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The Equal Protection Clause & Suspect Classifications: Children of Undocumented Entrants

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THE EQUAL PROTECTION CLAUSE & SUSPECT CLASSIFICATIONS: CHILDREN OF UNDOCUMENTED ENTRANTS

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I. INTRODUCTION

The Equal Protection Clause of the Fourteenth Amendment guarantees that no State "shall deny any person within its jurisdiction the equal protection of the laws."[1] Nevertheless, the government still makes inevitable, constitutionally permissible classifications and distinctions.[2] Courts defer to legislatures when

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[1] U.S. CONST. AMEND XIV, § 1.

[2] Plyler v. Doe, 457 U.S. 202, 216-21 (1982) (identifying the three main levels of scrutiny through which equal protection claims are evaluated and asserting that the "initial discretion . . . resides in the legislatures" unless the classifications disadvantage a "suspect class").

the distinctions are rational.[3] But in some cases, courts subject these classifications to a heightened level of scrutiny.[4] This occurs when courts find the discriminated group is a "suspect class."[5]

A suspect class is a group that meets a series of factors that suggest the group is historically subject to discrimination or political powerlessness and warrants protection.[6] One example of a suspect classification is race.[7] Historically, most laws that use race-based classifications rely on racial discrimination and have no legitimate purpose.[8] Classifications like this are automatically suspect and receive closer scrutiny.[9] Courts often strike down laws, regulations, and any government action that discriminates against suspect classifications under the Equal Protection Clause.[10] Thus, an equal protection claim may be determinative on whether a class is a "suspect," "quasi-suspect," or "non-suspect" group.

The Court has found that race, national origin, and alienage are all suspect classifications.[11] However, the Court declined to extend

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[3] *Id*.

[4] *Id.*; Regents of Univ. of California v. Bakke, 438 U.S. 265, 357 (1978) ("[A] government practice or statute . . . which contains 'suspect classifications' is to be subject to strict scrutiny, and can be justified only if furthers a compelling government purpose and, even then, only if no less restrictive alternative is available."); *see, e. g*., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973).

[5] *Bakke*, 438 U.S. at 357.

[6] *See Rodriguez*, 411 U.S. at 28 (finding that a suspect class is one "saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

[7] *Bakke*, 438 U.S. at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and call for the most exacting judicial examination"); Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").

[8] *Bakke*, 438 U.S. at 291-99.

[9] *Id*.; *Plyler,* 457 U.S. at 216.

[10] *Id*.

[11] *Rodriguez*, 411 U.S. at 61 (discussing race as the prime example of a suspect classification and identifying national origin, alienage, indigency and illegitimacy as suspect classifications in some settings); *see generally* Graham v. Richardson, 403 U.S. 365 (1971) (discussing national origin and alienage); Loving v. Virginia, 388 U.S. 1 (1967) (discussing race); Hernandez v. Texas, 347 U.S. 475, 480-81 (1954) (discussing national origin); Korematsu v. United States, 323 U.S. 214 (1944) (discussing race).

this suspect status to illegal aliens[12] in *Plyler v. Doe*—relying substantially on the voluntary nature of the class.[13] This reasoning falls short when applied to the children of undocumented aliens. Unlike undocumented adults, as the Court in *Plyler* itself stated, an undocumented youth-based classification[14] "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status."[15]

The children of undocumented entrants are not comparable to undocumented adult entrants.[16] This note presents the legal argument that minor children of undocumented entrants are distinct from undocumented adult entrants, and, as such, should not be grouped together under one single "illegal alienage" class. Instead, they should be extended "suspect" or "quasi-suspect" classification status. Their nonconformity with the general illegal alienage characteristics set forth in *Plyler* and their satisfaction of multiple factors used by the Court to determine what constitutes a suspect class sets them apart.

In this note, Part I provides a historical background of the Equal Protection Clause and a summary of the evolution of suspect classes and suspect classifications. Part I also examines the undocumented youth class and distinguishes this group from adult

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[12] Illegal aliens, undocumented aliens, undocumented entrants, and undocumented immigrants are terms used interchangeably throughout this note. These terms refer to "an alien who entered the United States illegally without the proper authorization and documents, or who entered the United States legally and has since violated the terms of his or her visa or overstayed the time limit . . . [and is] deportable if apprehended." INTERNAL REVENUE SERVICE (IRS), *Immigration Terms and Definitions Involving Aliens: Undocumented Alien* (last reviewed/updated May 5, 2018), https://www.irs.gov/individuals/international-taxpayers/immigration-terms-and-definitions-involving-aliens (last visited Mar. 6, 2019).

[13] Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982) (rejecting that "illegal aliens" are a "suspect class," and highlighting that unlike most of the classifications recognized as suspect "entry into this class, by virtue of entry into this country, is the product of voluntary action").

[14] Undocumented youth is used interchangeably with undocumented children, DREAMERs, undocumented students, and minor children of undocumented entrants. The terms refer to undocumented children who were brought to the United States through no fault of their own. This includes children that were brought as minors and may now be adults.

[15] *Plyler*, 457 U.S. at 223.

[16] *Id.* at 219 ("The children . . . are special members of this underclass.").

entrants. Furthermore, Part II identifies the factors the Court has used in finding suspect classifications that warrant a heightened level of scrutiny. Part II also explains why undocumented children should be a "suspect class," or at least a "quasi-suspect class," based on the factors identified by the Court.

II. THE EQUAL PROTECTION CLAUSE AND SUSPECT CLASSIFICATIONS

A. Historical Background: The Fourteenth Amendment and the Equal Protection Clause

1. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides that the government cannot deny "any person within its jurisdiction the equal protection of the laws."[17] In other words, the Equal Protection Clause requires that all persons similarly situated must be treated alike.[18] However, this does not mean that the government cannot make any kind of distinctions under any circumstances.[19] Despite the Fourteenth Amendment, the government may make legal distinctions between individuals if such distinctions are justified with adequate rationale.[20] Generally, courts defer to legislative judgement,[21] but in special circumstances they subject such classifications to more rigorous scrutiny.[22]

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[17] U.S. CONST. AMEND XIV, § 1.

[18] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985); *Plyler*, 457 U.S. at 216; F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("[A]ll persons similarly circumstanced shall be treated alike.").

[19] *F. S. Royster Guano Co.*, 253 U.S. at 415 ("It is unnecessary to say that the 'equal protection of the laws' . . . does not prevent the states from resorting to classification for the purposes of legislation."); *Plyler*, 457 U.S. at 216 ("[T]he initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures . . . A legislature must have substantial latitude . . . . ").

[20] *Plyer*, 457 U.S. at 216. For example, the government makes constitutionally legal distinctions based on age. The government sets the voting age at 18 and the legal age of alcohol consumption at 21.

[21] *Id.*

[22] *Id.* ("[W]e would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification.").

While written with recently freed slaves in mind,[23] the Fourteenth Amendment and its Equal Protection Clause are not limited solely to race.[24] Rather, the Equal Protection Clause was intended as a limitation on legislative conduct inconsistent with fundamental constitutional principles.[25] The point of the Equal Protection Clause is to be suspicious of government classifications, especially when there is a legal classification that disadvantages a "suspect class" or infringes upon a "fundamental right."[26] For purposes of this note, I will focus on the former—suspect classes and classifications.

2. Suspect Classification Origins in Equal Protection

Suspect classifications originate from the famous Footnote 4 of the seminal case *United States v. Carolene Products Company*,[27] and Equal Protection Clause arguments did not truly surface until

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[23] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 552 U.S. 701, 829 (2007) ("The [Fourteenth] Amendment sought to bring into American society as full members those whom the Nation had previously held in slavery."); *see* Strauder v. West Virginia, 100 U.S. 303, 306 (1879) (explaining the Fourteenth Amendment's purpose as "securing to a race recently emancipated . . . all the civil rights"); Slaughter-House Cases, 83 U.S. 36, 71 (1872) (finding the purpose of all Reconstruction amendments to be the "the freedom of the slave[s] . . . [and] the security . . . [of] that freedom").

[24] *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (discussing race, national origin, alienage, indigency, and illegitimacy as protected by the Fourteenth Amendment); Graham v. Richardson, 403 U.S. 365 (1971) (discussing national origin and alienage); Loving v. Virginia, 388 U.S. 1 (1967) (discussing race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (discussing race).

[25] Plyler v. Doe, 457 U.S. 202, 216-17 (1982).

[26] *Id*.

[27] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); Reginald C. Oh, *A Critical Linguistic Analysis of Equal Protection Doctrine: Are Whites a Suspect Class?*, 13 TEMP. POL. & CIV. RTS. L. REV. 583, 593 (2004) ("The suspect class theory of equal protection is one that originated from the theory of judicial review explicated in United States v. Carolene Products Footnote Four."); *see also* Lea Brilmayer, *Carolene, Conflicts, and the Fate of the "Insider-Outsider,"* 134 U. PA. L. REV. 1291, 1291 (1986) (explaining the famous nature of Carolene Products and the most famous footnote); Lewis F. Powell, Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982) ("Carolene Products retains its fascination solely because of Footnote 4—the most celebrated footnote in constitutional law.").

the Warren Court.[28] During the first fifty years of its enactment, the Equal Protection Clause was rarely invoked.[29] To the contrary, it was usually seen as the "last resort of constitutional arguments."[30] The clause was rarely used because it was often seen as intended to protect those freed from slavery.[31] However, years later, Equal Protection Clause arguments surfaced in conjunction with Justice Stone's famous Footnote 4—opening the door to protecting against prejudice for "discrete and insular minorities."[32]

In *Carolene Products*, the Court reviewed a federal law that banned filled milk believed to be injurious to the health of people.[33] The Court faced the question of whether, in evaluating government conduct, a deferential standard was constitutionally required under the Fourteenth Amendment's Due Process and Equal Protection Clauses.[34] The Court answered in favor of a deferential review for most legislation—granting government

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[28] Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV 135, 143 (2011) (discussing the initial dormant nature of the Equal Protection Clause); Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO L.J. 89, 90 (1984) ("The equal protection clause . . . over the last three decades [has] been transformed from the 'last resort of constitutional arguments' into a significant force" in large part as a result of the Warren Court). The Warren Court references a period between 1953-1969, where Earl Warren served as the Chief Justice. This period is known not only for protecting the rights of citizens but also for expanding them. *See* Ralph Adam Fine, *Chief Justice: A Biography of Earl Warren*, 70-Oct Wis. Law. 47 (1997) (book review).

[29] Strauss, *supra* note 28, at 143; Sherry, *supra* note 28, at 90.

[30] Strauss, *supra* note 28; Sherry, *supra* note 28; Buck v. Bell, 274 U.S. 200, 208 (1927) ("[The Equal Protection Clause] is the usual last resort of constitutional arguments."); *see also* Michael Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. Rev. 747, 750 & n.12 (1991) (explaining how the Supreme Court's equal protection evaluations "emerged during the interwar period from a long hibernation," and listing examples of the hibernation and reawaking periods).

[31] Strauss, *supra* note 28, at 142. Early cases rejected extending the protections of the Fourteenth Amendment to other classes and limited its scope to the freedom of slaves. *See, e.g.*, *Slaughter-House Cases*, 83 U.S. at 71 (limiting scope to the protection of former slaves); *see generally* Minor v. Happersett, 88 U.S. 162 (1875) (focusing the freedom of slave freedom and rejecting protections to gender).

[32] *Carolene Products*, 304 U.S. at 152 n.4; Powell, *supra* note 27.

[33] *Carolene Products*, 304 U.S. at 145.

[34] *Id.* at 152 n.4; Strauss, *supra* note 28.

action a constitutional presumption.[35] Nonetheless, the Court highlighted that "a more searching judicial scrutiny" would apply where legislation: (1) appears to be within "a specific prohibition of the Constitution;" (2) restricts political processes; or (3) is directed at "*discrete and insular minorities*."[36] This note focuses on this third instance. The Court reasoned that when prejudice is done against discrete and insular minorities this prejudice undercuts the "operation of those political processes ordinarily to be relied upon to protect minorities."[37]

The Court made it clear that legislation hostile to discrete and insular minorities would face a higher constitutional hurtle, but it did not identify what exactly constituted such "discrete and insular minorities."[38] However, years later Justice Powell explained in a lecture:

> The theory properly extracted from Footnote 4 . . . is roughly as follows: The fundamental character of our government is democratic. Our constitution assumes that majorities should rule and that the government should be able to govern. Therefore, for the most part, Congress, and the state legislatures should be allowed to do as they choose. But there are certain groups that cannot participate effectively in the political process. And the political process therefore cannot be trusted to protect these groups in the way it protects most of us. Consistent with these premises, the theory continues, the Supreme Court has two special missions in our scheme of government: First, to clear away impediments to participation, and ensure that all groups can engage equally in the political process; and Second, to review with heightened scrutiny legislation inimical

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[35] *Carolene Products*, 304 U.S. at 152 n.4.

[36] *Id.* (emphasis added).

[37] *Id.* ("[P]rejudice against discrete and insular minorities may be a special condition . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

[38] *Id.*

> to discrete and insular minorities who are unable to protect themselves in the legislative process.[39]

Accordingly, it is the Court's role to protect certain groups that cannot effectively participate in the political process from the democratic process itself. To do so, the Court has established that classifications that disadvantage a suspect class are presumptively invidious, and must be narrowly tailored to serve a compelling government interest to pass constitutional muster.[40]

3. Scrutiny Standards of Review and Their Effect on Equal Protection Cases

There are three levels of scrutiny that apply to laws that impose legal distinctions on different classes under the Equal Protection Clause.[41] As stated, if a law discriminates against a "suspect class" the law is subject to the highest level of scrutiny—strict scrutiny.[42] Under this standard of review, the government must demonstrate it has a *compelling interest* in the distinction and that this classification is *narrowly tailored* to achieve its purpose.[43] While some laws have survived strict scrutiny, most do not.[44]

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[39] Powell, *supra* note 27, at 1088-89.

[40] Plyler v. Doe, 457 U.S. 202, 216-17 (1982).

[41] *Id.* at 216-19 (identifying the three main levels of scrutiny through which equal protection claims are evaluated and asserting that the highest level of scrutiny is warranted to classifications that disadvantage a "suspect class").

[42] *Id.* at 216-17.

[43] *Id.* at 217.

[44] J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 948 n.15 (1975) (arguing that laws subject to strict scrutiny are almost always struck down); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1971) (explaining that strict scrutiny is "strict in theory and fatal in fact" in comparison to the rational basis standard); *see also* Strauss, *supra* note 28, at 136-137. There have been only a few laws that have survived strict scrutiny. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding a raced-based classification for affirmative action under strict scrutiny); Korematsu v. United States, 323 U.S. 214 (1944) (upholding a raced-based classification in a military ordinance).

On the other hand, if a law affects a "quasi-suspect class," a middle-tier level of scrutiny is applied—intermediate scrutiny.[45] Under this standard, the government must demonstrate that the classification it is making is *rationally related* to an *important* or *substantial* government interest.[46] The discrimination does not have to be "facially invidious."[47] Some classifications may not be facially discriminatory, yet may still give rise to "recurring constitutional difficulties" that demand such classifications be consistent with the ideals of equal protection.[48] Lastly, if a law does not affect a "suspect" or "quasi-suspect class," the classification is subject to rational basis.[49] Under this scrutiny level, the government must show that the classification is *rationally related* to a *legitimate* government purpose.[50] This

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[45] *Plyler*, 457 U.S. at 218 n.16; *see also* Lalli v. Lalli, 439 U.S. 259, 265 (1978) (subjecting illegitimacy classification to an intermediate scrutiny, where it must be "substantially related to permissible state interests"); Craig v. Boren, 429 U.S. 190, 197, 218 (1976) (highlighting the Court's application "of an elevated or 'intermediate' level scrutiny" for gender classifications and stating that the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives").

[46] *Lalli*, 439 U.S. at 265; *Craig*, 429 U.S. at 197, 218 (emphasis added).

[47] *Plyler*, 457 U.S. at 217.

[48] *Id*.

[49] Suzanne Goldberg*, Equality Without Tiers*, 77 S. CAL. L. REV. 481, 489 (2004) ("So long as a classification is neither suspect nor quasi-suspect, the Court promises that it will give every beneficial presumption to the government when assessing the validity of differential treatment.").

[50] *Plyler*, 457 U.S. at 216 ("In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.") (emphasis added); Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685, 693-94 (2008) ("[T]he concept of rational basis review—the idea that all legislation at a minimum must be rationally related to a legitimate government purpose—generally is not controversial. Minimum judicial review to evaluate the constitutionality of laws is consistent with preserving the supremacy of federal law, particularly the Constitution . . . . "); *see generally* McCulloch v. State, 17 U.S. 316, 421 (establishing rational basis and asking that "the end be legitimate . . . within the scope of the constitution . . . and [that all appropriate] means. . . [be] plainly adapted to that end . . . [and] consist[ent] with the letter and spirit of the constitution").

standard of review enjoys high deference, and thus, most laws often survive it.[51]

As a result, whether a law discriminates against a "suspect," "quasi-suspect," or "non-suspect" group can determine the outcome of an equal protection claim. Laws discriminating against non-suspect groups are subject to and often pass rational basis.[52] On the other hand, laws discriminating against suspect classes are subject to and often do not survive strict scrutiny.[53] If a group is considered a suspect class, it will have a substantial effect on the outcome of an equal protection case, as it is likely that the law in question will be found unconstitutional.

4. Undocumented Aliens and Equal Protection

Undocumented aliens are afforded the guaranteed protections of the Equal Protection Clause.[54] In *Plyler*, the Court struck down a Texas law that denied undocumented children public school education.[55] Texas argued that undocumented aliens were "not persons within the jurisdiction" of the State of Texas and, thus, were not entitled to the equal protection of Texas law.[56] The Court rejected this argument. The Court held that whatever the legal status of a person may be under immigration law, "an alien is surely a 'person' in any ordinary sense of that term."[57] The Court further stated that even undocumented aliens "have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."[58] The Court left no doubt that aliens, regardless of status, are entitled to the constitutional protections of the Fourteenth Amendment.[59]

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[51] Goldberg, *supra* note 49, at 489 (highlighting the Court's deference in "upholding over one hundred classifications on rational basis review since 1973"); *see also* Gunther, *supra* note 44, at 8 (identifying rational basis as "minimal scrutiny in theory and virtually none in fact").

[52] Gunther, *supra* note 44, at 8; *see also* Wilkinson, *supra* note 44, at 948.

[53] Wilkinson, *supra* note 44, at 948.

[54] *Plyler,* 457 U.S. at 210.

[55] *Id.* at 205, 210.

[56] *Id.* at 210.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 215 ("The Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a

B. Suspect Classifications: A Closer Look

1. Current Suspect Classifications: An Unclear Standard

While the Court has identified at least three suspect classifications—race, national origin, and alienage—[60] it has not identified with particular precision what constitutes a suspect class.[61] In *Plyler*, the Court admitted that several "formulations *might* explain . . . [their] treatment of certain classifications as 'suspect.'"[62] Nonetheless, it did not identify with clarity what factors were used to find a class suspect, nor if every factor identified had to be met.[63]

Instead, the Court only explained that some suspect classifications: (1) "are more likely than others to reflect deep seated *prejudice*;" (2) "tend to be *irrelevant* to any proper legislative goal;" and (3) "have historically been relegated to . . . a position of *political powerlessness*."[64] Aside from these tentative factors found in a footnote of the case, *Plyler* did not shed much light on the "suspect class factors." Similarly, the Court did not provide any further elaboration when it held distinctions based on

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State's territory."); *see* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment . . . 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 . . . . "); Wong Wing v. U.S., 163 U.S. 228, 238 (1853) (finding that the Fourteenth Amendment was designed to afford protections to all within the boundaries of a State).

[60] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 61 (1973) (discussing race as the prime example of a suspect classification and identifying national origin, alienage, indigency and illegitimacy as other classifications in some settings); Graham v. Richardson, 403 U.S. 365 (1971) (discussing national origin and alienage); Loving v. Virginia, 388 U.S. 1 (1967) (discussing race); Hernandez v. Texas, 347 U.S. 475, 480-81 (1954) (discussing national origin); Korematsu v. United States, 323 U.S. 214 (1944) (discussing race); CORNELL LEGAL INFORMATION INSTITUTE, *Suspect Classification*, https://www.law.cornell.edu/wex/suspect_classification (last visited Mar. 6, 2019) [hereinafter Cornell LII] ("There are four generally agreed-upon suspect classifications: race, religion, national origin, and alienage. However, this is not an inclusive list.").

[61] Wilkinson, *supra* note 44, at 983 ("[T]he suspect class is . . . an unruly horse which the Court refuses to tame."); Strauss, *supra* note 28, at 147.

[62] *Plyler,* 457 U.S. at 216 n.14 (emphasis added).

[63] *Id.*

[64] *Id.* at 233 (emphasis added).

national origin were subject to rigid scrutiny in *Oyama v. California*.[65] Again, the Court provided no explanation in *Graham v. Richardson* when it held that "aliens as a class are a prime example of a 'discrete and insular' minority for whom . . . heightened judicial solitude is appropriate."[66]

Since 1971, the Court has been reluctant to identify a new suspect class.[67] Without any recent decisions explaining what constitutes a suspect class, it is worth assessing already established suspect classes and classifications. By analyzing current classes and closely examining the Court's reasoning for identifying them as "suspect" or "non-suspect" will help pinpoint the set of factors traditionally considered. This list of factors will set the stage for subsequent analysis in Part II.

2. The First Suspect Classification: Race

The first established suspect classification, although not explicit at first, was race.[68] The Court first referenced race as warranting heightened scrutiny in 1944 in *Korematsu v. United States*.[69] There, the Court evaluated the constitutionality of a Civilian Exclusion Order that subjected all persons of Japanese

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[65] Oyama v. California, 332 U.S. 633, 644-46 (1948) (finding that discrimination based on national origin or distinctions between citizens on the basis of their racial descent are by their very nature "odious to a free people whose institutions are founded upon the doctrine of equality").

[66] Graham v. Richardson, 403 U.S. 365, 372 (1971).

[67] Emily K. Baxter, *Rationalizing Away Political Powerless: Equal Protection Analysis of Laws Classifying Gays and Lesbians*, 72 MO. L. REV. 891, 894 (2007) ("Since its last designation of alienage as a suspect classification in 1971 and its designation of gender and illegitimacy as quasi-suspect classifications in 1977, the Court has refused to declare that any new groups are suspect or quasi-suspect classifications, including the elderly, the mentally disabled, and the poor."); *see also* EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION 24 (University of Chicago Press, 1st ed. 1999); *see, e.g.*, *Graham*, 403 U.S. 365 (finding aliens are a suspect class in 1971); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976) (rejecting that the elderly are a suspect or quasi suspect class in 1976); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (holding that the mentally retarded are not a quasi-suspect classification in 1985); Maher v. Roe, 432 U.S. 464, 471 (1977) (finding that "financial need alone" does not create "a suspect class" in 1977).

[68] *Korematsu*, 323 U.S. at 216.

[69] *Id.*

ancestry to a curfew during World War II.[70] The Court found the order was constitutional.[71] Yet, the Court stated that "all legal restrictions that curtail the civil rights of a single racial restriction are immediately suspect" and must be subject to the "most rigid scrutiny."[72] In 1964 in *McLaughlin v. Florida*, the Court reaffirmed race restrictions as immediately suspect.[73] Using strict scrutiny, the Court struck down an anti-miscegenation state law that prohibited the cohabitation of men and women of different races.[74] *Korematsu* and *McLaughlin* both found that race triggered the highest level of scrutiny, but neither provided much explanation as to why.

3. The Beginning of a Criteria: Rejecting Suspect Classification Claims

The Court began to provide meaning to discrete and insular minorities that warrant constitutional protection as it struck down suspect classification claims in the 1970s.[75] Additionally, it was in 1973 that the Court first used the term "suspect class" when referencing discrete and insular minorities.[76] In its 1973 *San Antonio Independent School District v. Rodriguez* decision, the Court declined to extend suspect class status to the poor in an equal

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[70] *Id.* at 216-17.

[71] *Id.*

[72] *Id.* Although the Court signals a use of strict scrutiny, it is believed that the Court's scrutiny analysis more closely resembles rational basis. The Court provided great deference to the Military, who argued it was too difficult to identify who was loyal and disloyal among the Japanese during World War II. The government argued that excluding all people of Japanese descent was the best way to achieve their compelling interest of national security. *Korematsu* is the last time the Court upheld a discriminatory law on its face.

[73] McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954) and *Korematsu*, 323 U.S. at 216) ("[W]e deal here with classification based upon race . . . [which is] 'constitutionally suspect;' and subject to the 'most rigid scrutiny . . . . '").

[74] *Id.* at 184.

[75] Strauss, *supra* note 28, at 144-45; Reginald, *supra* note 27, at 594-95.

[76] Reginald, *supra* note 27, at 594-95; *see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17, 28 (1973).

protection challenge to a public-school funding scheme,[77] and it subject the scheme to rational basis.[78] The Court explained:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such *disabilities*, or subjected to such a *history* of purposeful unequal treatment, or relegated to such a position of *political powerlessness* as to command extraordinary protection from the majoritarian political process . . . . We thus conclude that the Texas system does not operate to the peculiar disadvantage of any *suspect class*.[79]

In rejecting suspect class status to the poor, the Court highlighted the relevance of historical unequal treatment or subordination, as well as the importance of assessing any political powerlessness or democratic defect.[80] These same factors were reiterated when the Court declined to extent suspect or quasi-suspect classification status to age and mental disability.[81] In particular, in *City of Cleburne v. Cleburne Living Center, Inc.*, the Court relied substantially on the history of discrimination against the mentally disabled, their political power or representation in the legislature, and the relevance of their disabled status to government legislation.[82]

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[77] *Rodriguez*, 411 U.S. at 28.

[78] *Id.* at 55 ("The constitutional standard . . . is whether the challenged state action rationally furthers a legitimate state purpose or interest.").

[79] *Id.* at 28 (emphasis added).

[80] *Id.* at 17-29; Strauss, *supra* note 28, at 144-45; Reginald, *supra* note 27, at 594-95.

[81] *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (rejecting age); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-42 (1985) (rejecting mentally disabled).

[82] *City of Cleburne*, 473 U.S. at 440-42, 445 (holding that continuous legislation protecting the mentally disabled is evidence of a lack of prejudice or antipathy but rather proves that this group is well represented and not politically powerless).

4. Adding to the Criteria: Creating Quasi-Suspect Classifications

The Court created a more solid standard when it began to extend "quasi-suspect" status to discriminated classes. In 1973, the Court found that gender was a "quasi-suspect classification."[83] In *Frontiero v. Richardson*, only female officers were required to show spousal dependency from their partners for military benefits.[84] The Court applied stricter scrutiny to the military regulation that placed the additional burden of proof on female officers but not on male officers and their spouses.[85] The plurality held that gender-based classifications, "like classifications based upon race, alienage or national origin, are inherently suspect and must be subjected to strict judicial scrutiny."[86] The Court also highlighted that gender was *not relevant* to a male or female's ability to perform and that sex was an *immutable* characteristic "determined solely by the accident of birth."[87] A few years later, in *Craig v. Boren*, where a statute set the legal drinking age at 21 for males and 18 for females, the Court affirmed gender as a quasi-suspect classification.[88] The Court struck down the law under intermediate scrutiny and reaffirmed immutability and relevancy as important factors to consider when evaluating if a group is a suspect or quasi-suspect class that warrants stricter scrutiny protections.[89]

5. Illegal Alienage Not a Suspect Class

Alienage is a suspect classification, but illegal alienage is not.[90] In *Plyler*, the Court found that aliens, regardless of status, are

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[83] Frontiero v. Richardson, 411 U.S. 677 (1973).

[84] I*d.*

[85] *Id.* at 678. For administrative convenience, spouses of male Air Force members were dependents for the purpose of military benefits. But spouses of female members were not dependents unless they showed they depended on more than 50 percent on their wife's support.

[86] *Id.* at 688.

[87] *Id*. at 686.

[88] Craig v. Boren, 429 U.S. 190, 197 (1976).

[89] *Id*.

[90] *Compare* Graham v. Richardson, 403 U.S. 365 (1971) (finding alienage is a suspect class), *and Plyler,* 457 U.S. 202 (declining to extend suspect class status to undocumented aliens).

entitled to the constitutional protections of the Fourteenth Amendment.[91] However, while the Court struck down a state law that denied education to undocumented children, it rejected the claim that undocumented aliens are a suspect class.[92] In arriving at its conclusion, the Court placed a special weight on the voluntary nature of the classification.[93] The Court reasoned that unlike most classifications recognized as suspect, this particular classification was a product of "voluntary action" and not an immutable characteristic.[94] Additionally, the Court added that unauthorized presence in the country was not a "constitutional irrelevancy" nor was education a fundamental right.[95] Therefore, the state did not need to justify through the strictest constitutional scrutiny the manner in which they chose to educate their population.[96] Consequently, *Plyler* held that because an undocumented entrant *willingly* enters the country in violation of the law, and his or her unlawful presence may be constitutionally *relevant* to government legislation, illegal alienage is not a suspect classification.[97]

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[91] Plyler v. Doe, 457 U.S. 202, 215 (1982) ("The Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory"); *see* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment . . . 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"); Wong Wing v. U.S., 163 U.S. 228, 238 (1853) (finding that the Fourteenth Amendment was designed to afford protections to all within the boundaries of a State).

[92] *Plyler,* 457 U.S. at 206, 224.

[93] *Id.* at 219 n.19 ("Unlike most classifications . . . recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action.").

[94] *Id*.

[95] *Id.* at 223 ("[I]t could hardly be suggested that undocumented status is a 'constitutional irrelevancy.' With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation.").

[96] *Id*.

[97] *Id.* at 219 n.19, 223.

6. The "Suspect" Evaluation: A Summary

Generally, to determine whether a group is considered a "discrete and insular minority" and should be extended suspect classification status, a multi-factor assessment is necessary.[98] Based on Supreme Court cases that identify a suspect classification, decline to extend the status, or only extend partial quasi-suspect status, the relevant factors include, but are not limited to, the following:

> (1) Signs of prejudice, subordination, or history of discrimination against the group—indicating the class has been historically disadvantaged;
>
> (2) Political powerlessness or the lack of effective representation in the political process—indicating the group's inability to seek political redress due to underrepresentation, indifference, or stereotypes; and
>
> (3) Immutability of the group's defining characteristic or trait.[99]

If the group in question meets most factors, if not all, it is more likely that a court will find it to be a suspect class and, thus, subject their Equal Protection claims to strict scrutiny. On the contrary, if the group satisfies less factors, the more likely the courts will find the group is a quasi-suspect or non-suspect class, and the more likely it will subject its claims to a lower standard of scrutiny. Part II below will group the common factors used to determine who is a suspect class for the purposes of the Fourteenth Amendment. Additionally, Part II will apply the factors to the class of undocumented minor children.

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[98] United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).

[99] *See generally* Cornell LII, *supra* note 60; Strauss, *supra* note 28, at 148-67; Sherry, *supra* note 28, at 108-14; *see*, *e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); *Plyler*, 457 U.S. at 202; Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Graham v. Richardson, 403 U.S. 365 (1971); McLaughlin v. State of Fla., 379 U.S. 184 (1964); Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944), *abrogated* by Trump v. Hawaii, 138 S. Ct. 2392 (2018).

C. Children of Undocumented Entrants: A Challenge to Principles of Equality Under Law

In addition to understanding the history of the Equal Protection Clause, its application to all people "whether citizens or strangers,"[100] and the evolution of suspect classifications, it is also important to understand the undocumented alien class and the subgroup at issue—minor children of the undocumented entrants.[101] The Court has noted several factors led to the "creation of a substantial overall 'shadow population'" of undocumented aliens.[102] According to the Court in 1982,

> This situation raises the specter of a permanent cast of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.[103]

Almost forty years later, this is still the case. Illegal immigration continues to be a social, economic, and political problem for the United States today. However, the purpose of this note is not to argue against or for immigration. This note presents a legal argument as to why minor children of undocumented entrants are distinct from undocumented adult entrants,[104] and, thus, should not be grouped together under a single "illegal alien" class. Rather, the undocumented youth should be extended suspect or quasi-suspect class status on their own merit.

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[100] Plyler v. Doe, 457 U.S. 202, 215 (1982).

[101] *See supra* note 14 for a list of the terms used in this note to refer to undocumented children.

[102] *Plyler*, 457 U.S. at 218 (listing "lax enforcement of laws" and "employment of undocumented aliens" as two causes).

[103] *Id.* at 218-19.

[104] *Id*. at 219. ("The children . . . are special members of this underclass.").

1. Plyler and the Undocumented Youth: A "Discrete Class" Not Comparably Situated

The children of undocumented entrants are not comparably situated.[105] *Plyler* focused generally on undocumented adult entrants and why they would not be considered a suspect class.[106] The Court used a rationale unique to undocumented adult entrants to weakly find that undocumented children too are not entitled to a more rigorous level of scrutiny.[107] The Court's reasoning that the voluntary nature of a class makes a class not suspect does not apply with the same force to the minor children of illegal entrants, as the Court itself explicitly highlighted.[108] In *Plyler*, the Court explained that the discrimination of the undocumented youth imposed "a lifetime hardship on a discrete class of children not accountable for their disabling status."[109] The Court suggested that children are innocent and are being excluded only because of a status resulting from the violation of a third party and not their own volition.[110] As such, if we look closely at the reasons listed to decline extending suspect status to illegal aliens and their focus on adult entrant characteristics, it is difficult to rationalize why it extends to the undocumented youth.

Persuasive arguments exist for the government to withhold benefits from those "whose very presence within the United States is a product of their own unlawful conduct," but these arguments do not apply to children of the undocumented entrants.[111] The Court in *Plyler* explained, "'[P]arents [of undocumented children]

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105 *Id.* at 220.

106 See id.

107 *Id.* at 223.

108 *Plyler*, 457 U.S. at 219-20 ("[A]rguments [about the consequences of own unlawful conduct] do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants.").

109 *Id.* at 223.

110 *Id.* at 220; *see id.* at 238 (Powell, J., concurring) ("They are excluded only because of a status resulting from the violation by parents or guardians of our immigration laws and the fact that they remain in our country unlawfully. The . . . children are innocent in this respect. They can 'affect neither their parents' conduct nor their own status.'") (citing Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

111 *Id.* at 219-20 ("[T]hose who elect to enter our territory by stealth and in violation of our law should be prepared to face the consequences . . . . ").

have the ability to conform their conduct to societal norms,' and presumably the ability to remove themselves from the State's jurisdiction; but the children . . . in these cases 'can affect neither their parents' conduct nor their own status.'"[112] The Court additionally reiterated that punishing children for an action outside their control went contrary to the basic concept of our legal system.[113] That is, the American principle that imposes legal consequences in relation to individual wrongdoing.[114] The Court noted:

> [Visiting] condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent."[115] Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.[116]

Lastly, the Court found that legal status is not completely irrelevant to Federal legislative goals, nonetheless, the immutable nature of the status in children deserved particular attention.[117] The Court wrote:

> Of course, undocumented status is not irrelevant . . . . Nor is undocumented status an absolutely immutable characteristic [in adults] since it is the product of conscious, indeed unlawful, action.

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112 *Id.* (quoting *Trimble*, 430 U.S. at 770 (internal quotations omitted)).
113 *Id.* at 220.
114 *See Plyler*, 457 U.S. at 220 (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (footnote omitted)).
115 *Id.* (quoting *Weber*, 406 U.S. 164, 175 (1972) (footnote omitted)).
116 *Id.*
117 *See id.*

> But . . . [when a classification] is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children . . . . [118]

As it made these observations, the Court highlighted that undocumented children's entrance into this class was not a result of voluntary action.[119] Rather, minor children obtained their status through no fault of their own.[120] Additionally, the Court visited a core basic principle of our legal system that demands legal burdens be proportional to self-wrongdoing.[121] The Court, thus, alluded that imposing legal burdens on a "discrete class" that is not accountable for its own "disabling status" is inconsistent with American principles.[122]

Consequently, *Plyler* illustrates a legal application error when classifying minor undocumented children. The Court could not justify how undocumented children are responsible for their legal status nor that children should face the consequences. Yet, the Court ignored its findings and concluded that *all* undocumented aliens, including the children, are not a suspect class because of the voluntary nature of the entrance into the class.[123] However, like most other established suspect classes, undocumented children do not voluntarily enter into this class.[124]

2. Plyler is Not Rational Basis, But a Heightened Scrutiny

The *Plyler* Court subjected the Texas State law that discriminated against undocumented children to heightened scrutiny, even though it found that illegal alienage was not a

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118 *Id.*

119 *Id.*

120 Plyler v. Doe, 457 U.S. 202, 220 (1982).

121 *See id.* (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (footnote omitted)).

122 *Id.* at 223.

123 *Id.* at 219 n.19 ("[E]ntry into this class by virtue of entry into this country is the product of voluntary action").

124 *See id.* at 220.

suspect class.[125] This further demonstrates that undocumented children are a special class not comparably situated to the illegal alienage class as a whole. The Court in *Plyler* stated that discrimination imposed on the children "could hardly be considered rational unless it furthers some *substantial goal* of the state."[126] While it is not altogether clear, the Court seems to signal a rational basis standard but ends up applying something else.[127] The language used in *Plyler* (i.e. "substantial goal") signals the use of a constitutional scrutiny that is greater than rational basis but less than strict scrutiny.[128]

Consequently, although the Court holds that illegal alienage is not a suspect class, its reasoning resting on adult characteristics,[129] its explicit statements that minor children are a special "discrete class" not accountable for their "disabling status,"[130] and its use of a scrutiny level other than rational basis[131] help establish that undocumented minor children are distinct from undocumented adult entrants. As such, the characteristics used and described in *Plyler* cannot be used to deny suspect class status to undocumented children. Rather, because of this and the reasoning set forth in Part II of this note,[132] minor children of undocumented entrants should be extended suspect or quasi-suspect classification.

3. The Undocumented Population and Undocumented Youth

Before analyzing why discrimination of this class should be subject to heightened scrutiny, it is important to understand the

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125 *See id.* at 223-24.

126 *Plyler*, 457 U.S. at 224.

127 *See id.* The Court is believed to have used "Rational Basis with Bite" or Intermediate Scrutiny. Rational basis review traditionally requires a rational relationship between the means and a legitimate government interest. On the other hand, "Rational Basis with Bite" is less deferential and requires that "the government bears the burden of establishing the actual reason for the law that would be advanced by applying the law on the facts . . . . " With "Rational Basis with Bite" the plaintiff's odds of prevailing increases. Ronald Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1198 (2008).

128 *See Plyler*, 457 U.S. at 224.

129 *Id.* at 219-20.

130 *Id.* at 223.

131 *See id.* at 224.

132 *See* discussion *infra* Part II.

makeup of the overall group and the subgroup in question. Today, according to the most recent estimate from the Department of Homeland Security (DHS), it is estimated that over twelve million immigrants live in the United States without proper documentation.[133] That is between 3.3 and 3.7 percent of the total U.S. population.[134] It is estimated that about eighty percent of the group have been in the United States for more than ten years.[135] On the other hand, determining the makeup of the undocumented

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[133] U.S. DEPT. OF HOMELAND SECURITY (DHS), Office of Immigration Statistics, *Population Estimates: Illegal Alien Population Residing in the United States: January 2015* 1, 2 (2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf [hereinafter *DHS Population Estimates*]. The Department of Homeland security estimations reflect numbers as of 2015. Two independent groups estimations reflect similar numbers. The Pew Research Center estimates the number of undocumented immigrants at 10.7 million in 2016, while the Center for Migration Studies estimates approximately 10.8 million people. All three estimation reports use Census Bureau data on the total foreign-born population and subtract the legal immigrant population. The reports show a continued decline in the undocumented population since 2010. *See* Jens Manuel Krogstad et al., *5 facts about illegal immigration in the U.S.*, PEW RESEARCH CENTER fig.1, Nov. 28, 2018, http://www.pewresearch.org/fact-tank/2018/11/28/5-facts-about-illegal-immigration-in-the-u-s/; Robert Warren, *The US Undocumented Population Fell Sharply During the Obama Era: Estimates for 2016*, CENTER FOR MIGRATION STUDIES NEW YORK (CMS), Feb. 22, 2018, https://cmsny.org/publications/warren-undocumented-2016/. *See generally* Robert Warren, U.S. Undocumented Population Continued to Fall from 2016 to 2017, and Visa Overstays Significantly Exceeded Illegal Crossings for the Seventh Consecutive Year, CENTER FOR MIGRATION STUDIES NEW YORK (CMS), Jan. 16, 2019, https://cmsny.org/publications/essay-2017-undocumented-and-overstays/.

[134] Lori Robertson, *Illegal Immigration Statistics*, FACTCHECK.ORG, June 28, 2018, https://www.factcheck.org/2018/06/illegal-immigration-statistics/; U.S. Census Bureau, *National Population Totals and Components of Change: 2010-2018* (2018), https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-total.html#par_textimage_2011805803; *see also* Lori Robertson & Factcheck.org, *Illegal immigration: Separating the facts from fiction*, USA TODAY, June 30, 2018, https://www.usatoday.com/story/news/politics/2018/06/30/illegal-immigration-facts-children-immigrants/747934002/ [hereinafter *USA Today: Facts from Fiction*].

[135] *DHS Population Estimates*, *supra* note 133, at 4. In 2014 only 5 percent of undocumented immigrants came to the U.S. in the previous five years. *USA Today: Facts from Friction*, *supra* note 134.

youth is difficult. However, the latest numbers estimate about 1.1 million undocumented minors make up this subgroup.[136] Thus, the undocumented youth make up almost ten percent of the total undocumented population.[137]

The children of undocumented entrants are special members of the illegal alien class.[138] Subsequently, arguments that apply to adult undocumented entrants do not apply "with the same force" to this class of minor children.[139] The undocumented youth faces distinctive legal uncertainties and challenges.[140] These limitations continue into an even more complicated adulthood for those unable to adjust their status—a status obtained through no fault of their own.[141] The Court made a note of this in *Plyler*.[142] The Court found it hard to justify that these undocumented children are responsible for their legal status and, therefore, should face the consequences.[143] Nevertheless, the Court turned a blind eye on its findings and concluded that all undocumented aliens, including the uniquely situated children, are not a suspect class.[144] In addition to this inconsistency, there are other reasons why undocumented children warrant heightened scrutiny. Part II uses the suspect classification factors set forth by the Court when declining or extending suspect class status to also arrive at this conclusion.

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[136] Jeffrey S. Passel and D'Vera Cohn, *U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade*, PEW HISPANIC CENTER 1, 4, Sept. 1, 2010, http://www.pewhispanic.org/2010/09/01/us-unauthorized-immigration-flows-are-down-sharply-since-mid-decade/ ("The number of children who are unauthorized, 1.1 million in 2009, declined slightly over the decade. By contrast, the population of U.S.-born children with at least one unauthorized parent nearly doubled from 2000 to 2009, when they numbered 4 million.").

[137] *See id.*

[138] *Plyler,* 457 U.S. at 219 (highlighting that "[t]he children… are special members of this underclass").

[139] *Id.* at 219-20.

[140] *See* Leisy Janet Abrego, *"I Can't Go to College Because I Don't Have Papers:" Incorporation Patterns Of Latino Undocumented Youth*, 4 LATINO STUDIES 212, 217 (2006). This subgroup is often called the 1.5 generation, as they may have been born in a foreign country but have spent a majority of life in the United States. Although some adjust their legal status, many remain undocumented, *see id.* at 213, n.2.

[141] *See, e.g*., *id.* at 224.

[142] *See Plyler*, 457 U.S. at 220, 223.

[143] *See id.*

[144] *Id.* at 219 n.19.

III. IDENTIFYING A SUSPECT CLASS: CARVING OUT AN EXCEPTION

To evaluate if undocumented children are a suspect class subject to a heightened level of scrutiny, the Court considers the same factors that led to heightened scrutiny for race.[145] Several of these factors are discussed in Part (I)(B)(3), (4), and (6) of this note.[146] This section groups together all factors and puts forward a four-part analysis. The more factors met, the more likely it is for the Court to extend suspect class status, warranting heightened scrutiny to the group in question.

The Court in *Plyler* declined to extend suspect class status to illegal aliens.[147] This note finds that the Court ruled in part correctly and in part erroneously. While adults voluntarily become a part of this class by virtue of entry into this country and fall short of suspect status,[148] undocumented children do not. *Plyler* correctly held that illegal alienage is not a suspect class, but incorrectly and over-inclusively included the minor children of these undocumented entrants in its holding. After analyzing the subgroup below through the four-part analysis, this note argues that undocumented juvenile aliens are a "suspect" or at least a "quasi-suspect" class entitled to higher constitutional scrutiny.

A. Original Intent and Its Understanding

While the Fourteenth Amendment's purpose was to eliminate race-based classifications,[149] the spirit of the Fourteenth

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[145] *See* discussion *supra* Part I (B) (3), (4), & (6); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-43 (1985).

[146] *See* discussion *supra* Part I (B) (3), (4), & (6); *e.g.*, *City of Cleburne*, 473 U.S. 432; *Plyler*, 457 U.S. 202; Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Graham v. Richardson, 403 U.S. 365 (1971); McLaughlin v. State of Fla., 379 U.S. 184 (1964); Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944), *abrogated* by Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[147] *Plyler*, 457 U.S. at 223.

[148] *Id.* at 219-20.

[149] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 829 (2007) (Stevens, J., dissenting) ("The [Fourteenth] Amendment sought to bring into American society as full members those whom the Nation had previously held in slavery.") (citing Strauder v. West Virginia, 100 U.S. 303,

Amendment extends to multiple additional classifications.[150] The first step in our analysis to determine if undocumented children are protected under the Fourteenth Amendment is to understand the intent of the Amendment itself. Focusing on the Fourteenth Amendment's intent and textual interpretation provides insight as to what classifications the amendment intended to eliminate.[151] A closer look at the Fourteenth Amendment illustrates that its purpose and original understanding was to afford free slaves the equal opportunity to participate in American society.[152] One may argue that at the time of the ratification the drafters did not intend to provide equality in all circumstances. Rather, the drafters intended to provide equality only to African Americans. It may also be argued that that the drafters did not have the "discrete class of undocumented children"[153] in mind when ratifying the amendment, thus, the amendment was not written to eliminate this classification. However, as illustrated in Part I of this note, the spirit of race classifications applies to other classifications, including that of minor children of undocumented entrants.[154]

Even if the overarching principle of the Fourteenth Amendment was to promote racial equality, the interpretation of the Fourteenth Amendment has changed over time.[155] The

306 (1880) (explaining the Fourteenth Amendment's purpose as "securing to a race recently emancipated . . . all the civil rights")); *Slaughter–House Cases*, 83 U.S. 36, 71 (1872) (finding the purpose of all Reconstruction amendments to be the "the freedom of the slave[s] . . . [and] the security . . . that freedom").

[150] *See generally Rodriguez*, 411 U.S. 1 (discussing race, national origin, alienage, indigency, and illegitimacy); *Graham*, 403 U.S. 365 (discussing national origin and alienage); *Loving*, 388 U.S. 1 (1967) (discussing race); *Korematsu*, 323 U.S. 214 (discussing race).

[151] Jennifer Huffman, *Justice Rehnquist and Alienage as a Suspect Classification*, 7 GEO. IMMIGR. L.J. 845, 849-50 (1993); *see also* Sugarman v. Dougall, 413 U.S. 634, 649-50 (1973) (Rehnquist, J., dissenting).

[152] Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483, 490 (1954); *Parents Involved in Cmty. Sch.*, 551 U.S. at 829.

[153] *Plyler*, 457 U.S. at 223.

[154] *See* discussion *supra* Part I (A) & (B); *see generally* Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); *Rodriguez*, 411 U.S. 1; *Graham*, 403 U.S. 365; McLaughlin v. State of Fla., 379 U.S. 184 (1964); Oyama v. California, 332 U.S. 633 (1948); *Korematsu*, 323 U.S. 214.

[155] Obergefell v. Hodges, 135 S.Ct. 2584, 2598 (2015) ("History and tradition guide and discipline this inquiry but do not set its outer boundaries.

Fourteenth Amendment has been adapted to eliminate not only race-based classifications but also alienage and national origin based-classifications.[156] Additionally, the Court has explicitly stated that even undocumented aliens "have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."[157] The Court has left no doubt that aliens, regardless of their status, are entitled to the protections of Fourteenth Amendment's Equal Protection Clause.[158]

Furthermore, a closer textual analysis illustrates that the original intent of the Equal Protection Clause was to protect any "person."[159] According to the Equal Protection Clause's drafters, the amendment's scope applies to "any person," which reflects a textual based intention to protect *all* people, not just those discriminated against based on their race.[160] This interpretation is also supported by cases where the Court utilized the Equal Protection Clause to reach beyond race to other classifications.[161] Moreover, the Equal Protection Clause is generally forward-looking, meaning that its interpretation reflects modern social values and should not be limited to protecting only one classification.[162] Consequently, the Equal Protection Clause

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That method respects our history and learns from it without allowing the past alone to rule the present.") (citing *Lawrence v Texas*, 539 U.S. 558, 572 (2003)).

156 *Rodriguez*, 411 U.S. at 61.

157 *Plyler*, 457 U.S. at 210 n.9 ("It would be incongruous to hold that the United States . . . is barred from invidious discrimination with respect to unlawful aliens, while excepting states from a similar limitation.") (citing Matthews v. Diaz, 426 U.S. 67, 84-86 (1976)); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (finding that the Fourteenth Amendment was designed to afford protections to all within the boundaries of a State); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment . . . 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 . . . . ").

158 *Plyler*, 457 U.S. at 215 ("[T]he Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory."); *see* discussion supra Part (I) (A) (4).

159 U.S. CONST. AMEND XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."); *Plyler*, 457 U.S. at 215.

160 U.S. CONST. AMEND. XIV, § 1.

161 *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985).

162 Obergefell v. Hodges, 135 S.Ct. 2584, 2598 (2015).

extends to classifications imposed on the undocumented youth class.

This first factor supports giving undocumented children suspect class status.

B. Classification Rarely Relevant for Legitimate Government Purpose

Next, it is important to evaluate whether the classification the government is trying to make is relevant to achieve a legitimate state objective.[163] Relevancy helps the Court determine if the legislature's judgement is clouded with bias or stereotypes against the class in question, or if the political process is protecting the group.[164] Strict scrutiny applies where the government's classification is rarely relevant to a legitimate legislative objective.[165] On the other hand, intermediate scrutiny may be appropriate where it is *sometimes* relevant,[166] while rational basis review is appropriate where the classification is *often* relevant.[167] For example, race is rarely relevant to a legitimate state interest.[168] One of the very limited instances where race may be relevant is

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[163] Goldberg, *supra* note 49, at 537 ("[S]keptical scrutiny will not follow if the trait plausibly can be the basis for differential treatment in a variety of contexts; but if the trait is so irrelevant to abilities that its use as the basis for differential treatment is likely to be arbitrary, regardless of the context, heightened scrutiny may be accorded.").

[164] Miriam J. Aukerman, The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records, 7 J.L. SOC'Y 18, 57 (2005) ("The Court's 'tiers of scrutiny' can be understood as a way to tie the level of scrutiny to a classification's likely relevance. Thus strict scrutiny is appropriate for classifications . . . which are almost never relevant . . . . "); Strauss, supra note 28, at 145, 164-65.

[165] Aukerman, *supra* note 164, at 57.

[166] Id.

[167] *Id*.

[168] Regents of Univ. of California v. Bakke, 438 U.S. 265, 291-99 (1978) (discussing race-based distinctions and their inherent suspect nature); Korematsu v. United States, 323 U.S. 214, 216 (1944), abrogated by Trump v. Hawaii, 138 S. Ct. 2392 (2018) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").

Affirmative Action.[169] Consequently, if race is used to make legal distinctions, the Court is automatically suspicious, as race-based classifications are rarely relevant to any legitimate state objective.[170]

The Court frequently relies on the relevancy factor to evaluate the level of trust it should place in the political process.[171] Relevancy was a tipping factor in declining to extend suspect classification to age and mental disability.[172] In assessing age, the Court held in *Kimel v. Florida Board of Regents* that, in comparison to race or gender, government conduct based on age could not be characterized as "seldom relevant" to achieve any legitimate state interest.[173] Those considerations were based on "prejudice and antipathy."[174] Similarly, in *City of Cleburne*, the Court found that the mentally disabled's "reduced ability to cope with and function in everyday world" was not rarely relevant.[175] The mentally disabled's immutability in this case was relevant, and

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[169] Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (upholding a raced-based classification for affirmative action under strict scrutiny); *Bakke*, 438 U.S. at 291-99 n.36.

[170] *Bakke*, 438 U.S. at 291 (citing *Korematsu*, 323 U.S. at 216).

[171] Aukerman, supra note 164; Jeremy B. Smith, The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation, 73 FORDHAM L. REV. 2769, 2775 (2005) (discussing the importance of relevancy and finding that "a view that those in the burdened class are not as worthy or deserving as others . . . [t]he lack of a relationship between a law and the characteristic against which it discriminates indicates that the law is not a result of 'legislative rationality' . . . but rather a reflection of 'deep-seated prejudice'") (quoting Plyler v. Doe, 457 U.S. 202, 216 n.4 (1982) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)); Strauss, supra note 28, at 145.

[172] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (quoting *City of Cleburne*, 473 U.S. at 440); *City of Cleburne*, 473 U.S. at 442-43.

[173] *Kimel*, 528 U.S. at 83 (internal quotations omitted) (quoting *City of Cleburne*, 473 U.S. at 440).

[174] *Id.*

[175] *City of Cleburne*, 473 U.S. at 441, 443. The Court struck down a city ordinance that denied a permit operation to a group home under rational basis. The Court found the discrimination was based on irrational prejudices against the mentally disabled. It is important to note that in this case the Court used laws dealing with mentality disabled as a plus factor in finding relevancy to legislative objectives, *see id.* at 450.

the state's interest to deal with it and pass beneficial laws for the class, such as the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6010(1), (2), was "plainly a legitimate one."[176] In both of these instances, the Court found that it should not automatically be suspicious of classifications whose characteristics were relevant for legitimate government purposes.[177] Rather, the Court should be suspicious of classifications that are rarely relevant for legitimate government purposes.

Classifications based on the status of minor children are not often relevant to accomplish a legitimate state objective. Aside from foreign policy, determination of nationality, and general federal immigration policy, the Court should be suspicious of laws using the illegality of a minor to discriminate against this class.[178] As *Plyler* demonstrated, state classifications that discriminate against minor children are hardly considered rational.[179] A law targeting undocumented minor children is often based on prejudice and animosity towards immigration.[180] Nevertheless, even if a Court were to find that the status of minor children was relevant to a legitimate state objective, it does not mean that heightened scrutiny should not be applied.[181] In *Grutter*, while upholding a race-based classification for affirmative action programs, the Court highlighted that just because a classification was relevant to government action it did not make classifications any less suspicious in the eyes of the Equal Protection Clause.[182]

This factor leans towards suspect or quasi-suspect class status.

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[176] *Id.* at 442-46 ("Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.").

[177] *See Kimel*, 528 U.S. at 83; *City of Cleburne*, 473 U.S. at 442.

[178] Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982).

[179] *Id.* at 224 ("[T]he discrimination contained . . . can hardly be considered rational . . . . ").

[180] *See* discussion *infra* Part II (C).

[181] *See* Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (discussing why heighten scrutiny does not mean or require that a classification be never relevant).

[182] *Id.*

C. Subordination or History of Discrimination

The next factor that is important to analyze is subordination or the group's history of discrimination. If the classification being used is generally used to subordinate or create a caste system, courts are immediately suspicious.[183] In *Brown v. Board of Education of Topeka, Shawnee City, Kansas*, the Court struck down the Separate but Equal Doctrine.[184] In doing so, the Court found the goal of segregation was subordination and the creation of a caste system that raises one group over another.[185] The Court found that the presence of subordination alerted to inherent suspicion and this factor favored a heighten level of scrutiny towards the statutes in question.[186] Similarly, almost thirty-one years later, the Court in *Cleburne* found subordination and the history of discrimination to be an important factor when deciding whether the mentally disabled were a suspect class.[187] The Court found that laws or regulations passed for the benefit of mentally disabled people were evidence against discrimination or

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[183] Smith, *supra* note 171, at 2774-75 (discussing laws subject to strict scrutiny and finding that these laws are likely to hold "a view that those in the burdened class are not as worthy or deserving as others") (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)); *see also* Darren Lenard Hutchinson, *"Unexplainable on Grounds Other than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 636 (2003) ("To obtain suspect class status, a group must demonstrate that it has suffered a history of discrimination.").

[184] Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483, 495 (1954) ("We conclude that . . . the doctrine of 'separate but equal' has no place.").

[185] *Id.* at 494 ("[T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority . . . ."); *see also* Bolling v. Sharpe, 347 U.S. 497, 497 (1954) (reaffirming that "Separate but Equal" in D.C. is not even a little equal, but rather, subordinates blacks); Sweatt v. Painter, 339 U.S. 629, 633 (1950) (finding that "Separate but Equal" is not even a little equal but rather subordinates blacks in State education); McLaurin v. Oklahoma State Regents for Higher Ed., 339 U.S. 637, 641 (1950).

[186] *Brown*, 347 U.S. at 494.

[187] *City of Cleburne*, 473 U.S. at 446; *id.* at 461 (Marshall, J., concurring) ("[T]he mentally retarded have been subject to a 'lengthy and tragic history.'") (quoting Regents of Univ. of California v. Bakke, 438 U.S. 265, 303 (1978)).

subordination of the mentally disabled.[188] Consequently, the Court has paid special attention to the existence of subordination or historical discrimination of a group when evaluating the suspect nature of a class.[189]

There has been a history of subordination of special relevance from the government against undocumented aliens and their undocumented minor children. In California, for instance, Proposition 187 prohibited the use of non-emergency health care, public education, and other services by the undocumented.[190] Likewise, California Proposition 227 required public schools to eliminate Spanish instruction and teach Limited English Proficiency (LEP) students in special classes in English, although they are not familiar with the language.[191] Similarly, the State of Arizona passed Proposition 200[192] and introduced the Senate Bill (SB) 1070.[193] Proposition 200 forced government employees to report if a person applying for public benefits lacked proper

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[188] *Id.* at 444-46 (holding that continuous legislation protecting the mentally disabled, and society's approval of it, is evidence against the subordination and powerlessness of the class).

[189] *See*, *e.g.*, *Brown*, 347 U.S. at 494; *City of Cleburne*, 473 U.S. at 446.

[190] League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1249, 1255 (C.D. Cal. 1997); Michelle R. Alvarez and Tara L. Butterfield, *The Resurgence of Nativism in California? The Case of Proposition 187 and Illegal Immigration*, 81 SOCIAL SCI. Q. 167, 168 (2000). Proposition 187 was passed in 1994 and was often referred to as the Save Our State initiative. The Proposition was struck down in part by the United States District Court for the Central District of California. The court found that California was "powerless to enact its own legislative scheme to regulate alien access to public benefits." Wilson, 997 F. Supp. at 1261.

[191] Valeria v. Davis, 307 F.3d 1036, 1038 (9th Cir. 2002). Proposition 227, which passed in 1998, was known as an anti-bilingualism approach as its purpose was to eliminate all bilingual classes from the public-school system and required public-school instruction to be conducted in English. *See id.*

[192] *Arizona Taxpayer and Citizen Protection, Proposition 200*, BALLOTPEDIA (2004), https://ballotpedia.org/Arizona_Taxpayer_and_Citizen_Protection,_Proposition_200_(2004) [hereinafter *Ballotpedia*] ("Proposition 200 [passed in 2004] requires that a state or local governmental entity that is responsible for administering 'state and local public benefits that are not federally mandated' must verify the identity and eligibility for each applicant for the public benefits.").

[193] Arizona v. United States, 567 U.S. 387, 393 (2012). SB 1070 passed in 2010, *id.*

identification to U.S. immigration law enforcement, and made it a misdemeanor for public officials who failed to report these findings.[194] While Arizona SB 1070 imposed a state misdemeanor on any alien who was not carrying his or her required documents,[195] and also required officers to determine an individual's immigration status during a "lawful stop, detention or arrest."[196] Likewise, the State of Alabama introduced House Bill (HB) 56, which permitted police officers to detain people based on the "suspicion" that they may be undocumented.[197] Local governing bodies have also passed regulations and ordinances with the purpose of subordinating and eliminating this class. At the local level, the City of Manassas, Virginia passed Resolution 07-894.[198] Resolution 07-894 allowed local enforcement to check the immigration status of anyone they suspected was in the United States illegally without any probable cause.[199] Additionally, the resolution called for the denial of social services and business licenses for this undocumented class.[200]

Because of the strong historical and present trend of government subordination against undocumented entrants, and by default their children, this factor leans towards suspect class status.

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194 Ballotpedia, supra note 192.

195 *Arizona*, 567 U.S. at 393-94.

196 *Id.* at 424.

197 Julia Preston, *In Alabama, a Harsh Bill for Residents Here Illegally*, NY TIMES, June 3, 2011, https://www.nytimes.com/2011/06/04/us/04immig.html. HB 26, also known as Alabama Taxpayer and Citizen Protection Act, was introduced in 2011. Later that year, a repeal for parts of the law was recommended by the Attorney General of Alabama. Elise Foley, *Alabama AG Luther Strange Recommends Repealing Parts Of State Immigration Law*, HUFFPOST, (Dec. 6, 2011, 4:05 PM), https://www.huffingtonpost.com/2011/12/06/alabama-attorney-general-recommends-repealing-parts-of-immigration-law_n_1132378.html.

198 9500 LIBERTY (St. Louis International Film Festival Nov. 15, 2009).

199 *Id.* The 2005 Resolution was particularly problematic because it gave to local enforcement immigration powers that fell under the Federal Government's prerogative and allowed local enforcement to conduct stops without the need of probable cause.

200 *Id.*

D. Democratic Defect or Political Powerlessness

Political powerlessness or democratic defect is another main factor the Court uses in evaluating if a class should be extended suspect status.[201] Democratic defect refers to the class' lack of ability to count on the legislative process to protect its interest.[202] As seen in Footnote 4 of *Carolene Products*, political powerlessness is the idea that when something has gone wrong and it harms a group, there is a high probability that it is a result of something that has gone wrong in democratic process.[203] In other words,

> While no group can expect to win every time in a democratic system, we all expect our lawmakers to consider our arguments with respect and to reject them only when they are inconsistent with the public interest. If a group fails to receive this treatment, it suffers a special wrong, one quite distinct from its substantive treatment on the merits.[204]

Thus, democratic defect recognizes that democracy presumes that people vote for those who represent their interests.[205] Nevertheless, sometimes this does not always work so well: either

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[201] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (finding that "[t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not . . . relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"); Rush, *supra* note 50, at 713-14 ("Recall that 'political powerlessness' is a major criterion the Court uses to classify groups as suspect."); Strauss, supra note 28, at 150-52 (discussing political powerlessness as a factor).

[202] Strauss, supra note 28, at 150-52 (discussing political powerlessness as a factor).

[203] U.S. v. Carolene Products Co., 304 U.S. 144, 152 (1938) ("[W]hether prejudice against discrete and insular minorities [exists depends on a serious] . . . curtail in the operation of those political processes ordinarily to be relied upon to protect minorities . . . which may call for a correspondingly more searching judicial inquiry.").

[204] Strauss, *supra* note 28, at 151 (quoting Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 738 (1985)).

[205] *Id.*

for voters or for those unable to vote.[206] Accordingly, if there is a democratic defect, Footnote 4 proposes that it is up to the courts to protect groups vulnerable to the biases of the legislature."[207] Generally, democratic defect considers three factors: (1) underrepresentation, (2) reliance on stereotypes, and (3) political indifference.[208]

1. Under Representation

Democratic defect can be measured by observing if members of the group have achieved political positions of power,[209] most often in legislative bodies. For example, the Court in *Frontiero* suggested that a women's political powerlessness was a direct result of the absence of women in positions of political office.[210] Although women may not "constitute a small and powerless minority," they are:

> Vastly underrepresented in this Nation's decision-making councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives . . . . [T]his underrepresentation

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[206] *Rodriguez*, 411 U.S. at 28; Rush, *supra* note 50, at 713-14; Strauss, *supra* note 28, at 150-52.

[207] Strauss, *supra* note 28, at 153 ("[C]ourts must protect groups that are vulnerable to legislative bias"); *see*, *e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (concluding that women continue to face discrimination in the political arena warranting equal protection even with the strides of improvement they have accomplished).

[208] *Id.* at 150-52; *Rodriguez*, 411 U.S. at 28; Rush, *supra* note 50, at 713-14; Caroline Mala Corbin, The Equal Protection Clause: Race-Based Classifications Subject to Strict Scrutiny, Constitutional Law Lecture (Fall 2018). This note narrows political democratic defect to these three main subfactors. Other proponents have alluded that courts consider (1) the ability to vote and (2) the pure numerical power of the group. Due to the inability of the undocumented and minors to vote, as well as the large population of the undocumented youth in the U.S, see discussion supra Part I (C)(3), these factors are not discussed. Additionally, both of these factors are often criticized and not frequently used.

[209] Strauss, *supra* note 28, at 159.

[210] *Frontiero*, 411 U.S. at 686.

> is present throughout all levels of our State and Federal Government.[211]

Furthermore, underrepresentation can also be measured through an analysis of laws passed in favor of the class in question.[212] If favorable laws exist, it is believed that the class has some sort of political power or influence in the legislature.[213] The ruling in *City of Cleburne* reflects this interpretation. The Court explained that the legislature's response for the mentally disabled "negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of lawmakers."[214]

There is an underrepresentation of illegal children or former undocumented individuals in the legislature at a local, state, and federal level. The age of this group for obvious reasons prevents undocumented children for running for office. However, even if they reach the necessary age requirement for a political office, their legal status prevents them from running for office or voting for a representative that will consider their interests.[215] For these reasons, there are very few lawmakers who originate from this group and have successfully been elected for political office.[216] As of 2019, only two "Dreamers" or formerly undocumented individuals have been elected to Congress: Congressman Adriano Espaillat from New York and former Congressman Ruben Kihuen

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[211] *Id.* at 687-88, 686 n.17.

[212] Strauss*, supra* note 28, at 156.

[213] *Id.*

[214] City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 445 (1985). It is important to note that in *City of Cleburne* the existence of laws for the handicapped was a sign of political power. Yet in *Frontiero*, the opposite was true. The existence of laws against sex discrimination showed Congress itself found that classifications based on gender are inherently invidious. *Frontiero*, 411 U.S. at 687-88.

[215] See, *e.g.*, U.S. CONST. art I, § 3 ("No Person shall be a Senator who shall not . . . been nine Years a Citizen of the United States"); U.S. CONST. art I, § 2 ("No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States").

[216] Alex Thompson, *How two formerly undocumented immigrants got elected to Congress*, VICE NEWS (Oct. 5, 2017), https://www.vice.com/en_us/article/9kdzmp/how-two-formerly-undocumented-immigrants-got-elected-to-congress.

from Nevada.[217] Arguably, there might be strong lobby groups or coalitions that may represent the interests of the undocumented youth, but even today very few specifically address the needs of this group or successfully advocate for beneficial legislation.

Notably, legislation, such as the Development, Relief, and Education for Alien Minors (DREAM) Act, has been brought to the legislative floor but it has failed to obtain the sufficient support or votes to pass.[218] The DREAM Act called for the cancelation of deportation for eligible aliens that were "younger than 18 years of age" when they entered the U.S.[219] The DREAM Act proposed the granting of conditional residency status for the eligible undocumented youth.[220] Additionally, the constitutional challenges Deferred Action for Childhood Arrivals (DACA) has faced also illustrates in part the political challenges children entrants confront.[221] DACA was created through an executive order under President Barack Obama and currently faces constitutional challenges.[222] Like the DREAM Act, DACA aims at stopping the deportation of the eligible undocumented youth.[223] Although it

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[217] *Id.* Former Congressman Kihuen came to the U.S. from Mexico at the age of eight on a visitor's visa and overstayed. He became a citizen through the 1986 Immigration Reform and Control Act signed by President Ronald Reagan. Congressman Espaillat, on the other hand, came to New York at age nine on a visitor's visa and also overstayed. A year later, he became a permanent resident.

[218] CONGRESSIONAL RESEARCH SERVICE (CRS), S.1615 – DREAM ACT OF 2017 (2017), https://www.congress.gov/bill/115th-congress/senate-bill/1615.

[219] *Id.*

[220] *Id.* Eligible aliens is considered "an alien who is inadmissible or deportable or is in temporary protected status who: (1) has been continuously physically present in the United States for four years preceding this bill's enactment; (2) was younger than 18 years of age on the initial date of U.S. entry; (3) is not inadmissible on criminal, security, terrorism, or other grounds; (4) has not participated in persecution; (5) has not been convicted of specified federal or state offenses; and (6) has fulfilled specified educational requirements."

[221] UNITED STATES CITIZEN AND IMMIGRATION SERVICES (USCIS), *Consideration of Deferred Action for Childhood Arrivals* (last reviewed/updated Feb. 14, 2018), https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca#guidelines (last visited Mar. 6, 2019).

[222] *Id.* DACA was rescinded on Sept. 5, 2017. Because of the legal challenges it faces, USCIS stopped accepting any DACA applications from applicants that had never before been granted deferred action under DACA.

[223] *Id.* Eligible aliens are considered those who: "(1) Were under the age of 31 as of June 15, 2012; (2) Came to the United States before reaching . . . [their]

does not grant permanent residency status, it provides eligible immigrants with a social security card and a work authorization permit.[224] Both of these proposals arguably have failed.

Because the undocumented youth have little to no positions of political power nor influence over the legislature, this class is underrepresented, which is evidence of an overall democratic defect.

2. Stereotypes and Prejudice

Second, if laws or lawmakers rely on dangerous or offensive stereotypes, rather than facts, it is likely that there is a democratic defect. Legislators are not always immune from the public biases resulting from stereotypes against groups and may be susceptible to prejudice.[225] Determining if lawmakers are relying on biases and stereotypes helps determine if closer judicial scrutiny is needed.[226] The Court in *City of Cleburne* explained:

> Heightened scrutiny does not allow courts to second-guess reasoned legislative or professional judgments tailored to the unique needs of a group . . . *but* it does seek to assure that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day . . . [T]he Court recognizes . . . that a group may . . . be the target of the sort of prejudiced, thoughtless, or stereotyped

16th birthday; (3) Have continuously resided in the United States since June 15, 2007, up to the present time; (4) Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS; (5) Had no lawful status on June 15, 2012; (6) Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and (7) Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

[224] *Id.*

[225] Strauss, *supra* note 28, at 151.

[226] *Id.*

> action that offends principles of equality found in the Fourteenth Amendment.[227]

Thus, classifications must be carefully scrutinized to ensure that they are not based on unconstitutional and false stereotypes or assumptions.[228] For example, in *Korematsu*, it is argued that the military order against the Japanese relied on the stereotype that *all Japanese were inherently dangerous* at this period in WWII.[229] Such a stereotype alerts the Court to a need for heighten scrutiny. Rather than facts, the government action would be relying on dangerous and impermissible stereotypes.

With respect to minor children of undocumented entrants, most of the legislation discussed in Part II (C) relied on private biases and dangerous stereotypes about immigrants.[230] Relying on dangerous or offensive stereotypes like this signal a democratic defect and offends the equal protection principles of the Fourteenth Amendment.

3. Selective Indifference

If there is an unconscious failure to extend to a minority or another the same care and recognition of humanity that one would give to their own, it is likely that there is a democratic defect.[231] This idea rests on the possibility that lawmakers have carved out a selective indifference for people who are not part of their own group.[232] To understand selective indifference, it is important to reference *Korematsu* again.[233] In *Korematsu*, people of Japanese descent were subject to a curfew in concentration-like camps under

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[227] City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 445 (1985) (emphasis added).

[228] *Id.* at 478 ("[C]lassifications . . . must be carefully examined to assure they do not rest on impermissible assumptions or false stereotypes . . . . ").

[229] Korematsu v. United States, 323 U.S. 214, 216 (1944).

[230] *See* discussion, *supra* Part II (C): Subordination or History of Discrimination; *see generally* Arizona v. U.S., 567 U.S. 387 (2011); League of United Latin American Citizens v. Wilson, 997 F.Supp. 1244 (C.D. Cal. 1997); Valeria v. Davis, 307 F.3d 1036 (9th Cir. 2002); Alvarez, *supra* note 190; 9500 LIBERTY, *supra* note 198.

[231] Corbin, *supra* note 208.

[232] *Id.*

[233] *See Korematsu*, 323 U.S. at 216.

the rationale of national security. [234] The drafters behind the order reasoned that isolating all people of Japanese descent was the best way to protect the United States against espionage.[235] Although the United States was at war with both Japan and Germany,[236] this order only targeted in application the Japanese, which signals the possibility of selective indifference. In other words, because Germans are more closely related and look like most of the drafters of the *Korematsu* Order, they are less likely to be impacted by the order. As such, because the drafters of the Order are less likely to be related to the Japanese and do not have a stake in the group, the drafters are more likely to be indifferent as to the effect of a *Korematsu* Order on a Japanese minority group.

It is possible that lawmakers have carved out a selective indifference for children of undocumented entrants. That is, lawmakers have declined to extend a sign of humanity to this group which they do not belong to. While we cannot be certain, it is important to note that there are not many lawmakers that represent this group.[237] It is also important to note that most lawmakers have voted down legislation that helps this particular group enter society as functioning members (i.e. The Dream Act) [238] and that lawmakers have set forth law and regulations that negatively impact this class.[239] The selective indifference present here signals a democratic defect, which as a whole makes this factor lean towards suspect or quasi-suspect class status.

Consequently, because all four prongs of the four-part analysis that considers the factors that led to heightened scrutiny for race lean towards strict scrutiny for children of undocumented entrants, this class too should be extended "suspect" or at least "quasi-suspect" class status. Accordingly, any law that makes

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[234] *Id.* at 218 ("We cannot say that . . . the Government did not have ground for believing . . . persons could not readily be isolated . . . and constituted a menace to the national defense and safety . . . . ").

[235] *Id.*

[236] *Id.*

[237] *See* discussion *supra* Part II (D) (1): Democratic Defect or Political Powerlessness—Under Representation.

[238] *Id.*

[239] *See* discussion *supra* Part II (D) (1): Democratic Defect or Political Powerlessness—Under Representation.

discriminatory classifications against this class should be subject to heightened scrutiny.

IV. CONCLUSION

Minor children brought to the United States through no fault of their own should be considered a suspect class. Undocumented children should be granted protection from prejudice and democratic defect as insular minorities. While illegal alienage has not been found to be a suspect class,[240] this subclass should be analyzed on its own merit. Although adult entrants voluntarily enter this class by virtue of entry into the country and fall short of suspect status,[241] undocumented children do not. As such, the undocumented youth class is inherently different. In *Plyler*, the Court found it hard to justify that these children are responsible for their legal status and thus should face the consequences.[242] Yet, the Court turned a blind eye on its findings and concluded that undocumented aliens and by default their children are not a suspect class.[243] Analyzing the Courts rationale closely and their application of something more than rational basis leads to the conclusion that classifications of minor undocumented children should be subjected to heightened scrutiny.

Furthermore, after reviewing a four-part analysis that considers the same factors that led to heightened scrutiny for race, this note arrives at the conclusion that this subclass too is a "suspect" or at least a "quasi-suspect" class. The four-part analysis groups all factors the Court has used to extend or decline suspect class status to other groups together into: (1) the original intent of the Fourteenth Amendment; (2) the relevancy of the classification; (3) the subordination or historical discrimination of the class, and (4) evidence of a democratic defect or political powerlessness.[244] This

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240 *See* Pyler v. Doe, 457 U.S. 202 (1982).

241 *Id.* at 219 n.19.

242 *Id.* at 220.

243 *Id.* at 202.

244 *See generally* Cornell LII, *supra* note 60; Strauss, *supra* note 28, at 148-67; Sherry, *supra* note 28, at 108-14; *see, e.g.*, City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985); *Plyler*, 457 U.S. 202; Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Graham v.

note finds that undocumented children meet most, if not all, of these factors. Because of their distinct nature from the general illegal alienage characteristics set forth by *Plyler* and the class' satisfaction of the multiple "suspect" factors set forth by the Court, undocumented children should be extended suspect class status that warrants heighten scrutiny.

Richardson, 403 U.S. 365 (1971); McLaughlin v. State of Fla., 379 U.S. 184 (1964); Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944).