Federalism and Undocumented Immigration

Federalism can be an important analytical tool available to courts in upholding the individual rights of undocumented aliens. The complexity of the socio-economic and political context of immigration has made Congressional attempts to regulate the field difficult. In the absence of a clear legislative mandate, the courts have played an active role in reviewing state laws and policies. (Judicial concern for federalism questions has often been seen as mutually exclusive with equal protection values when applied to laws regarding the undocumented.) Recent decisions have focused on either pre-emption or equal protection criteria for reviewing state legislation, but not both. The model for judicial review proposed in this paper permits courts to balance state autonomy values with anti-discrimination protections in a step-by-step procedure for analyzing state treatment of the undocumented. Through the process, the rights of undocumented aliens will be safeguarded to the fullest extent possible.

To what extent should courts take federalism concerns into account when reviewing state legislation and policies regarding undocumented aliens.1 The recent U.S. Supreme Court decision of Plyler v. Doe applied equal protection analysis to strike down a state law discriminating against undocumented alien children, but did not resolve the pre-emption issues raised in the lower courts and in previous cases.2 In skirting the issue of federalism, the Plyler court followed a line of analysis articulated by Professor Jesse Choper as "the federalism proposal."3 This proposal calls for judicial restraint in questions regarding the ultimate power of the federal government vis-a-vis the states, and allows for intervention only to protect individual rights.4 Similarly, recent legal scholarship on undocumented workers puts forth models of judicial review that either neglect federalism entirely or fail to directly address it.5 This essay will show that federalism questions are relevant

1. The terms "undocumented alien," "undocumented immigrant" and "undocumented worker" shall refer to individuals entering the United States without documents or inspection, in violation of the U.S. immigration laws.


4. Id.

5. Note, Immigration Policy and the Rights of Aliens, 96 Harv. L. Rev. 1286 (1983); Clarke, State Legislation Denying Subsistence Benefits to Undocumented Aliens: An Equal Protection Approach, 61 Tex. L. Rev. 859 (1983). The first of these maintains that the rights of the undocu-
to jurisprudence relating to the undocumented worker, and will propose a model that uses federalism and equal protection analysis as complementary, rather than mutually exclusive tools for protecting the rights of the undocumented.

To demonstrate the context in which this model will be applied, this Comment breaks down into four parts. Part I summarizes the results of recent empirical research demonstrating that undocumented immigration is not susceptible to uniform control by political entities. Part II examines the legislative history of federal statutes and policy on the subject and shows that there has been a lack of consistent Congressional intent to regulate the undocumented, except in specific, limited policy areas (such as border control and restrictions on federally-funded benefits). Part III discusses court decisions reviewing state regulation of the undocumented and demonstrates that the courts have allowed states a certain latitude to sanction employers of undocumented aliens, and to provide some social services, while still intervening to prevent discrimination. Finally, Part IV sets out a step-by-step model for judicial review of state action regulating the undocumented. This model shows how federalism analysis can complement a concern for individual rights. The allocation of federal and state regulatory power is not only relevant, but vital to addressing issues relating to undocumented aliens’ entry into, and their work and treatment within, the United States.

I
EMPIRICAL CHARACTERISTICS OF UNDOCUMENTED IMMIGRATION

Social science research on undocumented immigration shows that undocumented immigration is an issue difficult to define, having numerous possible causes as well as effects on American society. While state and local governments demand Congressional action to restrict the entry of undocumented or to assume financial responsibility for their welfare, the flow of undocumented workers into this country may not be susceptible to uniform regulation by the federal government.

The complex causes, difficulties in enforcement, and often posi-

6. The causes of undocumented immigration are not easily isolated or susceptible to legislative influence. Some theorists posit a “push-pull” economic imbalance idea, arguing that inadequate economic opportunity “pushes” immigrants from sending countries, such as Mexico and
tive effects\(^8\) of undocumented immigration make the formation of national, uniform policies problematic, at best. Though the federal

Central American nations, and better opportunities in the United States "pull" them here. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981). A variation on this theme is the "dependency" approach, which emphasizes the symbiotic relationship between the developed and the undeveloped worlds — depending on the former's need for the latter's workers, the immigration flow increases or decreases in a cyclical manner. J. BUSTAMANTE, ESPALDAS MOJADAS: *MATERIA PRIMA PARA LA EXPANSIÓN DEL CAPITAL NORTEAMERICANO*, (México D.F. Centro de Estudios Sociológicos, El Colegio de México, 1975.) A third, and more politically focused interpretation links undocumented immigration to the interplay of political interest groups within the United States. Comment, *Interest Group Politics and United States Immigration Policy Toward Mexico*, 1 LA RAZA L.J. 76 (1983). Conflicting international interests can also play a role. Thus, some sending countries' governments, such as that of Mexico, may in fact benefit from the safety-valve effect of immigration taking pressure off their national economies. Finally, specific government programs, such as the United States Bracero Program of 1942-64, and Mexico's Border Industrialization Program since 1965, have also affected undocumented immigration. *See* W. FOGEL, *MEXICAN ILLEGAL ALIEN WORKERS IN THE UNITED STATES* 29-33 (1979). Whatever interpretation is accepted, it is apparent that undocumented immigration is a complex phenomenon, not easily reducible to single causes or susceptible to uniform control by legislative fiat.

7. Given the multiplicity of possible causes of immigration, it is not surprising that attempts by the federal government to control the undocumented entering the United States have proved inefficient. Efforts of the federal agency charged with regulating immigration, the Immigration and Naturalization Service (INS), are notoriously ineffective in preventing the undocumented from entering the U.S. In the 1970's, undocumented immigration increased considerably more rapidly than did the INS's resources to control it. D. NORTH, *ENFORCING THE IMMIGRATION LAW: A REVIEW OF THE OPTIONS* 10-18 (1980). Multi-agency enforcement efforts, involving the Drug Enforcement Agency and the U.S. Coast Guard, have also been generally ineffective. States attempting to control immigration by imposing fines and other sanctions on the employers of undocumented migrants have had hardly more success than the INS, often because such enforcement is difficult in practice and politically inexpedient. K. CALAVITA, *CALIFORNIA'S "EMPLOYER SANCTIONS": THE CASE OF THE DISAPPEARING LAW* (1982); SCHWARTZ, *Employer Sanctions Laws: The State Experience as Compared with Federal Proposals*, in CORNELIUS AND ANZALDÚA MONToya, *AMERICA'S NEW IMMIGRATION LAW: ORIGINS, RATIONALES, AND POTENTIAL CONSEQUENCES* (1983). Thus, regulation by federal and state entities is difficult, if not impossible.

8. Even if enforcement is inefficient, the overall positive effects of undocumented immigration on the U.S. economy and society may outweigh potential negative effects, so as to make control unnecessary. The relatively small number of undocumented aliens; their role in inexpensive production; and their uncompensated contributions to social service funding make them a net asset to this country. Contrary to previously inflated figures, 1980 census estimates place the number of undocumented aliens at roughly two million. There is little evidence that these immigrants take jobs away from U.S. citizens or permanent resident workers, and in many areas there is continual employer demand to fill low-skilled, low-paying positions. CORNELIUS, CHAVEZ & CASTRO, *MEXICAN IMMIGRANTS AND SOUTHERN CALIFORNIA: A SUMMARY OF CURRENT KNOWLEDGE* 8-9 (1982). In fact, the undocumented may help generate jobs for U.S. workers by maintaining industries that would otherwise move to foreign labor markets. *See generally SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRANTS POLICY AND THE NATIONAL INTEREST, FINAL REPORT* at 39-40 (1981). Nor, as has been alleged, are undocumented aliens a drain on federal, state, and local social and health services. Rather, they often pay for these services through withholding and other taxes, while being afraid to use the services for fear of deportation. *SELECT COMMISSION, supra* at 38-39. Even to the extent that net benefits from undocumented workers may be partially the result of their illegal status there is no evidence to suggest that more uniform or effective immigration law enforcement would aid U.S. workers or reduce any supposed "drain" on services.
government might effectively enforce the border to some extent, once people are inside, apprehension is nearly impossible. The problems with controlling and identifying these individuals means that ultimately they or their children become part of the American fabric and must be treated in accordance with the same constitutional norms applied to other Americans. At the point when the undocumented seeks to take out of the system the social services he/she has been subsidizing, the federal problem of control and identification becomes a state “problem” of assistance. Thus, the whole immigration question, though normally considered “federal,” in fact calls for state authority to formulate policies adapted to specific local conditions, so long as federal constitutional interests are not usurped.9

II
FEDERAL LEGISLATIVE TREATMENT

An examination of the legislative history of federal immigration statutes reveals a general silence with respect to the state role in regulating the undocumented. Congressional debates and statutes do not seem to satisfy either a strict pre-emptive intent standard or the broader “pervasive scheme” test that courts have used to determine whether Congress intended to pre-empt the field. The former test requires objective evidence of a “Congressional design” to pre-empt the field and conflict between state and federal schemes of regulation.10 The latter, broader test allows merely subjective inference of a “pervasive federal scheme,” a “dominant federal interest,” and a danger of conflict between the federal and state programs.11 Applying these two standards to the legislative history of the 1952 and 1965 versions of the Immigration and Nationality Act (INA), the benefit restrictions adopted in the 1970’s, and the recent debate over the Simpson-Mazzoli Bill results in little evidence that Congress, intentionally or inferentially, has pre-empted all issues connected to undocumented immigration.

The Immigration and Nationality Act of 1952 and its 1965 amendments demonstrated only a peripheral Congressional concern with state

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9. Issues particularly adapted to state regulation will henceforth be referred to as “quasi-immigration” issues. These include matters of employment, education, and social services.
10. This test was set forth by the U.S. Supreme Court in Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).
11. This test was stated in Pennsylvania v. Nelson, 350 U.S. 497 (1956). The strict test tends to be more protective of state interests; the broader test, of the federal sphere. For a discussion (written prior to the major cases analyzed in this essay) of how these two tests could be applied to the state employer sanctions laws, see Benke, The Doctrine of Pre-emption and the Illegal Alien: A Case for State Regulation and Uniform Pre-emption Theory, 13 San Diego L. Rev. 166 (1975). For a survey of recent developments in pre-emption law, see Note, The Pre-emption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 Colum. L. Rev. 623 (1975).
involvement in the undocumented issue, yet did not foreclose the possibility of a state role. The 1952 Act was an attempt to comprehensively revise the immigration admissions laws around the principles of reunification of families, protection of U.S. workers from the competition by foreign laborers, and the encouragement of immigration of persons with more precise skills. Little attention was paid in the Congressional debates to the undocumented. The only hint in the 1952 Congressional debates that some state participation in immigration enforcement was contemplated came with a provision allowing non-INS officials to make arrests for violation of the smuggling/harboring ban. Most other aspects of direct enforcement may be assumed to fall within the federal sphere.

In 1965, the INA was amended to provide for new quota limitations and work certification procedures. The Senate report accompanying the bill stated that the federal Department of Labor would be able to enlist the aid of State Employment Service agencies in deciding work certification questions. The debates, reports, and the INA itself failed to reveal any specific Congressional intent to exclude the states from addressing concerns associated with the undocumented. Thus, a general pre-emptive “pervasive scheme” intent may not be drawn from this record, because some provisions showed that a state role was in fact considered.

The next major bout of legislative activity in the 1970's and early 1980's also did not evidence a legislative intent to pre-empt the field, for although Congress placed greater restrictions on access to federal aid programs, no attempt was made to limit similar state aid. A 1972 amendment to the Social Security Act prohibited the issuance of social security numbers to aliens who were not permanent residents or did not have INS permission to work. Food stamps and federally-funded un-

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13. The provision states that smugglers can be arrested not only by INS officials, but by "all other officers whose duty it is to enforce criminal laws." 8 U.S.C. § 1324(c). The representative who offered the amendment stated that its purpose was "to make it possible for any law enforcement officer to make an arrest." 98 CONG. REC. 1414-15 (1952).

14. The author's reference to "direct enforcement" includes arrests for violations of the INA, such as admissions, entry without documents, or entry without inspection. "Indirect enforcement" refers to secondary means of restricting immigration, such as limiting benefits and sanctioning employers.


employment compensation programs were withdrawn, and the Omnibus Budget Reconciliation Act of 1981 excluded the undocumented from eligibility for Aid to Families with Dependent Children (AFDC), and federal housing assistance.

On the other hand, some pay-in programs, such as Workers' Compensation, disability insurance, and Social Security are today still available to the undocumented. Congress also did not prevent the states from providing their own benefits, except in federally-assisted programs such as Medical and AFDC. Thus there appears to be no Congressional intent to prohibit state benefits, quite apart from the fact that the legislative scheme does not even comprehensively remove all federal aid.

Even the most recent attempt to comprehensively revamp immigration law, the Simpson Mazzoli Bill, has not resulted in any clearer mandate as to how states should deal with the undocumented. Little Congressional attention has been given to allocating responsibility for the undocumented between federal and state spheres. Thus, it is fair to conclude that certain aspects of immigration are still considered federal domain while others are within the scope of state authority to regulate. The latter category would, of course, include all matters with respect to which Congress has not spoken.

In summary, federal legislative treatment of undocumented immigration has historically skirted the issue of state involvement. Enforcement seems to be largely a federal preserve, though some state participation is allowed in preventing the smuggling and transporting of the undocumented. Some federal benefits are prohibited, while others remain; and it is not clear how far states can go in providing

21. The Immigration Reform and Control Act of 1982, S. Res. 2222, 97th Cong., 2d Sess. (1982). In the early part of the Reagan administration, pressure from unions along with right-wing restrictionist groups built bipartisan support for tighter controls on undocumented immigrants and their employers. See Wong, The Simpson Mazzoli Bill in the Ninety-Eighth Congress, 1 La Raza L.J. 72 (1983). The bill that finally passed the Senate on May 18, 1983 included provisions giving legal permanent or temporary resident status to the undocumented in the country since 1980, imposing penalties on employers, and setting new admissions quotas. 129 CONG. REC. 68, S6970. For a complete text of the Senate bill, see id. at S6970-S6986. A similar, though more lenient bill in the House, however, ran into opposition from Hispanic and civil rights groups, on the one hand, and the Reagan administration, on the other, and did not pass by the close of the 1983 session. San Francisco Chronicle, Oct. 5, 1983, at 11. The effect of the bill, had it passed, would have been to federally pre-empt the area of employer sanctions, and to invalidate similar state legislation. Passage of the bill, if it occurs, will be a further step away from state authority over "quasi-immigration" matters, which, since the 1970's, has sometimes been more favorable to undocumented rights than federal regulation.
their own welfare programs. The only clear evidence of state immigration legislation, the so-called "Texas Proviso," has still not been cancelled by any federal action. Applying the Florida Lime strict intent test, there is no objective evidence of a "Congressional design" to preempt the immigration field, except in the admissions and direct enforcement areas. In the benefits area, nowhere has Congress prohibited state supplementation of federal action. Even applying the broader Nelson test, the hodgepodge of various federal restrictions covering only some aspects of undocumented immigration does not demonstrate a "pervasive scheme." The lack of employer sanctions legislation, and the remaining federal social welfare benefits demonstrate a failure by Congress to occupy the field. Yet federalism concerns have appeared in state legislation relating to immigration and immigrants' rights. In the absence of a clear federal mandate, it has been left to the courts to determine which areas fall within the federal scheme and which are legitimate concerns of state governments.

III
JUDICIAL REVIEW OF STATE LAWS AND POLICIES

Federal and state courts have been far more active than Congress in exploring the federalism questions raised by undocumented immigration. In a series of decisions in the 1970's and early 1980's, state and local officials were prohibited from direct enforcement of some INA provisions, state employer sanctions laws were upheld, and states were prevented from denying benefits to the undocumented. Courts have applied both pre-emption and equal protection analysis in allowing some state legislation to stand and prohibiting benefit cutoffs.

To provide a sampling of the most salient cases, three states will be surveyed: California, New Mexico, and Texas. All are border states, where the undocumented issue is particularly important in local politics, and all have seen major court decisions attempting to delineate federal and state spheres of responsibility. Analysis of these cases can show how the courts have gradually attempted to fill in the gaps left by Congress' sporadic immigration legislation.

Direct immigration enforcement, covering areas such as admissions, alien registration, and the violation of entry restrictions, has been considered by the courts as clearly within the federal domain. For example, a state statute requiring aliens to register with state authorities

22. The "Texas Proviso" exempts employers from the ban on transporting and harboring undocumented aliens. In allowing this exception to stand, the House demonstrated its reluctance to penalize farmers who depend upon cheap labor from across the border.
23. See supra note 10 and accompanying text.
24. See supra note 11 and accompanying text.
was struck down in the 1941 case of *Hines v. Davidowitz*,\(^{25}\) on the
ground of conflict with the federal Alien Registration Act of 1940.
Federal courts have also enjoined local police from detaining individuals
to discover their immigration status.\(^ {26}\) To a large extent, these limits
on state enforcement are undercut by tacit cooperation between the
INS and other law enforcement agencies.\(^ {27}\) And in some states, such as
Arizona, local police can still arrest an individual for criminal violation
of the INA if the state has a warrantless arrest statute.\(^ {28}\) In most in-
stances, however, direct enforcement is still considered to be a federal
responsibility. Indirect forms of enforcement, such as employer san-
tions and restrictions on benefits, have proved to encompass a mixture
of state and federal concerns.

\section*{A. California}

Judicial confrontation over state employer sanction laws emerged
in California in at least two cases.\(^ {29}\) The legislation at issue in these
cases was the Dixon Arnett law, which prohibited the employment of
the undocumented, and fined their employers.\(^ {30}\)

In two parallel decisions, the Dixon Arnett law was held unconsti-
tutional under a broad pre-emption standard.\(^ {31}\) In *Dolores Canning v.
Howard*, an employer of undocumented workers brought an action to
restrain the state Labor Commissioner from enforcing the law.\(^ {32}\) The
court first applied the broad *Nelson* test to argue that Congress had
completely and pervasively occupied the field of immigration, includ-
ing employment.\(^ {33}\) The court stated that it could infer Congress’ intent
to retain federal jurisdiction over the undocumented, because Congress

\begin{footnotes}
\footnote{25. 312 U.S. 52 (1941).}
Cerda v. Umatilla County, No. 8-908 (D. Ore., March 1, 1979), 13 C.C.H. 220 (July, 1979), cited in
*Lopez, Equal Protection for Undocumented Aliens*, 5 CHICANO L. REV. 13, 43 n.74 (1981).}
\footnote{27. *Carter, Santa Fe Railroad Police and Illegal Aliens*, 14 J. CAL. LAW ENF. 190 (1980).}
\footnote{28. *Gonzales v. City of Peoria*, 772 F.2d 468 (9th Cir. 1983).}
\footnote{30. *CAL. LAB. CODE* § 2805 (West 1982). The bill’s sponsor was Republican Assemblyman
Dixon Arnett.}
\footnote{31. *Dolores Canning* and *De Canas* applied to a narrow concept of pre-emption and limited
the federal sphere. They were decided in a context of public agitation over the undocumented
alien issue. In the 1960’s, an unofficial state government policy supporting liberal immigration
with Mexico had responded to pressure from agribusiness and a growing political consciousness
within the Chicano community. Yet with the recession of the early 1970’s, the state legislature
scapegoated undocumented workers for rising unemployment, a ploy to which sectors of organ-
ized labor contributed. K. Calavita, *supra* note 7, at 19-21, 26-31; Saltzman, *Unofficial State Pol-
 icy: Open Border with Mexico*, 10 CALIF. J. 44 (1979).}
\footnote{32. 40 Cal. App. 3d 676, 115 Cal. Rptr. 435 (1974).}
\footnote{33. *Id.* at 680-82, 115 Cal. Rptr. at 438-39.}
\end{footnotes}
was "quite aware of the illegal alien worker when it passed the INA." 34
Finally, the court suggested that the law was overbroad and could actually conflict with federal action, because it prohibited the employment of all persons "not entitled to lawful residence," while some persons in this category were actually permitted to work by the INS. 35 The court ignored the fact that state administrative regulations limited the language "not entitled to lawful residence" to exclude those with temporary work permits from the definition, 36 and enjoined the law's enforcement.

In a parallel case, De Canas v. Bica, 37 farmworkers suing for damages, allegedly because their jobs were illegally replaced by undocumented workers, were denied relief on similar grounds. The court in De Canas relied on the Texas Proviso as evidence that Congress did not intend to prohibit employers from hiring the undocumented. 38 By striking down the Dixon Arnett law in these cases under the broad Nelson pre-emption test, the California courts undermined state regulation of the undocumented.

The De Canas case was reversed by the U.S. Supreme Court, in a narrow view of pre-emption, which was diametrically opposed to that of the California Court of Appeal. 39 Justice Brennan, writing for an 8-0 majority, first disputed the lower courts' assumption that the federal immigration power included the regulation of employment. "The Court has never held," he wrote, "that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised." 40 Employment restrictions might have, Brennan argued, only "a speculative and indirect" effect on immigration. 41

The Supreme Court then applied the strict pre-emptive intent standard of Florida Lime. 42 It held that the employment relationship is traditionally within the purview of state police power, and that there is no express Congressional intent in the INA to limit states from regulating it. 43 The court noted that Texas Proviso provides an example of Congress' intention that states step in where Congress has not acted. 44 Finally, the Court noted the potential interference of the Dixon Arnett

34. Id. at 683, 115 Cal. Rptr. at 440.
35. Id. at 689, 115 Cal. Rptr. at 444.
36. CAL. ADMIN. CODE § 16209 (West 1982).
38. Id. at 980, 115 Cal. Rptr. at 446.
40. Id. at 355.
41. Id. at 355-56.
42. See supra note 10.
43. Id. at 356-57.
44. Id. at 360-61.
law with INS temporary work permits, but said that such a conflict would have to be reinterpreted on remand in the light of the California administrative regulation defining "lawful residence."\textsuperscript{45} The significance of \textit{De Canas} was that the Supreme Court for the first time discussed the respective responsibilities of the states and the federal government in the undocumented immigration context.

The \textit{De Canas} decision, though an important judicial statement as to the relative federal and state authority over the undocumented, was flawed in several respects. The Court ignored possible inconsistencies with other federal statutes, such as the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA), that had been held to protect undocumented workers in the employment relationship.\textsuperscript{46} Further, though the law was held not pre-empted, the question whether its effect on the undocumented might be an equal protection violation was never reached. Both of these issues were left unresolved in the years following the decision because, despite the apparent constitutionality of employer sanctions, the laws in California and other states were almost never enforced.\textsuperscript{47} \textit{De Canas} nevertheless is an interesting case study on federalism and the undocumented because at least some issues involving the undocumented have been explicitly removed from the federal immigration scheme.

Other cases involving undocumented immigrants, though not directly addressing questions of federalism, have nevertheless treated benefit issues as falling outside the federal immigration scheme. Statutes restricting benefits were not pre-empted, and the state agencies ordered to provide the benefits were compelled to do so on statutory construction rather than pre-emption grounds. In general, the limited pre-emption concept applied in \textit{De Canas} has tended to govern.

In \textit{Alonso v. State},\textsuperscript{48} an appeals court denied undocumented workers the right to state unemployment benefits, arguing that they were not

\textsuperscript{45} \textit{Id.} at 364.


\textsuperscript{47} As of 1980, only one of the eleven states with employer sanctions laws had enforced its measure. Kansas imposed one $250 fine. The reasons for nonenforcement are various, including bureaucratic discretion, expense, and political controversy. \textit{See} U.S. \textit{GENERAL ACCOUNTING OFFICE, ILLEGAL ALIENS: ESTIMATING THEIR IMPACT ON THE UNITED STATES} 45-49 (1980).

\textsuperscript{48} 50 Cal. App. 3d 242, 123 Cal. Rptr. 536 (1975).
available for work" within the definition of the statute. The court found the law consistent with the INA, and refused to recognize any fundamental right to equal employment opportunity for the undocumented.49 However, a subsequent state appeals case, Ayala v. California Unemployment Insurance Appeals Board, held that state agencies could not deny disability benefits to undocumented workers who otherwise complied with the State Unemployment Insurance Code.50 A further case, Cabral v. State Board of Control,51 held that state agencies could not preclude an individual's recovery under the California Victim of Violent Crimes Act by requiring a showing of lawful residence in addition to the Act's mere state residence requirement.52 In general, equal protection rights, rejected in dicta in Alonso, have not been deemed to extend to undocumented aliens.

In summary, the California courts have limited their intervention in immigration matters by applying a narrow pre-emption standard to undocumented immigration issues. California courts have tended to interpret restrictions on the undocumented as falling outside the federal sphere and being susceptible to challenge only on a semantic basis. State employer sanctions and benefit legislation were allowed. Administrative policies were struck down on the limited basis of conflict with their own enabling statutes instead of on the basis of federal pre-emption. In the case of employer sanctions, state intervention did not add much to the federal scheme since the laws were not enforced. Yet, by carving out some areas of state responsibility, the California courts established that there were limits to the comprehensiveness of the federal immigration scheme. Other states provide a fuller understanding of what rights undocumented workers have when state action is not pre-empted.

B. New Mexico

The use of pre-emption analysis to protect the rights of the undocumented to medical benefits was introduced in the 1978 New Mexico case of Perez v. Health and Social Services.53 The Perez court held

49. Id.
51. 112 Cal. App. 3d 1012, 169 Cal. Rptr. 604 (1980). Though the cases in this section constitute the major decisions interpreting California statutes concerning undocumented immigration, many other such laws have yet to be judicially reviewed. For example, among the most recent of such legislation was a 1983 bill allowing foreign-born children of undocumented aliens to enter state colleges and universities as California residents. The new law makes undocumented students eligible for state financial aid and resident status if they have lived in the state at least one year. Los Angeles Times, December 1, 1983.
that state emergency health care and other state-funded benefits made available to the undocumented were not pre-empted by the federal government.

In New Mexico as in California, the state legislature had responded to the economic recession of the 1970's with an attempt to enact an employer sanctions bill. However, unlike California's Dixon Arnett law, this measure failed to pass. State agencies adopted other cost-saving measures, however, for restricting benefits. As in the California cases of Ayala and Cabral, the state appeals court in Perez struck down this form of agency lawmaking, but did so on the additional ground of non-pre-emption.

In Perez, the court construed the legislation enabling state-funded health care and applied a narrow pre-emption test. It found that an agency could not deny benefits to statutorily eligible undocumented workers. Perez involved an undocumented alien gunshot victim who applied for and had been denied emergency medical funding by the Health and Social Services Department (HSSD). The position of the HSSD was that plaintiff Ruben Perez could not be a "person" or a "state resident" under the statute without having been lawfully admitted to the United States. Furthermore, the HSSD maintained that the state law was pre-empted by the federal immigration scheme.

The state Court of Appeals struck down the HSSD action, on the ground that an undocumented alien could be a "person" and a "resident" under the statute in question. Then, reaching the pre-emption issue, the court ruled that granting benefits to undocumented aliens by a wholly state-funded medical aid system was not excluded by a need for federal immigration control. Applying a strict intent test, the court argued that the legislative history of the Special Medical Needs Act did not authorize the HSSD to cooperate with the federal government in establishing and administering the law. Rather, the court maintained that the state of New Mexico had "assumed the responsibility of financing health care for illegal aliens." Finally, touching on

54. On the ease of passage between New Mexico and the bordering Mexican state of Chihuahua, see Morgan, A Border Story, 59 New Mexico Magazine 2 (1981). On concern about the potential economic impact of the undocumented in the late 1970's, see Brayer, Medical Benefits Awarded to an Illegal Alien: Perez v. Health and Social Services, 9 N.M. L. Rev. 89, 94 (1978-79).
56. Brayer, supra note 50, at 89.
57. 91 N.M. at 336.
58. Id. at 337.
59. Id. at 336-37.
60. Id. at 337.
62. Perez, 91 N.M. at 337.
the injustice of not providing needed health care, the court stated, in dicta, that it followed from the HSSD's argument that Perez should either be shipped out of the country or left here to die.63 Such a conclusion was unacceptable to the court.

Though no independent basis for benefits was actually established, the court's narrow view of pre-emption served a social justice end. Thus Perez went beyond the semantic analysis of Ayala and Cabral by applying pre-emption analysis, and suggesting that states might have a moral obligation to provide benefits to the undocumented.

Perez showed that if judicial pre-emption analysis could serve to justify restrictions on undocumented aliens, as in De Canas, it could also serve to permit states to extend benefits. The New Mexico Court of Appeals construed the federal immigration scheme restrictively enough to allow room for state discretion in providing aid. A 1978 U.S. Justice Department memorandum substantiates this view in declaring that a state can give medical help to undocumented workers without interfering with the INA.64

Perez made no explicit determination of any independent right to benefits by the undocumented based on equal protection grounds. Furthermore, the policy effects of the decision were limited. The Special Medical Needs Act under which Perez applied for medical assistance did not provide funding for more than a fraction of the number of undocumented then eligible for it.65 Most other medical aid programs in New Mexico were partially federally funded, thus excluding all but citizens and lawful U.S. residents.66 Despite these limitations however, Perez established that states were not pre-empted from aiding the undocumented, regardless of federal immigration and benefit restrictions.

The non-pre-empted state sphere of discretion, symbolized by Perez, had mixed effects on other administrative policies regarding the undocumented. In New Mexico, state agencies were left free both to grant or deny benefits, depending upon the nature of the enabling statutes at issue. Some state programs with no residency or only state residency requirements were interpreted to be available to the undocumented. These include disease control, family services, special education, and vocational rehabilitation.67 On the other hand, the New Mexico unemployment compensation law is administered to exclude the undocumented on the same grounds upheld in California's Alonso

63. Id. at 338.
64. Memorandum from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, County Hospital Admissions Procedures as Related to Illegal Aliens (July 6, 1978), cited in Brayer, supra note 54 at 93.
65. Id. at 94-95.
66. Id. at 95.
67. Id. at 95-96.
case — “non-availability for work” in the statute’s terms. Services without any clear statutory mandate can also be denied. For example, some school districts, such as Albuquerque, report children without documents to the INS. The INS also receives sporadic reports from the Human Services Department, the agency governing state assistance programs. Lacking any independent right to benefits, the undocumented can be hurt or helped by state discretion in immigration matters.

In sum, the New Mexico courts applied a narrow pre-emption standard to allow the granting of benefits to the undocumented under state law. The emergency medical aid validated by Perez, as well as other social services with no residency, or only state residency requirements, were made available to individuals regardless of their legal status. Perez proves that non-pre-emption does not inevitably result in restrictive state laws like Dixon Arnett. However, narrow pre-emption is still a double-edged sword where the rights of undocumented aliens are concerned. Where a statute is specific enough to exclude the undocumented (as with unemployment compensation) or where no law provides a basis for broad availability, the Perez pre-emption analysis must give way to clear legislative intent. The states’ freedom from the federal immigration scheme will not guarantee a more humane policy, for deference to states has produced the Special Medical Needs Act on the one hand, and employer sanctions on the other. Though Perez hinted that broader questions of public interest were at issue, no independent ground for upholding such values was asserted. It remained for the U.S. Supreme Court to rescue the undocumented from the dubious benefit of judicial pre-emption analysis with the more solid shield of equal protection.

C. Texas

In 1978, a federal district court decision interpreting a Texas education statute overrode the pre-emption emphasis of earlier cases and established an independent basis for upholding the rights of undocumented aliens. The state law in question denied undocumented alien children access to free public schools and was definitively struck down as an equal protection violation by the U.S. Supreme Court. As in other states, an influx of migrants, an economic recession, and a rela-

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68. Smith, supra note 55 at 107.
69. Id. at 104.
70. Id. at 111.
tively permeable border generated popular opposition to liberal immigration policies. The Texas legislature responded to this popular sentiment in 1975 by amending the state education code and limiting free public schooling to U.S. citizens and lawfully-admitted aliens.

To implement the statute, the school district of Tyler, Texas charged undocumented children a yearly tuition of $1,000 beginning in 1977. In the first application of the Fourteenth Amendment's equal protection guarantee to undocumented aliens, that statute was overturned in *Doe v. Plyler*.

The various *Doe v. Plyler* opinions demonstrated a gradual substitution of equal protection analysis in place of the pre-emption focus of early decisions concerning the undocumented. In the first of the series, U.S. District Judge Wayne Justice attacked the statute on both pre-emption and equal protection grounds. Applying a broad interpretation of the federal scheme, the court reasoned that Congress did not envision that "additional burdens on illegal immigrants are to be imposed at the whim of the various states." Furthermore, the law might potentially conflict with a proposed Congressional amnesty for the undocumented.

The decision also rested on the more innovative ground of equal protection. Failing to recognize undocumented aliens as a "suspect class" or the education denied them as a "fundamental right," the court did not use the "strict scrutiny" standard reserved for racial discrimination. Rather, Justice considered that Texas had not even demonstrated a "rational basis" for the discriminatory law, this being the lowest level of Fourteenth Amendment scrutiny. He did not consider the state's arguments of cost-saving, and the burdens imposed by undocumented children, to be empirically convincing. The court distinguished *De Canas*, saying that the employer sanctions law was both in line with the federal scheme, and would have been upheld under a rational basis test. By introducing his equal protection argument alongside the pre-

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75. *Id. at* 571-72.

76. *See generally id.*

77. *Id. at* 592.

78. *Id.*

79. *Id. at* 592 n.30.

80. *Id. at* 588.
emption analysis, Justice provided two alternative means of reviewing the statute.

In the Fifth Circuit Court of Appeals, Justice's pre-emption argument was dropped and his decision affirmed on the equal protection ground alone. The Fifth Circuit applied a pre-emption analysis but found that the law was not pre-empted. According to the court, the Texas education amendment was entirely compatible with Congress' intent to restrict federal largesse from going to the undocumented. Possible conflicts were "at most illusory." However, the rational basis standard of equal protection was enough to invalidate the law. In support of its argument that the law was irrationally suited to achieve Texas' stated goal of deterring undocumented immigration, the court considered that the state's failure to adopt employer sanctions "casts serious doubt on its exclusionary motive." Like the trial court, the Fifth Circuit did not reach an application of the strict scrutiny standard, as the law was found "constitutionally infirm regardless of whether it is tested using the mere rational basis standard or some more stringent test." It remained for the U.S. Supreme Court to bypass the rational basis test for a stricter form of equal protection scrutiny, and to give even shorter shrift to pre-emption analysis.

By the time an appeal reached the U.S. Supreme Court as Plyler v. Doe in 1982, pre-emption and federalism had become unimportant in the case with its focus now being entirely on the Fourteenth Amendment. The opinion, delivered by Justice Brennan, found that the undocumented were not a suspect class and that education was not a right. Yet, the long term effect of the statute on "helpless" alien children and the accompanying detriment to society necessitated stricter scrutiny than the mere "rational basis" standard of the lower courts. The Court emphasized the children's lack of control over their situation, the permanent handicap that could result from a denial of educational opportunity, and the danger to society from the creation of an uneducated underclass. An "intermediate scrutiny" test was devised, in which the law had to further a "substantial goal of the state" in order to be constitutional. Texas, wrote Brennan, had failed to present evidence adequate to meet this burden, so the law was struck down.

The Court's only mention of pre-emption was made toward the
end of the opinion. Basically adopting the trial court's broad pre-emption analysis, Brennan considered that the state failed to show that the education code amendment was compatible with national policy.88 The Court also suggested, as had Justice, that conflict with federal law might occur.89 Ultimately, Plyler's treatment of pre-emption was an afterthought unimportant to the result reached and failed to resolve the previous debates regarding its application to the undocumented.

In the last of the three Plyler decisions striking down the Texas education amendment, the Court consummated the gradual substitution of equal protection for pre-emption. In so doing, Plyler minimized the importance of the state interest in maintaining autonomous state functions,90 which in some states, notably New Mexico, have proven to be more favorable to the undocumented than has the federal immigration scheme. Such an "either/or" approach to undocumented immigration questions present federalism and equal protection as mutually exclusive. Rather, pre-emption and equal protection are merely alternative means of reviewing a statute and do not inevitably interfere with each other.

Furthermore, even the Fourteenth Amendment analysis so important to the Court's holding was not specific as to the class of individuals protected, or the scope of state action prohibited. The rights of undocumented adults were not reached, and even the rights of children to benefits other than education were not clear. The state action trigger for intermediate scrutiny was not specified, leaving for future decisions the elaboration of what was meant by the term "substantial goal." The Court, like Congress, failed to address the jurisdictional issues. Yet, implicit in the fact that the Plyler court was reviewing a state statute, was the concession that states have the authority to enact statutes which will reach the undocumented, but which deal mainly with the police powers of the state.

The Supreme Court in Plyler downplayed the importance of pre-emption analysis in cases involving access to social services by undocumented aliens. Instead, the Court used an equal protection analysis. Following Choper's theory, the trigger for judicial intervention became the violation of individual rights.91 Thus, it became clear that if pre-

88. Id. at 2399-2400. Unlike De Canas, where those opposing the law had the burden of proving it incompatible with the federal scheme, the state here had the burden of showing it compatible. See De Canas v. Bica, 424 U.S. 351, 356-58 (1976).
89. Plyler, 102 S. Ct. at 2399-2400.
90. See notes 10-11 and accompanying text. Along with the federal and state interests protected by broad and narrow pre-emption tests, respectively, some recent cases have pointed to a state interest in preserving a separate sphere of autonomous activity. See Nat'l League of Cities v. Usery, 424 U.S. 833 (1976).
91. Choper, supra note 3, at 175-76.
emtion was to play any future role in undocumented immigration cases, it was to be one mutually exclusive of equal protection. This may have been the inevitable result of the earlier decisions surveyed above. Pre-emption turned out to be a vague concept which could not guarantee that the rights of the undocumented would not be violated. Deference to state legislation could produce positive (Perez) or negative (De Canas) results for the undocumented. By establishing an independent ground for access to state services, Plyler added greater predictability to cases involving access to social services by undocumented aliens. Yet in so doing, the decision sacrificed the state interest traditionally maintained by a pre-emption analysis. What is needed is a scheme for judicial review of state immigration laws that will incorporate these federalism concerns with the demonstrated need for full equal protection coverage.

IV
PROPOSAL FOR JUDICIAL REVIEW OF UNDOCUMENTED IMMIGRATION QUESTIONS

The historical evolution of judicial intervention in matters concerning the undocumented points up the need for a review process which considers both federalism and equal protection. In striking a balance between preserving the undocumented alien's equal protection rights and encouraging federalism analysis which may provide even greater protections in more liberal states, courts need not limit themselves to only one of these analytical tools. An effective system of judicial review of state legislation should rectify the vagueness with which pre-emption has been applied previously, and coordinate it with the Fourteenth Amendment interest asserted in Plyler. The following section proposes such a scheme.

A three-step analysis could safeguard both federalism and equal protection concerns. First, courts must ask whether the state law is arguably within the federal scheme to be potentially susceptible of being pre-empted.92 Only legislation completely peripheral to immigration concerns would allow pre-emption analysis to be bypassed.93 This broad trigger for pre-emption would protect the federal interest in regulating some immigration matters.

92. This broad trigger follows the broad pre-emption test for NLRA-related activities set out in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). Unlike the Garmon court, however, I do not assert that subject matter arguably within the federal scheme is automatically pre-empted; rather such subjects are worthy of being investigated to see if federal interests worth protecting are present.
93. Id. at 243. On this point, I follow Garmon in saying that peripheral concerns are not pre-empted.
Second, if the state law is arguably within the federal scheme under Step 1, an inquiry into legislative intent to pre-empt would take place, governed by the strict intent standard of Florida Lime. If pre-emptive intent were found, the state law would be void. This strict standard protects the state interest in regulating local matters, in the absence of clear Congressional exclusion of such regulations. Under this standard, state laws benefitting the undocumented may be saved from pre-emption. The strict standard also allows equal protection, the third step, to be reached in many cases. A broader pre-emptive intent test might too easily prevent the court from deciding issues of discrimination, even if equal protection violations were apparent.

If the law were peripheral to immigration concerns under Step 1, or not pre-empted under Step 2, it would be analyzed according to equal protection principles. In this way, the potential for discriminatory state laws passing through the rather open pre-emption net of Step 2 would be remedied by applying Fourteenth Amendment analysis to all legislation not pre-empted. This step completely protects the undocumenteds' anti-discrimination interest while courts do not have to wastefully analyze laws that can be pre-empted before reaching this point. The level of scrutiny would be determined by the class sought to be protected and the interest at issue.

Thus the model incorporates federalism analysis into the undocumented worker context and buttresses individual rights. Step 1 ensures that federal pre-emption concerns are aired; Step 2 preserves state interests against too broad a federal pre-emptive reach; and Step 3 protects the undocumented from potential state discrimination.

Practically, the model might result in many laws not being pre-empted, only to be struck down as equal protection violations. Despite the reduced likelihood of a finding of federal pre-emption in this system, federalism concerns are far better preserved than with the bypassing of pre-emption analysis as in Plyler. The model gives states an opportunity to provide local benefits to undocumented aliens, while imposing federal anti-discrimination protections as a floor beneath which benefits cannot be withdrawn. Maximum preservation of both federalism and equal protection concerns is thus assured.

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95. There is some reason to believe, based on Plyler, that intermediate scrutiny could be extended to all undocumented aliens, for they, like the children the Court found "blameless," were not at fault for the adverse economic and/or political conditions in their sending countries. The "underclass" argument could be applied to all undocumenteds as well. See Note, supra note 5, at 1450.
CONCLUSION

This essay has surveyed the empirical, legislative, and jurisprudential connections between federalism and undocumented immigration, and has proposed a model procedure for the incorporation of these issues into judicial review of state legislation. Past problems in adjudicating questions of complex factual background, vague legislative intent, and murky applications of pre-emption can be resolved by adopting a scheme of judicial review structured to address these areas and protect the rights of the undocumented. Responsibility for the undocumented can be allocated between federal and state governments by testing the desired state action, first against the federal scheme, and then against anti-discrimination principles.

In Part I of this paper we saw that the proposed legislative “solutions” to immigration may not be feasible, given the practical difficulties in restraining immigration, the political problems in forming coalitions to take such action, and the fact that such measures may not even be necessary given the economic contributions of undocumented workers. Since courts must make sense of Congress’ shifting intent in deciding cases before them, it is important to have some standard by which state legislation can be judged in the interim.

Federalism is relevant to this review process and important in preserving the rights of undocumented immigrants because some states have opted to give the undocumented as much protection as they do their own citizens. In states where this has not been the case, due consideration to Fourteenth Amendment values as provided by the proposed model will ensure justice. As long as federalism is balanced with the Fourteenth Amendment, independent federal and state spheres can be preserved while the undocumented are still included within the ambit of equal protection.