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# Closing the Doors to the Land of Opportunity: The Constitutional Controversy Surrounding Proposition 187

Jeffrey R. Margolis

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## COMMENT

### CLOSING THE DOORS TO THE LAND OF OPPORTUNITY: THE CONSTITUTIONAL CONTROVERSY SURROUNDING PROPOSITION 187

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## I. INTRODUCTION

The United States (U.S.) is a nation of protected borders. Any person attempting to enter may be challenged by immigration authorities. Individuals who are U.S. citizens may enter freely; individuals who are not, referred to as "aliens" under immigration laws,<sup>1</sup> must meet several requirements established by law in order to enter or remain in the U.S.<sup>2</sup>

Immigration law is the principal means by which the U.S. government determines who obtains access to the country's limited resources and opportunities. Law, however, is only as effective as its enforcement, and immigration law, admittedly,<sup>3</sup> suffers from weak enforcement.<sup>4</sup> The rising influx of illegal immi-

1. Under the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503 (1988), an "alien" is "any person not a citizen or national of the United States." *Id.* § 1101(a)(3).

2. Aliens can legally enter the United States (U.S.) with either immigrant or nonimmigrant visas. While an immigrant visa allows an alien to remain and work in the U.S. for an indefinite period of time, a nonimmigrant visa only allows an alien to enter for a specific purpose and for a limited period of time. 8 C.F.R. § 214.2 states in part:

No immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa or was born subsequent to the issuance of such visa of the accompanying parent and (2) presents a valid unexpired passport or other suitable travel document or document of identity and nationality, if such document is required under the regulations issued by the Attorney General." 8 U.S.C. § 1181(a) (1994).

3. President Clinton, during a campaign speech for state and local officials in California, conceded that federal immigration policy has failed by stating that he finds it, "highly ironic that the governor would essentially seek re-election based on the failure of federal policy . . . ." John Jacobs, *Campaign '94 Sprinting to a Close*, SACRAMENTO BEE, Nov. 7, 1994, at A1.

4. The border patrol, which is understaffed, underfunded, and overworked, is selective about which illegal immigrants merit prosecution for illegal entry. Federal prosecutors cannot keep up with the excessive number of illegal immigrants. Dianne Klein, *The Law vs. Reality: Agents Choose Which Border-Crossing Criminals to Prosecute*, L.A. TIMES, Nov. 27, 1993, at A6. It is difficult for the Immigration and Naturalization Service (INS) to track down illegal immigrants with only 1500 immigration agents, which is one-fifth the strength of the Los Angeles police force. Richard Simon, *Illegal Residents Not Just From Nearby Nations*, L.A. TIMES, Nov. 26, 1993, at A7.

grants renders the statutory limits on legal immigration illusory.<sup>5</sup>

States have lost patience with the federal government's attempts to solve the illegal immigration problem, and have begun to take both legislative<sup>6</sup> and judicial action.<sup>7</sup> Citizens have started anti-illegal immigration movements,<sup>8</sup> proposed anti-illegal immigration bills in their legislatures,<sup>9</sup> and passed voter referendums,<sup>10</sup> all aimed at solving the problem of illegal immigration. These actions demonstrate that states, localities, and the voters themselves are not willing to take responsibility for the federal government's failure to control the national borders.<sup>11</sup>

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5. The national quota for legal immigrants was set at 700,000 in 1990. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

6. "The people of California have simply had enough." Patrick J. McDonnell, *Prop. 187 Turns Up Heat in US Immigration Debate; Election: Backers Seek Revolution in National Policy, Foes Predict Ill-Educated Disease Prone Underclass*, L.A. TIMES, Aug. 10, 1994, at A1.

7. California, Florida, Arizona, Texas, and New Jersey filed lawsuits against the federal government for reimbursement of costs incurred in providing education, health care, and welfare services to illegal immigrants. *Prodding Washington on Immigration*, PITTSBURGH POST-GAZETTE, Jan. 6, 1995, at C3. The State of New York sued the federal government to get illegal immigrant inmates out of its penal system. Dianne Klein, *The Hit or Miss Approach to Curbing Deportable Felons; Illegal Immigration: Costs of System-wide Breakdown are Staggering, Enforcement Agencies Overcrowded*, L.A. TIMES, Nov. 27, 1993, at A1. See generally Jahan Segatol-Islami, *Mr. Jefferson Must be Smiling: How State Challenges to Immigration Policy May Prompt Re-evaluation of Federalism as a Core Concept of Our Republic*, 26 U. MIAMI INTER-AM. L. REV. 51 (1994) (discussing states' lawsuits against the federal government for reimbursement of costs associated with illegal immigration).

8. Anti-illegal immigration movements have formed in California ("Save our State Committee"), Florida ("Citizens for Immigration Control") and Texas. Daniel W. Sutherland, *Immigration's Hard Problems and Easy Answers*, WASH. TIMES, Jan. 12, 1995, at A17.

9. For example, on March 7, 1995, one bill was introduced in the Florida House of Representatives and two bills were introduced in the Florida Senate. 1995 FL H.B. 245; 1995 FL S.B. 262; 1995 FL S.B. 476. These bills would prevent illegal aliens from receiving public social services and publicly funded health care, provide a penalty for the distribution and use of false documents to conceal true citizenship or resident alien status, and require state law enforcement agencies to cooperate with the INS regarding the arrest of any person alleged to be in the U.S. in violation of federal immigration laws. *Id.*

10. On November 8, 1994, California voters overwhelmingly passed Proposition 187, an anti-illegal immigration measure. David Reyes, *Prop. 187 Ruling Awaited With Confusion*, L.A. TIMES, Dec. 31, 1994, at A1.

11. The INS estimates that over 693,000 immigrants entered the U.S. illegally in 1992. Ronald Brownstein & Richard Simon, *Hospitality Turns into Hostility for Immigrants*, L.A. TIMES, Nov. 14, 1993, at A1.

Global economic and political turmoil prompted thousands of people to immigrate to the U.S. The federal government, however, does not have an obligation to provide for those in need of a better place to live. On the other hand, it does have the sole power to deport illegal aliens.<sup>12</sup> Whether through the political system or the courts, the federal government must be held accountable to the states to help address the illegal immigration crisis.<sup>13</sup>

California was the first state to send a clear message to the federal government that it must do something about illegal immigration. California voters, many of whom are foreign-born,<sup>14</sup> passed Proposition 187,<sup>15</sup> a sweeping, "get-tough," measure aimed at illegal immigration<sup>16</sup> and the various economic<sup>17</sup> and social problems caused thereby. The people of California clearly expressed that they will no longer remain the "victims" of illegal immigration.<sup>18</sup>

Proposition 187 was passed in the wake of overcrowding,<sup>19</sup>

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12. *Traux v. Raich*, 239 U.S. 33, 42 (1915). "The authority to control immigration — to admit or exclude aliens — is vested solely in the federal government."

13. Despite its exclusive control over immigration, the federal government is unwilling to help states with the expenses stemming from illegal immigration, including education, medical care, housing and incarceration. See Segatol-Islami, *supra* note 7 (arguing that the current system regulating immigration is unfair and unconstitutional, but concluding that the courts will likely find the issue nonjusticiable).

14. As many as 52% of California's Latino population favored the initiative in September 1994. Pamela Burdman, *A Push to get Immigrants to Vote: Campaign to Defeat Prop. 187*, S. F. CHRON., Sept. 24, 1994, at A2. Although early support was strong, only 22% of Latinos voted for the initiative. K. L. Billingsley, *California Illegal Alien Measure Blocked by Judges, 1 of 2 Temporary Orders Cites High Court's Education Ruling*, WASH. TIMES, Nov. 10, 1994, at A17.

15. CA Prop. 187, 1994 Cal. Legis. Serv. (West) [hereinafter Proposition 187]. Proposition 187 was passed by a 59-41% margin (i.e., over 2 million California voters approved the initiative). Reena Shah Stamets, *Seed Planted for Florida Prop. 187*, ST. PETERSBURG TIMES, Jan. 11, 1995, at 1A.

16. The INS estimates that over 1.3 million illegal immigrants live in California. This constitutes about 40% of the nation's 3.2 million illegal immigrants. Brownstein & Simon, *supra* note 11. Others place the number of illegal immigrants nationwide at 3.5 million, although, privately, INS officials estimate that there are over 3 million illegal immigrants in Southern California alone. Alan C. Miller, *Studies Prove Inconclusive on Impacts*, L.A. TIMES, Nov. 21, 1993, at A1.

17. California is in the midst of its worst economic downturn since the Depression. Brownstein & Simon, *supra* note 11. Some of the costs of illegal immigration borne by states include the cost of supplying education, incarceration, medical services and housing. See Segatol-Islami, *supra* note 7, at 53, n.10.

18. Paul Feldman & Patrick J. McDonnell, *U.S. Judge Blocks Most Sections of Prop. 187; Courts: Jurist Cites Significant Constitutional Questions. Enforcement is Delayed Pending Outcome of Lawsuit*, L.A. TIMES, Dec. 15, 1994, at A1.

19. Notwithstanding the actual numbers, there is a notion among Californians

unemployment,<sup>20</sup> scarcity of state resources,<sup>21</sup> and fears of cultural fragmentation.<sup>22</sup> Accordingly, it denies access to social services (including welfare benefits),<sup>23</sup> health care,<sup>24</sup> and education.<sup>25</sup> These provisions raise serious constitutional, as well as practical, issues.

Opponents of Proposition 187 claim that it usurps federal authority over immigration, violates due process and equal protection guarantees, and violates the immigrant child's right to a public education.<sup>26</sup>

On December 14, 1994, a U.S. district court judge issued a preliminary injunction blocking enforcement of all but three of Proposition 187's provisions: the prohibition on illegal immigrants attending California's public colleges, universities, and community colleges; the prohibition on the sale and manufacture of false documents; and the prohibition on the use of false documents.<sup>27</sup> In another lawsuit, a state judge, just one day after

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that "the state is full." Brownstein & Simon, *supra* note 11.

20. The slump in California's economy cost Californians more than 830,000 jobs between 1991 and 1993 and raised anxieties about competing with both legal and illegal immigrants for jobs. *Id.* Foreign-born workers make up 25% of the labor force in California. Owing to heavy immigration and slow job growth, competition between immigrants and those born in the U.S. is fierce. Stuart Siverstein, *Job Market a Flash Point for Natives, Newcomers*, L.A. TIMES, Nov. 15, 1993, at A1. According to the U.S. Department of Labor, California's unemployment rate rose to 7.9% in July 1995, which is higher than the national average of 5.7%. Tom Murph Bloomberg, *Lost Jobs Reflect Bumpy Economy*, FRESNO BEE, Aug. 5, 1995, at E1; *California Jobless Rate Climbs*, UPI, Aug. 4, 1995, available in LEXIS, News Library, UPST94 File.

21. California's financially-strained economy has eroded optimism about California's future. Brownstein & Simon, *supra* note 11. Some estimate that California residents pay over \$2.4 billion a year to educate, treat, and incarcerate undocumented immigrants in their state. Hugh Dellios, *Immigration Issue Complicated by Many Immigrant Categories*, CHI. TRIB., Feb. 19, 1995, at C4. Other estimates put the figure at over \$3 billion per year. Miller, *supra* note 16.

22. The increasing number of immigrants in the state has fueled fears about the balkanization of American culture. Brownstein & Simon, *supra* note 11.

23. See Proposition 187, *infra* note 55, § 5. According to a recent poll of Californians, immigrants' receipt of welfare benefits was considered the worst consequence of immigration for the State of California. The fear of job competition ranked second. Silverstein, *supra* note 20.

24. See Proposition 187, *infra* note 48, § 6. The recent recession put strains on state and local budgets and the state can no longer afford to provide public services, such as health care, to illegal immigrants. Brownstein & Simon, *supra* note 11.

25. See Proposition 187, *infra* note 46, § 8(b).

26. See League of United Latin American Citizens v. Wilson, No. CV 94-7569MRP (S.D. Cal. Dec. 14, 1994) (LEXIS, Immig library, Extra file).

27. *Id.* See also Dan Whitcomb, *Judge Keeps Ban Intact Against Calif. Immi-*

the initiative passed, issued an injunction blocking enforcement of the higher education provision.<sup>28</sup>

Proposition 187 applies to several major areas: education, health, social services, and law enforcement. Part I of this comment explains the various provisions of the initiative, summarizing the impact on each area. Part II addresses the "practical problems" potentially created by Proposition 187's poor wording, failure to address key issues, and over-simplification of the illegal immigration problem. Parts III and IV analyze the initiative's constitutionality; specifically, examining illegal immigrants' equal protection and due process rights,<sup>29</sup> and the federal government's preemption of the immigration field. In light of the practical and legal problems with Proposition 187, Part V suggests several alternative solutions to handling the illegal immigration problem.

## II. WHAT DOES PROPOSITION 187 DO?

With an estimated 1.3 million illegal immigrants in California,<sup>30</sup> fifty-nine percent of the state's electorate voted for Proposition 187.<sup>31</sup> The voters saw the initiative as a method to solve the problem of illegal immigration and regain what they believe they are entitled to as Americans: jobs, services, and tax dollars.<sup>32</sup> Proposition 187 denies public elementary, secondary, and

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*gration Law*, REUTERS LIMITED, Dec. 14, 1994.

28. Feldman and McDonnell, *supra* note 18; Laura Mecoy, *Prop. 187 on Hold — Again*, SACRAMENTO BEE, Dec. 15, 1994, at A1.

29. Throughout this comment, the terms "illegal alien," "illegal immigrant" and "undocumented immigrant" are used interchangeably.

30. *Decision '94 / Special Guide to California's Elections; Prop. 187; Is it 'Save Our State' or 'Sink Our State'?*, L.A. TIMES, Oct. 30, 1994, at W9 [hereinafter *Sink Our State*]. Almost one out of every twenty state residents is an undocumented alien. *Florida May Become the Next Battleground Over Illegal Immigrants*, ST. LOUIS POST-DISPATCH, Jan. 8, 1995, at 6B.

31. Stamets, *supra* note 15.

32. Proposition 187, § 1 reads:

The People of California find and declare as follows: Findings and Declaration.

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

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

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

post-secondary education; nonemergency health care; and government-provided social benefits to undocumented immigrants and their children. Proposition 187 also requires that educators, law enforcement authorities, health professionals, and social and welfare workers verify immigrants' legal status and report those suspected of being in the U.S. illegally to federal immigration authorities. Additionally, Proposition 187 provides stiff penalties for the manufacture and sale of false U.S. citizenship or residency documents.<sup>33</sup>

### A. Education

Federal law requires states to provide a free public education to all children, even if the children are in the U.S. illegally.<sup>34</sup> This obligation to provide a free public education to illegal immigrants is one of the largest unfunded federal mandates.<sup>35</sup> Currently, the State of California provides a public education to approximately 308,000 illegal alien children at a cost of \$1.4 to \$1.6 billion per year.<sup>36</sup> Additionally, schools are overcrowded,

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ly.

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

33. See *infra* part II.E.

34. *Plyler v. Doe*, 457 U.S. 202 (1982). The Court declared it unconstitutional to deny a free public education to undocumented school-age children. At issue was a Texas policy that refused illegal immigrant children a free public education. Although there were arguments to support the view that a state may withhold benefits from those residing in the U.S. illegally, the Court believed that these arguments did not apply with equal force to classifications that impose disabilities on the children of illegal entrants. The children can affect neither their parents' conduct nor their own status. *Id.* at 219. Further, because the Texas statute imposed a lifetime of hardship on a discrete class of children not accountable for their disabling status, the Court concluded that the discrimination could not be considered rational. *Id.* at 223.

35. David Andrew Price, *Educating Illegal Aliens: Nation, Not State, Should Pay Tab*, PHOENIX GAZETTE, Nov. 16, 1994, at B7. The Supreme Court in *Plyler* was silent on the costs imposed upon states for educating illegal alien children. 457 U.S. 202 (1982).

36. Price, *supra* note 35. Some estimate that illegal immigrants cost Los Angeles public schools \$1.5 billion annually. Marcos Bretan, *Prop. 187 No Friend of Schools, Critics Say*, SACRAMENTO BEE, Nov. 1, 1994, at A1. Others estimate that California spends \$1.6 billion annually to educate illegal immigrant children. U.S. General Accounting Office, *Illegal Aliens: Assessing Estimate of Financial Burden on*



children are not receiving a quality education, and numerous extra expenses are incurred for bilingual teachers, bilingual books, and remedial classes.<sup>37</sup>

Proposition 187 bars both illegal immigrants and their children<sup>38</sup> from attending public elementary and secondary schools.<sup>39</sup> It also requires public school administrators to verify

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*California* 6 (1994).

37. *Texas Learned Immigration Lesson — Will California?*, ABC World News Saturday, Jan. 7, 1995, available in LEXIS, News Library, CURNWS File.

38. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside." U.S. Const. amend. XIV, § 1. Therefore, under the 14th Amendment a child is a U.S. citizen by virtue of being born in the U.S., even though his or her parents are illegal immigrants.

39. Proposition 187, § 7 which is to be added as § 48215 to the California Education Code, reads:

Exclusion of Illegal Aliens from Public Elementary and Secondary Schools

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

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

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

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

- (1) A citizen of the United States.
- (2) An alien lawfully admitted as a permanent resident.
- (3) An alien admitted lawfully for a temporary period of time.

(e) Each school district shall provide information to the State Superintendent of Public Instruction, the Attorney General of California, and the United States Immigration and Naturalization Service regarding any enrollee or pupil, or parent or guardian, attending a public elementary or secondary school in the school district determined or reasonably suspected to be in violation of federal immigration laws within forty-five days after becoming aware of an apparent violation. The notice shall also be provided to the parent or legal guardian of the enrollee or pupil, and

the immigration status of all enrolled students and their parents.<sup>40</sup> Beginning January 1, 1995, schools were to verify the legal status of children enrolling in school for the first time.<sup>41</sup> The legal status of those currently enrolled is supposed to be verified beginning January 1, 1996.<sup>42</sup> Under the initiative, public school administrators must forward the names of suspected illegal immigrant children and parents to the INS, the California Attorney General, and the California Superintendent of Public Instruction.<sup>43</sup> Students who cannot prove that they are citizens or lawfully admitted immigrants must transfer out of the public school system within ninety days.<sup>44</sup>

Proposition 187 not only affects public elementary and secondary school education, but it also prohibits California's public colleges, universities, and community colleges from admitting students who are neither citizens nor legally admitted immigrants.<sup>45</sup> Like public elementary and secondary school administrators, college and university administrators are required under the initiative to verify the legal status of all students, and report suspected illegal immigrants.<sup>46</sup>

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shall state that an existing pupil may not continue to attend the school after ninety calendar days from the date of the notice, unless legal status is established.

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

40. Proposition 187, §§ 7(b) - (d).

41. Proposition 187, § 7(b). This section of the Proposition, as well as most of the other provisions (except the one mandating stiff penalties for the use, manufacture, and sale of false documents) has been enjoined from taking effect until a court determines the initiative's constitutionality. See *League of United Latin American Citizens v. Wilson*, No. CV 94-7569MRP (S.D. Cal. Dec. 14, 1994) (LEXIS, Immig library, Extra file). See also *Feldman & McDonnell, supra* note 18.

42. Proposition 187, §§ 7(c) - (d).

43. Proposition 187, § 7(e).

44. Proposition 187, § 7(f).

45. Proposition 187, § 8(a) states:

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

46. Proposition 187, §§ 8(b) - (c) state:

### B. Health Care

Due to a lack of funding in the currently overburdened California health care system,<sup>47</sup> Proposition 187 prohibits all publicly funded hospitals and health care clinics from providing any taxpayer financed services, other than emergency medical care, to people who cannot prove that they are U.S. citizens, lawfully admitted permanent residents, or lawfully admitted temporary visitors.<sup>48</sup> This prohibition applies even if the undocumented

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

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

47. See *Sink Our State*, *supra* note 30.

48. Proposition 187, § 6, which is to be added as § 130 of the California Health and Safety Code, reads:

Exclusion of Illegal Aliens from Publicly Funded Health Care

(a) In order to carry out the intention of the People of California that, excepting emergency medical care as required by federal law, only citizens of the United States and aliens lawfully admitted to the United States may receive the benefits of publicly-funded health care, and to ensure that all persons employed in the providing of those services shall diligently protect public funds from misuse, the provisions of this section are adopted.

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

- (1) A citizen of the United States.
- (2) An alien lawfully admitted as a permanent resident.
- (3) An alien lawfully admitted for a temporary of time.

(c) If any publicly funded health care facility in this state from whom a person seeks health care services, other than

immigrants are willing to pay for such services.<sup>49</sup> Public health administrators are required to verify the citizenship status of all patients before rendering any nonemergency health care services, and they must also provide the names of those suspected of illegal status to the INS, the California Director of Health Services, and the California Attorney General's Office.<sup>50</sup>

Currently in California, illegal immigrants can receive basic indigent health care service.<sup>51</sup> Although undocumented immigrants are not eligible for nonemergency Medi-Cal services,<sup>52</sup> they are eligible for various nonemergency health care services and public health programs including prenatal services,<sup>53</sup> nursing home care for the disabled or elderly, immunizations, and testing for sexually transmitted diseases.<sup>54</sup> In denying these services, Proposition 187 attempts to control the rising health

emergency medical care as required by federal law, determines or reasonably suspects, based upon the information provided to it, that the person is an alien in the United States in violation of federal law, the following procedures shall be followed by the facility:

- (1) The facility shall not provide the person with services.
- (2) The facility shall, in writing, notify the person of his or her apparent illegal immigration status, and that the person must either obtain legal status or leave the United States.
- (3) The facility shall also notify the State Director of Health Services, the Attorney General of California, and the United States Immigration and Naturalization Service of the apparent illegal status, and shall provide additional information that may be requested by any other public entity.

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

See also Paul Feldman & Patrick J. McDonnell, *Spreading the Word on Prop. 187; Immigration: Activists Plan Campaign to Dispel Uncertainty Over Measure's Status in Wake of Federal Ruling That Put it on Hold*, L.A. TIMES Dec. 16, 1994, at A3.

49. The language of Proposition 187, §§ 6(a) - (c), compels this conclusion.

50. Proposition 187, § 7(c).

51. Although illegal immigrants do not qualify for welfare, they are eligible to receive free emergency and pregnancy related services at public hospitals under the Medicaid program. U.S.-born children of illegal immigrants are eligible to receive welfare. See Brownstein & Simon, *supra* note 11.

52. Medi-Cal is a program which provides basic health care services to indigents in California. See *Sink Our State*, *supra* note 30.

53. Two-thirds of all women who gave birth in L.A. County's four public hospitals during fiscal year 1990-1991 were illegal aliens. Miller, *supra* note 16.

54. *Sink Our State*, *supra* note 30.

care costs associated with illegal immigrants.

### C. Social Services

Prior to Proposition 187, illegal immigrants were prohibited from receiving most major publicly funded social services including unemployment insurance, welfare, and food stamps. Proposition 187 bans all public social services to anyone other than U.S. citizens or immigrants lawfully admitted as permanent residents or temporary visitors.<sup>55</sup> If this provision of the initiative goes into effect,<sup>56</sup> the list of banned services would be extended to

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55. Proposition 187, § 5, which is to be added as § 10001.5 to the California Welfare and Institutions Code, reads:

*Exclusion of Illegal Aliens from Public Social Services*

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

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

- (1) A citizen of the United States.
- (2) An alien lawfully admitted as a permanent resident.
- (3) An alien lawfully admitted for a temporary period of time.

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

- (1) The entity shall not provide the person with benefits or services.
- (2) The entity shall, in writing, notify the person of his or her apparent illegal immigration status, and that the person must either obtain legal status or leave the United States.
- (3) The entity shall also notify the State Director of Social Services, the Attorney General of California, and the United States Immigration and Naturalization Service of the apparent illegal status, and shall provide any additional information that may be requested by any other public entity.

56. See *supra* note 41 (explaining that most of Proposition 187's provisions are currently enjoined).

include publicly funded family planning programs; child welfare and foster care benefits; and specialized government efforts targeting at-risk groups including: abused and parentless children, the elderly, the blind, the homeless, the mentally impaired, and drug abusers.<sup>57</sup>

Like the education<sup>58</sup> and health care provisions,<sup>59</sup> the social services provision requires all persons employed in positions of providing social services to verify the legal status of all applicants.<sup>60</sup> Likewise, social services providers are to report the name of any applicant suspected of being an illegal immigrant to the California Attorney General's office, the California Director of Social Services, and federal authorities.<sup>61</sup>

#### *D. Law Enforcement Officers*

According to Proposition 187, all law enforcement agencies in California must cooperate fully with the INS regarding the arrest of any person suspected of being an undocumented immigrant.<sup>62</sup> Arresting authorities must verify an arrestee's legal

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57. See *Sink Our State*, *supra* note 30.

58. Proposition 187, § 7(e).

59. Proposition 187, § 6(c).

60. Proposition 187, § 5(b).

61. Proposition 187, § 5(c).

62. Proposition 187, § 4, which is to be added as § 834(b) of the California Penal Code, reads:

##### Law Enforcement Cooperation with INS

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

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

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

status<sup>63</sup> and report those with an apparent illegal status to the INS and the California Attorney General.<sup>64</sup> All arrestees who appear to be in the U.S. illegally are to be informed that, in addition to complying with any criminal justice proceedings, they must obtain legal status or leave the U.S.<sup>65</sup>

These provisions void all municipal sanctuary ordinances protecting refugees,<sup>66</sup> and put an end to limited cooperation agreements<sup>67</sup> between the INS and various local law enforcement agencies.<sup>68</sup> Theoretically, the measure only applies to those arrested for crimes other than illegal immigration. Thus, an individual cannot be arrested on mere suspicion of being an illegal immigrant.<sup>69</sup>

### E. False Documents

Falsified documents including green cards, social security cards, drivers licenses, and birth certificates are openly sold on

his or her legal status.

- (2) Notify the person of his or her apparent status as an alien who is present in the United States in violation of federal immigration laws and inform him or her that, apart from any criminal justice proceedings, he or she must either obtain legal status or leave the United States.
- (3) Notify the Attorney General of California and the United States Immigration and Naturalization Service of the apparent illegal status and provide any additional information that may be requested by any other public entity.

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

63. Proposition 187, § 4(b)(1).

64. Proposition 187, § 4(b)(3).

65. Proposition 187, § 4(b)(2).

66. *Sink Our State*, *supra* note 30. A sanctuary ordinance is a local law that protects illegal immigrants from deportation. McDonnell, *supra* note 6.

67. Under limited cooperation agreements, many local police agencies avoid involvement in any immigration matters since it would discourage victims and witnesses from reporting crimes. McDonnell, *supra* note 6.

68. *Id.*

69. *But see Sink Our State*, *supra* note 30 (reporting on those opposed to Prop. 187 who argue that the requirement to turn in suspected illegal immigrants will foster a "police state mentality" in which citizens and legal residents will be harassed and possibly arrested as a result of their appearance, name or accent).

the streets of Los Angeles.<sup>70</sup> Those who sell these false documents, otherwise known as "street vendors,"<sup>71</sup> are rarely, if ever, confronted by law enforcement officials or INS agents.<sup>72</sup> Accordingly, Proposition 187 attempts to abolish the false documents market by imposing severe penalties on the traffickers and consumers.<sup>73</sup> These provisions bolster existing federal law prohibiting the manufacture and/or use of false documents.<sup>74</sup>

Prior to the enactment of the false documents provisions,<sup>75</sup> those who falsified citizenship documents faced a maximum of three years in prison under California's forgery statute.<sup>76</sup> The maximum sentence when charged with multiple counts for fraudulent documents was up to six years in prison.<sup>77</sup> Additionally, prior law did not impose fines on those who falsified documents.<sup>78</sup> Proposition 187's stiffer penalties, however, have not been applied as intended.<sup>79</sup>

70. Sutherland, *supra* note 8.

71. *Id.*

72. Whereas, if this were a drug market, the L.A. Police Department would blanket those neighborhoods. *Id.*

73. Proposition 187, §§ 2, 3, which are to be added to the California Penal Code as §§ 113, 114, read:

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

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

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

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

74. 18 U.S.C. 911 (1994); 18 U.S.C. 1426 (1994); 18 U.S.C. 1546 (1994).

75. The provisions on false documents are the only sections in Proposition 187 currently in force. See Feldman & McDonnell, *supra* note 18.

76. CAL. PENAL CODE § 473 (Deering 1994). See also Paul Feldman, *Forgers Get 6 Months in Prop. 187 Plea Bargain; Courts: In First Sentencing Under New Measure, Prosecutors Say Unclear Wording Means Stiffer Terms are not Mandatory. Initiative's Leaders are Furious*, L.A. TIMES, Jan. 5, 1995, at B1.

77. CAL. PENAL CODE § 473 (Deering 1994).

78. See *id.*

79. See Feldman, *supra* note 76. Two forgers prosecuted under Proposition 187 received only six months in jail due to a plea bargain. Ron Prince, chairman of the Proposition 187 campaign, was dismayed that the two defendants did not receive what he considers to be a mandatory, stiffer sentence: "It's a five-year prison term or a \$75,000 fine — there is no other option." Los Angeles County prosecutors, how-



### F. Other Provisions

Proposition 187 requires the Attorney General of California to work with and provide information to the INS and all other government entities on issues of immigration and undocumented aliens.<sup>80</sup> With the state and federal government working together, presumably the INS can more efficiently and consistently administer the immigration laws.

The final provision of Proposition 187 recognizes the questionable constitutionality of at least some of the initiative's provisions; it proclaims all provisions of the act severable and separate.<sup>81</sup> Thus, if any one provision is found unconstitutional, the other provisions will remain in force. Proposition 187's severability provision has already been implicated.<sup>82</sup> Without a reversal on appeal, these provisions will have to be redrafted. Because Proposition 187 is a statutory amendment, the California Legislature may only amend it to further the initiative's goals.<sup>83</sup>

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ever, say the initiative's wording gives them discretion. According to Robert Jordan, assistant head deputy of the district attorney's Norwalk branch, "[U]nder the law, when you have the option of giving a state prison sentence or a fine, that makes it a section for which probation can be granted." *Id.*

80. Proposition 187, § 9, which is to be added to the Government Code, reads:

#### Attorney General Cooperation with the INS

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

81. Proposition 187, § 10 states in part:

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

82. See *supra* note 41 (discussing the injunction imposed on most of Proposition 187).

83. Proposition 187, § 10 states in part:

The statutory provisions contained in this measure may not be amended by the Legislature except to further its purposes by statute passed in each house by roll call vote entered in the

Query, however, whether compromising Proposition 187 to pass constitutional scrutiny "furthers" its goals. Any change would require a two-thirds vote in each house of the Legislature or a majority vote by state voters.<sup>84</sup>

### III. PRACTICAL PROBLEMS WITH PROPOSITION 187

Proposition 187 oversimplifies the problem of illegal immigration.<sup>85</sup> If enforced, the initiative will be counter-productive, causing more social and economic problems than it solves.<sup>86</sup> Furthermore, the initiative does not address several key issues involving illegal immigration, including: deportation procedures for illegal aliens, border enforcement, and the employment of illegal immigrants.<sup>87</sup>

#### A. Poor Wording of the Initiative

Proposition 187 is poorly worded, poorly drafted, inadequate, and ambiguous.<sup>88</sup> The initiative classifies those people eligible for publicly funded medical and social services into three groups: (1) "a citizen of the United States;" (2) "an alien lawfully admitted as a permanent resident;" and (3) "an alien lawfully admitted for a temporary period of time."<sup>89</sup> In distinguishing

journal, two thirds of the members concurring, or by a statute that becomes effective only when approved by the voters.

84. *Id.*

85. See Dellios, *supra* note 21 (explaining that immigrants do not neatly fit the legal versus illegal notions that lie behind Prop. 187: "The legal problems now besetting the measure have underscored the complexity of the U.S. immigration system—and how difficult it can be to sort out those who are living here legally from those who [are not]."); see also Paul Feldman, *Figures Behind Prop. 187 Look at its Creation; Initiative: Wording of Anti-Illegal Immigration Measure is Under Heightened Legal Scrutiny. Its Drafting was a Committee Project, its Chief Sponsor Says*, L.A. TIMES, Dec. 14, 1994, at A3; Feldman & McDonnell, *supra* note 18 ("The measure's wording tends to oversimplify the multitude of immigration categories").

86. See *Sink Our State*, *supra* note 30.

87. According to the federal government's plenary power over immigration, however, California is powerless to address border enforcement and the deportation of illegal immigrants.

88. See Feldman, *supra* note 76. "Throughout the fall election campaign and in state and federal courtrooms since, Proposition 187 has been repeatedly attacked as poorly written. 'It looks as if this was enacted or drafted by one person drafting one section and some other person drafting another section,' a U.S. district judge declared . . . ." *Id.*

89. See Proposition 187, §§ 4(b)(1), 5(b)(2-3), 6(b)(2-3), and 7(d)(2-3).

between a "citizen," "an alien lawfully admitted as a permanent resident," and "an alien lawfully admitted for a temporary period of time," Proposition 187 oversimplifies the multitude of immigrant classes protected under federal law.<sup>90</sup> For example, all lawful immigrants do not fit within the initiative's established categories, especially those that fall somewhere between a permanent resident and a temporary visitor. Thus, various immigrants who are lawfully present in the U.S.<sup>91</sup> will be excluded from public services<sup>92</sup> even though they are entitled to benefits under federal law.<sup>93</sup> In this sense, the initiative is overinclusive.<sup>94</sup>

The immigrant categories created by Proposition 187 that are excepted by the initiative's prohibitions include asylum applicants and other foreign nationals protected from deportation under federal law. Although only the INS has the power to deport an individual, immigrants not subject to deportation under federal law are unlikely to question the authority of a law enforcement officer, educator, or health care provider that orders

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90. See Immigration and Nationality Act, 8 U.S.C. §§ 1101(15)(A)-(N) and 27(A)-(H) (1988). Classes considered as nonimmigrant aliens under federal law include, but are not limited to: (1) lawful permanent residents or green card holders who have a right to live and work in the U.S. and travel to other countries; (2) lawful temporary residents who are people in the process of getting legal status through one of the amnesty programs and who can work with a work authorization card; (3) asylees and refugees who have been granted political asylum or refugee status and have a right to work, travel outside the U.S., and accept certain public benefits; (4) non-immigrant visa holders who are tourists, students, and temporary workers and who come to the U.S. for a temporary time and for a specific purpose; (5) border crossing card immigrants who can come into the U.S. for up to 72 hours and must stay within 25 miles of the border; (6) aliens with temporary status who have temporary permission to live and work in the U.S. because of civil war, natural disasters or other dangerous conditions in their native country; (7) family unity immigrants who are the spouse and children of people who are in the U.S. legally and are able to live and work in the U.S. temporarily; and (8) parolees who the INS chooses to "parole" into the U.S. for a variety of reasons.

91. For example, asylum applicants and relatives of legal immigrants.

92. Dellios, *supra* note 21.

93. *Id.*

94. Opponents of Proposition 187 argue that the initiative does not deal adequately with the federal immigration system that includes dozens of humanitarian, political, and economic categories of immigrants who are neither permanent residents nor temporary visitors. *Id.* Asylum applicants and relatives of legal immigrants, in addition to many others who fall into unusual immigrant categories, will find it difficult to prove that they are in the U.S. legally and therefore have legitimate claims to public services. *Id.*

them to leave the country.<sup>95</sup> Thus, Proposition 187 may cause immigrants protected under federal law to mistakenly leave the country. This would cause obvious "irreparable harm" to those categories of immigrants.<sup>96</sup>

Further, Proposition 187 requires educators, health care providers, law enforcement officials, and social service providers to verify the citizenship status of their clients and report the presence of anyone they "reasonably suspect" of being in the U.S. illegally to the Attorney General and various other officials.<sup>97</sup> The initiative, however, fails to define the phrase "reasonably suspected." Such ambiguity will surely lead to confusion and uneven enforcement of the initiative's provisions.

The wording of Proposition 187 also fails to address the possession of false documents. It only prohibits the manufacture, distribution, sale, or use of such documents.<sup>98</sup> According to the proposition,<sup>99</sup> an illegal immigrant would have to actually use a fake green card, drivers license, birth certificate, or social security card in order to face arrest and consequent penalties.<sup>100</sup> An individual cannot be arrested for merely possessing a fake document. In this respect, the initiative is underinclusive.

### *B. The Initiative's Indirect Effects on the General Population*

Proponents of Proposition 187 argue that banning benefits and services to illegal immigrants in California will save the state over \$3 billion a year.<sup>101</sup> Opponents argue that spending

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95. *Id.*

96. See Dellios, *supra* note 21. Judge Mariana Pfaelzer, in issuing an injunction enjoining enforcement of most of Proposition 187's provisions, stated that the initiative's description of who is legal does not match that of the federal government's classification. This could cause irreparable harm to immigrants in certain categories. See *League of United Latin American Citizens v. Wilson*, No. CV 94-7569MRP (S.D. Cal. Dec. 14, 1994) (LEXIS, Immig library, Extra file). Although proponents of the initiative believe that the reporting mechanisms will result in "self-deportations," there is no guarantee that anyone will leave the country. State officials have no authority to deport people nor can they force the INS to act. See McDonnell, *supra* note 6.

97. See Proposition 187, §§ 4(a), 5(b), 6(c), 7(e), and 8(c).

98. See Proposition 187, §§ 2, 3.

99. *Id.*

100. Feldman, *supra* note 86.

101. *Sink Our State*, *supra* note 30.

less for social services, health care, and education will eventually increase California's crime rate, the rate of illness among the general population, emergency medical care costs,<sup>102</sup> and lost federal funding.<sup>103</sup> Further, the measure may also have disastrous effects on California's health, education, and law enforcement infrastructures,<sup>104</sup> transforming health care officials, educators, social workers, and law enforcement officers into quasi-immigration agents.

Denying medical services to illegal immigrants will likely result in greater health risks for the general population. If immigrants are prohibited from receiving immunizations and other nonemergency treatment for highly contagious diseases, these diseases will threaten the entire population.<sup>105</sup> "Disease does not recognize borders or ask for green cards."<sup>106</sup> Undoubtedly, the lack of preventive treatment is likely to cause a future increase in emergency medical costs.<sup>107</sup>

Illegal immigrant children who are denied an education will grow-up and become a costly, long-term burden to society. Without school, these children are more likely to be on the streets, join street gangs, use drugs, and lead lives of crime.<sup>108</sup> Even children who are legal citizens could face problems remaining in school if their parents are illegal immigrants.<sup>109</sup> While California would annually save \$1.2 billion by excluding illegal immigrants from public schools, it also risks losing \$2.3 billion in annual federal education funding.<sup>110</sup>

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102. *Id.*

103. McDonnell, *supra* note 6. Proposition 187 puts as much as \$15 billion in federal funding provided for health, education, and welfare programs at risk because it conflicts with federal privacy, nondiscrimination, and procedural requirements. See *Sink Our State*, *supra* note 30.

104. Feldman & McDonnell, *supra* note 44.

105. *Id.* "It [is] shortsighted to allow people with contagious diseases . . . to spread their illnesses to the rest of the population." Daniela Wild, *Brown Calls for Package of Immigration Reforms*, UPI, Sept. 29, 1993, available in LEXIS, News Library, UPSTAT File.

106. *Sink Our State*, *supra* note 30.

107. It is irresponsible to deny prenatal care to pregnant women when the costs of future, preventable diseases and illnesses will be many times higher. Wild, *supra* note 105.

108. *Sink Our State*, *supra* note 30.

109. Proposition 187 prohibits children of illegal immigrants that are U.S. citizens from attending public schools. See discussion *supra* part II.A.

110. *Sink Our State*, *supra* note 30. The proposition puts California at risk of losing federal education funding because reporting suspected illegal immigrants vio-

The requirement under Proposition 187 to turn in suspected illegal immigrants will foster a police state mentality not only among educators, health care and social service providers, but also among the general population. Enforcement of Proposition 187 will cause an "aura of suspicion."<sup>111</sup> It will lead to the harassment of citizens and legal residents based on their looks, skin color, accents, and names.<sup>112</sup>

Widespread uncertainty over Proposition 187's status has generated great anxiety among immigrants.<sup>113</sup> Immigrants are foregoing medical care, avoiding welfare centers, and withdrawing their children from school.<sup>114</sup> Many fear that Proposition 187 will cause a massive number of California's illegal immigrants to flee to surrounding states — imposing California's problem on its neighbors.<sup>115</sup>

#### IV. FEDERAL PREEMPTION OF IMMIGRATION

Alienage-based classifications implicate the federal government's plenary power over immigration.<sup>116</sup> The Supreme Court has consistently upheld the federal government's exclusive power over both the admission of immigrants and its correlative power over the deportation, exclusion, and naturalization of aliens within U.S. borders.<sup>117</sup> The power to control immigration

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lates provisions of the Federal Education Privacy Act. *Id.*; Feldman & McDonnell, *supra* note 18.

111. *Id.*

112. *Sink Our State*, *supra* note 30; see also *United States v. Brignani-Ponce*, 422 U.S. 873, 886 (1975) ("Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens.") *Id.*

113. Feldman & McDonnell, *supra* note 18; see also, *Impact of Reichs, Wrongs Begins to Sink In*, ARIZ. REPUB., Nov. 27, 1994, at D5.

114. *Id.*

115. The day after passage of Proposition 187, people in California began calling friends in the State of Washington to ask if their undocumented children could go to Washington schools. *Id.*

116. U.S. CONST. art. I, § 8, cl. 4 states, "The Congress shall have Power to establish a uniform Rule of Naturalization . . ." Although naturalization is not synonymous with immigration, the Supreme Court has repeatedly held that the Federal Government has exclusive control over immigration matters. *Fiallo v. Bell*, 430 U.S. 787 (1977); *Henderson v. Mayor of City of New York*, 92 U.S. 259 (1856).

117. See *De Canas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably a federal power."); *Graham v. Richardson*, 403 U.S. 365 (1971) (holding that a state's desire to preserve limited welfare benefits for its own citizens is inadequate to justify making non-citizens ineligible for public assistance);

is an attribute of sovereignty that predates the Constitution.<sup>118</sup> As such, U.S. immigration policy is subject to far fewer constitutional restraints than other governmental activities.

The federal government derives its constitutional authority over immigration from Congress' power "[t]o establish [a] uniform Rule of Naturalization . . ." <sup>119</sup> and its power "[t]o regulate Commerce with foreign Nations . . ." <sup>120</sup> The Supreme Court has stated that "over no conceivable subject is the legislative power of Congress more complete."<sup>121</sup> Consequently, states are precluded from passing legislation that directly infringes on this area of federal domination.<sup>122</sup> Proposition 187 further denies services that the Supreme Court considers to be constitutionally protected. These services include providing a public education,<sup>123</sup> public benefits,<sup>124</sup> and medical care<sup>125</sup> to aliens.<sup>126</sup>

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Mathews v. Diaz, 426 U.S. 67 (1976) (unanimous court upheld a federal statute limiting participation in a federal medical insurance program to citizens and aliens who had continuously resided in the United States for 5 years and had been admitted for permanent residence, stating that Congress has broad powers over naturalization and immigration); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) ("Under the Constitution the states are granted no such powers [over aliens]; they can neither add to nor take from the conditions lawfully imposed by Congress . . ."); Traux v. Raich, 239 U.S. 33, 42 (1915) ("The authority to control immigration — to admit or exclude aliens — is vested solely in the Federal Government.")

118. Chae Chan Ping v. U.S., 130 U.S. 581, 609 (1889) (finding that the power to regulate immigration is an inherent sovereign power residing in the federal government).

119. U.S. CONST. art. I, § 8, cl. 4.

120. U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has interpreted this clause broadly, granting Congress wide latitude in foreign affairs. See, e.g., Toll v. Moreno, 458 U.S. 1, 10 (1982).

121. Fiallo v. Bell, 430 U.S. 787 (1977).

122. See Hines v. Davidowitz, 312 U.S. 52 (1941) (holding that areas traditionally left to federal control, such as immigration, will be found to be federally preempted); Plyler v. Doe, 457 U.S. 202 (1982) (finding that states could not deny public education to illegal immigrant children); Toll v. Moreno, 458 U.S. 1 (1982) (invalidating a state policy of denying in-state status to nonimmigrant aliens for purposes of qualifying for tuition reductions at state universities).

123. See Plyler v. Doe, 457 U.S. 202 (1982).

124. Graham v. Richardson, 403 U.S. 365 (1971) (holding that states cannot deny welfare benefits to aliens; a state's desire to preserve limited welfare benefits for its own citizens is an inadequate justification for denying aliens public assistance); Takahashi v. Fish & Game Comm'n., 334 U.S. 410 (1948).

125. See Brownstein & Simon, *supra* note 11.

126. With the exception of education, the federal government argues that the states are not constitutionally obligated to provide these services. See Segatol-Islami, *supra* note 7. Even if the states are not obligated to provide such services, the poor enforcement of immigration laws has placed the burden of immigration on a few states. Despite its exclusive control over immigration, the federal government is

Arguably, Proposition 187 is unconstitutional because it establishes what is tantamount to a state immigration and naturalization service.<sup>127</sup> California is, in effect, "setting up its own post office system or military."<sup>128</sup> As such, the measure conflicts with federal responsibilities and confuses the roles of the state and federal governments.<sup>129</sup> If each state enacted provisions limiting the rights and benefits of illegal immigrants, Congress could not ensure the uniformity in naturalization that the Constitution demands.<sup>130</sup>

The power of the states to discriminate against aliens is confined and limited by the federal government's exercise of its authority over immigration. In immigration matters, states may only act and set policies where there is Congressional authorization.<sup>131</sup> The power to classify aliens is committed to the political branches of the federal government, not the states.<sup>132</sup> The Supreme Court suggested that if Congress were to articulate a policy authorizing states to limit the rights of illegal aliens, then states would have more flexibility to enact such policies.<sup>133</sup> Even absent congressional intent to occupy a field, the Supremacy Clause<sup>134</sup> requires invalidation of any state legislation that conflicts in any manner with federal law.<sup>135</sup> Because the federal government has sole responsibility for supervising immigration, the judiciary will give greater deference to a discriminatory policy enacted by the federal government rather than a discrimi-

unwilling to assist the states in paying for the services. *Id.*

127. Feldman & McDonnell, *supra* note 18.

128. *Id.*

129. Mark Rosenbaum, legal director of the ACLU of Southern California, stated, "That is the dominion of the federal government."

130. U.S. CONST. art. I, § 8, cl. 4, states that "The Congress shall have Power . . . [t]o establish a uniform Rule of Naturalization . . ."

131. *Plyler v. Doe*, 457 U.S. 202, 224 (1982). Courts must be attentive to congressional policy when faced with a challenge respecting aliens. The exercise of congressional policy affects states' prerogative to afford differential treatment to particular classes of aliens. In striking down a state statute denying illegal immigrant children a free public education, the Court stated that it could not find in the congressional immigration scheme any statement of policy which authorized the state to deny public school enrollment to such children. *Id.* According to the court, "[T]he States enjoy no power with respect to classification of aliens." *Id.* at 225; *see also* *Hines v. Davidowitz*, 312 U.S. 52 (1941).

132. *Plyler v. Doe*, 457 U.S. at 225 (*citing* *Mathews v. Diaz*, 426 U.S. 67 (1976)).

133. *Id.* The court noted that states have some authority to act with respect to illegal aliens where the act mirrors federal objectives and national policies.

134. U.S. CONST. art. VI.

135. *See De Canas v. Bica*, 424 U.S. 351 (1976).



natory policy enacted by a state.<sup>136</sup> The Supreme Court stated in *Harisiades v. Shaughnessy* that "any polic[ies] towards aliens . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."<sup>137</sup>

Due to the greater judicial deference toward federal immigration policies, Proposition 187 might have passed constitutional scrutiny if Congress had authorized California to so act.<sup>138</sup> As the Court in *Mathews v. Diaz* stated, "[I]t is not political hypocrisy to recognize that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization."<sup>139</sup>

#### V. CONSTITUTIONAL RIGHTS OF ILLEGAL ALIENS: EQUAL PROTECTION AND DUE PROCESS

Aliens who are in the U.S. can claim certain protections under the Constitution. Almost all constitutional guarantees of individual freedom have no qualifying designation; applying instead to "persons."<sup>140</sup> Therefore, all immigrants in the U.S., irrespective of their legality, are entitled to protection under the Fourteenth Amendment.<sup>141</sup>

The Supreme Court has stated that all persons within the U.S., even if illegally present, are entitled to due process<sup>142</sup> and equal protection.<sup>143</sup> In declaring that the guarantees of the Fourteenth Amendment apply universally to all persons within the U.S., the Court in *Yick Wo v. Hopkins* broadly decreed:

136. See *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

137. 342 U.S. 580, 588 (1952).

138. In *De Canas v. Bica*, 424 U.S. 351 (1976), the Court upheld California's exclusion of illegal aliens from certain employment because the exclusion was implicitly authorized by federal law.

139. *Mathews v. Diaz*, 426 U.S. 67 at 86 (1976).

140. U.S. CONST. amend. XIV, § 1, states in part, "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

141. The Court stated in *Plyler v. Doe*, 457 U.S. 202, 210 (1982), that whatever his status under the immigrations laws, an alien is surely a "person" in the ordinary sense of that term, and, thus, entitled to protection under the 14th Amendment to the U.S. Constitution.

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

143. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

The Fourteenth Amendment to the Constitution is not confined to protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.<sup>144</sup>

In addition, a state has no authority to arbitrarily restrict an alien's life, means of living, or any material benefit essential to the enjoyment of life.<sup>145</sup>

More specifically, Proposition 187's ban on public school enrollment flies in the face of the Supreme Court's decision in *Plyler v. Doe*, wherein the court held that denying illegal aliens a free public education was an unconstitutional violation of equal protection and due process.<sup>146</sup> In *Plyler*, Texas advanced the same arguments in support of its ban on public education to illegal immigrants as those advanced by California for Proposition 187: (1) The measure will decrease the influx of illegal immigrants into the state; (2) the presence of illegal aliens in schools imposes a heavy burden on the state's ability to provide a high quality public education; and (3) undocumented children are less likely than other children to remain in the state and put their education to productive use within the State.<sup>147</sup>

In *Plyler*, the Supreme Court rejected Texas' arguments, stating that they were not sufficiently legitimate to overcome the constraints of the Fourteenth Amendment.<sup>148</sup> In striking down the Texas law,<sup>149</sup> which was analogous to Proposition 187, the Court reached the conclusion that the measure would not significantly decrease the number of illegal immigrants in the state, that illegal aliens imposed no more burden than legal immigrants on the education system, and that most illegal immigrant children would remain in the state despite the statute. In order

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144. *Id.* at 369.

145. *Id.* at 374.

146. *Id.*

147. *Sink Our State*, *supra* note 30.

148. *Plyler*, 457 U.S. at 224-30.

149. *Id.*

to uphold this provision of Proposition 187, the Supreme Court's interpretation of the Fourteenth Amendment in *Plyler* would have to be reversed.

The Supreme Court has further held that a state's denial of welfare benefits to aliens not residing in the U.S. for a specified number of years violates the Equal Protection Clause.<sup>150</sup> Although this decision specifically dealt with resident aliens, the Court's reasoning applies persuasively in the context of illegal aliens. The Court labeled the aliens a "discrete and insular minority"<sup>151</sup> and applied a strict scrutiny analysis under which a state must show a compelling interest to justify its action.<sup>152</sup>

In *Graham v. Richardson*,<sup>153</sup> the Court found that a state's desire to preserve its limited resources for its own citizens was not a compelling state interest, and was thus an inadequate justification for depriving aliens of their eligibility for public assistance. Also, illegal immigrants, like resident aliens, are a discrete and insular minority. Proposition 187 imposes a lifetime of hardship on a discrete class, which is the same reason the Court struck down the Texas law in *Plyler*.<sup>154</sup>

In *Plyler*, the Court indicated that discrimination against illegal aliens would be closely scrutinized where the state's purpose differed from federal policies.<sup>155</sup> These same principles will be applied to all sections of Proposition 187. The Court rejected arguments that the statute should be sustained because it furthered the state's interest in preserving its limited resources for lawful residents. The preservation of limited resources, however, was the stated rationale behind the passage of Proposition 187.<sup>156</sup> The fact that a state saves money and resources can never, by itself, justify disparate treatment of an entire class.<sup>157</sup>

Proposition 187 appears to be racially motivated against

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150. *Graham v. Richardson*, 403 U.S. 365 (1971).

151. *Id.* at 372.

152. See generally GEOFFREY R. STONE ET AL, CONSTITUTIONAL LAW (2nd ed. 1991).

153. 403 U.S. 365 (1971).

154. *Plyler*, 457 U.S. at 210.

155. *Id.*

156. *Sink Our State*, *supra* note 30.

157. *Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi v. Fish & Game Comm'n.*, 334 U.S. 410 (1948). See generally STONE ET AL, *supra* note 152.

people who are different than California's dwindling but politically dominant white majority.<sup>158</sup> The initiative seems to sanction racist attitudes<sup>159</sup> and immigrant bashing.<sup>160</sup> The measure, aimed at California's Hispanic and Latino population,<sup>161</sup> violates the Equal Protection Clause because it is discrimination based on national origin.<sup>162</sup>

## VI. ALTERNATIVE METHODS OF DEALING WITH ILLEGAL IMMIGRATION

In addition to the legal issues that confront Proposition 187,<sup>163</sup> opponents of the initiative also argue that its focus on public benefits and services is misdirected.<sup>164</sup> Very few immigrants are drawn to the U.S. because of public benefits, and therefore, restricting public benefits and social services for immi-

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158. Opponents claim that Proposition 187 is racially motivated. Jacobs, *supra* note 3. "This turned into an all-out racial issue." K. L. Billingsley, *California Illegal Alien Measure Blocked by Judges. 1 of 2 Temporary Orders Cites High Courts Education Ruling*, WASH. TIMES, Nov. 10, 1994, at A17.

159. Jay Hamburg, *Politico Wants Immigrant Issue On State Ballot; but Members of Farm Workers' Group Protested, Saying Denying Welfare to Illegal Immigrants is Racist*, ORLANDO SENTINEL, Jan. 11, 1995, at C1.

160. Daniel M. Weintraub, *California Elections/Governor; Wilson Ad Sparks Charges of Immigrant-Bashing; Politics: Commercial Describes His Efforts to Get U.S. to Pay for State Services to Foreigners. But Critics Say it Could Inflare Ethnic Tensions*, L.A. TIMES, May 19, 1994, at A1.

161. Jacobs, *supra* note 3.

162. Discrimination based solely on ancestry or national origin is prohibited by the Fourteenth Amendment. *Hernandez v. State of Texas*, 347 U.S. 475 (1954); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (discrimination against Chinese-Americans held to violate the Equal Protection Clause). "Distinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943).

163. Currently there are a total of eight lawsuits, both state and federal, filed against Proposition 187 alleging that the measure is unconstitutional. *Suits Challenging Proposition 187 Kept Alive*, UPI, Mar. 13, 1995, available in LEXIS, News Library, UPST94 File.

164. "[M]aking welfare benefits for illegal immigrants the focus of immigration reform would perhaps be the worst legacy of Prop. 187." Sutherland, *supra* note 8. Restricting benefits will not significantly affect the rate of illegal immigration since most illegal immigrants come to the U.S. almost exclusively because of the abundant employment opportunities. *Id.* It is unreasonable to expect that those illegally here will voluntarily leave just because they cannot receive government benefits and services. Harry Bernstein, *A New Card Could Help Border Control; Grant Another Amnesty for Those Here Illegally, Then Bolster and Enforce the 1986 Reform Law*, L.A. TIMES, Jan. 3, 1995, at B7.

grants will not significantly affect the rate of illegal immigration.<sup>165</sup> Numerous other less controversial, constitutionally acceptable solutions to the illegal immigration problem exist.

One alternative solution to dealing with illegal immigration is to reform the federal immigration bureaucracy, specifically the INS. The INS, like most out-of-control bureaucracies, has a complicated hierarchy and structure.<sup>166</sup> A weak management structure, faulty accounting systems, inaccurate informational systems, and a long record of failures, render the INS the most troubled major federal agency.<sup>167</sup> Instead of incrementally reforming the agency, the INS should be eliminated and a brand new agency constructed.<sup>168</sup> A new, more efficient federal immigration agency could provide better enforcement of immigration laws; the main vehicle for keeping illegal immigrants out of the country. The agency should assign separate responsibilities to each level of officials to avoid the problems of overlapping and unclear authority. In addition to revamping the INS, Congress should amend current immigration laws to make it tougher for immigrants to gain access to the U.S. under the guise of obeying the law.<sup>169</sup>

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165. Sutherland, *supra* note 8.

166. The INS Commissioner has divided the U.S. into four regions: the Northern, Southern, Eastern, and Western regions. Each region is headed by a Regional Commissioner who is responsible for enforcing the immigration laws of the U.S. . . . Each region is divided into INS districts and Border Patrol sectors. Each district is headed by a District Director. Each district handles all INS functions such as deciding applications, prosecuting people in deportation and exclusion hearings, and deporting people. Each district office may have sub-offices spread out in the region. Each Border Patrol Sector is headed by a Chief Patrol Agent. The task of the Border Patrol is to patrol the borders with Canada and Mexico in order to stop unlawful entry of aliens. The INS District Offices and the Border Patrol Sectors are independent, but both report to the Regional Commissioner. 8 C.F.R. § 100.4 (1995).

167. Sutherland, *supra* note 8. A New York Times investigation concluded that the Immigration and Naturalization Service has more problems than all other federal agencies. *Id.* After a General Accounting Office audit of the INS, the project director stated, "I don't think we've found a federal agency this badly managed." *Id.*

168. *Id.*

169. For example, the process for gaining political asylum must be toughened because too many immigrants falsely claim political asylum and persecution in their home countries. Mike Brown, *Mazzoli Offers Solutions to Immigration Problems*, COURIER-JOURNAL, Dec. 26, 1994, at 5A. Doris M. Meissner, INS Commissioner, advocates reforming the asylum system stating that, "[T]he asylum system right now is as much a source of enforcement vulnerability as anything at the borders. The asylum system . . . invite[s] unfounded applications." Ronald Brownstein, *Solving the Problem*, L.A. TIMES, Nov. 30, 1993, at A20. President Clinton made it more difficult to take advantage of the asylum process with the new Cuban refugee policy. Clinton

A third solution is to focus on the borders, specifically increasing and vitalizing border patrol.<sup>170</sup> Keeping illegal immigrants out of the U.S. must start at the border.<sup>171</sup> Border patrol agents are severely outnumbered at the nation's borders.<sup>172</sup> The federal government is finding that it can substantially reduce unlawful border crossings by providing the appropriate resources, such as more agents, stronger fences, better lights, and heightened surveillance technology.<sup>173</sup> A pilot-program called Operation Hold the Line increased the number of border patrol agents and cut down the number of illegal border crossings from 10,000 per month to about 1,000 per month at the U.S.-Mexico border in El Paso, Texas.<sup>174</sup> Lastly, the U.S. must seek the cooperation of foreign border authorities to stop those trying to enter the U.S. illegally.

Immigration reform should focus not on welfare and public benefits reforms, but on prohibiting jobs and enforcing bans on employment opportunities for illegal immigrants.<sup>175</sup> Because illegal immigrants come to the U.S. almost exclusively for its abundant employment opportunities,<sup>176</sup> Congress threatened sanctions against employers who hire illegal aliens in the Immigration and Reform Act of 1986.<sup>177</sup> These sanctions have not been enforced.<sup>178</sup> A program of immigration reform should, therefore, focus on this core problem; cutting off illegal immigrants' access to jobs.

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abandoned the 35 year policy favoring Cuban refugees. William Schneider, *Immigration Politics Strikes Again*, 27 THE NAT'L J. 19, May 13, 1995, at 1206; Thomas W. Lippman, *Cuba Added to '96 Campaign Agenda*, WASH. POST, June 15, 1995, at A8.

170. See Bernstein, *supra* note 164; Jacobs, *supra* note 3; Ron Packard, *Legislation Attacks Illegal Immigration*, CONGRESSIONAL PRESS RELEASES, Jan. 4, 1995; Sutherland, *supra* note 8.

171. Packard, *supra* note 170.

172. Sebastian Rotella, *Costs, Risks of Halting Illegal Immigrants Fuel Debate*, L.A. TIMES, Nov. 20, 1993, at A1.

173. *Id.* Currently, only 85 to 120 border agents defend the San Diego Mexico Border, which records half of the illegal crossings nationwide. *Id.*

174. Scott Pendleton, *Human Fence Better than Steel*, CHRIS. SCI. MON., Jan. 10, 1995, at 2.

175. Bernstein, *supra* note 164.

176. See Sutherland, *supra* note 8; See also Wild, *supra* note 105.

177. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in various sections scattered throughout 8 U.S.C. (1994)).

178. Even in California, the federal government did not bring an indictment against an employer for violating the act until the summer of 1994. Robert J. Lopez, *'86 Immigrant Hiring Ban Used in L.A. Case*, L.A. TIMES, Aug. 9, 1994, at A1.

One method of implementing this solution is by using a tamper proof identity card, which would help ensure that all employees are legal residents or citizens.<sup>179</sup> Under the plan, everyone would have to show a tamper resistant card or other identifier to a prospective employer in order to prove work eligibility.<sup>180</sup> This would make it more difficult for illegal aliens to obtain jobs. In theory, the lack of job opportunities would discourage illegal aliens from entering the U.S.

Together with the tamper proof identity card, tougher sanctions should be imposed on employers who hire and exploit illegal immigrants.<sup>181</sup> The federal government must increase programs to identify and remove illegal aliens from the workplace, and penalize employers who hire illegal aliens.<sup>182</sup> Additionally, the INS must target and investigate companies and business enterprises that employ illegal aliens.<sup>183</sup> Lastly, the law that prohibits states from imposing fines on employers who knowingly hire illegal aliens should be repealed.<sup>184</sup>

A long-term solution to the illegal immigration problem that focuses on job opportunities is the expansion of trade with South America, Central America, and Asia.<sup>185</sup> By increasing trade with these nations, there would be more jobs in the countries

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179. See Brown, *supra* note 169; Bernstein, *supra* note 164; Wild, *supra* note 105. California Governor Pete Wilson favors a tamper proof identity card which could also be used as proof of eligibility for government benefits. Bernstein, *supra* note 164.

180. Brown, *supra* note 169.

181. See Bernstein, *supra* note 164; Sutherland, *supra* note 8; Wild, *supra* note 105.

182. Bernstein, *supra* note 164. Alan Nelson of the Federation for Immigration Reform, states that immigration reform must center around identifying and removing illegal immigrants from the workplace and that there must be increased efforts to ensure that illegal immigrants are apprehended and removed from jobs. *Id.*

183. Sutherland, *supra* note 8. "The INS has not intelligently enforced the 1986 law requiring companies to verify the employment eligibility of their employees." *Id.* Instead of focusing on companies that exploit illegal immigrants, the INS has focused on the business community. There it finds only technical violations of the law; the easy targets of investigations. *Id.*

184. Federal law imposes sanctions against any person or entity who hires, recruits, or refers for a fee for employment in the U.S. an alien, knowing the alien is an illegal immigrant. Violating employers are subject to civil fines, injunctive relief, and criminal penalties. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, (1986).

185. Sutherland, *supra* note 8. The last commission to study illegal immigration in 1990 concluded that, "expanded trade between the sending countries and the United States is the single most important long-term remedy" to the problem. *Id.*

from which a majority of the illegal immigrants originate. This would decrease the influx of illegal immigrants searching for employment in the U.S.<sup>186</sup> Thus, creating new markets for American goods abroad would significantly decrease illegal immigration.<sup>187</sup>

Additional solutions might include a constitutional amendment eliminating the Fourteenth Amendment provision that automatically grants U.S. citizenship to individuals born on American soil.<sup>188</sup> Another suggestion is to devise a computerized system to track foreign visitors entering the U.S. in order to ensure that they do not overstay the ninety day limit.<sup>189</sup> Further, we need to increase efforts to deport those illegal aliens that are convicted criminals.<sup>190</sup> Finally, rather than expect states to deny essential services, the federal government should reimburse the states for the services they must provide to illegal immigrants.<sup>191</sup>

## VII. CONCLUSION

The U.S. is being overburdened by wave after wave of illegal immigrants. The country does not have the social or economic capacity to absorb so many newcomers. Illegal immigrants come to the U.S. and use states' school systems, medical services, and other public benefits. As a result of this overuse, illegal aliens

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186. One of the best known studies on NAFTA concluded that NAFTA would result in an additional 609,000 jobs in Mexico. Paul Kengor, *NAFTA—Did We Hafa? A year later, a look at the treaty's effect on the local economy*, EXECUTIVE REP.-PITTSBURGH, July 1995, at 12. Many expect that the creation of these jobs will remove the primary incentive for coming to the U.S.

187. *Id.*

188. Brown, *supra* note 169; U.S. CONST. amend XIV, § 1 states in part, "All persons born or naturalized in the United States . . . are citizens of the United States and the State wherein they reside."

189. Brownstein & Simon, *supra* note 11.

190. Jacobs, *supra* note 3. There are over 14,000 illegal immigrants in California state penitentiaries and an estimated 15,000 illegal immigrants in California county jails and taxpayers spend over \$500 million per year for their incarceration. Wild, *supra* note 105.

191. See Feldman, *supra* note 76. People are better protected if a sick alien is given health care and if an alien child is in school instead of on the streets. *But see* Packard, *supra* note 170. ("It is ludicrous to expect United States citizens and legal resident taxpayers to fund benefits and aid to individuals who, just by being here, break the laws of the United States, especially when there are not enough dollars to fund programs for those who are legally residing here.")



adversely affect and infringe upon benefits that rightfully belong to U.S. citizens. By entering into the U.S., illegal immigrants are breaking the law. They should not be rewarded for this wrongdoing. While many illegal immigrants are fleeing deplorable social and economic conditions, they do not have an inalienable right to cross the U.S. border.

Americans are not going to tolerate illegal immigration and its consequences any longer. Legal immigrants, too, are frustrated with illegal immigration.<sup>192</sup> The first citizens to voice this grievance were the voters of California, who overwhelmingly passed Proposition 187 and at the same time re-elected Governor Pete Wilson, whose successful re-election campaign was based on the passage of Proposition 187.<sup>193</sup> By placing illegal immigration at the top of his political agenda,<sup>194</sup> Governor Wilson capitalized on the public's concern.<sup>195</sup> Proposition 187 is having a "ripple effect" beyond California; citizens in Arizona, Texas, and Florida<sup>196</sup> are organizing movements to put initiatives similar to Proposition 187 on their ballots.<sup>197</sup> Residents in more than twelve other states have expressed an interest in organizing similar anti-illegal immigration movements.<sup>198</sup>

These movements are studying Proposition 187 in order to avoid its legal pitfalls.<sup>199</sup> For example, Florida's proposed anti-

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192. See *supra* note 14 (noting the initial Latino support of Proposition 187).

193. See Feldman & McDonnell, *supra* note 18.

194. *Id.*

195. See Weintraub, *supra* note 160.

196. In Florida, a group called Citizens for Immigration Control drafted a ballot initiative with provisions similar to those of Proposition 187. The movement was started because of Florida residents' anger and frustration over the financial burden imposed by illegal immigrants. Specifically, Florida residents were angry because aliens washing up on Florida beaches almost automatically become eligible for the same public services and benefits, including welfare and public education, that are received by lifelong citizens. *Florida Version of Proposition 187 Planned*, NPR TRANSCRIPT # 1103-2, Dec. 24, 1994. Further, a group called the Save Our State Committee, has formed and has filed papers with the state to officially form the committee and put an anti-illegal immigrant referendum on the ballot in 1996. Hamburg, *supra* note 158. One estimate is that Florida has 345,000 illegal immigrants. *Id.* Other estimates put the figure at anywhere between 400,000 and over 1 million illegal immigrants in the state. *Id.* On March 7, 1995, bills were introduced in both the Florida House of Representatives and the Florida Senate which is very similar to Proposition 187. These bills are reproduced *infra* Appendix.

197. Sutherland, *supra* note 8.

198. *Id.*

199. Dellios, *supra* note 21.

illegal alien bills do not contain any provisions prohibiting illegal immigrant children or children of illegal immigrants from receiving a free public education.<sup>200</sup> Further, the categories of immigrants created by Florida's proposed bills, including "a person who is otherwise authorized under federal law to be present in the United States," do not conflict with federal law, as do those in Proposition 187.<sup>201</sup> Moreover, the Chairman of the House Judiciary Committee is planning to introduce a national version of Proposition 187.<sup>202</sup> The nation's anti-immigrant mood, however, must not lead to the erosion of constitutional principles. Government officials must not devise rash solutions to excite impassioned voters.

Proposition 187 will force the courts to revisit the issue of illegal immigration and determine the nature, scope, and extent of benefits available for those who are illegally in the U.S. Since states, counties, and localities bear a disproportionate share of the burdens created by illegal immigration,<sup>203</sup> the federal government is not directly affected.<sup>204</sup> Courts will be forced to determine the federal government's responsibility concerning illegal immigration and enforcement of immigration laws.<sup>205</sup> If Proposition 187 fails in the courts, it will nevertheless have served two purposes: drawing national attention to immigration issues by bringing them to the forefront, and pressuring the federal government to act.<sup>206</sup>

When the U.S. allows individuals to illegally enter and re-

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200. See *infra* Appendix.

201. *Id.*

202. Representative Henry Hyde expressed plans to introduce a national anti-illegal immigration measure similar to Proposition 187 in the House. Dellios, *supra* note 21. California Governor Pete Wilson, in a meeting with Senate Majority Leader Robert Dole and House Speaker Newt Gingrich, and again in a speech at the Heritage Foundation in Washington, D.C., proposed a federal version of Proposition 187. *Id.*

203. See generally Segatol-Islami, *supra* note 7 (detailing the various economic burdens imposed on the states).

204. See Miller, *supra* note 16.

205. See Segatol-Islami, *supra* note 7.

206. President Clinton stated that when federal immigration policy fails, the federal government should do more, arguing that he has done everything he can do to (1) strengthen border patrol by doubling the number of border guards at the San Diego-Mexico border; (2) transfer funds to California and other states that deal with immigration costs, specifically increasing federal aid to California by one-third in order to deal with illegal immigration; and (3) doubling the number of convicted criminals who are being deported. Jacobs, *supra* note 3.

main in the country, the procedure for attaining legal status becomes meaningless. If the problem of illegal immigration is not adequately addressed, the U.S. will not be able to deliver the "American dream" to anyone. Illegal immigration raises complex issues. These issues do not lend themselves to easy solutions, but we must search for viable, legal, and effective solutions to solve this complicated problem.

JEFFREY R. MARGOLIS\*

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\* J.D. Candidate 1996, University of Miami School of Law.

## APPENDIX

The Florida Legislature is considering the following bills aimed at illegal immigration. One proposed bill states:

WHEREAS, the people of Florida have suffered and are suffering economic hardship caused by the dependence of illegal aliens upon the state, and

WHEREAS, the people of Florida have suffered and are suffering personal injury and damage caused by criminal conduct of illegal aliens who are dependent on this state, and

WHEREAS, the people of Florida have a right to be protected by their government from any harm caused by the illegal entry of persons into this country, and

WHEREAS, there must be cooperation among the state and local agencies and the Federal Government to establish a system of required notification among such agencies to prevent illegal aliens in the United States from receiving benefits or public services in this state, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Exclusion of illegal aliens from public social services or benefits

(1) A person may not receive any public social services or benefits to which the person is otherwise entitled, until the legal status of that person has been verified as:

(a) A citizen of the United States;

(b) An alien lawfully admitted as a permanent resident of the United States;

(c) A person who is otherwise authorized under federal law to be present in the United States.

(2) A local or state agency that determines, based upon information presented to it, that a person who applies for public social services or benefits does not possess the legal status required under subsection (1) may not provide the person with those services or benefits. The agency, upon such determination, must notify the person in writing of his apparent illegal immigration status and that the person must obtain legal status or leave the United States.

(3) The agency shall notify the Department of Health

and Rehabilitative Services, the Department of Legal Affairs, and the United States Immigration and Naturalization Service of the apparent illegal status. The agency shall provide any additional information that is requested by another governmental agency.

Section 2. Use of false citizenship or resident alien documents; punishment. Any person who knowingly and willfully, with the intent to defraud, uses false documents to conceal his true citizenship or resident alien status is guilty of a misdemeanor of the first degree, punishable as provided in section 775.082, Florida Statutes, or section 775.083, Florida Statutes.

Section 3. Manufacture, distribution, or sale of false citizenship or resident alien documents; punishment. Any person who manufactures, distributes, or sells false documents that conceal the true citizenship or resident alien status of another person is guilty of a felony of the second degree, punishable as provided in section 775.082, Florida Statutes, or section 775.083, Florida Statutes.

Section 4. Law enforcement cooperation. Each law enforcement agency in this state shall cooperate fully with the United States Immigration and Naturalization Service regarding any person who is arrested in this state and is alleged to be present in the United States in violation of the federal immigration laws.

Section 5. This act shall take effect upon becoming a law.

1995 Fla. H.B. 245; 1995 Fla. S.B. 262.

Another bill introduced in the Florida Senate states:

WHEREAS, the people of Florida have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state, and

WHEREAS, the people of Florida have suffered and are suffering personal injury and damage caused by the criminal conduct of illegal aliens in this state, and

WHEREAS, the people of Florida have a right to be protected by their government from the harm caused by the illegal entry of persons into this country, and

WHEREAS, there must be cooperation among the state and local agencies and the Federal Government to establish a system of required notification among such agencies to prevent illegal aliens in the United States from receiving benefits or public services in this state, NOW THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Exclusion of illegal aliens from public social services or benefits.

(1) A person who is 18 years of age or older may not receive any public social services or benefits to which the person is otherwise entitled, unless the person is under 23 years of age and is a student living with his parents or unless the legal status of that person has been verified as:

(a) A citizen of the United States;

(b) An alien lawfully admitted as a permanent resident of the United States; or

(c) A person who is otherwise authorized under federal law to be present in the United States.

(2) A local or state agency that determines, based on information presented to it, that the person who applies for public social services or benefits does not meet the requirements of subsection (1) may not provide the person with those services or benefits. The agency, upon such determination, must notify the person in writing of his apparent illegal immigration status and that the person must obtain legal status or leave the United States.

(3) The agency shall notify the Department of Health and Rehabilitative Services, the Department of Legal Affairs, and the United States Immigration and Naturalization Service of the apparent illegal immigration status. The agency shall provide any additional information that is requested by another governmental agency.

Section 2. Exclusion of illegal aliens from publicly funded health care.

(1) A person who is 18 years of age or older may not receive, from a publicly funded health care facility, any health care services to which the person is otherwise entitled, unless the person is under 23 years of age and is a student living with his parents or unless the legal status of that person has been verified as:

(a) A citizen of the United States;

(b) An alien lawfully admitted as a permanent resident of the United States; or

(c) A person who is otherwise permitted by federal law to be present in the United States.

(2) A publicly funded health care facility to which a person has applied for health care services, other than emergency medical care as required by federal law, which determines, based on information presented to it, that the person does not meet the requirements of subsection (1) may not provide the person with services. The facility, upon such determination, must notify the person in writing of his apparent illegal immigration status and that the person must obtain legal status or leave the United States.

(3) The facility shall notify the Department of Health and Rehabilitative Services, the Department of Legal Affairs, and the United States Immigration and Naturalization Service of the apparent illegal status. The facility shall provide any addition information that is requested by a governmental agency.

(4) For purposes of this section, the term "publicly funded health care facility" includes a governmental public health unit, a government-operated primary care program, a federally funded community or migrant health center, and public hospital or hospital district.

Section 3. Use of false citizenship or resident alien documents; punishment. Any person who uses false documents to conceal his true citizenship or resident alien status is guilty of a felony of the second degree, punishable as provided in section 775.082, Florida Statutes, or section 775.083, Florida Statutes.

Section 4. Manufacture, distribution, or sale of false citizenship or resident alien documents; punishment. Any person who manufactures, distributes, or sells false documents that conceal the true citizenship or resident alien status of another person is guilty of a felony of the second degree, punishable as provided in section 775.082, Florida Statutes, or section 775.083, Florida Statutes.

Section 5. Law enforcement cooperation. Each law enforcement agency in this state shall cooperate fully with the United States Immigration and Naturalization Service regarding any person who is arrested in this state and is al-

leged to be present in the United States in violation of federal immigration laws.

Section 6. This act shall take effect upon becoming law.  
1995 Fla. S.B. 476.