* note 7, at 1061, who argue that much of the dicriminatory legislation (by the states) against aliens is vulnerable on grounds of federalism rather than on the suspiciousness of alienage classifications. In *Plyler*, the Court suggests that state policies that discriminate against aliens are permissible when they "mirror" a federal policy. Thus state laws prohibiting the employment of illegal aliens are constitutional, because they mirror the federal goal of protecting the domestic labor market. *Plyler*, 102 S. Ct. at 2390 n.5. *See also* DeCanas v. Bica, 424 U.S. 351 (1976). Since there is no clear federal policy to exclude illegal aliens from education, the Court suggested, the Texas statute may violate the supremacy clause.

32. The term "moral inferior" is ambiguous. In the "agent-relative" sense, a person is mor-

view that no person is morally inferior to another by virtue of race; any law predicated on a contrary view offends equal protection.[33]

This formulation might, however, be misleading. For it might suggest that if a person *were* morally inferior to others (in virtue of race or some other trait), then it would be permissible for that reason to discriminate against him or to exclude him from the scope of equal protection. It seems fair to say that some people—cold-blooded killers, some child abusers or rapists—are morally inferior to others. But even they are entitled to equal protection; the equal protection clause applies to all persons within its jurisdiction. We might express this aspect of the equal protection clause by saying that every person is *entitled* to equal protection, whether he *deserves* it or not. To deserve something, one has to have earned it in some way or other. Entitlement is a different sort of concept.[34] The hired killer may not deserve equal protection, but he is entitled to it anyway. Conversely, one might deserve some benefit or reward, but not be entitled to it. (An obvious example is the industrious illegal alien who is excluded from certain benefits and privileges. This is cited merely as an example, and not to beg any questions.)

What, then, does moral inferiority have to do with equal protection? Everything and nothing. Everything, because equal protection requires that the state never treat a person as morally inferior, even if he is. Nothing, because a person's moral inferiority per se is neither necessary nor sufficient to justify the state's discriminatory treatment. That it is not sufficient is clear enough. To justify discrimination, moral inferiority or moral worth has to manifest itself; it has to make a difference in the world. The state may not deprive the murderer of his freedom simply because of some inner

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ally inferior if he is deficient in those qualities that make one behave as a decent human being behaves; the cold-blooded killer is morally inferior in this sense. In the "patient-relative" sense, a person is morally inferior if, for whatever reason, he deserves less than decent treatment. One might think that a person is morally inferior in the second sense only if he is morally inferior in the first: only by one's own acts can one become deserving of inferior treatment. Many traditional racists probably did not hold that blacks were morally inferior in the agent-relative sense; but they believed that blacks were morally inferior in the second sense: inferior-*qua*-persons, worth less, deserving of less.

In what follows I use "moral inferior" in the patient-relative sense (sometimes—it will be obvious when—with the other implication as well).

33. *See* Karst, *supra* note 30, at 6-8, 21; Perry, *Modern Equal Protection*, *supra* note 7, at 1028-32.

34. *See* J. FEINBERG, DOING AND DESERVING 56-61, 86 (1974).

quality of moral inferiority; it may do so only because of what he has done and what he may do again.

That moral inferiority is not necessary to justify discrimination is obvious on one level. Laws inevitably discriminate against people on grounds having nothing to do with their moral worth or moral status, and no rational person could possibly object to this. Indeed, countless laws discriminate against people on grounds similar in important respects to race, and this too is uncontroversially legitimate. For example, when the state prohibits blind or myopic people from driving, it discriminates against them on the basis of an immutable characteristic having nothing to do with their moral worth. Why is this legitimate while racial discrimination is not?

The obvious reply is that a person's ability to see is relevant to the formation of a sound public policy concerning the licensing of drivers. Discussing racial discrimination, Professor Perry argues that "Because race is not a factor indicating anything about the moral worth of persons, race is morally irrelevant to state laws and policies."[35] The ability to see is not a factor indicating anything about the moral worth of persons, either; it's a factor indicating something about whether it would be sensible to allow a person behind the wheel. Now *if* we thought race were such a factor, and *if* we had *very* good reasons for thinking it, then race *would* be relevant to the licensing of drivers. (It's hard to imagine this, because it's hard to imagine how something like race could be relevant to something like driving. But, for example, some physical trait genetically correlated with race might be relevant.[36] Because of the usually insidious nature of racial discrimination, and our desire to avoid association with it, we would probably take race as the criterion of discrimination only if absolutely necessary—if, for example, the relevant factor were in itself undetectable.)

In any case, it is clear that the ability to see is relevant to public policy in a perfectly legitimate way. By contrast, if one does not believe that blacks and whites are fundamentally or significantly different, race is usually irrelevant to the formation of policy. It doesn't add anything, except a certain cachet, to say it's "morally irrelevant"; it's just irrelevant. If blacks and whites were significantly different in ways relevant to policy, as the blind and the

35. Perry, *Modern Equal Protection*, *supra* note 7, at 1030.

36. *See* the discussion of proxy factors (factors correlated with relevant characteristics) in Perry, *The Principle of Equal Protection*, 32 HASTINGS L.J. 1133, 1148-51 (1981).

sighted are different, then it would be legitimate and not a violation of equal protection to take such differences into account in making legislation.

These arguments might appear to support only the weakest constraints on how the state is required to treat people in order to satisfy equal protection. They seem to suggest only that grounds for discrimination must be relevant to governmental purposes, but they do not put constraints on the purposes themselves. These arguments, then, might seem vulnerable for reasons similar to some of those that undermine the rationality test. Criteria for assessing means are not enough; we need criteria for evaluating ends as well.

But the principles I have sketched are stronger than they look. The idea that the state may treat no one as a moral inferior or as a nonperson is not empty. It means, first, that the state may not treat one person's or group's interests differently from the similar interests of another person or group: it cannot matter more per se that *A* goes hungry than that *B* does.[37] Of course, other differences between *A* and *B*, or other relevant factors, may permit treating *A* and *B* differently; may, that is, override the similarity between them. Second, not treating a person as a moral inferior or as nonperson means that one may not ignore or dismiss his interests, for that would be to treat him as if he did not matter; as if he were not a person with feelings, concerns, and projects of his own. Again, of course, these interests may sometimes be legitimately overridden; but that is something else, and need not imply the kind of disrespect that is involved when one dismisses a person's interests.

Just which of people's interests may be legitimately overridden in what circumstances is a difficult and controversial question that the equal protection clause appears to leave largely undetermined. However, it does not leave the answer wholly undetermined, and we can extract from equal protection a third constraint on governmental action. Certain kinds of harms are particularly invidious: not only those that *presuppose* the moral inferiority of a group (these are obviously ruled out) but also those that *cause* a group to become systematically isolated from the rest of society, so that its members

37. *Cf.* R. DWORKIN, TAKING RIGHTS SERIOUSLY 272-73 (1977); Karst, *supra* note 30, at 5-7, 33 and *passim*. My formulation appears to avoid the charge that equality is empty because it offers no criteria of similarity and difference. *See* Westen, *supra* note 29. Identifying similar interests is not problematic in the way identifying "persons similarly situated" is, because to call something a certain sort of interest (an interest, say, in adequate nutrition, or in not being tortured) is to give the criterion by which similar interests are identified.

are unable to participate as equals.[38] There are strong presumptions against tolerating harms that foster deep class divisions. Separate is necessarily not equal; "the Constitution forbids a system of caste."[39]

There is another constraint on the legitimacy of governmental purposes that is of a different sort. It concerns our commitment, as a society, to the view that in fact people are not very different from each other by virtue of traits like race. (Although this is in some sense a factual question, it may well be that we accept it almost as a matter of faith. We might even choose to believe it in the face of facts to the contrary. This is not necessarily a criticism.) Even more certainly, we believe that whatever the differences between blacks and whites, they are inessential characteristics and do not support treating some people as generally inferior to others. Thus we believe not only that one must *treat* people as moral equals, but that in fact they *are* moral equals.

Far from being empty, then, the equal protection clause can be seen to embody four distinct principles. First, the state may not treat anyone's interests differently from the similar interests of anyone else. Second, it may not dismiss anyone's interests. Third, it may not impose harms that cause a group to become systematically isolated from the rest of society so that its members are unable to participate as equals. The fourth principle is the guiding belief that people are not essentially different in ways that would warrant treating some as generally inferior to others.

Racial classifications are ordinarily impermissible because they violate some or all of these constraints. Either they are plainly irrelevant to governmental purposes (since people are basically similar irrespective of race), or they imply that blacks do not count in the same way as whites. Reverse discrimination can avoid the problems of traditional racial discrimination because it can be relevant to a purpose, such as integration, that need not treat anyone's interests as less worthy of respect.

Although the fourteenth amendment was intended to eliminate certain kinds of racial discrimination, the principles I have just enumerated have much wider application. One cannot make sense of the prohibitions specifically intended by the fourteenth amendment

38. We should understand the concern about "discrete and insular minorities," United States v. Carolene Prod. Co., 304 U.S. 144 (1938), then, not simply as solicitude for those discrete and insular minorities that already exist, but also as concern to prevent their creation.

39. Karst, *supra* note 30, at 21.

without consideration of the more general theory behind these principles. It follows from this theory, I have argued, that the state must always take into account the ways in which its policies and laws affect the interests of those within its jurisdiction. That a statute harms some person or group is always relevant to establishing its constitutionality, because to ignore or dismiss a person's interests is to treat him as a nonperson or as a morally inferior person. Now, of course, some interests are trivial, some are vitally important, and most fall at various places in between. Some of a person's most vital interests, I have argued, are given special weight by the principle of equal protection: those whose violation reifies class divisions and makes mobility all but impossible. But a person's interests may often be outweighed, not only by the more important or more predominant interests of others, but also by facts about himself or acts he has performed.[40] Gauging the importance of interests will often be controversial; weighing and balancing them against each other are problems no crude utilitarian calculus will resolve. However, no one concerned with equal protection can hope to avoid these messy problems.

This view appears to be at odds with the prevailing conception of what courts should do. According to the prevailing conception, the courts should not be in the business of balancing interests; that is the job of legislatures. Both a practical and a principled rationale underlie this premise: legislatures are better equipped to gather the information and make the judgments needed to strike the right balances; and, unlike judges, legislators are elected by the people. To endorse balancing by courts, then, is both inefficient and undemocratic.

At least three responses can be made to this defense of judicial restraint. The first is that even if one agreed completely with the defense of judicial restraint, that would not vitiate the theory of equal protection I have elaborated. The Constitution in general, and the equal protection clause in particular, are binding not only

40. Thus, *e.g.*, a criminal's interests in freedom and the like may be overridden by his criminal activity. This can be viewed as an overriding-in-the-interests-of-others (removing the danger from society; deterrence), but it can also be seen in retributive terms: by committing the criminal act, the criminal "forfeits" his right to freedom. Forfeiting something and having one's interest in it overridden may not be exactly the same; but they are similar in the crucial respect that neither need signify lack of respect or treatment as a moral inferior. Indeed, many would argue that we can treat people as moral equals only if we hold them responsible for their actions, and punish them for wrongdoing.

on courts but on legislatures and all governmental bodies. But the Constitutional language might not bind all in the same way. A theory of equal protection must instruct legislators and policymakers, not just judges, how to proceed. The theory I have sketched does that. Now we might well agree that courts ought not ordinarily mimic the legislatures, for the reasons just mentioned: it is practically impossible for courts to do what legislatures do, and it is undemocratic as well. But it is important to see what equal protection requires, even if not every failure to satisfy it calls for judicial intervention.

Legislatures, then, must have wide latitude to make mistakes. The mere fact that the balance of interests has been struck in the wrong place is not a sufficient reason for a court to invalidate legislation. But sometimes the balance is struck not merely in the wrong place, but in a place that encroaches on a significant interest (not necessarily a constitutionally fundamental one)[41] of some group. In such cases, especially where the group burdened is already disadvantaged, it is appropriate for courts to intervene. This is the second response to the objection against courts getting into the balancing act: they should get involved in it only when important interests are at stake. To say this is not to predict a court's decision; it is only to say that closer judicial scrutiny in such cases is not inappropriate.

The third response buttresses the second: theories of judicial restraint notwithstanding, a certain amount of interest-balancing is what courts do anyway, and what in some case they cannot avoid doing. In the preceding section we saw that for a certain class of cases the rationality test is useless; the only way to resolve these cases is to balance the interests of those who would be harmed by a statute against those governmental interests that would be served by it.[42] And even where the rationality test is not empty, a certain amount of balancing often occurs anyway.[43]

The Supreme Court's development in recent years of "interme-

41. What makes an interest constitutionally fundamental is not clear. Presumably, an interest is fundamental if it is guaranteed, explicitly or implicitly, by the Constitution. But what it means to be "implicitly guaranteed" is not obvious. Some have suggested more cynically that an interest is fundamental if the Supreme Court says it is. In any case, the Court has made clear that the importance of an interest does not determine whether it is constitutionally fundamental. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 30 (1973). Thus it may be simplest to concede that "fundamental interest" is a technical term and proceed without it.

42. *See infra* part III for this approach applied to aliens and illegal aliens.

43. *See supra* text accompanying notes 23-27.

diate scrutiny"[44]—something more than the minimum review associated with the rationality test, but less than the strict scrutiny triggered by suspect classifications and fundamental interest—is easily understood in terms of the theory of equal protection sketched here, according to which there must be a "continuum of scrutiny," depending on the strength of the interests at stake on all sides. Indeed, one can see the concept of intermediate scrutiny struggling to emerge from both the rationality and strict scrutiny tests: out of the limitations of the rationality test, in which balancing often goes on beneath its smooth surface; and out of the general principles underlying the doctrine of suspect classifications. In "inventing" intermediate scrutiny, the Court was only making explicit what has been implicit in constitutional theory all along: it takes more than two simple rules to realize the underlying moral/political theory of the Constitution.[45]

III.

The constitutional status of aliens and illegal aliens raises questions that strain the limits of equal protection theory. On the one hand, it is incontrovertible that all persons physically within the United States are within the pale of equal protection.[46] This includes even those whose presence is unlawful: those with no right to be here have rights by virtue of being here. (A benign Catch-22). To be within the pale of equal protection means that one's interests cannot be dismissed or ignored, and cannot be given less weight than others' similar interests, even if they are finally overridden. On the other hand, legitimate governmental interests and goals (including the promotion of preponderant individual and group interests) may pull against these individual or group interests; and, I shall argue, the state does have legitimate interests that limit the rights of aliens. To the extent that governmental interests are important ("weighty," "substantial," "compelling"), they pull harder against the claims of individuals or groups, and these claims must themselves be substantial to resist the pull. In the limiting case, the preservation of the state or society may be at stake, and individual interests will have

44. *See, e.g., Plyler*, 102 S. Ct. at 2394; Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976); Vlandis v. Kline, 412 U.S. 441, 458 (1973) (White, J., concurring).

45. For further suggestions that the traditional categories of scrutiny are not as neat as they appear, see R. FULLINWIDER, THE REVERSE DISCRIMINATION CONTROVERSY: A MORAL AND LEGAL ANALYSIS 204-08 (1980); Perry, *Modern Equal Protection*, *supra* note 7, at 1045, 1054-55.

46. *Plyler*, 102 S. Ct. at 2391-94; Yick Wo v. Hopkins, 118 U.S. 356, 359 (1886).

great trouble withstanding the force exerted.[47] Conversely, to the extent that the interests of individuals or groups are important, they exert a stronger pull against state interests. Equal protection exhibits the fundamental tension between the individual and the state, and between minorities and the majority.

The question before us is how the claims of aliens, legal and illegal, compete with governmental purposes that would have the effect of discriminating against them. Under what circumstances and on what grounds are such laws and policies within the bounds of equal protection?

Let us return to *Plyler*. We are ready to answer the questions with which we began: What standard of review did the Court use to strike down the Texas statute, and was it the appropriate one?

The Court reasoned that:

> [M]ore is involved in this case than the abstract question whether § 21.031 [the Texas statute] discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In the light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.[48]

Professor Perry argues that the Court equivocates here in its use of "rationality"; this is not "rationality" in the sense of the rationality test.[49] Chief Justice Burger, in his dissent, suggests the same: however else one might describe the view behind the Texas statute

47. Such circumstances, however, are extraordinary and very rare. Under the strictest standard of review associated with compelling state interests, "the modern Court has sustained only two race-dependent decisions disadvantaging nonwhites, and the Court's action in that regard was and continues to be most controversial and is not likely to be repeated." Perry, *Modern Equal Protection*, *supra* note 7, at 1035-36. These are the Japanese internment cases, Korematsu v. United States, 323 U.S. 214 (1944), and Hirabayashi v. United States, 320 U.S. 81 (1943). What is problematic about these cases is not the assumption that the state's interest was compelling, but the connection between it and the internment of Japanese-Americans.

48. *Plyler*, 102 S. Ct. at 2398.

49. Perry, *Equal Protection and Judicial Activism*, *supra* note 10, at 338.

("folly," "wrong"[50]), "it simply is not 'irrational' for a State to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the State and this country is illegal as it does to provide for persons lawfully present."[51]

It was shown in Part I that the rationality test is incapable of generating any solution to the issue raised in *Plyler*. It follows that the Court could not be determining the rationality of the Texas statute according to the rules of the rationality test. Thus we must agree that the Court's use of "rationality" is an equivocation.

But Chief Justice Burger's use of "rationality" is also an equivocation, for the same reason. If it is not "irrational" for the state to treat unlawful residents differently from lawful ones, it is not because such treatment satisfies the rationality test. It does not, or, if it does, it satisfies it in a meaningless way. The rationality or irrationality of the Texas statute must be a question of its *reasonableness*, its rationality all things considered. This is different from, and more complex than, the formalistic notion of rationality employed in the rationality test. Determining a statute's reasonableness requires judgment of its relationship not simply to some one purpose, but to the various interests and purposes that are touched by it. Such judgments were made by the Court in deciding *Plyler*; they are expressed, among other places, in the passage just cited.

The question, then, is not whether it was wrong for the Court not to apply the traditional rationality standard, as it could not meaningfully have done so. Perhaps it was unfortunate that the Court framed its decision in terms of rationality; but that is a merely linguistic complaint. One cannot complain that the Court took into consideration the way in which the Texas statute affected various interests and purposes. It had to. The only remaining question is whether, in light of the interests at stake on all sides, the Court struck the balance correctly.

Once this is conceded, *Plyler* seems an easy case. It is easy both because of the nature and significance of the claims of undocumented children, and because of the nature and relative insignificance of the interests of the state. As we saw in Part II, to agree that a balancing of interests is appropriate is not necessarily to agree that judicial intervention is justified, or to agree that heightened scrutiny is the appropriate standard of review. Only when significant inter-

50. *Plyler*, 102 S. Ct. at 2408.

51. *Id.* at 2412; *see also supra* note 11.

ests are at stake is it clear that courts should intervene, and scrutinize a statute more carefully. But the conditions for heightened scrutiny are clearly met in *Plyler*. It is not simply that, as the Court has made clear, education is extremely important (though not constitutionally fundamental).[52] It is that to deny a person education is among the most damaging and caste-enforcing acts imaginable. To be denied "the ability to live within the structure of our civic institutions" is to be cast out, to be made inherently unequal. Education is not, of course, sufficient to prevent these harms, but it is almost certainly necessary.

Furthermore, the state interests which are pulling against these crucial interests of undocumented children have little weight of their own. There are two reasons for this: first, the drain on Texas's financial and educational resources caused by the children's presence is negligible,[53] and second, even from the point of view of Texas's own (and its lawful residents') interests, there are powerful reasons to believe that the Texas statute is contrary to those interests. It is harmful to the society itself to permit the creation or perpetuation of a "permanent underclass" of people who make little contribution to and have no stake in the common good. (This is different from a society in which some are poor, however objectionable the latter.) This holds true even if on balance illegal immigration is inimical to domestic interests. It might be better that illegal aliens not be here at all; but given that they are here, and that they are likely to remain, it is better that they not be systematically rendered helpless and useless. Whatever morality requires, these are the dictates of prudence.

It is not obvious, then, that the state has *any* interest in excluding undocumented children from its schools.[54] It is important to see that it cannot be irrelevant to the constitutional question, as Chief Justice Burger seems to think, that denying children education is "folly."[55] For if it is folly, then the state does not have an interest in

52. *See supra* text accompanying note 48; San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. at 37. The *Rodriguez* decision is famous for having insisted that education is not a fundamental interest. But in *Rodriguez* the Court also explicitly abstained from judging whether an absolute denial of education, as opposed to inequality in educational opportunities, would be constitutional. *Plyler* might be taken to answer that question. *See also* Brown v. Board of Education, 347 U.S. 483, 493 (1954).

53. *Plyler*, 102 S. Ct. at 2400-01.

54. This, of course, depends on the facts, and so factual inquiries cannot be strictly separated from the Court's proper role.

55. *Plyler*, 102 S. Ct. at 2408.

it, much less the substantial interest necessary to outweigh those of undocumented children. In this case, where the balance of interests lies is clear.

It might be objected that such reasoning, and the *Plyler* decision itself, sanctions illegal immigration in particular, and unlawful activity in general. Must not the state express its disapproval of such activity by insuring at least that those who break the law do not benefit thereby? In *Plyler*, the implicit principle underlying this objection, however, weighs against the Texas statute, not in favor of it. The principle is that one ought not to benefit from one's own wrongful acts; it seems only consistent to say also that one ought not to suffer for others' acts beyond one's control. The children of illegal aliens have not, we may assume, chosen to act unlawfully, so they ought not to suffer the consequences attendant on unlawful behavior. As a general principle of legal reasoning the idea that the innocent ought not to suffer at the hands of the state is too strong. As was argued above, moral inferiority is neither necessary nor sufficient to justify discrimination; similarly, "moral superiority"—innocence—is neither necessary nor sufficient to invalidate it.[56] But there is a more circumscribed principle that is acceptable: one may not *sacrifice* the innocent to express disapproval for wrongful acts. If the exclusion of undocumented children from education were a significant disincentive to illegal migration, that would be relevant (though not necessarily decisive) to justifying the Texas statute. In that case, innocent children might be made to suffer, but the harm to them would be a "by-product" of another goal. But it is something else to single out undocumented children as a way of expressing opposition to illegal activity for which they are not responsible. *That* reason for discrimination is unacceptable.[57]

This argument has its limitations; they are the limitations of the *Plyler* decision itself. One of the reasons *Plyler* is an easy case, in addition to the nature and significance of the interests at stake, is that it concerns children who are not to blame for their unlawful

56. We can agree with Chief Justice Burger, then, that "the Equal Protection Clause does not preclude legislators from classifying among persons on the basis of factors and characteristics over which individuals may be said to lack 'control.'" *Plyler*, 102 S. Ct. at 2409.

57. My view rests on some version of the doctrine of double effect: the belief that there is a morally significant difference between what one brings about directly and intentionally, and what occurs as a "side effect" of one's intended actions. For a discussion of this view, see Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 OXFORD REV. (1967), *reprinted in* KILLING AND LETTING DIE 156 (B. Steinbock Ed. 1980).

status. The same cannot be said of their parents, who have chosen to act illegally. *Plyler* provides no obvious clues to deciding what *their* rights are.

With adults, it is not irrelevant or unfair to count the illegal act of entry against them. But still we must decide how much it should count. It is clear that the illegal act of entry does not nullify every claim an undocumented alien might make. The fundamental fact remains: the equal protection clause applies to all persons in the United States, no matter how they got here. And, we might add, there are worse deeds than crossing a border illegally to look for work. One might object that even if illegal entry is in a certain sense no more serious than, say, speeding or possession of marijuana, there is a crucial difference precisely because the illegal act of entry transports the alien into the protected realm. Just because his protected status depends essentially on his illegal act (in a way that the protected status of other offenders does not), it is appropriate, it might be argued, for the state to treat the illegal alien's offense more seriously, not as just one factor among others.

It is hard to know how to evaluate this argument. Even if we agree that it has some force, we are still left to decide how much. Here we begin to strain the limits of equal protection doctrine, and find ourselves arguing in circles. How must the state treat illegal aliens? They are within the pale of equal protection, so there are limits on how the state may treat them. What are these limits? The interests of illegal aliens cannot be dismissed out of hand. Their illegal acts of entry may be counted against them, but do not nullify every claim they might make. But which claims do they nullify? Which claims do the illegal acts justify taking less seriously? Does not the state have the right to treat its own citizens better than it treats outsiders? But even outsiders, when they are inside, come within the pale of equal protection. . . .

We can break out of this circle only by realizing that, except in the most general sense, the Constitution and constitutional precedent are limited sources of guidance in answering these questions. The standing of aliens, especially illegal aliens, in contemporary American society involves problems that were not envisioned by the framers and that the Constitution and the Reconstruction amendments are not equipped to solve. As Alexander Bickel observed, "the concept of citizenship plays only the most minimal role in the

American constitutional scheme."[58] No doubt this is at least in part because of the different attitudes toward immigration, rooted in radically different historical conditions, in the nascent frontier society of two centuries, and even one century, ago. Population in those periods was virtually an unmixed blessing. But however much one may agree in principle with Professor Bickel that the Constitution's neglect of citizenship is a happy fact, it is clear that the distinction between strangers and compatriots can no longer be taken so lightly. The most important distinction may not be between literal citizens and noncitizens; more likely it is between lawful and unlawful residents.[59] But somewhere, sometimes, lines have to be drawn. The starting point for this view is the recognition that unlimited immigration to the United States would in fact constitute a grave threat to its existence (to its existence, anyway, in anything like its present form). Such a threat permits the state to treat aliens in ways that would otherwise be forbidden. In the limiting case, then, government's interest in cases involving aliens is compelling; it is nothing less than the preservation of the society itself.

This is rather apocalyptic talk. Things have not come to this, and it is unlikely that they will. But the thrust of the argument is sound: to the extent that aliens constitute a threat to essential features of American society, it is legitimate for the government to discriminate against them. Therefore it is important in every case to settle the factual questions as firmly as possible. Is there a threat? If so, how great is it? Determining this has two parts: first, establishing how great a drain on resources would in fact result from extending the benefit in question to aliens; and, second, deciding to what degree extending it would encourage others to migrate illegally and thus increase the drain.[60]

Determining the state's interests is, however, only part of the story; the claims of those aliens who would be targets of discrimina-

58. A. BICKEL, THE MORALITY OF CONSENT 33 (1975).

59. Ironically, although Professor Karst's central theme in the understanding of equal protection is the concept of equal citizenship, he means "citizenship" not in its usual sense but in a broader one that comprehends noncitizens: equality of citizenship is in essence equality of persons. Karst, *supra* note 30, at 5, 45. This view is no doubt grounded in the understanding that citizenship in the narrow sense plays a minimal role not only in constitutional development but also in American society: "[F]or most purposes [noncitizens] are members of our society." *Id.* at 45.

60. The decision in *Plyler* is supported on both grounds: neither the drain on resources, nor the incentive to immigration, is great. *See Plyler*, 102 S. Ct. at 2400-01.

tion must also be evaluated. Sometimes, as in *Plyler*, the balance will be easy to strike; often, it will be harder.

Finally, we will need sometimes to make finer distinctions. All aliens are not alike. Which contrasts are important: Alien/citizen? Legal/illegal alien? Long-standing/newly-arrived resident? English speaker/non-English speaker? "Americanized"/"exotic" alien? One can envision circumstances in which each of these distinctions would be relevant to a legitimate governmental purpose. But they are neither equivalent nor interchangeable.

In the past, differential treatment of aliens rested primarily on two foundations. Sometimes it was rooted in simple racism or xenophobia,[61] and in such cases alienage was indeed a suspect classification. In other cases, discriminatory treatment was based on the belief that aliens are—perhaps by definition—not members of the political community, and are therefore ineligible for certain benefits or activities within that community.[62] But there has been little reason, until very recently, to doubt that aliens belong to the economic or the social community; or that, with a few exceptions, they may participate in the same range of activities as full citizens do.[63] We are beginning to test the limits of this view.

The doctrines of equal protection provide only the bare outlines within which to reason about the standing of aliens in contemporary American society. To settle these issues in a more systematic way, if that is possible, would require answers to the deepest questions one can raise regarding the nature of the social community, the criteria for belonging, and the moral ties that bind members to each other and to those outside. Short of answers to these questions, we will probably have to muddle through, one case at a time.

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61. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

62. *See, e.g.*, Folie v. Connelie, 435 U.S. 291 (1978); Sugarman v. Dougall, 413 U.S. 634 (1973).

63. But the idea that aliens might be excluded from the economic community is not altogether new. At one time, the Court held that states might have a "special public interest" in regulating a variety of economic activities to the detriment of aliens. To conserve domestic resources, for example, a state could limit ownership or use to citizens. *See, e.g.*, Terrace v. Thompson, 263 U.S. 197 (1923); Heim v. McCall, 239 U.S. 175 (1915). In Oyama v. California, 332 U.S. 633 (1948), and Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), however, the Court retreated from this view: a state's interest in, for example, conserving fish in coastal waters was found inadequate to prevent "lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living." *Id.* at 418-19. It is plausible that the earlier exclusions were based on racist or xenophobic grounds. Today, however, more respectable reasons may support discrimination against aliens—though obnoxious views are often lurking just beneath the surface.