STATE OBLIGATIONS, STATE INTERESTS

AND

UNDOCUMENTED MEXICAN IMMIGRATION

Monograph 84-8

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Undocumented 1/ Mexicans in the United States constitute a disquieting reality for many persons in Mexico and the United States. They are not supposed to be there, but they are. As we will argue below, that presence is likely to expand in the future. Regardless of whether the United States adopts policies to contain that expansion or diminish the presence of undocumented Mexicans, it is still very likely that they will continue to be a fact of life for years, and perhaps decades to come.

The question of what rights these persons have in the United States touches profound moral and legal issues, controversial matters of public policy, and will test the will of people and institutions responding to it. Emblematic of this is the 1982 U.S. Supreme Court decision, Plyler v. Doe, 2/ which struck down a Texas law (Section 21.031) that would have barred undocumented children from public schools or, its functional equivalent, would have required them to pay tuition. The situation that gave rise to this case is a harbinger of future events, where the United States, 3/ as a society and a government, will have to face complex moral and legal questions regarding the membership rights of undocumented migrants present in the United States.

This paper is an exploratory normative inquiry. The Supreme Court case Plyler v. Doe is a point of departure for this analysis; some of its implications are discussed here. Ultimately, however, I am concerned with broader normative questions: What fundamental societal interests are affected by
the presence of undocumented Mexicans in the U.S., and how are they so affected? More specifically, what kinds of moral and legal obligations—if any—does the U.S. have toward those migrants. 4/ From a review of past cases, what implications can we draw regarding the nature and extent of such obligations? What follows is an attempt to structure these questions in normative terms and to offer tentative answers. In so doing, this paper will discuss several court decisions regarding the rights of undocumented migrants. It is written, however, from the vantage point of a nonlawyer who is interested in connecting legal questions with broader public policy issues.

Before considering these issues, the paper first addresses a relevant empirical question: Why is it likely that undocumented migration will continue for some time into the future?

CURRENT TRENDS IN MEXICAN-U.S. MIGRATION

It might appear easy to assert boldly that the undocumented Mexican population in the United States is growing by leaps and bounds. While such assertions are common in the on-going debate over U.S. immigration policy, the available evidence points to a somewhat different picture: a population that has grown relatively slowly, by somewhat less than 100,000 per year, but steadily during the past decade or so. 5/ It is the latter point—steady growth—that I want to stress here. It means that of the approximately 2.1 million undocumented persons counted in the 1980 U.S. census, more than half—1.1 million—were Mexicans. 6/
(One should add that an additional 600,000 Mexican undocumented migratory workers were estimated to be present in the U.S. at the time of the 1980 census, but who, because they do not have habitual residence in the U.S. were excluded from the census count.)

These numbers may strike some as low, given that various mass media publications suggest numbers in the range of 6 million, and sometimes the equally ingenious range of 4 to 12 million. Such numbers, though unquestionably exaggerated, have become conventional wisdom. They came to be accepted as true for two principal reasons: the Immigration and Naturalization Service (INS) "locales" (generally understood to mean "apprehends" and "expels") more than one million undocumented aliens a year, based largely on these large numbers of expulsions, many observers have assumed that many millions of Mexicans are in the United States.

The INS data on deportable aliens located is worth discussing briefly. In fiscal year 1984, according to unpublished data, the Border Patrol located 1,138,566 deportable aliens—1,102,583 of them Mexicans—and the Investigations Branch (which conducts deportation raids in the interior) located 102,923—66,178 of them Mexicans. Although the Border Patrol apprehends almost 100,000 deportable aliens annually in areas away from the border and from highway checkpoints, the relatively small number of aliens caught by the Investigations Branch is suggestive of the problem of interpreting INS data on deportable aliens located. The large numbers of deportable aliens located have nothing to do
with the size of the undocumented population in the country; rather, they are indicative of the concentration of INS police resources on the U.S.-Mexico border and the relatively large traffic of Mexicans who enter illegally into the United States, the vast majority of whom return to Mexico—voluntarily, undetected by INS, or as expellees—within a period of weeks or months.

The best empirical evidence that we have, therefore, indicates that the size and growth of the undocumented Mexican population in the United States is smaller than commonly assumed. Nevertheless, we should not lose sight of the fact that despite concerted INS action to prevent illegal entries and remove deportable aliens from the interior, this population has grown significantly over the past decade. Thus, if the trends of the 1970s are any indication of what we may expect in the 1980s, it is evident that this population is still growing and is likely to continue to grow for some time into the future.

In this context, it is appropriate to state that, even though it is difficult to predict what future trends may be, it seems clear that what I will call "migration pressures", both in the places of origin of the migrants and in their destination, are likely to continue and probably grow in the years ahead. Migration pressures at home are easy to understand in an intuitive sense but more difficult to demonstrate with the construction of theoretical and empirical models. Clearly, undocumented Mexicans migrate for economic reasons. It is
generally easy to connect this statement with another obvious empirical observation: unemployment and underemployment levels in Mexico are high, income levels are low, and thus the United States offers considerable employment and income opportunities to potential migrants. However, the connection between micro-level motivations and macro-level conditions is not simple and, indeed, available evidence presents patterns contrary to commonly-held assumptions. 11/

Even so, it should not be forgotten that with the exception of migrants that leave in order to accompany family members or other relatives, economic considerations are the principal motivation for entering the United States illegally and finding a job. And the possibilities that the conditions giving rise to these motivations will change are virtually zero. Mexico’s economic growth, even with continued emigration, must accommodate a labor force growth of 3.6-4% per annum between now and the year 2000; in recent years, after the petroleum bust of 1981 and the debt crisis that has plagued the country since then, the economy has fluctuated between contraction (1983), moderate rates of growth (1984) and stagnation (1985). Domestic employment opportunities in industry and urban services, and the possibilities of growth in peasant agriculture, will be severely limited in the years ahead. International resources to change this situation do not appear to be any more forthcoming. Even export markets for major Mexican products seem to be closing. 12/

"Migration pressures" in the place of destination most
clearly manifest themselves in relative shortages in unskilled labor, shortages which are likely to become acute in the years ahead. 12/ It is admittedly hazardous to attach specific numbers to such a prognosis, in part because the economy may respond in many different ways, only one of which is increasing a demand for labor. But the labor market trends—and the growth of undocumented migration—during the last two decades are suggestive. Undocumented Mexican workers, who used to be virtually segregated in agricultural labor, can now be found in a wide range of industries and services. Moreover, there is incontrovertible evidence that many of these industries and activities depend in important ways upon the availability of such labor. 14/ Whether one likes it or not, it is clear that in some parts of the country and for some activities, such workers have become sufficiently important that employers will resist attempts on the part of the government to take them away. 15/

Finally, one may note that the politics of immigration, despite the rhetoric, is not likely to result in a reduction of the number of Mexican migrants entering the United States—although it may result in a change in their immigration status. This conclusion is supported by two different arguments.

One is that the centerpiece of current legislative proposals to reduce undocumented migration—employer sanctions—is not likely to have the effects intended for it (and will, on the other hand, have unintended effects). Employer sanctions is basically a measure which seeks to reduce labor demand by
providing an employer with a disincentive for hiring undocumented workers. One can cite several flaws in the design of past proposals: exceptions created for employers that have four and fewer workers, the establishment of means of identification (to determine which employees are authorized to work) which allow for the possibility that undocumented workers can legally obtain such identification; means of identification established which are relatively easy to forge and which will stimulate an already extensive traffic in documents; and the refusal to create the additional judicial positions within the Immigration and Naturalization Service (INS) which will be required if prosecutions are to take place. Other pertinent arguments can be raised to suggest, not that the objective sought by employer sanctions is impossible, but that achieving it is a cost the U.S. does not appear willing to absorb. 16/

If one takes the employer sanctions proposal seriously, one is led inevitably to a conclusion whose implications have yet to be measured: its adoption would signify the first time that Congressional power to regulate immigration was used in a manner which regulated important aspects of the daily lives of citizens (their employment) on a massive scale. Under present circumstances, it is hard to visualize, despite the immigration politics rhetoric, a genuine popular acceptance of so massive an intrusion of the federal government in society.

The first argument quickly brings us to the second. A close examination of the legislative process in immigration reform
during the past few years does not reveal the political will to substantially reduce undocumented migration. The bills have been amended to such an extent that agricultural employers have essentially carved out important exceptions and concessions for themselves, principally in the availability, on favorable terms, of nonimmigrant workers such as those admitted under Section 101 (15) (H) (ii) of the Immigration and Nationality Act.

The most likely scenarios, then, are not an abrupt and substantial reduction in the number of undocumented Mexicans in the United States. Instead, we can expect a combination of possibilities, starting with the current paralysis in the legislation of employer sanctions—which dates back to the early 1970s—and including the possibility of the adoption of a symbolic law which promises to do much but which accomplishes little. 17/ Less likely, though not impossible, is somewhat more forceful action which will either provoke strong resistance by employers and a result in a return to the status quo, or the legislation alternative channels of temporary migration in order to compensate them for the costs that such action might impose upon them.

Finally, one may note that the only sustained interruption in the flow of Mexican labor to the United States occurred during the Great Depression, largely because demand for its services dried up. 18/ No major administrative action designed to substantially reduce undocumented migration without substituting them with legal workers has been successful. Even the deportation
campaign of 1954 known as Operation Wetback was, contrary to popular belief, principally a mechanism by which undocumented workers were substituted by legally-admitted contract laborers. 12/

To conclude, then, past trends, current pressures, and the small likelihood that the United States will act in a manner which will result in a sustained decrease in the migration of undocumented migrants all point in the same direction: For the foreseeable future, undocumented migration from Mexico will be a mass phenomenon. Should the U.S. act to substitute this flow with one of legally-admitted temporary migrants, the immigration status will change, but if history serves as a guide, the problems involved in recognizing and defending their rights will not go away. Thus, the normative issues I explore below can be expected to become more, not less important with time.

THE SOCIETAL/STATE OBLIGATION: A TENTATIVE FRAMEWORK

My purpose here is to begin by inquiring into the nature of the rights of undocumented Mexicans vis-a-vis the United States government and/or U.S. society. As James Nickel so clearly defines the term, "a right is a high-priority prescription of a freedom or benefit that generates definite obligations for parties other than the rightholder." 20/ This squares with the usual legal notion that a right is judicially enforceable. Our inquiry then, regards the nature of U.S. societal and/or governmental obligations towards these persons. 21/
The answers that I arrive at are likely to be controversial, for two principal reasons. First, the very presence of that population in U.S. territory is controversial. From this it follows that a first dimension of inquiry should be how some U.S. obligations change with respect to the citizenship, immigration status, and the territorial location of the individuals we are talking about. Second, our contemporary world has witnessed an expansion in the kinds of rights asserted by different groups and individuals with respect to government and society. As a result, it has become increasingly apparent that some claims—even for citizens—are more fundamental than others. It should not surprise us that very fundamental rights, such as voting and participating in the political community, and claims which only recently have come to be viewed as "rights", such as "welfare rights", have yet to be asserted as rights for undocumented migrants. Thus, a second dimension of inquiry should distinguish between different kinds of claims.

First Line of Inquiry: The Sovereign Obligation

With respect to the first dimension, it may be useful to state the obvious. Governments and societies make formal distinctions between the different human beings in this world in that they assume important obligations toward some groups and hardly any obligations toward others. "Membership" or "citizenship" are the operative terms here. The scope of obligations to "citizens" or "members" is ordinarily thought to be much greater than to "noncitizens" or "nonmembers". Aliens in the United States, by
definition are not "citizens", but they are present in the
territory of the country and by virtue of that presence they have
a range of complex relationships with the society and government
of the United States. Thus, for some purposes, these persons are
"members".

Hence we should look more closely at the issue of membership
and territorial location at a general level. At one extreme we
have the obligations of the United States toward its citizens
within its territory; at the other extreme we have the
obligations of the government toward foreigners outside its
territory. According to the Constitution and laws of the United
States, the former is much greater than the latter. (The
obligations of the U.S. government to its citizens outside its
territory are not a subject of discussion here.) It is
reasonable, therefore, to assert as a point of departure that the
scope of the legal rights that aliens—documented or no—have in
the United States is somewhere between these two extremes.

Clearly, aliens outside the United States have few rights. In
U.S. vs. Shaugnessy ex rel Mezei 22/ the United States Supreme
Court ruled that a legally-admitted alien who left the country
and attempted to return could be denied permission to enter
without a hearing. Mr. Mezei resisted the denial of U.S.
immigration authorities by claiming that his due process rights
were being violated; the court essentially ruled that an alien
who has not entered the United States is not a person within the
meaning of the Constitution.
Landon v. Plasencia 23/ made a qualification on this decision, although not one which alters the basic thrust of our argument. This case arose from an appeal by an alien who was denied permission to enter and was given a summary exclusion hearing—on such a short notice that it was impossible for the person to get her attorney to be present. The Supreme Court ruled that this procedure did in fact violate due process of law. If Mazzei stood for the proposition that the U.S. government does not have to give aliens who have not entered a hearing in an immigration context, Landon stands for the proposition that that hearing, once provided, must be meaningful.

In the same vein, I may point to two considerations of a specific territorial nature which serve to underscore my argument. The first is that aliens within the U.S. and outside the U.S. receive significantly different treatment, in a normative sense, in immigration proceedings. Those inside the U.S. whose expulsion is sought by the government have a constitutional right to a deportation hearing 24/ and, in that hearing, certain important constitutional rights, most of them arising from the due process clause of the Fifth Amendment. 25/ Aliens outside the United States seeking to enter at a port of entry merely have a conditional statutory right to an exclusion hearing. 26/ The scope of the rights that an alien has in such a hearing, even taking Landon into account, are much more limited than those mentioned regarding deportation proceedings. The second consideration is that where an individual is
located--inside or outside the U.S.--matters in claims of U.S. citizenship. A person claiming U.S. citizenship and seeking entry into the United States has the burden of proof of establishing that claim; 27/ within the United States, it is the government who has the burden of proof of establishing its claim that an individual is an alien and is deportable. 28/

Together, the constitutional and statutory norms previously mentioned suggest that that foreigners outside the territory of the United States--even those previously admitted legally into the country--have virtually no or very weak constitutional rights that the U.S. government might abridge. They can claim few constitutional rights lawfully in a U.S. court. 29/ This should not be terribly surprising given that traditional conceptions of state sovereignty suggest that domestic law is supreme within its territory. As a derivative result of the territorial nature of sovereign obligations, as recognized by U.S. courts, such obligations to foreigners outside the United States are severely limited.

Is the territorial basis upon which the reach of domestic law and constitutional protections rest sufficient to assure the legal rights of undocumented aliens? As we shall see below 30/ the answer that courts have generally given to this question is yes. But the answer is not obvious, for at least two reasons. One is that so far, it is difficult to find a coherent normative theory which establishes the connection between this territorial presence and the notion that certain collective obligations on
the part of the U.S. toward undocumented migrants exist. Clearly there is some commitment to the notion that these migrants have some rights, but why they have them is not always made explicit, which makes it more difficult to suggest where those rights may begin and where they may end. The other reason is that predominant U.S. opinion—which, after all, does influence the general trend of Supreme Court decisions (and of its dissents)—is hostile to the presence of undocumented migrants and to notions that they have certain rights.

The "grumblings" that Plyler set off in the State of Texas are one indicator of predominant opinion in the U.S. with respect to what the rights of undocumented migrants should be. 31/ Another is the view expressed in the testimony of a Texas State official responsible for the administration of Section 21.031 in the schools. His views reflect a more or less commonsensical notion that undocumented migrants alienate whatever rights they may have upon entering illegally into the United States:

Q. Do you recall making this statement in your Dallas testimony..."In my office alone, not in my attendance office when they come to my office, they really, you know, they're really going all the way...and I've got to get really obnoxious to them and tell them that I give them two minutes to get out or I'm going to call the border patrol because they come demanding, and I don't think they have any
right to demand anything because they shouldn't be in this country. That's the law of this country. They have no business here."

Do you recall making that statement?

A. Certainly.

Q. Do you also recall making the following statement..."My interview with them has been short and simple. I give them five minutes to leave my office or I will call the authorities because they're breaking the law, and I am a firm believer in the law..."

A. Sure.

Q. Is that what you call procedural due process?

A. Well, I don't see why I have to give anybody procedural due process who has no right [to be here]... 32/

The above discussion, whatever it reveals about the witness' ignorance of the law that he was executing, rests upon two related but distinct normative assumptions. The first is that persons who have allegedly entered the country illegally have waived their rights to due process. Put in other terms, due
process rights are alienable—at least for foreigners. The second is that undocumented migrants are not to be considered on the par with citizens or legal immigrants—at least when it comes to deciding who shall get a free public education.

It was Willmore Kendall who was supposed to have said that "running men out of town on a rail is at least as much an American tradition of declaring unalienable rights." This underscores the tension within U.S. society—and every other society I know of—between norms as aspirations and the realities of prejudice and public intolerance. But there is more to the statement than this. Particularly applicable to my concern about the normative basis (or lack thereof) for the assertion of rights on the part of undocumented migrants is the definition of community membership. Who shall be run out of town on a rail, and to whom will a declaration of inalienable rights apply?

The truth is that the United States has a long history of ambivalence toward immigration. Since the establishment of the Union, it has welcomed outsiders for various reasons, mostly economic, which suggest that for much of this history, immigration flows have been congruent with the objective interests of dominant groups within the United States. In the national discourse, views which welcomed foreigners have been expressed in ways which suggest that such flows also have been congruent with subjective interests: providing refuge for persons persecuted abroad; being a good host; promoting a pluralist national culture.
There is, however, also a dark side to the United States immigration experience. Since about mid-nineteenth century there has been an established practice—indeed, a tradition—of societal hostility and antipathy toward immigrants, be they Irish, German, Chinese, Jewish, Italian, or Mexican. This history of indiscriminate hostility toward newcomers is too well known to require further comment here. Suffice it to say that xenophobia, which is by no means an attitude unique to the United States, has coexisted with the recognition that immigrant labor was an important ingredient to the national economy and with a discourse which welcomed foreigners for other reasons. 24/

Immigration, therefore, has forced a tug of war in the American conscience. Throughout history, immigration has always looked better when viewed as part of the nation's history—as a process, or even as an event, that occurred in the past. For many decades, the country has yielded to the impulse of expressing pride in its immigrant origins and applauding itself for having admitted immigrants in the past; yet, at any given moment, it has also pointed to present limitations of a social and economic nature to justify state actions designed to curb future immigration and measures to limit the rights of aliens under law: the right to hunt, fish, own property, bear arms, engage in certain licensed occupations, work for state, local and federal government, and receive various forms of public largesse. 25/

Undocumented immigrants are not very different from
documented immigrants in this respect. They are invited into the United States, not by society or by the government as a whole, but by employers. As Alejandro Portes observes

The image of a powerful and technologically advanced country being overwhelmed by the poor of backward lands was so ludicrous that it prompted and inevitable conclusion: the United States did not want to stop the surreptitious flow. An alternative way of saying the same thing was that, while some officials and government agencies wanted to put an end to clandestine immigration, they could not do so because of forces inside and outside government. 36/

Such invitation may or may not provide a moral claim on the part of undocumented immigrants regarding their continued presence in the United States. The point here is that, as in the case of legal immigrants, U.S. society is of two minds regarding their presence and largely of one mind regarding their rights as members of society—it wants to restrict them.

The first dimension of this inquiry, then, supports a number of propositions. In the application and interpretation of its laws, the United States makes distinctions between citizens and noncitizens and between foreigners within and outside its territory. The rights of foreigners arise principally from their presence in U.S. territory; i.e., from a sovereign application of
constitutional law. However, the presence of aliens—documented or no—engenders uneasiness in the United States (as in most countries) and, historically, it has responded by attempting to limit those rights. By the same token, the judiciary has acted to strike down or qualify those limitations and have expanded them in others. That has not made aliens, legal or otherwise, identical to citizens before the law. But although some inequalities and distinctions have been found to be justifiable (which are discussed below), the rights of foreigners within the country are quite superior to those of foreigners outside of the territorial limits of the country. This is essentially a restatement of my point of departure: undocumented aliens in the United States have significant rights recognized by U.S. courts, but the full scope of those rights is narrower than that of U.S. citizens located within the United States.

Second Line of Inquiry: The Sovereign Prerogative

My second dimension of inquiry is necessary in order to determine in a more precise fashion just where the scope of those rights lies by comparison to those of U.S. citizens. An analysis of major U.S. court decisions on the rights of aliens in the United States suggests that it is appropriate to make citizen/alien distinctions with respect to certain kinds of claims and not others. A rough approximation of these distinctions could be: a) constitutionally-protected rights; b) statutory protections; and c) a right to a service provided by the federal or State government. Generally speaking, the courts have held that those rights afforded to citizens under the
Constitution (with the exceptions of voting and holding office) are largely protected for aliens, and undocumented aliens as well. Rights established in legislation for persons within the United States are, to a somewhat lesser extent, said to be applicable for aliens as well. Services provided by state and federal governments are more controversial. *Flyer v. Doe* is an example of an instance where an important service—public education—provided by a state government was held to be applicable for undocumented aliens as well; the "right" that such persons have to services is not so clear.

These distinctions made are not just on the basis of the kind of right, but also the kind of rightholder. Introducing the issue to be decided in *Mathews v. Diaz*, the Court said:

...the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for all aliens. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country; Congress may decide that as the alien's tie grows
stronger, so does the strength of his claim to an equal share of that munificence. 38/

**Constitutionally-protected Rights**

There are several Supreme Court decisions which support the notion that the U.S. federal government and the state governments as well are constitutionally-required to respect and uphold the constitutional rights of aliens in terms identical to their obligations to citizens. The earliest case on this point, *Wong Wing v. United States* 39/ had to do with a right to due process of law under the Fifth Amendment. From the opinion, it can be deduced that aliens are like citizens from the standpoint of the Bill of Rights. *Valenzuela Bernal v. United States* 40/ expands on this. The issue raised in this case was whether through deportation of witnesses in a criminal case against an undocumented alien the U.S. government had violated the Sixth Amendment rights of the accused to confront witnesses. The Court ruled that in this particular fact situation a violation did not occur, but it never doubted for a moment that an undocumented alien has Sixth Amendment rights.

The moral obligations of the United States government extend beyond the proscription of violating such rights and includes upholding them. In a case where alien workers had been employed with no pay under slave labor conditions, the government prosecuted these employers. It is important to note that the courts accepted this prosecutorial discretion; their ruling indicates that undocumented migrants are persons within the
meaning of the Thirteenth Amendment. 41/

In another early case, Vick Wo v. Hopkins, 42/ the Supreme Court established that aliens have a right to equal protection under the Fourteenth Amendment. In this case, the Court struck down a San Francisco ordinance which prescribed licensing for laundries constructed in a certain manner—hardly a statute which would appear to discriminate on its face. The city official named in the lawsuit administered the statute, however, in a manner that made it virtually impossible for Chinese laundry operators to get licensed. Thus, the Court was willing to look behind the text of the law, to its administration, in order to rule on its constitutionality.

In Traux v. Raich, 43/ the Court established that permanent resident aliens have a right to work, if otherwise eligible. In Sugarman v. Douglall, 44/ the Court established that States cannot exclude aliens from all civil service jobs. Thus, the access of legal immigrants to jobs is not significantly different from citizens.

The implications of these cases are several. First, legally-admitted immigrants are clearly persons within the meaning of the Constitution. Second, both documented and undocumented immigrants are entitled to the full panoply of constitutional protections afforded to citizens in criminal cases, including, but not limited to, due process. Finally, aliens are persons within the Equal Protection Clause of the Fourteenth Amendment.
Statutorily-protected Rights

In **Sure-Tan v. NLRA**, the U.S. Supreme Court upheld a National Labor Relations Board decision that undocumented aliens were persons within the meaning of the National Labor Relations Act. Thus, even though they are unauthorized to work under immigration laws, once employed, they have the same labor rights that other workers do.

The implications of this case are as far-reaching as they are ironic. From a public policy standpoint, what seems clear is that neither the NLRA nor the Supreme Court wanted to sanction unfair labor practices and exploitation against a vulnerable group, even though that same group, under a different set of laws, could be expelled from the country. From the point of view of the undocumented workers, the Court essentially held that these individuals have a recognized right to organize, hold elections, strike, and otherwise conduct business in the United States as organized workers. The recognition of such a right, of course, does not protect those workers from deportation nor, in this case, did it require the Immigration and Naturalization Service to bring back workers it had lawfully deported even though in so doing it had played into the hands of an unfair labor practice by the employer.

It is in some ways difficult to see how the Court could have ruled otherwise, with respect to the issue of coverage under the National Labor Relations Act. Had the Court held that
undocumented workers were not persons within the meaning of this labor law, it could have led to the tacit approval of a range of employer abuses against such workers which, though not uncommon in practice, are not accepted as a norm. For example, it could have implied that child labor was legal, as long as the children were undocumented. It would have also cast into doubt the legal basis for undocumented worker claims against employers for unpaid wages and mistreatment. 46/

Rights to Services: the Federal/State Distinction

American society has traditionally been sensitive to the use of services by aliens, documented or not. Early in the history of the nation's immigration laws, it specified that the government should exclude foreigners at entry that it considered "likely to become a public charge." This exclusion remains in the current Immigration and Nationality Act, and it means that aliens are not admitted, even as nonimmigrants, if they do not have substantial means of support. Keeping aliens out who are perceived to go on the public dole, and deporting aliens who happen to end up on welfare is, whether we like it or not, a national tradition.

During the Great Depression, unofficial and official pressure were placed upon Mexicans—and other foreigners—who were out of work and receiving public benefits. During the 1970s, part of the controversy regarding the presence of undocumented aliens has arisen from the allegation, initially promoted by INS spokesmen, that they cost the taxpayer "billions" each year in welfare services.
The societal preoccupation behind the limiting of such services to "members" seems to reflect two different kinds of concerns. One could be called the fear that services available to citizens and other deserving members of the community may be diluted. This "empirical" concern was accorded some weight in the decision in Mathews to permit Congressional limits upon the distribution of Medicare benefits: "An unlikely, but nevertheless possible, consequence of holding that appellees are constitutionally entitled to welfare benefits would be a further extension of similar benefits to over 440,000 Cuban parolees." 47/ Obviously this preoccupation is accompanied, implicitly or explicitly, by an assessment of the number of "nonmembers" that might dilute the stock of available public services. Another concern is based on the perception that "nonmembers", in this case undocumented migrants, do not contribute to the public coffers from which such services are funded.

The judiciary has reflected in part this societal concern. Generally speaking, the cases that have been presented can be classified according to what level of government is withholding the service from aliens and whether the aliens involved are legal immigrants or undocumented (see Figure 1).
Figure 1

Taxonomy of Government Service Providers and Immigration Status of Recipients

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<td>Undocumented Immigrant</td>
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Type I cases, which involve state discrimination against legal immigrants in the provision of services, tend to be decided in favor of the immigrant. It is here where the rights of the alien most closely approximate those of a citizen in the provision of services. Perhaps the most prominent example of this is *Graham v. Richardson*, 487 which established the right of such immigrants to food stamps if otherwise eligible. Distinctions between aliens and citizens are minor; legal immigrants are assumed to be entitled to services in a manner similar to citizens. The Court justified this position with a variation of the balancing tests between state interest and an alienage classification ruled to be "inherently suspect." Moreover, the Court noted that there is a special role for the judiciary to play here, given that aliens cannot vote nor hold public office.
and, therefore, cannot rely on the usual political process to protect their interests.

Type II cases are relatively new—indeed, *Plyler v. Doe* may be the first. Here, the decision was also in favor of the immigrants, but there are important elements in this fact situation that seemed to have made that possible: the state discrimination seemed to have little connection with the purpose of the law the service provided is very important—education—even if it was not a fundamental right, 49/ and finally, the individuals involved were innocent children.

The state/federal distinction (types I and II vs. III and IV) is very important, if one is to judge from the string of cases that have been decided over the past few years. Perhaps the most important, involving federal government withholding of a service from legal immigrants (type III) is *Mathews v. Diaz*. 50/ This decision established that Congress could deny permanent resident aliens access to Medicare based on length of residence. More importantly, however, it indicated that Congress had considerable power to restrict the rights of aliens in ways that would be unconstitutional for States to do so.

As far as I know, no type IV cases have gone up to the Supreme Court as yet. It seems fairly clear from established law that this is a weak area in which to assert rights: undocumented migrants may justifiably claim due process and statutory rights before the U.S. federal government, but their claims to federal
services are weak. An example of a policy, thus far untested in the courts, which corroborates this argument is the decision of the Congress, during the Reagan Administration, to withhold federally-funded legal services from undocumented migrants in deportation proceedings.

In Mathews, the judiciary left the door open for discrimination against aliens by making a distinction between state and federal government obligations toward aliens. This distinction is made not only for services, but in other areas, such as governmental employment. The states are prohibited from excluding aliens from all civil service jobs (Sugarman), although in other cases it has permitted certain occupations to be reserved for U.S. citizens. In Hampton v. Mow Sun Wong the judiciary made some important qualifications on what might otherwise be inferred is the federal government relationship with aliens, even though the issue discussed was not that of a right to a service but to employment. The Court began by recognizing that the federal government may require citizenship for employment in the federal service even though an identical requirement may not be enforced by a State. However, the Court added this comment:

We do not agree, however...that the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens.
We have the irony that the federal government can withhold medicare benefits from legal immigrants (Mathews) but states cannot withhold food stamps from the same individuals (Graham). It seems clear that the difference in the rulings of these two cases has little to do with the nature of the service; certainly there is little basis upon which to assert that food stamps are a more essential right than medical care. Rather, the difference is based on the federal/state government distinction. This paradox reflects an attempt on the part of the judiciary to balance two opposing sets of concerns: the importance of upholding the rights of aliens against discrimination and that of permitting the other branches of government wide latitude in the exercise of state sovereignty. 54/ As Elizabeth Hull notes, "While the Supreme Court has from time to time required that noncitizens be accorded at least minimal procedural rights, it has not once in its history invalidated federal practices on substantive grounds." 55/

By prohibiting discrimination against aliens on Fourteenth Amendment grounds, the judiciary has sought to fulfill its obligation in the first instance. By permitting the federal government to discriminate against aliens in ways that states cannot, it is deferring to the sovereign prerogative of the other branches of government to determine to a greater extent where the rights of aliens begin and where they end. The same territorial dimension that creates certain sovereign obligations—recognized by the judiciary mostly at the level of the States—is implicitly
invoked to justify certain government prerogatives—at the federal level—with respect to alien rights.

DOE v. PLYLER

In considering the background to Plyler, it seems appropriate to note that the state law which was struck down, Statute 21.031, was passed in 1975, a moment when the hysteria about the entry of undocumented Mexicans and their alleged consumption of social services was at a temporary peak.

It seems clear that the justifications provided by the State of Texas for 21.031 in later litigation can be rejected upon careful analysis. This is certainly true for the *ex post facto* justification that the State wanted to save some money—school funds spent on the education of undocumented school children. Even if the legislature did not look with skepticism at the "guestimates" of the size of the undocumented population, it must have been clear that not many "illegal aliens" in the State were to be found in the schools. Apparently, the State made no effort to ascertain the size of this population or the potential savings that would result from enacting the statute.

A second rationale for Statute 21.031 was that it was designed to reduce undocumented immigration. This rationale is specious. The vast majority of undocumented migrants are not school-aged; limiting enrollment to those few who are would not have had a perceptible effect on the size of the undocumented
population present in the State of Texas.

There is, it seems to me, a plausible alternative explanation for the passage of 21.031. One must keep in mind the context in which the law was enacted— "illegal aliens" were widely perceived to be the cause of various social and economic ills. It was a context which encouraged people to do their part to make it inhospitable for "illegal aliens". The Texas State Legislature took it upon itself to punish a group that arguably had no right to be in the United States for consuming a public good: tax-supported education. (I say "arguably" because, as was borne out in the case, the persons barred from education under the statute included both persons who would have been found to be deportable in an immigration hearing and others who would have not.) Lashing out at unpopular groups whose legitimacy within U.S. society is subject to question, unfortunately, is not alien to U.S. or Texas history. Statute 21.031 fits into this pattern.

However, that cannot be all of the explanation. I have already mentioned the State's justifications of saving money and controlling immigration. But there are at least two other reasons which might have led one to believe that the law might be upheld in the courts. First, it would not appear to be unreasonable or even bad public policy to withhold public education from a population that was subject to deportation and that soon could be expected to be expelled from the country. Second, if someone gave it any thought at all during the legislative process, they could have adopted the conventional view, supported by the ambivalence
of the courts in protecting alien rights as regards the provision of services, that they might find undocumented persons not to be "persons" within the meaning of the Fourteenth Amendment. So there are legal and technical reasons which would appear to justify 21.031, not just the political context of the 1970s.

If I return to my original schema in Figure 1 the issue may be cast in a somewhat different way. Which concern was more likely to sway the court: the immigration status of the plaintiffs (which, it would be expected, would militate against their right to any service provided with public funds) or the level of government which legislated 21.031 (which, it would be expected, would militate in favor of such a right). The end result, the striking down of 21.031 would seem to suggest that the state/federal distinction was more important to the Court than the immigration status distinction. Certainly, the Court hinted that a federal law similar to 21.031 might be considered constitutional. But, as is often the case with specific cases that arise from peculiar fact situations, there are other elements that appear to have been at least as important in the decision of the thin majority--5 to 4--in striking down the law.

The first, and most visible component in the Court's normative reasoning was that the statute penalized persons for being in a status over which they had little or no control. Put in other terms, the plaintiff children were brought into the United States illegally by their parents, and did not enter of their own volition.
This first point is worth examining closely because it represents the most outstanding failure of the Court to assert a right by undocumented migrants to services in a more general sense. To the extent that the outcome of *Flyler* rested upon the distinguishing features of the plaintiffs as minor children, the rejection of Section 21.031 was independent of the immigration status of the plaintiffs. The Court did not say: "We would have held that there was no rational basis for state discrimination even if the plaintiffs were adults or emancipated minors, and thus accountable for their disabling status." Of course, the Court did not say the precise opposite either, a fact which, though may be criticized for side-stepping the issues, is not unexpected for a judicial determination. But the Court did assert: "Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct." 54 This seems to suggest that it would be difficult to expect a court finding that the state has important obligations to undocumented migrants in the realm of state beneficence.

The statute also undermined a state interest in an educated society and in social cohesion. This particular issue rests upon an empirical assumption embraced by the Court: Many of the children affected by 21.031 would remain in the United States and become permanent members of U.S. society. In this manner, the problem posed by the statute was changed in a significant way, which has bearing on my concern about the standing of
undocumented migrants as individuals with rights in the United States. Instead of accepting the original definition of the problem—that the statute denied education to children who would eventually be deported—the Court substituted another: The State was denying an elementary education to a segment of its own society, members of which will become its future citizens. In the words of the Court:

We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests. 57/ 

Moreover, the statute appeared to have been drafted for a purpose other than that enunciated. Put in other terms, the Court did not believe the ex post facto justifications of the State of Texas for statute 21.031. Justifications are important. The whole philosophy behind equal protection analysis as applied by U.S. courts, the balancing of state interests against the social costs of discrimination, and of requiring at least a rational basis for such legislation is predicated on the assumption that de jure discrimination is serious business, and that both jurisprudence and societal values require that it be justified.

Finally, however, I must refer to a normative consideration which was mentioned in the opinion, but whose weight is difficult to assess. This is that statute 21.031 was a morally repugnant
law. Its intent to punish "illegal aliens" was evident to all. It is striking that both the majority and the dissent coincide in reacting to the statute in this manner, and that it is the dissent that expresses the point most clearly:

...it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education. I fully agree that it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language. 58/

The point is clear: the social costs of 21.031 would be high. How to justify it? Whether the State of Texas is portrayed as in a penny-pinching mood or as trying to do its bit for "regaining control of the country's borders", in moral terms the arguments do not wash.

CONCLUSION

In Plyler as in other cases, the judiciary sidestepped several important normative questions. That the Supreme Court—and lower courts—will have to face them, sooner or later, is not in doubt. Without anticipating the precise legal questions that will have to be faced, I will try to outline some of the normative questions that will have to be addressed in the controversial area of the rights of undocumented aliens to services or
beneficence provided by government agencies.

In determining whether to expand such rights or not, and how to condition them, it seems that in the future, the judiciary is likely to weigh three different sets of variables. First to be considered, of course, are state interests: The interest of the government to decide for itself who shall be admitted as a member in full standing of U.S. society; the protection of the welfare of citizens and legally-admitted aliens from dilution. Moreover, courts will also be concerned about the proper distribution of federal/state distribution of authority in the legitimate exercise of state power to promote such interests. Mathews suggests that federal sovereign rights will not be circumscribed by the judiciary in withholding beneficence from aliens in general and, it can be argued, from undocumented aliens in particular.

A second set of variables would have to do with what harm might be suffered potentially by an immigrant if the government were to withhold a certain benefit. Can the government, for example, allow a person—"even an illegal alien," to borrow Justice Burger's phrase, to starve to death? Would it be desirable state policy to have fire services denied to an undocumented migrant whose dwelling was on fire—"even if" the dwellings of others were not threatened? Can the state expel someone who is deportable when that person requires constant medical attention and cannot be transported without endangering his or her life? Would a government "do no wrong if it refused to
protect an illegal alien from an angry mob or to provide food for persons awaiting deportation"? Clearly, the harm that an undocumented alien might suffer under these circumstances of state action or inaction is of a very serious nature. The harm suffered by a migrant who did not receive some other benefit of a lesser importance would present a problem that is not so morally compelling, even though it could be argued on other grounds—the contributions of undocumented migrants to the tax system, for example—that the state is obligated to extend such beneficence.

A third and final set of variables likely to influence the development of normative theories of the obligations of the U.S. government or society toward undocumented migrants has to do with the contributions of such persons to society and their participation in the community. This goes to the heart of the issue of membership. Arguably, persons who do not contribute or do not interact with a community are less than full members of the same. Undocumented migrants pay taxes, they contribute to Social Security, and ultimately, they contribute to the growth and progress of society with their labor and community participation. This is one of the reasons why it so difficult to accept the notion that by crossing the border illegally they somehow left behind all the possibilities of making any moral claims upon the host state.

Ultimately, if the direction of court interpretations on the nature and extent of U.S. governmental/societal obligations toward undocumented migrants proceeds in accordance with
traditional standards of fairness, it will assert these obligations, with some exceptions like state beneficence which falls into the category of poverty benefits, according to some principle similar to the following: In general, the obligations of the United States toward undocumented immigrants should be independent of immigration status. That does not mean, of course, that the government should not expel them if found to be deportable. But such a principle would be consistent with the long-standing tradition of considering aliens to be "persons" within the meaning of the Constitution and, more specifically, the Fourteenth Amendment. It would hold, as the Court did implicitly in Plyler, that withholding such beneficence as a method of controlling illegal entry is questionable state policy, particularly if such withholding is likely to result in the creation or maintenance of an "underclass" in U.S. society.

NOTES

1 I will use the term "undocumented" to refer to aliens that entered the United States illegally under current provisions of the Immigration and Nationality Act 8 USC 1251(a)(2) or violated the terms of their admission (various sections). Such persons may be found to be subject to deportation.

Mexico, as a society and government, also faces some difficult questions regarding this migration. The most visible issue is what is—or can—the government do to prevent or reduce this flow; the short answer is "very little." But as the problems faced by undocumented migrants become more visible, particularly those that could be characterized as "human rights violations," the nature of the obligations of the Mexican federal government in providing its citizens consular protection can be expected to come under scrutiny.

Undocumented migrants in the United States also have some obligations to this country—among others, to behave in a lawful manner, to make tax contributions and, some would argue, even serve in the armed forces of the United States. A discussion of these obligations, however, is beyond the scope of this paper.

The U.S. census included about 1,131,000 undocumented Mexicans in 1980. Jeffrey S. Passel and Karen A. Woodrow, "Geographic Distribution of Undocumented Immigrants: Estimates of Undocumented Aliens Counted in the 1980 Census by State," *International Migration Review* Vol. 18, No. 3 (Fall, 1984): 656. Unpublished data provided by Mr. Passel to this author, derived from the same study, shows that of these, 903,000 undocumented migrants entered between 1970 and 1980. This number, divided by ten, is a reasonable approximation of the average annual net flow of such persons.
during that decade. The actual net flow would differ from 90,300 in two respects. It would be higher to the extent that the census undercounted such persons. It would be lower to the extent that during the 1970s there was any return migration at all of undocumented migrants that entered before 1970. Both of these effects are probably proportionally small, because they tend to cancel each other out, the error resulting from using such an approximation is even smaller.

6 Passel and Woodrow, supra, n. 5, p. 656. The actual numbers are 2,057,000 undocumented immigrants and 1,131,000 undocumented Mexicans.

7 This number refers to a population separate and distinct from that counted in the U.S. census—the number of undocumented Mexican workers that had their habitual residence in Mexico, not the United States, but were physically present in the latter country as temporary migrants. The number is presented in the text is an upward adjustment, to account for growth until 1980, of an estimate derived from a survey conducted in Mexico during the latter part of December, 1978 and early part of January, 1979. The survey, the Encuesta Nacional de Emigración a la Frontera Norte del País y a los Estados Unidos, Enefneu, was based on a probabilistic sample of 62,500 Mexican households that reported an absent worker or a returned migrant from the United States. A discussion of the survey results appears in Manuel García y Griego, "Comments on Bustamante and Sanderson Papers and on Research Project


The data come from unpublished INS 23.18 forms provided by the INS Central Office in Washington, D.C. The same source provides other indicators of the extent to which the large number of deportable aliens located reflects a "revolving door" traffic of migrants who get caught shortly after entry, are expelled, and frequently attempt entry again and again until they succeed. Of the 1,168,761 deportable Mexicans located in FY 1984, 926,109 were caught within 72 hours of entry. In contrast to this, the number of Mexicans caught who are already employed at the time of detection has not exceeded 200,000 in recent years. In FY 1982, 1983 and 1984, these numbers were 184,217, 174,728 and 146,134, respectively. One should also note other problems in the use of deportable aliens located statistics to infer the stock or
flow of such persons into the United States; they represent events rather than individuals, these numbers represent a flow component—expelled returns of undocumented migrants—not a stock, per se, and their use to arrive at flows or stocks of total migrants requires that the data be disaggregated so that the migrants caught in the interior are not mixed with those detected at the border and, either 1) an empirical estimate of the risk of being detected by INS applicable to various categories of migrants; or 2) empirical estimates of the other flow components that alter the size of the undocumented population—particularly voluntary returns and legalizations (i.e., changes from deportable to nondeportable status without departing from the United States). Virtually all "guestimates" of undocumented aliens in the U.S. which employ this INS statistical series rely upon estimates of risk of being detected by INS which are not derived empirically, combined with erroneous methodological manipulation of the data. See Manuel García y Griego and Carlos H. Zazueta, Approaches to the Estimation of Deportable Mexicans in the United States: Conjecture or Empirical Measurement? (La Jolla, California, Center for U.S.—Mexican Studies, forthcoming) (Monograph Series, no. 2).

Several surveys conducted in Mexican communities during the past decade support this conclusion. See Lourdes Arizpe, "The Rural Exodus in Mexico and Mexican Migration to the United States," The Border that Joins: Mexican Migrants and U.S. Responsibility, edited by Peter G. Brown and Henry Shue,
E.g., the Enfneu survey result that the unemployment rate of migrants during the month prior to departure was only 3%, although a larger proportion (20%) was economically inactive. García y Griego, supra, n. 7, p. 30%. Another example would be the geographical distribution of undocumented migrants. Although such persons leave from all States of the Mexican Union, about 70% of the flow departs from only eight States, which are not the poorest regions in Mexico: Baja California, Jalisco, Michoacán, Guanajuato, Chihuahua, Durango, San Luis Potosí, and Zacatecas. See Ceniel, Análisis de algunos resultados de la Primera Encuesta a Trabajadores Mexicanos Devueltos de los Estados Unidos (Mexico City: Centro Nacional de Información y Estadísticas del Trabajo, [1979]), p. 23; Jorge A. Bustamante and Gerónimo Martínez G., "Undocumented Immigration from Mexico: Beyond Borders but within Systems," Journal of International Affairs Vol. 33, No. 2 (Fall/Winter, 1979): 268. Cf. Harry E. Cross and James A. Sandos, Across the Border: Rural Development in Mexico and Recent Migration to the United States (Berkeley: Institute of Governmental Studies, U. of California, 1981), p. 59.

Projections of the Mexican labor force can be found in: Boletín demográfico Vol. 18, No. 35 (January, 1985): 142; Pedro Azpe and José Gómez de León, "El crecimiento de la
población de México 1950-1980; algunas de sus implicaciones económicas hacia el fin del siglo," unpublished paper, Instituto Nacional de Estadística, Geografía e Informática, Secretaría de Programación y Presupuesto, Mexico City, May 1985. The latter paper discusses some of the challenges the Mexican economy faces in employment generation for the years ahead. A more general discussion of employment as a development problem for the contemporary Mexican economy can be found in Manuel Gollás, La economía desigual: empleo y distribución en México (Mexico City: Consejo Nacional de Ciencia y Tecnología, 1982). See also Pacual Garcia Alba and Jaime Serra Puche, Causas y efectos de la crisis económica en México (Mexico City: El Colegio de México, 1984) (Jornadas Series, no. 104). A comprehensive discussion of Mexico's problems in gaining access to export markets, particularly that of the United States, can be found in Gustavo Vega Cánovas, "Comercio y política en Estados Unidos: libre-cambismo versus proteccionismo desde la segunda guerra mundial," México-Estados Unidos, 1984 (Mexico City, El Colegio de México, forthcoming, 1985) and, in the same volume, Isabel Molina, "La renovación del Sistema Generalizado de Preferencias arancelarias de Estados Unidos: triunfo para las tendencias proteccionistas."

Clark W. Reynolds, "Labor Market Projections for the United States and Mexico and Their Relevance to Current Migration Controversies," Mexican-U.S. Relations: Conflict and Convergence, edited by Carlos Vásquez and Manuel García y


My analysis here is based on the content of the employer sanctions provisions of the Simpson and Mazzoli bills of 1984, S. 529 and H.R. 1510, respectively, as amended. This bills expired at the end of the legislative session in October, 1984, without being enacted into law. The Rodino-Mazzoli bill, H.R. 3080, introduced in the House in 1985 is virtually identical, in its employer sanctions provisions to these prior bills. The Simpson bill of 1985, S. 1200, is somewhat different from these bills in that it provides a stiffer range of fines. Despite this, the most recent Simpson bill has internal weaknesses probably more
serious than previous versions, because it would make
optional the previous requirement that employers examine the
documents of all new employees.

17 See Kitty Calavita, "Employer Sanctions Legislation in the
73-81 and Carl E. Schwarz, "Employer Sanctions Laws: The
83-101; both articles in America's New Immigration Law:
Origins, Rationales, and Potential Consequences, edited by
Wayne A. Cornelius and Ricardo Anzaldúa Montoya (La Jolla,
California: Center for U.S.-Mexican Studies, 1983) (Monograph
Series, No. 11).

18 Abraham Hoffman, Unwanted Mexican Americans in the Great
Depression: Repatriation Pressures, 1929-1939 (Tucson: U. of
Arizona Press, 1974).

19 Manuel García y Griego, "The Importation of Mexican Contract
Laborers to the United States, 1942-1964: Antecedents,
Operation, and Legacy," The Border that Joins: Mexican
Migrants and U.S. Responsibility (Totowa, New Jersey: Rowman

20 James W. Nickel, "Human Rights and the Rights of Aliens," The
Border that Joins: Mexican Migrants and U.S. Responsibility,
edited by Peter C. Brown and Henry Shue (Totowa, New Jersey,
My discussion will focus on the legal and moral obligations to undocumented migrants as persons, and not other aspects of judicial interpretation which have definite, but indirect bearing on this population. This article does not treat, for example, recent judicial trends regarding the interpretation of the scope of the police powers of INS. That trend, it might be noted, has been unfavorable from the point of view of the person accused of alienage and deportability, from the point of view of their employers and their fellow workers—be they undocumented or not.

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953)


Japanese Immigrant Case, 189 U.S. 86 (1903).

"The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons [aliens] from deprivation of life, liberty, or property without due process of law....Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." Mathews v. Diaz, 426 U.S. 67 (1976) p. 67, citing Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 and Wong Wing v. United States, 163 U.S. 228, 238.
26 8 U.S.C. 1225(b), 1226.

27 Ex parte Miyazono, 53 F. 2d 172 (9th Cir. 1931).


29 For one of the few exceptions when foreigners outside the U.S. have successfully pressed claims in U.S. courts see Zichernig v. Miller, 389 U.S. 429 (1969).

30 See also n. 25, supra.


36 Portes, n. 15, supra, p. 19.

37 A brief synthesis of how these considerations have entered into Supreme Court decisions can be found in Hull, n. 35, supra, pp. 223-224.

38 Mathews, n. 25, supra, p. 80.

39 Wong Wing v. United States, 163 U.S. 228 (1896).


43 Traux v. Raich, 239 U.S. 33 (1915).


45 Sure-Tan, Inc. v. National Labor Relations Board, 52 United States Law Week, 4357.

Mathews, n. 25, *supra*, pp. 81-82.


*Rodríguez v. San Antonio Schools*, *Olivas***

Mathews v. Diaz, n. 25, *supra*.

*Foley v. Connellie* 435 U.S. 291 (1978). However, in *In re Griffith* 413 U.S. 717 (1973) the Court had already struck down a state law which reserved the practice of law for United States citizens.


See, e.g., the discussion in *Mathews* regarding "the need for flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication. *Mathews*, n. 25
supra, p. 81.

55 Hull, n. 35, supra, p. 225.


57 Ibid., p. ___. <Olivas>***

58 Ibid., p. 2408.

59 Nickel, n. 20, supra, p. 43.