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Angela M. Elsperger

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I. The Nature of the Problem

A. *Jean and Carlos*

Jean was born January 29, 1978, in Petit Goave, Haiti.[1] In September 1991, his father was killed after a military coup overthrew the democratically elected President.[2] Fearing their well-being, Jean's family hid from the military.[3] Around October of 1992, Jean's mother sent fourteen-year-old Jean unaccompanied to the United States on a commercial fishing boat.[4] Upon reaching the United States, the child reached Miami, Florida, where he sought the Haitian consulate.[5] Jean was taken in by a woman whom he met at the consulate and with whom he lived for approximately eight months.[6]

In May 1993, Jean was abandoned at the Haitian Refugee Center by the woman who had initially provided him with a home.[7]

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* B.A. 1992, University of North Dakota; Third-year law student at the University of North Dakota. I wish to thank Candace Zierdt, my Juvenile Law professor, for providing me with the paper topic for my Juvenile Law paper from which this article originated. I also wish to thank Christina Zawisza and Alan Mishael for supplying me with copies of the briefs and other material from the Florida litigation.

1. Petitioner's Memorandum of Law Opposing the Department of Health and Rehabilitative Services' Motion to Dismiss Petition for Dependency at 3, *In re* R.R., (No. 94-15030D003) (Fla. Cir. Ct. filed Feb. 2, 1994) (on file with the *Law & Ineq. J.*). The child's name was deleted from the Memorandum by the child's attorney to protect confidentiality, but the child will be referred to as "Jean" for the purposes of this article.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Petitioner's Memorandum of Law Opposing the Department of Health and Rehabilitative Services' Motion to Dismiss Petition for Dependency at 3, *In re* R.R. (No. 94-15030D003) (Fla. Cir. Ct. filed Feb. 2, 1994).

7. *Id.*

Wandering from shelter to shelter, homeless and penniless,[8] Jean sought assistance from Florida's Department of Health and Rehabilitative Services (HRS) hotline.[9] HRS told the police to take the child to Miami Bridge, a private shelter which provides temporary housing for runaway children.[10] Because of the temporary nature of Miami Bridge, authorities from the facility soon notified Jean that he would not be able to stay there any longer.[11]

Like Jean, Carlos has had a troubling childhood.[12] Carlos was born on December 24, 1976, in Esquintla, Guatemala.[13] Carlos' mother was killed by guerrillas in Guatemala when Carlos was seven years old, and he never knew his father.[14] Carlos was taken in by the guerilla camp, but soon fled in order to return to the small village of his birth.[15] There, a neighbor cared for Carlos and two other young boys who had also escaped from the guerilla camp.[16] Finding Guatemala too dangerous, the neighbor abandoned the boys and moved to El Salvador.[17]

When Carlos was ten years old, he left Guatemala for Mexico and obtained work there at a grocery store. After two years,[18] he

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8. *Id.* at 3-4. The child was taken to Miami Bridge, a temporary shelter for children, but the shelter later brought him to the Haitian American Community Center which housed him at a motel for two nights. *Id.* Desperate, the child notified the police, who refused to assist him. *Id.* at 3. Jean then sought refuge at a homeless shelter where he was able to stay for a few days. *Id.* There, a church service worker helped him, finding him a private home where he lived until November 1993. *Id.* at 3-4. In November a different family of three shared their home, a one-room apartment, with Jean. *Id.* at 4. In January 1994, severe poverty and cramped quarters led Jean to the streets once again. *Id.*

9. *Id.* at 4. The HRS hotline refused at least two previous calls because the child was an undocumented immigrant. *Id.* The third time that the hotline was contacted, the concerned individual claimed that he had no knowledge of the child's immigrant status, and only then did the HRS act. *Id.*

10. *Id.* HRS refused to investigate Jean's circumstances. *Id.*

11. Petitioner's Memorandum of Law Opposing the Department of Health and Rehabilitative Services' Motion to Dismiss Petition for Dependency at 4, *In re* R.R. (No. 94-15030D003) (Fla. Cir. Ct. filed Feb. 2, 1994).

12. *See* Petitioner's Memorandum of Law in Opposition to Motion to Dismiss and in Support of Appointment of Guardian Ad Litem, *In re* Child, (No. 93-15754) (Fla. Cir. Ct. filed Dec. 20, 1993) (on file with LAW & INEQ. J.). The child's name was deleted on the Memorandum to protect confidentiality, but the child will be referred to as "Carlos" for the purposes of this article.

13. *Id.* at 2.

14. *Id.*

15. *Id.*

16. *Id.*

17. Petitioner's Memorandum of Law in Opposition to Motion to Dismiss and in Support of Appointment of Guardian Ad Litem at 2, *In re* Child, (No. 93-15754) (Fla. Cir. Ct. filed Dec. 20, 1993).

18. *Id.* Petitioner's Memorandum indicates that it is unclear whether Carlos entered the United States in 1988 or 1989. *Id.*

entered the United States at the Texas border.[19] In Texas, Carlos remained homeless until he was taken in by a group of Mexican and Honduran adults in Dallas.[20] Shortly thereafter, he left Dallas for San Antonio, where he lived for two years.[21] Carlos then moved to Miami, Florida.[22] Like Jean, Carlos sought shelter at Miami Bridge, but Miami Bridge was unable to find assistance for Carlos from any state agency because he did not have documentation.[23] Miami Bridge authorities encouraged Carlos to report himself to the Immigration and Naturalization Service (INS),[24] where he was taken into custody. INS wished to transfer Carlos to an appropriate placement, but HRS refused to take custody of the child.[25]

Attorneys for Jean and Carlos filed dependency petitions in Florida's Circuit Court Juvenile Division so that Jean and Carlos could be found dependent and, thus qualify for the Department of Health and Rehabilitative Services' programs, such as foster care placement and special immigrant J-visa status.[26] Prior to the dependency hearings, however, HRS filed motions for dismissal, asserting that the Florida courts lacked jurisdiction to hear the dependency actions because the children were illegal aliens.[27] The Florida Circuit Court granted the department's motions for dismissal for lack of jurisdiction and, as a result, denied Jean and Carlos foster care and other social services.[28]

B. Florida's Struggle With the Budget

Until recently, Florida's Department of Health and Rehabilitative Services took state custody of immigrant children without in-

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19. *Id.*

20. *Id.*

21. *Id.* During that time, Carlos lived with members of a Refugee Aid Project for a month in 1993. *Id.* The Project raised a collection to get Carlos bus fare to Miami, Florida, so he could meet up with a friend who never arrived. *Id.* at 2-3.

22. Petitioner's Memorandum of Law in Opposition to Motion to Dismiss and in support of Appointment of Guardian Ad Litem at 3, *In re* Child, (No. 93-15754) (Fla. Cir. Ct. filed Dec. 20, 1993).

23. *Id.*

24. *Id.*

25. *Id.* INS facilities are inappropriate facilities for children because INS cannot substitute as parents, nor can INS facilities substitute as homes for children. Petitioner's Memorandum at 14, *In re* R.R., (No. 94-15030D003).

26. Telephone Interview with Christina Zawisza, Attorney, Legal Services of Greater Miami (Mar. 14, 1994) [hereinafter Zawisza].

27. Petitioner's Memorandum at 2, *In re* R.R. (No. 94-15030D003); Petitioner's Memorandum at 4, *In re* Child, No. (93-15754).

28. Zawisza, *supra* note 26. The Petitioners are appealing the decisions. *See* R.G. v. Florida Dept. of Health and Rehabilitative Services, (No. 94-00779) (Fla. Dist. Ct. App. filed June 8, 1994). Following Jean's and Carlos' action against HRS, other suits followed. *See, e.g.*, Doe v. Towey, (No. 94-1696) (Fla. Cir. Ct. filed Aug. 17, 1994).

cident and without reference to their undocumented status.[29] Florida's policy of not making distinctions between children based on their alienage reflected the state's overriding social and humanitarian interest in the welfare of all children, regardless of their citizenship.[30]

The Department of Health and Rehabilitative Services has apparently reconsidered its interest in the welfare of all children by requiring children to show documentation before qualifying for child welfare services.[31] Although Florida does not require citizenship or legal resident status in its dependency statutes[32] or administrative policies,[33] the Department of Health and Rehabilitative Services is requiring such documentation in its practice.[34] The State of Florida's limited resources and the Federal government's "unrealistic immigration policies"[35] were considerations which led to this seemingly uncharitable decision; but Florida officials plead that they were without alternative.[36]

C. Florida's Governor's Plea for Payment

The U.S. Commission on Immigration Reform has been holding public hearings to review and evaluate the impact of current immigration policy in the United States and to report its findings to Congress.[37] The Commission was formed to recommend immigration policy changes which would be consistent with domestic and international realities, national interests, and humanitarian per-

29. *Florida Governor Tells of Alien Woes; Chiles Says Illegal Immigrants Costing State $1 Billion Yearly*, DALLAS MORNING NEWS, Feb. 12, 1994, at 4A [hereinafter *Alien Woes*].

30. Judge J. Daniel Dowell et al., *Protection and Custody of Children in the United States Immigration Court Proceedings*, 16 NOVA L. REV. 1285 (1992) (advocating that Congress vest immigration judges with the ability to appoint guardians ad litem so that children's rights and personal well-being are fully protected).

31. *Alien Woes, supra* note 29, at 4A.

32. FLA. STAT. ANN. §§ 39.01, 39.40-.404 (West 1988 & Supp. 1994) (statute does not explicitly require citizenship or legal resident status for dependency determination).

33. FLA. ADMIN. CODE ANN. § 10M-6.141 (1992) (stating that unaccompanied minors who are refugees or entrant minors are provided child welfare services).

34. *See supra* notes 9 and 24 and accompanying text (stating that HRS refused to provide services to undocumented children).

35. *Alien Woes, supra* note 29, at 4A (quoting Governor Chiles).

36. *Choosing What Child Suffers*, ST. PETERSBURG TIMES, Feb. 12, 1994, at 4B.

37. *See, e.g.*, Meeting Notice, 59 Fed. Reg. 3331 (1994) (announcing Hearing of Commission with government officials and others in Miami, Florida, on February 11, 1994); Meeting Notice, 59 Fed. Reg. 9965 (1994) (announcing Hearing of Commission with government officials and others in El Paso, Texas, on March 17, 1994) [hereinafter The Commission].

spectives.[38] The Commission's first report, which includes recommendations to Congress, was made available September 30, 1994.[39] Due to outcries by public officials and media coverage, the public has become increasingly aware of the growing population of undocumented aliens in the United States and the domestic problems that such growth exacerbates.[40]

The growing immigration population has prompted the creation of social programs which require intergovernmental cooperation between Federal, State, and local governments.[41] The fiscal responsibilities in administering the programs are creating problems for state and local governments in particular.[42] States such as Florida feel overly burdened by Federal immigration policies mandated without accompanying federal support.[43]

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38. U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY - A REPORT TO CONGRESS at 24-25.

39. 59 Fed. Reg. 3331 (1994); 59 Fed. Reg. 9965 (1994). The Commission acknowledged the fiscal impact that the ineffective enforcement of Federal immigration law has had on States and localities. U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY - A REPORT TO CONGRESS 25 (1994) (stating that "the federal government clearly bears a responsibility for alleviating the impacts of unlawful immigration," the Commission supported authorization of impact aid to offset the fiscal burden during the short-term while immigration enforcement is improved). *Id.* at 24-25.

40. ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 79-80 (1985). *See also*, Larry Rohter, *Florida Opens New Front in Fight on Immigrant Policy*, N.Y. TIMES, Feb. 11, 1994, at A14 (addressing Florida's influx of illegal immigrants and inability to provide state support for both aliens and citizens) [hereinafter *New Front in Fight*]. Immigration policy is complex and emotionally divisive, particularly because of the "nation of immigrant" status of the United States. Susan Forbes Martin, *U.S. Immigration Policy: Challenges for the 1990s*, 4 NAT'L STRATEGY REP. 1, 1 (1993). Although the United States continues to value its diversity and immigrant tradition, government officials and individual states have become increasingly concerned about the ability of the United States to absorb the immigrant population. *Id.* at 5.

Even when this paper was in its final stages, immigration was frequently at the forefront of national concern. On September 9, 1994, the United States and Cuba reached a U.S.-Cuban Immigration Agreement. The Agreement was made in response to an emergency influx of Cuban immigration to the United States. *U.S. Announces Rules to Ease Cuban Immigration*, HOUS. CHRON., Oct. 13, 1994, at A26. The Agreement includes a pledge to bring 20,000 Cuban immigrants to the United States annually by using a more efficient process for granting visas. *Id.* In exchange, Cuba pledged to stop the Cuban exodus to the United States in unsafe structures. *U.S. and Cuba to Meet on Immigration Issues*, N.Y. TIMES, Oct. 19, 1994, at A14. The means by which the Agreement will be implemented are still being negotiated. *Id.* Although the impact that the Agreement will have on Florida's foster care situation is uncertain, the recent exodus to the United States makes all the more urgent the need for the federal government and Florida to resolve the issue of who is responsible for the care of immigrant children.

41. Martin, *supra* note 40, at 5.

42. *Id.*

43. *Id.* Florida, California, New York, Hawaii, and New Jersey, are "home" to 78% of the foreign born in the United States. *Id.*

During the Commission's fact-finding visit to South Florida, Floridian officials and citizens informed the Commission about Florida's struggle with United States's immigration policy.[44] Governor Lawton Chiles claimed that Florida had done its part to help immigrants, but that the federal government needed to do more to assist the States.[45] Telling the Commission that the Federal Government must "open its eyes to unrealistic immigration policy,"[46] Governor Chiles asserted that the Federal Government has inadequately funded programs which were supposed to reimburse the States for providing services to immigrants.[47] Governor Chiles estimated that the illegal alien population alone costs Florida over one billion dollars a year.[48]

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44. Impacts of Immigration on South Florida, 1994: Hearings on Immigration Reform Before the U.S. Commission on Immigration Reform (Feb. 11, 1994) (unpublished Commission Summary, on file with the author) [hereinafter Impacts on South Florida]. The Commission has engaged a two-track approach to research the United States' immigration policies, the first track addressing short-term issues, and the second track addressing long-term impacts of immigration legislation. Susan Forbes Martin, *The Commission on Immigration Reform*, 21 MIGRATION WORLD 43, 43 (1993). The discussions in Florida between the Commission and Florida officials were part of the fact-finding process intended to investigate the impacts of immigration on the United States and to collect data from state and local agencies. *Id.*

45. Impacts on South Florida, *supra* note 44, at 5.

46. *Alien Woes, supra* note 29, at 4A. Governor Chiles stated that the federal government is not enforcing its immigration laws, enabling undocumented aliens to come to the United States without being deported, either because they are not caught by the INS or because the INS has chosen not to deport them. Impacts on South Florida, *supra* note 44, at 7. He argued that the federal government must enforce its immigration laws better and take responsibility for the costs which result from its immigration policy. *Id.* An example of the impact of the Federal government's failure to enforce the immigration laws or to provide payment includes a 1993 Miami hospital report that visits by undocumented aliens accounted for 16% of its total visits, amounting to a total cost of $312 million, of which $240 million went unpaid. *Id.*

When an Immigration Reform Commissioner asked Governor Chiles whether certain federal immigration laws were especially "unrealistic," the Governor replied that after liberal amnesty was granted by the federal government in the 1980s, the government claimed that it would strictly enforce the immigration laws, but then did not. *Id.* Governor Chiles failed to provide the Commission with a recommendation that included specific programs or statutes, but he stated that in balancing Florida's annual budget, he had to make "hard choices." *Id.* He felt that the federal government should also be required to balance its books. *Id.*

47. Impacts on South Florida, *supra* note 44, at 7. Immigration was at the forefront of Governor Chiles election campaign. *See Bush, Chiles Still Split on Immigration*, ORLANDO SENTINEL, Oct. 26, 1994, at 1A. Florida voters considered immigration to be second in their list of concerns only to crime, which was their primary concern. *Id.*

48. *Bush, Chiles Still Split on Immigration*, *supra* note 47, at 1A (the actual figure cited by Governor Chiles was $1.5 billion). Members of the Governor's cabinet illustrated for the Commission the extent of the expenses for services which Florida provided to aliens. The Education Commissioner, Doug Jamerson, stated that the cost of federally mandated education of foreign-born students, including illegal and legal aliens and refugees, was $45 million dollars in Dade County alone, which spent

An ongoing battle has developed between the States and the Federal government regarding reimbursement for programs and demands that the Federal government has placed on the States. Immigration experts contend Florida's recent move to deny foster care to undocumented immigrant children displays a new aggressiveness on the part of state officials.[49] Florida's hardline decision involving undocumented immigrant children is a response to the lack of federal support, both in enforcing immigration laws and reimbursement for program costs.

The Secretary of the Department of Health and Rehabilitative Services, Jim Towey, informed the Commission that Florida administers foster care to 9,000 children.[50] Towey claimed that, due to costs and the lack of resources, Florida can barely provide for children who are citizens, let alone undocumented children.[51] However, only 113 of the children receiving foster care in Florida are undocumented immigrants.[52]

Florida's denial of foster care has been criticized by children's interests groups such as the National Association of Social Workers

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$581 for every new foreign-born student. Impacts on South Florida, *supra* note 44, at 6. Harry Singletary, the Secretary of Corrections, stated that Florida spent $133 million dollars to incarcerate illegal aliens from 1988 to 1993, none of which was reimbursed by the federal government. *Id.*

Governor Chiles pleaded that the "[f]ederal bills are being charged to Florida's account, and [Florida has] had enough. We are depriving our citizens . . . because we are having to take care of illegal immigrants." *Alien Woes*, *supra* note 29, at 4A.

49. *New Front in Fight*, *supra* note 40 at A14. While Florida was filing suit against the federal government for reimbursement, California displayed its own aggressiveness by approving the Proposition 187 initiative on November 8, 1994, which purports to bar "illegal aliens" from receiving many public benefits, including education. Jerry Seper, *Reno Has Proposition 187 Situation on Watch; No Signal If, How Justice Will Step In*, WASH. TIMES, Nov. 11, 1994, at A15. Temporary restraining orders have halted enforcement of the law. *Id.* The decisions rely on the Supreme Court's decision in Plyler v. Doe, 457 U.S. 202 (1982). *Id.* Proposition 187 has implications beyond the scope of this article, but the article reflects the federalism concerns and raises the same constitutional questions. *See infra* notes 112-87 and accompanying text (applying Plyler v. Doe analysis to Florida's situation).

50. *New Front in Fight*, *supra* note 40, at A14.

51. *Id.*

52. Telephone Interview with John Perry, Florida's Chief of Child Protection Services (Apr. 5, 1994) [hereinafter Perry]. Previously, the Department of Health and Rehabilitative Services did not collect data regarding the immigrant status of children seeking care. Telephone Interview with Jack Ahearn, Florida's Chief of Permanency Planning (Apr. 5, 1994) [hereinafter Ahearn]. After the Commission questioned Florida officials on the number of undocumented immigrant children in their care, Florida began collecting the data. Perry, *supra*. *See* Plaintiffs' Mem. Supp. Summ. J. at 19-20, Doe v. Towey, (No. 94-1696) (Fla. Cir. Ct. filed Aug. 17, 1994) (citing Elsperger, *Florida's Battle with the Federal Government Over Immigration Policy Holds Children Hostage: "They Are Not Our Children!"* (unpublished manuscript)).

and the Child Welfare League,[53] but Secretary Towey claims that the denial is for humane, as well as economic reasons.[54] He claimed that the tough approach was to avoid the "magnetic effect" that providing foster care to illegal immigrant children would have on Florida.[55] In addition, Towey claimed that if foster care were provided to undocumented children, a signal would be sent to parents in countries such as Cuba, Haiti, and Guatemala that a right to foster care exists in the United States and, thus, a better life for their children.[56] This perception, according to the Secretary, would risk children's lives at sea.[57]

Aside from defending in court its policy which denies foster care to children based upon their immigrant status,[58] Florida has filed a lawsuit against the Federal government seeking reimbursement for services that Florida has already provided to immigrants.[59] Although the Florida policy has assisted state officials in

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53. *New Front in Fight*, *supra* note 40, at A14 (quoting Luisa Lopez of the National Association of Social Workers as stating that the policy was a disservice to the children and the greater community). Ira Kurzban, an attorney specializing in immigration law, stated that Florida's approach creates an "underclass in society" which is helpless in that it does not have a source to obtain support. *Alien Woes*, *supra* note 29, at 4A. Without support, the children turn to criminal activity. *Id.* Jim Towey, Florida's Secretary of the Department of Health and Rehabilitative Services, confirmed Kurzban's observation to the Commission when he stated that many of the children turn to prostitution and crime because they cannot find assistance. Impact on South Florida, *supra* note 44, at 6.

54. *New Front in Fight*, *supra* note 40, at A14.

55. *Id.*

56. *Id.*

57. *Id.* The Secretary's concern is based on the thousands of Cubans and Haitians who have arrived in the United States since the 1980s after journeys at sea, many immigrants having endured the voyage on makeshift rafts and wooden boats. *Id.*

58. When questioned, Jack Ahearn stated that there was not a policy in place which denied services to undocumented children. Instead, he stated that the policy was exactly the opposite and that HRS did not ask children their immigration status. Ahearn, *supra* note 52. When asked if that was Florida's policy, then why two children were denied services, he stated that he was aware of the situation but that no official policy had been drafted. *Id.* On April 14, 1994, an HRS agency provided a "directive" entitled "HRS Handling of Cases in Conjunction With INS." Plaintiffs' Mem. of Law in Supp. of S.J. at 1, Doe v. Towey, No. (94-1696) (Fla. Cir. Ct. filed Oct. 25, 1994). The "directive's" validity, authority, and applicability to Florida law is being challenged. *Id.* at 5. The "directive" considers immigration status when determining whether a child should be provided HRS services. Plaintiffs' Complaint for Injunctive Relief, Doe v. Towey, (No. 94-1696) (Fla. Cir. Ct. filed Aug. 17, 1994).

59. Impacts on South Florida, *supra* note 44, at 7. Florida's lawsuit against the Federal Government has been coined a "rebellion" by states which cannot afford the costs of illegal immigrants any longer. *Florida Governor Tells U.S.: Pay for Aliens*, ST. LOUIS POST, Feb. 12, 1994, at B13.

Governor Chiles filed suit on behalf of the State of Florida, Dade County Public Health Trust, and the Dade County School Board against the United States on April 11, 1994. Reena Shah Stamets, *Chiles Sues Government Over Illegal Immigrants*, TAMPA TODAY, Apr. 12, 1994, at 1B [hereinafter *Chiles Sues Government*]. Also

gaining the nation's attention,[60] denial of foster care is not consistent with the requirements of Florida law,[61] Federal statute,[62] nor the U.S. Constitution.[63]

II. The Foster Care System: A Need for Intergovernmental Cooperation

Florida Statutes section 39.40(2) provides that the circuit court shall have "exclusive original jurisdiction" in a dependency proceeding.[64] Florida Statutes' definition of a "child" is not limited to citizens or legal residents.[65] The Department of Health and Rehabilitative Services regulation, promulgated pursuant to Chapter

named as defendants in the suit were Immigration Commissioner Doris Meissner; Miami INS District Director, Walter Cadman; Secretary of Health and Human Services, Donna Shalala; and Attorney General, Janet Reno, who was the former Dade County State Attorney prior to her cabinet position. *Id.*

The suit alleges that Florida spent nearly $1 billion a year on services to illegal aliens, such as education, medical services, and welfare without reimbursement from the Federal government. Reuters, *U.S. Is Sued Over Aliens*, N.Y. TIMES, Apr. 11, 1994, at A13. The suit has been coined a "political attention grabber" or "political rally" rather than a lawsuit with significant merit. Stamets, *Chiles Sues Government*, at 1B. The suit will likely pay off more with political leverage in Washington than reimbursement of costs by a court judgment. William E. Gibson, *Chiles Sues to Recoup $1.5 Billion Spent on Illegal Immigrants*, ORLANDO SENT., Apr. 12, 1994, at C1. Perhaps that was Florida's intent. Prior to filing the suit, Governor Chiles stated "[w]hat do we have to do to get [the federal government's] attention. We have pleaded and begged, so it's kind of like, 'We'll see you in court.'" Diane Rado, *Study: State Pays $884 Million for Illegal Aliens*, TAMPA TODAY, Mar. 13, 1994, at 4B.

As this article was in its final stages, Mr. George High, the executive director of the Center for Immigration Studies in Washington, stated that because immigration is largely under the control of the Federal government, governors cannot affect immigration policy "'unless they really start shouting, screaming and bringing the house down.'" Impacts on South Florida, *supra* note 44, at 7. Perhaps Chiles' "bringing the house down" and Florida's filing a complaint against the Federal government contributed to the allocation of more than six million dollars for refugee assistance. *Id.*

60. *See* Impacts on South Florida, *supra* note 44, at 7; *Florida Seeks Federal Aid in Support of Immigrants* (ABC television broadcast, Apr. 11, 1994) (reporting that Florida filed suit against the United States); Paul Leavitt, *Immigration Costs*, USA TODAY, Jan. 18, 1994, at 8A (announcing the petition which Legal Services of Greater Miami filed against the Department of Health and Rehabilitative Services due to the Department's refusal to take two minor illegal immigrants as wards).

61. *See infra* notes 64-70 and accompanying text.

62. *See infra* notes 67-106 and accompanying text.

63. *See infra* notes 109-194 and accompanying text.

64. FLA. STAT. ANN. § 39.40(2) (West 1988). *See* Padgett v. Pettis, 445 So.2d 633, 635 (Fla. Dist. Ct. App. 1984) (stating that a circuit court has inherent and continuing jurisdiction to enter orders pertaining to a child's welfare).

65. FLA. STAT. ANN. § 39.01(7) (West 1988 & Supp. 1994). Section 39.01(7)(a) provides that a child is *any* unmarried person under eighteen who is "alleged to be dependent, in need of services, or from a family in need of services, or any married or unmarried person who is charged with a violation of law occurring prior to the age of eighteen." *Id.* (emphasis added).

39 of the Florida Statutes, expressly recognizes that undocumented children are to be provided with child welfare services and benefits.[66] Although HRS policy has not been modified by either legislative enactments or policy changes, Jean and Carlos have been denied care with Florida's knowledge and apparent approval.[67]

A Florida court is competent to decide child custody matters when the child is physically present in Florida and the child has been abandoned or neglected;[68] or the best interests of the child require the court to assume jurisdiction;[69] or it appears that no other state would have jurisdiction.[70] Jean and Carlos are children within Florida's definition because they are under eighteen and have filed a dependency petition with the court. Because the circuit court has sole jurisdiction over dependency matters, it must hear Jean's and Carlos' petitions because the children are in the United States without any parent or guardian, they have no means of obtaining assistance, and they cannot return to their countries of origin because of political unrest. Although the court does not have to grant either petition, Jean's and Carlos' best interests require that their dependency petitions be heard by the court pursuant to Florida statute and policy.

Dismissing Jean and Carlos' petitions for lack of jurisdiction also contravenes Federal law which depends upon the States to de-

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66. FLA. ADMIN. CODE ANN. r. 10M-6.141 (1992). Florida recognizes that refugees or entrant children are to receive care from the state, but that the care costs are reimbursed by the Federal government. *See infra* notes 91-94 and accompanying text (discussing the Refugee Act of 1980).

67. Florida's policy is unclear and a discrepancy exists as to the policy's authority. *See supra* note 58 (discussing HRS policy). No Florida legislation has been proposed or adopted which would modify the dependency statutes or jurisdiction of the courts. Florida has addressed the immigration situation in its last legislative session, however. A Florida Commission on Newcomer Issues was formed to serve as a state liaison to federal agencies and state congressional delegations. H.B. 1117, S. 2426, 1994 Fla. Sess. Law Serv. 1. Among its duties, the Commission on Newcomer Issues is to identify population figures, develop and maintain an inventory of federal grant programs, and keep inventory of state and local matching fund requirements. *Id.*

The Florida Legislature also offered a Memorial to Congress in which the Legislature urged Congress to take action with respect to aliens and financial assistance to states for their provision of services to aliens. H.B. 1219, 1994 Fla. Sess. Law Serv. 1. Because the Federal government is responsible for immigration policy and state and local governments have the responsibility to provide services, Florida requested that the states be provided with funding. *Id.* The Memorial also urged cooperation between Florida and federal agencies, particularly the INS. *Id.* No specific legislation was introduced pertaining to foster care. *See id.*

68. FLA. STAT. ANN. § 61.1308(c)(1-2) (West 1988 & Supp. 1994).

69. FLA. STAT. ANN. § 61.1308(d)(2) (West 1988 & Supp. 1994).

70. FLA. STAT. ANN. § 61.1308(d)(1) (West 1988 & Supp. 1994).

termine the best interests of immigrant children.[71] Furthermore, both Federal and State statutory schemes require cooperation between Federal and State governments. The States receive payments from the Federal government for providing federally approved foster care to qualified children.[72] To receive the federal payments, a state must have its plan for foster care approved by the Secretary of Health and Human Services.[73] Before approval, all plans must conform to the federal statutory requirements which provide for foster care maintenance payment programs.[74]

The state must make payments to qualified children, as defined under the Federal statute.[75] If the child has received or could receive aid under the federally approved state plan for aid to families with children,[76] the child is eligible for foster care payments.[77] Because neither Jean nor Carlos is a citizen or permanent resident-alien of the United States, each must reside within the United States "under color of law" to receive aid under the foster care statutory framework.[78]

The statutory language "[p]ermanently residing under color of law" has received much attention by courts and commentators because it is subject to various interpretations.[79] A better-reasoned interpretation of the statutory language would recognize eligibility

71. *See infra* note 97 (discussing Federal law's dependence on State court determinations).

72. 42 U.S.C. § 670 *et seq.* (1991 & Supp. 1994) (providing federal payments for foster care and adoption assistance).

73. 42 U.S.C. § 671(a) (1991 & Supp. 1994).

74. *Id.* (stating that the plan must provide for foster care maintenance payments in accordance with 42 U.S.C. § 672 (1991 & Supp. 1994)).

75. 42 U.S.C. § 672(a) (1991 & Supp. 1994).

76. 42 U.S.C. § 602 (1991 & Supp. 1994) (providing federal aid for approved state plans for aid and services to needy families with children). Section 602(a)(33) (Supp. 1994) provides that in order for any child to be considered dependent and thus eligible for AFDC, the child must be either "(A) a citizen, or (B) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law," or as a result of an application for asylum.

77. 42 U.S.C. § 672(a)(4) (1991 & Supp. 1994). Section 672(a)(4) provides an exception for children who are excluded from federal benefits under Title 8. As long as the child would otherwise qualify for benefits under § 602, the child is eligible for foster care maintenance payments. § 672(a)(4). Section 672 requires that other provisions be met before a child has been considered "qualified" under the provision, but qualification under section 602 is the primary criterion. *See* § 672(a)-(b).

78. *See* 42 U.S.C. § 602 (1991 & Supp. 1994) (describing requirements for children to qualify for aid under § 602).

79. Robert Rubin, *Walking a Gray Line: The "Color of Law" Test Governing Noncitizen Eligibility for Public Benefits*, 24 SAN DIEGO L. REV. 411 (1987). Proponents exist for both narrowly and expansively construing the statutory language. *Id.* at 411-12. Those who urge a narrow construction claim that making benefits widely available to undocumented immigrants lures aliens to this country. *Id.* at 411. Those who urge a more liberal interpretation do so to protect persons who are permitted to remain in the United States. *Id.* at 412.

for assistance to aliens that the INS has permitted to reside in the United States "under federal immigration policy and practice."[80] Under this interpretation, as long as the undocumented immigrant resides in the United States with INS knowledge and permission, including inchoate permission, the individual satisfies the statutory requirement.[81]

In *Holley v. Lavine*, an undocumented alien mother sought federal assistance.[82] The INS indicated that it knew of the woman's presence in this country but would not exercise its ability to deport her "at [that] time."[83] Recognizing that an executive official has discretionary power to enforce deportation, the Second Circuit found that because of INS knowledge and refusal to exercise its power to deport her, the woman was residing in the United States "under color of law."[84]

The *Holley* court also liberally interpreted "permanently residing" in the United States. Deriving the definition of "permanently" from the immigration statute's definition of "permanent," the court found that the mother needed to have a relationship of a continuous nature with the United States, even though the relationship may have been terminated by either the United States or the individual at any time.[85] Thus, the woman satisfied the statutory requirement of "permanently residing in the United States under color of law" and was eligible for assistance.[86]

Jean and Carlos have been residing in Florida with the knowledge of INS officials.[87] The INS has indicated that it does not wish to take custody of Jean nor initiate deportation proceedings.[88] Similarly, the INS has stated that although it has Carlos in custody, it wishes to place him in foster care, and has stayed deportation pro-

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80. Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395, 431 (1987-88). A broad interpretation of the language is more just and humane because restrictions in its application adversely affect the most vulnerable in society, in this instance children. *Id.*(stating that vulnerable groups include children, the elderly, and the handicapped).

81. Holley v. Lavine, 553 F.2d 845, 850 (2d Cir. 1977).

82. *Id.* at 847-48.

83. *Id.* at 850.

84. *Id. See also* Sudomir v. McMahon, 767 F.2d 1456, 1461 (9th Cir. 1985) (permitting alien's inchoate presence in the United States to satisfy the "under color of law" statutory requirement).

85. *Holley*, 553 F.2d at 850 (citing 8 U.S.C. § 1101(a)(33), which defines "permanent").

86. *Id.*

87. Petitioner's Memorandum at 5, *In re* R.R. (No. 94-15030D003); Petitioner's Memorandum at 3, *In re* Child (No. 93-15754).

88. Petitioner's Memorandum at 5, *In re* R.R. (No. 94-15030D003).

ceedings pending the outcome of his dependency petition.[89] Jean's and Carlos' presence is also "permanent" within *Holley's* statutory interpretation since the INS has failed to deport them, even though it has such ability.[90] Like the woman in *Holley*, Jean and Carlos are eligible for aid because they are permanently residing in the United States under color of law.[91]

Even if Jean and Carlos are not permanently residing in the United States under color of law, they are "refugees."[92] Refugees were given special protections and benefits by Congress under the Refugee Act of 1980.[93] Under the Act, unaccompanied refugee children may receive child welfare services, including foster care maintenance payments and services, until the child reaches one month past the age of eighteen.[94] The Federal government may reimburse the States for one hundred percent of these costs.[95]

Although the Federal government enjoys almost full reign in defining immigration status,[96] the Federal statutes rely on the States' abilities to determine the best interests of the children and

89. Petitioner's Memorandum at 3, *In re* Child (No. 93-15754).

90. *See Holley*, 553 F.2d at 850 (discussing *Holley's* interpretation of "permanently" as consistent with 8 U.S.C. § 1101(a)(33)'s definition of "permanent"). *See also* Brief for Appellant at 24, R.G. v. Florida Dept. of Health and Rehabilitative Services, (No. 94-0079) (Fla. Dist. Ct. App. filed June 8, 1994) (citing Elsperger, *Florida's Battle with the Federal Government Over Immigration Policy Holds Children Hostage: "They Are Not Our Children!"* (unpublished manuscript, 1994) for the children's inchoate justification to reside in the United States).

91. *See* Calvo, *supra* note 80, at 413 (stating that post-*Holley* cases have failed to reach a consensus on the appropriate application of the standard, but that most have looked to the reality of immigration law, policy, or practice and have found the standard satisfied if the alien resides in the United States with the knowledge of the INS, and the aliens continued presence has been condoned by INS failure to deport).

92. A "refugee" is any person who is unwilling or unable to return to his or her country of nationality because of persecution or fear of persecution "on account of race, religion, nationality, membership in a particular social group or political opinion," or as granted by the President of the United States. 8 U.S.C. § 1101(a)(42) (Supp. 1994). Jean and Carlos are unwilling to return to their countries because of fear of persecution. *See supra* notes 3, 14-17 and accompanying text (stating that Jean was hiding from a military coup and Carlos was seeking refuge from a guerillan camp).

93. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.). The purpose of the Act was to provide humanitarian assistance to refugees. *Id.*

94. Refugee Act of 1980, § 412, 8 U.S.C. § 1522 (d)(2)(B) (1988). Section 1522(d), which specifically provides assistance for refugee children, refers to the application of foster care maintenance payments. The section also permits the federally approved State plan to extend the age requirement past eighteen, as long as the refugee is prescribed the same availability to the program as other children of the state. *Id.*

95. *Id.*

96. *See infra* notes 110-119 and accompanying text (discussing the ability of the federal government to define immigration status in the United States).

to provide care in exchange for funding.[97] Florida claims that the INS has sole jurisdiction over the undocumented juveniles, yet the Federal statutory scheme requires a cooperative federalism in which the immigration statutes under Title 8 have relied upon the child welfare programs under Title 42.[98] By accepting federal funding, Florida must comply with the federal conditions.

Federal law allows an undocumented child to obtain "special immigrant status" if a juvenile court finds the child dependent, eligible for long-term foster care, and that it is in his or her best interests to stay in the United States.[99] Federal regulation defines a juvenile court as a United States court having jurisdiction "under State law to make judicial determinations about the custody and care of juveniles."[100] A child's eligibility for long-term foster care requires a juvenile court's determination that family reunification is not feasible.[101] In Florida, the circuit court is the only court with jurisdiction to make dependency determinations.[102] Thus, by denying undocumented children the jurisdiction of juvenile court for dependency proceedings, Florida has denied Jean and Carlos access to "special immigrant status" which would permit them to apply for lawful, permanent residence in the United States.[103]

A state's participation in the federally assisted welfare program is voluntary, but election to participate obligates a state to comply with the Federal statutes and regulations which govern the program.[104] The foster care assistance provision under Part E of Title 42 is a component of a "scheme of cooperative federalism" between the Federal government and the states.[105] Under coopera-

97. *See* 8 U.S.C. § 1101(a)(27)(J) (relying on state juvenile courts to determine the dependency of an undocumented child); 42 U.S.C. § 671(a)(4) (permitting alien children to qualify for foster care maintenance payments considering the best interest of the child pursuant to § 671(e)); 58 Fed. Reg. 42,850 (to be codified at 8 C.F.R. § 204.11) (proposed Aug. 12, 1993) (providing that the juvenile court must determine dependency and eligibility for foster care pursuant to the state's program).

98. *See supra* notes 71-77 and accompanying text (discussing the relationship between the Federal government and the state).

99. 8 U.S.C. § 1101(a)(27)(J)(1988).

100. Immigrant Petitions, 58 Fed. Reg. 42,850 (1993) (to be codified at 8 C.F.R. § 204.11) (proposed Aug. 12, 1993).

101. *Id.*

102. FLA. STAT. ANN. § 39.40(2) (West 1988).

103. *See* 8 U.S.C. § 1204 (1970 & Supp. 1994). An immigrant visa may be issued to a special immigrant who has shown that he or she is of "special immigrant status." *Id.*

104. Pratt v. Wilson, 770 F. Supp. 539, 541 (E.D. Cal. 1991) (citing Philbrook v. Glodgett, 421 U.S. 707 (1975)).

105. In *King v. Smith*, 392 U.S. 309, 316 (1967), the Court referred to the AFDC program, of which the foster care assistance is a subpart, as a scheme of cooperative federalism because both the Federal and State governments were involved: the pro-

tive federalism, Congress explicitly and implicitly defines the boundaries of state prerogatives.[106]

Because Florida is provided funding for foster care assistance by the Federal government, Congress is able to explicitly and implicitly affect Florida's foster care program, which Congress has done to further immigration policy. Because Congress requires dependency determinations and foster care assistance for undocumented immigrant children, Florida must comply, unless Florida wishes to jeopardize its federally assisted welfare programs for its citizens.[107] But even if Florida is willing to risk its federal funding, the Florida policy is invalid under the Equal Protection Clause of the Fourteenth Amendment[108] and the Supremacy Clause of the U.S. Constitution.[109]

III. Equal Protection of the Law

The Fourteenth Amendment of the U.S. Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[110] By finding that the illegal alien children are not within the jurisdiction of the juvenile courts, Florida denied the children equal protection of Florida state law.[111] However, not all distinctions between groups of immigrants are unconstitutional.

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gram is financed largely by the federal government on a matching fund basis while the program is administered by the States.

106. Doe v. Beal, 523 F.2d 611, 615-16 (3d Cir. 1974), *rev'd on other grounds*, 432 U.S. 439 (1977).

107. Considering the small number of undocumented children in Florida's foster care system, it would be economically efficient for Florida to comply with the immigration statutes. *See supra* note 52 and accompanying text (stating that only 113 of the 9,000 children in foster care are undocumented children).

108. *See infra* notes 108-186 and accompanying text.

109. *See infra* notes 187-193 and accompanying text.

110. U.S. CONST. amend. XIV, § 1.

111. The Petitioners did not challenge the motion to dismiss on equal protection grounds pursuant to the Fourteenth Amendment. Zawisza, *supra* note 26. However, an equal protection challenge was deemed "very plausible." *Id.* Consistent with constitutional doctrine, the Petitioners avoided the constitutional challenge. *Id. See, e.g.*, Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944) (stating that it is prudent for a court to avoid decision on a constitutional question when alternative grounds exist for resolution). Rather, the Petitioners challenged the Department of Health and Rehabilitative Services' Motion for Dismissal based upon the Florida State Constitution and Florida statutes. Zawisza, *supra* note 26. The Florida policy has been challenged as violative of equal protection. Plaintiffs' Complaint for Injunctive Relief, Doe v. Towey, (No. 94-1696) (Fla. Cir. Ct. filed Aug. 17, 1994).

A. Unequal Powers Under the Constitution

The U.S. Constitution grants Congress the power to "establish an uniform Rule of Naturalization."[112] Based upon this power, Congress has developed a complex immigration scheme governing legal admission to the United States[113] that reflects foreign and domestic policy decisions.[114] The States, however, are not granted constitutional power to classify aliens and, therefore, are more limited in their ability to draw distinctions based on alienage.[115] Courts scrutinize alienage classifications pursuant to constitutional requirements, regardless of which governmental body draws the distinction.[116]

Who draws the distinction or classification affects the level of judicial scrutiny that a court will use. Classifications drawn by states which treat aliens differently on the basis of status are reviewed pursuant to the Equal Protection Clause of the Fourteenth Amendment, while classifications drawn by federal acts are reviewed pursuant to the Due Process Clause of the Fifth Amendment.[117] State laws which distribute benefits or limit opportunities on the basis of alienage are subject to strict scrutiny, which requires the state to show a compelling state interest for the classification and a narrowly tailored means of achieving that interest.[118] Federal laws, however, which classify on the basis of alienage are

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112. U.S. CONST. art. I, § 8, cl. 4.

113. Plyler v. Doe, 457 U.S. 202, 225 (1982) (citing Mathews v. Diaz, 426 U.S. 67 (1976)); *see* 8 U.S.C. § 1101-1525 (governing immigration and nationality).

114. *See Plyler*, 457 U.S. at 223-25.

115. Mathews v. Diaz, 426 U.S. 67, 81 (1976) (stating that line-drawing between groups of aliens to determine eligibility for social service programs is best left to the political branches of the Federal government, and not the judiciary).

116. See, e.g., *id.*

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.

Id. at 77 (citations omitted).

117. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 14.12, at 631 (3d ed. 1986).

118. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971). A state statute imposed greater restrictions on legal resident aliens than on citizens for welfare benefits. *Id.* at 367. The court found this distinction violative of the Fourteenth Amendment. *Id.* at 382. *Compare Mathews*, 426 U.S. at 86-87 (holding congressional classification based on residency of aliens constitutional). If the classification is related to a "political function," however, in which citizenship is a necessary prerequisite, then the classification is subject only to rational basis review. *See* Sugarman v. Dougall, 413 U.S. 634, 647 (1973). The Court has not extended strict scrutiny analysis to aliens who are unlawfully present in the United States, however.

subject to traditional rational basis scrutiny and are upheld so long as the classification rationally furthers a legitimate interest.[119]

Under Federal law, whether an alien is eligible for benefits depends on the immigration status of the alien and the eligibility requirements of the particular benefit program.[120] Aliens who are resident aliens, refugees, asylums, or of "parole" status are generally eligible for benefits, provided that they qualify for the individual programs.[121] Aliens who enter the United States without valid documents and are, thus, undocumented or "illegal" aliens, are almost never eligible for Federal government benefits.[122]

Because the U.S. Constitution gives the Federal government considerably more discretion to make alienage distinctions than it gives to State governments, intergovernmental relations have been strained. The result is an ongoing struggle between Federal and State governments. The Federal government's eligibility requirements for federal benefits and its failure to enforce immigration statutes result in disproportionate burdens.[123] The states are frustrated because, although they cannot change federal immigration policy, they must nevertheless "bear the entire social and economic burden" when the Federal government does not contribute to the costs.[124] Still, the State of Florida must heed the Constitution, even when the Federal government does not help pay the costs incurred by states.[125]

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119. *See* Mathews v. Diaz, 426 U.S. at 82-84. Congress determined that those legal resident aliens who had resided within the United States for five years were eligible for federal benefit. *Id.* at 70 n.2. The Court found that this classification did not violate the Fifth Amendment. *Id.* at 87. *Compare* Graham v. Richardson, 403 U.S. 365, 376 (1971) (holding that a state violated Equal Protection by restricting benefits based on alienage classifications).

120. DAVID CARLINER ET AL., THE RIGHTS OF ALIENS AND REFUGEES: THE BASIC ACLU GUIDE TO ALIEN AND REFUGEE RIGHTS 214 (An American Civil Liberties Union Handbook, 2d ed. 1990).

121. *Id.*

122. CARLINER ET AL., *supra* note 120.

123. Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395, 424 (1987-88). California, New York, Texas, Illinois, and Florida bear the largest burden because most aliens reside in these states. *Id.*

124. *Id. See supra* notes 58, 66 and accompanying text (discussing Florida's attempts to obtain federal reimbursement for services provided to illegal immigrants). *See also supra* note 49 (discussing California's response to immigration burdens).

125. Florida's suit against the Federal government for reimbursement is not the first occasion that the Federal government has been the defendant in an immigration action. *See* Lewis v. Gross, 663 F. Supp. 1164 (E.D.N.Y. 1986). In *Lewis*, a New York City health corporation intervened in a suit against the Federal government because New York City was not being reimbursed for health care costs to aliens. *Id.* at 1166.

B. Plyler v. Doe: *Special Protection for Alien Children*

1. The Fourteenth Amendment Applies to Illegal Aliens

In *Plyler v. Doe*,[126] the Court extended the Fourteenth Amendment equal protection guarantee to aliens who were unlawfully in the United States, or "illegal aliens."[127] In *Plyler*, the plaintiffs were illegal alien children who were challenging a Texas statute which denied free public education to children who were not citizens of the United States or not legally admitted to the United States.[128] Texas argued that the Fourteenth Amendment's phrase "persons within the jurisdiction" did not extend to undocumented aliens and that the children were not entitled to equal protection under Texas law.[129] The Court swiftly disposed of this argument, stating that aliens, even though undocumented, are clearly "persons," and have been previously guaranteed due process rights under the Fifth and Fourteenth Amendments.[130]

To permit Texas to identify the undocumented children as non-"persons" would enable Texas to avoid its obligation to provide equal protection under Texas law to all persons.[131] The Court

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126. 457 U.S. 202 (1982).

127. *Id.* at 215.

128. *Id.* at 206. Section 21.031 of the Texas Education Code made a classification on the face of the statute and provided the following:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

Id. at 205 (citing TEX. EDUC. CODE ANN. § 21.031 (West 1981)).

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

130. *Id.* at 210 (1982). The Court stated that the Fifth Amendment protects undocumented aliens from invidious discrimination by the Federal Government. *Id.* (citing Mathews v. Diaz, 426 U.S. 67, 77 (1976)).

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

stated that to grant Texas such permission would violate the clause's very intent, which is to abolish class-based legislation.[132]

Like Texas, Florida has attempted to deny jurisdiction to undocumented children because of their status. While the Fourteenth Amendment requires that undocumented children enjoy the same equal protection benefits as children who are citizens, this is a conclusion that "only begins the inquiry."[133]

2. An Intermediate Equal Protection Standard Is Required

Applying equal protection analysis to most State acts requires assurance that the State's classification is rationally related to a legitimate State purpose.[134] However, as *Plyler* reiterated, such deference to State action is not available to classifications that affect a "suspect class," or that infringe upon the exercise of a "fundamental right."[135] When a suspect class or fundamental right is affected, the Constitution requires that the State action meet the strict scrutiny standard, which demands a narrowly tailored means justifying a compelling state interest.[136]

The *Plyler* Court determined that illegal aliens are not a suspect class, although aliens who lawfully reside in the United States do attain "suspect class" distinction.[137] Similarly, education is not a fundamental right.[138] Thus, the Texas statute did not have to satisfy the strict scrutiny test of equal protection.[139] Yet, the Court required Texas to satisfy an intermediate scrutiny standard, which

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132. *Id.* at 213. Although an alien's unlawful presence in the United States subjects him or her to deportation, until he or she leaves the jurisdiction either voluntarily or involuntarily, he or she is entitled to equal protection of the laws of the States. *Id.* at 215.

133. *Id.* at 215.

134. *Id.* at 216. This rational basis Equal Protection standard is applied to State action regarding social and economic welfare legislation. This standard is usually readily satisfied by the states since it is the minimum standard applied in equal protection analysis. *See, e.g.,* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (stating that the Constitution permits the states wide latitude with social or economic legislation).

135. Plyler v. Doe, 457 U.S. 202, 216 (1982). *See* McLaughlin v. Fla., 379 U.S. 184, 192 (1964) (requiring Florida to meet strict scrutiny for a discriminatory statute); Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982) (requiring the State to meet intermediate scrutiny when discriminating on the basis of gender); Mathews v. Lucas, 427 U.S. 495, 505 (1976) (requiring the State to meet intermediate scrutiny when discriminating against illegitimate children).

136. *See, e.g.,* Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985) (stating that laws subject to strict scrutiny "will be sustained only if they are suitably tailored to serve a compelling state interest").

137. *Plyler*, 457 U.S. at 221 n.19.

138. *Id.* at 223.

139. *See id.*

requires more than mere rationality, because of the innocent children affected and the nature of the interest involved.[140]

A "shadow population" comprised of illegal aliens has emerged in the United States due, in part, to the lenient enforcement of immigration laws and the failure to effectively bar employment opportunities to illegal aliens.[141] The *Plyler* Court was concerned that these factors fostered a permanent caste of underclass undocumented aliens.[142] Children are special members of this underclass because of their vulnerability and their inability to control their parents, who alone are able to make their presence in the United States lawful.[143] The Court noted that a rational purpose for penalizing children who are unlawfully present in this country is almost inconceivable.[144]

The Court also considered the importance of education in "maintaining the fabric" of society chiefly due to its lasting impact on children's lives.[145] The special status of undocumented alien children and the importance of education combine to elevate the requisite standard to that of intermediate scrutiny, which requires a showing of substantial state interest.[146] The Court questioned, however, whether the Texas statute could even meet a minimum rationality standard.[147]

A strong dissent by Justice Burger criticized the Court for tailoring the Equal Protection standard to *Plyler's* specific context, rather than applying the minimum rationality standard traditionally used by the Court.[148] Heeding Justice Burger's criticism, the

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140. *Id.* at 224.

141. *Plyler*, 457 U.S. at 218.

142. *Id.* at 219.

143. *See id.* at 220.

144. *Id.* at 220.

145. *Plyler*, 457 U.S. at 221 (citing Meyer v. Neb., 262 U.S. 390, 400 (1923) (regarding education as of supreme importance); Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (stating that public schools are vital institutions in society); Wis. v. Yoder, 406 U.S. 205, 221 (1972) (recognizing that some degree of education is necessary to properly prepare children for civic duties)).

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

147. *Id.* at 220.

148. *Plyler*, 457 U.S. at 244 (Burger, J., dissenting). Justice Burger was joined by Justices White, Rehnquist, and O'Connor. *Id.* at 242. The dissent deemed the majority approach "results-oriented," *id.* at 244, an approach aimed at compensating for congressional failures and lack of effective immigration management. *Id.* at 242-43. While these failures created grave socio-economic problems for the illegal aliens, the Judiciary was not seen as the appropriate forum to resolve the immigration influx and the correlating socio-economic dilemma; rather, the constitutional duty belonged to Congress. *Id.* Justice Burger stated that Congress must decide whether to deport or provide for illegal alien children; that it was inappropriate for the Court to compensate for the failures of Congress. *Id.* at 254.

Court may have limited the *Plyler* precedent in a more recent decision.[149]

In *Kadrmas v. Dickinson Pub. Schools*, the Court seemed to limit *Plyler* by stating that *Plyler's* holding was not intended to go beyond the " 'unique circumstances' . . . that provoked its 'unique confluence of theories and rationales.' "[150] The Court refused to extend *Plyler's* elevated scrutiny in *Kadrmas*, a case which involved a poor child unable to afford the busing fee charged for transportation to a public school.[151] The Court distinguished wealth and alienage classifications, stating that while it did not require elevated scrutiny for wealth classifications, it did consider classifications based on alienage to be suspect.[152] The Court also found significant that the child in *Kadrmas* was not being punished for the illegal conduct of her parents.[153] Finding that *Kadrmas* did not resemble *Plyler*, the Court refused to extend *Plyler's* rationale.[154] The Court, however, did not reverse *Plyler*,[155] which still requires that Florida laws meet a heightened equal protection scrutiny.

The "unique circumstances" of *Plyler* are equally applicable to Jean and Carlos' situations. Like the children in *Plyler*, Carlos and Jean are innocent, undocumented children who are being denied a service that they would receive but for their immigrant status. Rather than education, however, Carlos and Jean are being denied foster care. The nature of the interest involved and the special class of children affected require an intermediate Equal Protection standard.

Like the children in *Plyler*, Jean and Carlos have been given an inchoate justification to stay in the United States. Although the INS is aware of their presence in the United States, the INS has chosen not to take Jean into custody and would prefer not to deport Carlos. The Supreme Court has recognized the special needs of undocumented alien children and has given them a special protection,

149. *See* Kadrmas v. Dickinson Pub. Schools, 487 U.S. 450 (1988).

150. *Kadrmas*, 487 U.S. at 459 (citing *Plyler*, 457 U.S. at 243 (Powell, J., concurring)). In *Kadrmas*, a mother and child from North Dakota challenged a Dickinson School District's busing fee. *Id.* at 455. The family refused to sign the busing contract and claimed that the fee violated equal protection based on *Plyler*. *Id.*

151. *Id.* at 459.

152. *See id.* at 457-58.

153. *Id.* at 459.

154. *Id.* at 460.

155. The *Kadrmas* decision stands for the Court's retreat from the context-specific balancing approach it used in *Plyler*. *The Supreme Court, 1987 Term — Leading Cases*, 102 HARV. L. REV. 143, 203 (1988). But the decision does not seem to have altered the special consideration given to undocumented alien children, since the Court found this the distinguishing factor between the two cases. *Kadrmas*, 487 U.S. at 459.

particularly when they have been given an inchoate justification to stay in the United States.[156]

Before elevating the standard in *Plyler*, the Court calculated the nature of the interest being denied by Texas.[157] The justifications that the Court gave for elevating the standard for education are equally applicable to foster care. Foster care, like education, is not a fundamental right,[158] but it plays a pivotal role in our society by providing children, who otherwise lack one, with a home. A stable home environment provides children with the same self-reliance and self-sufficiency which the Court found to be provided by education.[159] The Court stated that education was a means to "awake" a child to values, both social and professional.[160] The Court found education to be a necessity if society expects children "to succeed in life."[161] Likewise, foster care which provides a "home" for children is of equally great importance for a child's social and intellectual well-being.

The family relationship has been recognized as a fundamental unit of society which contributes to a child's nurturing.[162] Jean and

156. *Plyler* recognized the inability of children to have control over their illegal presence in the United States. *Plyler*, 457 U.S. at 220. Jean's mother placed him on a boat which was en route to the United States and Carlos was without alternatives when he was abandoned. Although Jean and Carlos' parents did not bring them to the United States, the lack of control applies to undocumented children accompanied by their parents as well. *See supra* note 90 and accompanying text (discussing Brief for Appellant at 24, R.G. v. Florida Dept. of Health and Rehabilitative Services, No. 94-0079) (Fla. Dist. Ct. App. filed June 8, 1994) citing Elsperger, *Florida's Battle with the Federal Government Over Immigration Policy Holds Children Hostage: "They Are Not Our Children!"* (unpublished manuscript, 1994) for the children's inchoate justification to reside in the United States)).

157. *See Plyler*, 457 U.S. at 221.

158. Foster care is not recognized as a fundamental right, although children may acquire constitutional protections once they are taken into custody by the State. *See, e.g.*, Deshaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 201 n.9 (1988) (implying that the child would have a due process right if the state had removed the child from his home and if he were abused in the foster home); *see also* Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protections of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 217-44 (advocating a child's constitutional right to safety in foster care).

159. *Plyler*, 457 U.S. at 222 (quoting Wis. v. Yoder, 406 U.S. 205, 221).

160. *Id.* at 223 (quoting Brown v. Board of Educ., 347 U.S. 483, 493).

161. *Id.* In his concurring opinion, Justice Powell noted that penalizing children by withholding welfare benefits because of their parents' status, when the benefits were made available to other children who qualify, would likewise be impermissible. 457 U.S. at 239 n.3 (Powell, J., concurring).

162. A host of decisions recognize the importance of the family unit. *See* Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977) (family instills most values); Roe v. Wade, 410 U.S. 113, 152-53 (1973) (recognizing the fundamental interest in family relationships); Wis. v. Yoder, 406 U.S. 205, 232-33 (1972) (stating the importance of the family and family environment); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (the custody, care and nurturing of a child are a part of family life).

Carlos are unaccompanied, undocumented children who are without family. If denied benefit of Florida's dependency proceedings, they lose the nurturing environment the foster care system provides.[163] The foster care system has increasingly become a permanent, rather than temporary, substitute for the family unit.[164] In the child care context the state has a responsibility to provide care for a child when the parents are unable to maintain their own responsibilities.[165] The Court has repeatedly recognized the state's role as *parens patriae* in protecting children from harm.[166] Florida is ignoring its *parens patriae* duty[167] by denying foster care to undocumented alien children. Because of the special status of alien children and the nature of the foster care interest, the Equal Protection Clause requires Florida to satisfy a heightened standard of scrutiny when the denial of foster care is challenged.

3. Federal Policy Supports Equal Treatment

In *Plyler*, Texas argued that because the children were unlawfully present in the United States pursuant to Federal statute, the State, too, could deprive illegal aliens Equal Protection of the

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163. *But see* Stacie Marie Colvin, Comment, *Lashawn A. v. Dixon: Responding to the Pleas of Children*, 49 WASH. & LEE L. REV. 529, 529 (1992) (the foster care system in the United States is failing and in shambles).

164. *See* Lipscomb v. Simmons, 884 F.2d 1242, 1249 (9th Cir. 1989) (citing Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 625, 626-27 (1976)).

165. Wilder v. Bernstein, 848 F.2d 1338, 1348 (2d Cir. 1988) (the state is obligated to act for parents and to fulfill parental obligations by providing religious needs to children while the children are in foster care).

166. *See, e.g.*, Reno v. Flores, 113 S.Ct. 1439, 1455 (1993) (O'Connor, J. concurring). In *Flores*, the Court upheld an INS regulation which permitted detained juvenile aliens to be released only to their parents, close relatives, or legal guardians, except in unusual circumstances, as not violative of the Fourteenth Amendment, in part because the regulation was designed to protect the welfare of juveniles.

167. The Supreme Court has qualified a State's duty to act by holding that the Constitution does not impose an affirmative obligation upon a state to protect an individual's liberty interest or to provide substantive services. *See* Deshaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 202 (1989) (a State may impose "affirmative duties of care and protection," but such duties were not required by the Constitution); Harris v. McRae, 448 U.S. 297, 317-18 (1980) (as a general matter the Constitution does not impose an affirmative obligation on a State to enable a woman to exercise her constitutional right to an abortion). Jean and Carlos are not claiming that the State has an affirmative duty to provide foster care. They are asserting that because Florida provides foster care to other children who are similarly situated, but for immigration status, they too qualify for Equal Protection under the law. The role of foster care in a child's life and the State's provision of such care are factors illustrating the nature of the interest for determining the appropriate Equal Protection standard, rather than determining whether the State has an affirmative duty to provide foster care.

law.[168] The Court, however, reiterated that classification of immigration status was not within the constitutional domain of the states; rather, Congress defined alien status.[169] Congressional policy is considered when scrutinizing state action, but with respect to illegal aliens, the action must "mirror federal objectives," as well as further a state interest.[170] No Federal policy supported denying illegal alien children an elementary education.[171] The failure of the immigration statutory scheme to provide for the education of undocumented alien children did not relieve Texas of the Equal Protection requirement.[172] As in *Plyler*, neither Florida nor Congress has initiated a law or policy in support of denying foster care services to children. Rather, both Florida and federal laws do provide for foster care, notwithstanding a child's undocumented alien status.[173]

4. Florida Must Show A Substantial State Interest

Plyler required Texas to show a substantial state interest for its alienage classification.[174] Preservation of limited resources for lawful residents was an insufficient purpose to satisfy the heightened scrutiny.[175] The Court recognized three "colorable" interests which might support the Texas statute.[176] First, Texas claimed that it wanted to protect itself from "an influx of illegal immigrants;" however, the Court found that illegal aliens under-utilize public benefits and hardly come to the United States "in order to avail themselves of a free education."[177] Secondly, Texas claimed that undocumented children specially burden the ability to provide quality education; however, the Court found the differences be-

168. *Plyler*, 457 U.S. at 224.
169. *Id.* at 225.
170. *Id.*
171. *Id.* at 226. Notwithstanding that an undocumented alien child may be deported at any time upon the act of the Federal government, the Federal government may choose never to act upon this right. *Id.* at 226. *Plyler* described this failure of the Federal government to act as an "inchoate federal permission to remain." *Id.* Thus, as long as the Federal government has not chosen to exercise deportation proceedings against a child, the State must assume that the child might never be deported.
172. The Court did recognize that in another context undocumented status in conjunction with an articulated Federal policy might strengthen a State's ability to exclude undocumented aliens in its laws. *Plyler*, 457 U.S. at 226.
173. *See supra* notes 51, 63-107 and accompanying text (discussing Florida and the Federal government's provisions for child welfare services to children, regardless of their immigration status).
174. *Plyler*, 457 U.S. at 226.
175. *Id.*
176. *Id.* at 228.
177. *Id.*

tween undocumented children and lawfully resident alien children nonexistent.[178] Finally, Texas claimed that the undocumented children were less likely to stay in the state and would not put their obtained education to societal use. Again, the Court found that there was no guarantee that any child would stay within the state.[179]

Because Texas was unable to provide a substantial state interest to deny education to a small class of innocent children, the statute at issue violated Equal Protection requirements and, thus, was invalid.[180] Unlike Texas, Florida's statutes and policies do not discriminate against undocumented children in their language; nevertheless, Florida has discriminated against the children in its application of the law and must satisfy Equal Protection requirements.[181]

Florida's Department of Health and Rehabilitative Services Director, Jim Towey, has stated that the denial of foster care is protecting the welfare of children by discouraging children from making a dangerous journey to the United States.[182] While protecting the welfare of children is a State interest, as in *Plyler*, children do not journey to the United States in search of foster care. Rather, the prevailing reasons individuals seek refuge in the United States are to escape a dreadful environment or to obtain employment.[183] Thus, Florida's means, denying foster care, is not rationally related to its state interest, protecting the welfare of children.

Second, Florida claims that the additional demands which undocumented children place on the foster care system encroach upon

178. *Plyler*, 457 U.S. at 229.

179. *Id.* at 229-30.

180. *Id.* at 230.

181. The language of the Florida statutes is nondiscriminatory. *See supra* notes 63-70 and accompanying text (describing the requirements of Florida law and policy). Yet, the Department of Rehabilitative Services has failed to provide care to undocumented children, notwithstanding Florida law. *See supra* note 57 and accompanying text (describing the Department's refusal to provide services based on status). When a statute or policy is facially neutral as to class distinction, the Court has interpreted the Constitution to require a showing of purposeful discrimination. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (stating that the individual must show that the State's application of the death penalty was purposefully discriminatory). Assuming that the "directive" issued on April 14, 1994, is not a policy, Florida officials have stated that Florida will not provide foster care to undocumented alien children solely because of their status, this declaration satisfies the purposeful discrimination requirement. *See supra* notes 36-57 and accompanying text (discussing Florida officials' statements to the U.S. Immigration Reform Commission).

182. *New Front in Fight, supra* note 40, at A14.

183. Martin, *supra* note 40, at 2 (stating that "jobs are the major lure for undocumented aliens" coming to the United States).

the services it is able to provide.[184] However, Florida is providing care to only 113 undocumented children out of the 9,000 children to whom it provides services. These are all of the children that have sought care when HRS provided services on an indiscriminate basis. The small number of undocumented children who have been provided services has not especially burdened HRS since it provides the same care to undocumented children as it would to any other child. Florida's denial of foster care to undocumented children does not further a substantial State interest, thus this practice violates the Equal Protection Clause of the Fourteenth Amendment.

5. Florida Cannot Satisfy Even Minimum Scrutiny

Even if the Florida court does not use a heightened scrutiny consistent with *Plyler*, but rather applies the minimum rationality standard generally applied to socio-economic legislation, Florida may still be unable to meet even this minimum standard. Notably, the *Plyler* dissent found that the Texas statute satisfied minimum scrutiny because Texas was conserving limited resources by choosing not to provide benefits for persons whose very presence in the United States was illegal.[185] The dissent found Texas' choice supported by the Federal government's exclusion of illegal aliens from many social welfare programs.[186] Nonetheless, Justice Brennan stated that it would be difficult to conceive of a reason to punish especially vulnerable children in the United States for their presence, which in some instances has inchoate Federal approval.[187]

Saving money is not sufficient justification to satisfy the rationality test. Although the Supreme Court gives great deference to a state's social and economic regulation, the circumstances warranting such deference have not involved absolute deprivation.[188] When a state absolutely deprives a group, whether suspect or not, the Court focuses "more sharply on the state's rationale."[189]

Florida's classification is not rational because it does not draw its distinctions based on characteristics peculiar to illegal alien status.[190] The Florida policy is inconsistent with the federal framework because Florida has denied care to children solely because of

184. *See supra* notes 28-35 and accompanying text (describing Florida's struggle with its budget).

185. *Plyler*, 457 U.S. at 248-50 (Burger, C.J., dissenting).

186. *Id.* at 251.

187. *See id.* at 220, 226.

188. Doe v. Plyler, 458 F. Supp. 569, 586 n.25 (E.D. Tex. 1978), (citing Dandridge v. Williams, 397 U.S. 471 (1970), *aff'd*, 457 U.S. 202 (1982)).

189. *Id.* (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) (Stewart, J., concurring)).

190. *Id.*

their immigration status. Florida has not offered any reason for denying services to undocumented children other than increased demand and cost for services. Florida's classification cannot satisfy even minimum rationality because no rational basis exists to deny innocent children services, other than a strain on limited resources, which by itself is insufficient to satisfy even a minimum level of scrutiny.

IV. Federal Law Preempts State Action

The Supremacy Clause of the U.S. Constitution provides that the Constitution and federal laws are the supreme law of the land, notwithstanding state laws to the contrary.[191] Although the Federal government has well-established, exclusive power in the field of immigration, not all state action relating to aliens is preempted as a regulation of immigration.[192] A state law may be preempted under the Supremacy Clause when Congress has intended to override State power[193] or when the State action burdens or conflicts with Federal legislation.[194]

Congress has not sought to preclude State action in determining the welfare of undocumented children. Rather, federal legislation relies on the state to determine the best placement of the child, considering his or her best interests.[195] By not complying with the Federal government's framework, Florida has impeded the Federal government in fulfilling its constitutional obligation to define immigration status. Without state assistance, "special immigration status" will be nonexistent for undocumented children because the statutory framework requires a State court dependency determination before a child can be declared a special immigrant.[196] Even if Florida chooses not to comply with federal requirements in order to receive funding for its foster care program,[197] the Supremacy Clause mandates that the states make dependency and foster care determinations pursuant to their state law requirements, regardless of whether the foster care program is federally or state funded.

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191. U.S. CONST., art. VI, cl. 2.

192. DeCanas v. Bica, 424 U.S. 351, 355 (1976).

193. *DeCanas*, 424 U.S. at 357.

194. *Id.* at 357-58 n.5.

195. *See supra* notes 71-104 and accompanying text (discussing the necessity for cooperation between the Federal and State governments).

196. *See supra* notes 97-101 (discussing the requirements for "special immigrant status").

197. *See supra* notes 70-89 (discussing the federal assistance for foster care).

Conclusion

Arguably, Florida has violated State and Federal law by refusing to provide welfare services to undocumented immigrant children when it provides such services to non-immigrant children. Florida state officials are combatting the Federal government's immigration policy, making children "hostages" unless the Federal government reimburses Florida for services it has provided to aliens. As illustrated, the vulnerability of children has allowed Florida to attract national exposure to its fiscal dilemma, but State and Federal law does not tolerate this exploitation. The State's *parens patriae* role becomes especially necessary when a child is without parents. Because of the special status of children and the state's interest in furthering the welfare of children, State, Federal, and constitutional law ensure that children are protected.

Florida's struggle is with the Federal government, which must reexamine and prioritize its immigration policy. If the Federal government does not exercise its powers to deport immigrants, it must take responsibility for the undocumented immigrants' inchoately approved presence in the United States and reimburse the burdened states for service costs. Cooperative federalism requires negotiations between State and Federal governments. Florida cannot make innocent children soldiers in the front-lines in its battle against the Federal government because children are the ones most in need of protection.

Author's Note: Rejection of Children as "Hostages"

While this paper was in the publication process, a settlement was reached in which an "Alien Children" Emergency Rule was promulgated. The Rule clarifies Florida's commitment to the protection of children and rejects the use of children as "hostages." The summary of the rule provides that it "affirms that the clear and unambiguous policy of HRS is that *all* children in Florida who have been abused, neglected or abandoned are to be treated the same." *Emergency Rules*, 21 FLORIDA ADMINISTRATIVE WEEKLY, Mar. 10, 1995, at 1438. *See Emergency Rules*, 21 FLORIDA ADMINISTRATIVE WEEKLY, Mar. 10, 1995, at 1438-40 (providing the full text of the rule).