

## Scholarly Commons @ UNLV Boyd Law

---

Scholarly Works

Faculty Scholarship

---

2003

### Workers' Compensation and Vocational Rehabilitation Benefits for Undocumented Workers: Reconciling the Purported Conflicts Between State Law, Federal Immigration Law, and Equal Protection to Prevent the Creation of a Disposable Workforce

Robert I. Correales

*University of Nevada, Las Vegas -- William S. Boyd School of Law*

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Immigration Law Commons](#), [Labor and Employment Law Commons](#), [Legislation Commons](#), and the [Workers' Compensation Law Commons](#)

---

#### Recommended Citation

Correales, Robert I., "Workers' Compensation and Vocational Rehabilitation Benefits for Undocumented Workers: Reconciling the Purported Conflicts Between State Law, Federal Immigration Law, and Equal Protection to Prevent the Creation of a Disposable Workforce" (2003). *Scholarly Works*. 343.  
<https://scholars.law.unlv.edu/facpub/343>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact [youngwoo.ban@unlv.edu](mailto:youngwoo.ban@unlv.edu).

# WORKERS' COMPENSATION AND VOCATIONAL REHABILITATION BENEFITS FOR UNDOCUMENTED WORKERS: RECONCILING THE PURPORTED CONFLICTS BETWEEN STATE LAW, FEDERAL IMMIGRATION LAW, AND EQUAL PROTECTION TO PREVENT THE CREATION OF A DISPOSABLE WORKFORCE

ROBERT I. CORREALES<sup>†</sup>

"I came to America because I heard the streets were paved with gold. When I got here, I found out three things: first, the streets were not paved with gold; second, they weren't paved at all; and third, I was expected to pave them." –Old Italian saying<sup>1</sup>

## INTRODUCTION

For more than a century, undocumented migration to the United States has provided a steady stream of workers to industries in which the jobs are not attractive to citizens or other legal residents because of unpleasant or dangerous working conditions and low wages. Undocumented workers are concentrated in high-risk, low-pay occupations such as construction, agriculture, landscaping, meatpacking, hotel service, and restaurant work. Their willingness to work unpleasant jobs for low wages, the perception that they possess a superior work ethic, and the minimal possibility that employers will be prosecuted for employing them, combine to make undocumented immigrants particularly attractive to employers desperate to find workers. Unfortunately, in many jurisdictions they are welcome only as long as they are physically able to work.

State workers' compensation systems have adjusted in part to the presence of this often critical and virtually permanent group of uninvited guests. Indeed, a large number of state courts and legislatures have awarded workers' compensation benefits to that group.<sup>2</sup> Of the states that

---

<sup>†</sup> Assistant Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I wish to thank Professors Lynne Henderson, Annette Appell, Joan Howarth, Carl Tobias, and Steve Johnson for all their help and encouragement in the writing of this Article and for their constant and selfless mentoring. I also thank Mr. James Rogers for his unyielding support of this law school and for making much of our research possible. Many thanks also to my research assistants, Christopher Carson and Amanda Yen (L'2005), for their hard work and dedication.

1. GEORGE BROWN TINDALL & DAVID E. SHI, *AMERICA: A NARRATIVE HISTORY* 942 (1984).

2. See *Champion Auto Body v. Indus. Claim Appeal Office*, 950 P.2d 671, 673 (Colo. Ct. App. 1997); *Dowling v. Slotnik*, 712 A.2d 396, 409 (Conn. 1998); *Gene's Harvesting v. Rodriguez*, 421 So. 2d 701, 701 (Fla. Dist. Ct. App. 1982); *Dynasty Sample Co. v. Beltran*, 479 S.E.2d 773, 775 (Ga. Ct. App. 1996); *Artiga v. M.A. Patout & Son*, 671 So. 2d 1138, 1139 (La. Ct. App. 1996); *Ruiz v. Belk Masonry Co.*, 559 S.E.2d 249, 251 (N.C. Ct. App. 2002); *Gayton v. Gage Carolina Metals*

have considered this problem, only Wyoming continues to deny completely workers' compensation benefits to undocumented workers.<sup>3</sup> However, this virtual unanimity in the workers' compensation field does not extend to vocational rehabilitation services. Those services are generally provided to workers who cannot return to their original job after a severe injury but who can work in a limited capacity or in other occupations after retraining. While several influential states have decided in favor of disabled undocumented workers,<sup>4</sup> others continue to deny them those benefits.<sup>5</sup> Those states completely disavow any obligation to provide vocational rehabilitation services to undocumented workers, even where work-related accidents result in life-long disabilities.

---

Inc., 560 S.E.2d 870, 872 (N.C. Ct. App. 2002); *Fernandez-Lopez v. Jose Cervino, Inc.*, 671 A.2d 1051, 1056 (N.J. Super. Ct. App. Div. 1996); *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221, 224 (N.J. Super. Ct. App. Div. 1996); *Lang v. Landeros*, 918 P.2d 404, 406 (Okla. Ct. App. 1996); *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 749 A.2d 1036, 1041 (Pa. Commw. Ct. 2000); *Villa v. E. Wire Prods. Co.*, 554 A.2d 644, 646 (R.I. 1989); *Commercial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635, 637 (Tex. Civ. App. 1972). Many states include "aliens" in the definition of "employees." See, e.g., ARIZ. REV. STAT. § 23-901(5)(b) (2003); CAL. LAB. CODE § 3351(a) (Deering 2003); FLA. STAT. ch. 440.02(15)(a) (2003); TEX. LAB. CODE ANN. §§ 401.011(4), 406.092 (Vernon 2003); see also *Fernandez-Lopez*, 671 A.2d at 1053 (holding that an illegal alien's inclusion is "self-evident" from the statutory definition of employee); *Brambila v. Chase-Walton Elastomers, Inc.*, Bd. No. 6734092, 1997 WL 487359, at \*5 (Mass. Dept. Indus. Accidents Aug. 22, 1997) (holding that illegal aliens are included under the definition "employee"). However, as the Virginia experience demonstrates, coverage of undocumented immigrants does not necessarily follow. See *infra* notes 10-12 and accompanying text. The term "aliens" is commonly applied to authorized immigrants, who do not always enjoy the same rights as citizens. Thus, states that include "aliens" in their workers' compensation statutes without differentiating between legal and undocumented immigrants, may mean legal resident or may simply not have encountered situations involving undocumented workers.

3. See WYO. STAT. ANN. § 27-14-102(a)(vii) (Michie 2002) ("Employee" . . . includes legally employed minors and aliens authorized to work [in the United States] by the United States department of justice immigration and naturalization service."); see also *Felix v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 986 P.2d 161, 164 (Wyo. 1999) (holding expressly that the definition of "employee" in §27-14-102(a)(vii) does not include illegal aliens). Though the subject is beyond the reach of this article, Wyoming is also behind the times in its refusal to cover illegally employed minors under its workers' compensation laws. § 27-14-102(a)(vii). For the protection of the children and for public policy reasons, that issue has been decided in favor of the minors in most other jurisdictions. See ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 66.02 (2003) (citing forty states whose workers' compensation statutes cover illegally employed minors). Larson's treatise on workers' compensation identifies Idaho as another jurisdiction that prohibits coverage of undocumented workers under its workers' compensation statute. *Id.* § 66.03 (citing IDAHO CODE § 72-1366(19)(a) (Michie 2002)). However, a closer look at the statute reveals that the benefit prohibited is unemployment compensation, not workers' compensation. Unemployment compensation is generally dependent on the worker's availability to work. IDAHO CODE § 72-1366(5) (Michie 2003). In 1976, Congress passed a law denying certification to any state unemployment compensation program that awards those benefits to undocumented workers. 26 U.S.C. §§ 3304(a)(14)(A), (c) (2000).

4. See, e.g., *Foodmaker, Inc. v. Workers' Comp. Appeals Bd.*, 78 Cal. Rptr. 2d 767, 775 (Cal. Ct. App. 1998); *Ruiz*, 559 S.E.2d at 251, 254; *Gayton*, 560 S.E.2d at 874; *Garcia v. Dep't of Labor & Indus.*, 939 P.2d 704, 704-06 (Wash. Ct. App. 1997) (noting implicitly that vocational rehabilitation benefits are payable to illegal aliens, but suspending employee's benefits for other reasons).

5. See, e.g., *Tarango v. State Indus. Ins. Sys.*, 25 P.3d 175, 183 (Nev. 2001) (holding that undocumented workers may receive workers' compensation, but not vocational rehabilitation). Virginia provides workers' compensation but denies vocational rehabilitation by statute. See *infra* notes 11-12 and accompanying text. Louisiana provides workers' compensation but denies vocational rehabilitation by administrative regulation. See *infra* note 13.

In many jurisdictions, undocumented workers who can work without restrictions after medical treatment are simply returned to their jobs, where they have become virtually indispensable. However, those who without vocational rehabilitation are unable to return to work due to permanent disabilities are systematically discarded without recourse. This shortsighted practice contradicts traditional American notions of justice and ignores important economic and social factors by creating disposable workers who can be discarded after their useful lives have accidentally expired. These workers are of the most vulnerable populations in the United States because they have the least political and economic power of any group and enjoy virtually no safety nets.

This shadow population is primarily employed in high-risk occupations. Therefore, the economic windfall to private providers of workers' compensation insurance coverage and self-insurers is quite significant. Laws in some states enable those providers, or self-insurers, to save up to \$16,000 for every claim denied.<sup>6</sup> In stark contrast, the real human consequences of those policies can be devastating, not only to the undocumented immigrants themselves, but to legal residents and citizens as well.

Martha Gomez's case is typical.<sup>7</sup> Mrs. Gomez, a pregnant 28 year-old, was brutally attacked by a stranger in a laundry room where she was working as a maid for a Las Vegas hotel. As the attacker hit and kicked Mrs. Gomez's abdomen, head, and back, she kept herself in a fetal position to protect her pregnancy. Fortunately, Mrs. Gomez was able to save her pregnancy and delivered her child (an American citizen)<sup>8</sup> on February 15, 1999. In March of 1999, after experiencing numbness and weakness on the left side of her body, memory loss, and depression, Mrs. Gomez was given a medical examination. The doctor concluded that Mrs. Gomez had not received appropriate medical attention since her attack. The doctor diagnosed limited range of motion in her spine and on the left side of her body, and hemiparesis on the left side of her body. The physician recommended extensive diagnostic work-ups including MRI studies of the brain, cervical spine, and left shoulder, in addition to a psychological evaluation. Ms. Gomez was declared totally and temporarily disabled pending results of the diagnostic work-ups. The doctor also recommended vocational rehabilitation, but Mrs. Gomez was denied that treatment because of her undocumented status.

---

6. The cost of vocational rehabilitation can be significant. *E.g.*, ALASKA STAT. §§ 23.30.041(k)–(l) (Michie 2003) (authorizing vocational rehabilitation costs up to \$13,300 for two years); NEV. REV. STAT. 616C.580(2)(b) (2003) (authorizing lump sum of up to \$20,000 in lieu of vocational rehabilitation services available to injured employees who reside outside the state).

7. The three stories in this section are actual cases that took place in Nevada. The names of the claimants have been changed. Records from their cases are on file with the author.

8. All children born in the U.S. are citizens of the country at birth. *INS v. Rios-Pineda*, 471 U.S. 444, 446 (1985).

Another example is the case of Antonio Gutierrez, who suffered the amputation of his left arm at the shoulder in a work-related accident. Mr. Gutierrez's arm was severed at the shoulder by the blades of a cement mixer. As a result of the accident, Mr. Gutierrez was determined to have a permanent disability rating of fifty nine percent. Mr. Gutierrez was restricted to light duty labor with a weight lifting limit of ten to twenty pounds when he was released from care. Mr. Gutierrez was initially issued a prosthesis with a hook. Later, he was given a "cosmetic" prosthesis, but it was not functional with respect to employment. The employer did not provide light duty employment within the restrictions established by Mr. Gutierrez's physician, thus, pursuant to Nevada law, Employers' Insurance Company of Nevada (EICN) (the state's provider of workers' compensation insurance) became obligated to provide vocational rehabilitation services. However, on October 18, 1995, EICN determined that because of Mr. Gutierrez's failure to supply "proof of his right to work," all vocational rehabilitation benefits would be suspended, and Permanent Total Disability (PTD) would not be offered. The Appeals Officer agreed with EICN's argument that the Immigration Reform Control Act of 1986 (IRCA) preempted state law and prohibited vocational rehabilitation services or payments for permanent total disability.<sup>9</sup>

In another case, Roberto Chavez sustained a severe back injury when he fell fifteen feet to the ground from a scaffold while installing sheetrock for a drywall company. After receiving treatment, Mr. Chavez was released from medical care with physical restrictions of thirty pounds maximum lifting and fifteen pounds repetitive lifting. Because his former employer could not accommodate his restrictions, Mr. Chavez became eligible for vocational rehabilitation services. In fact, Mr. Chavez was initially offered vocational rehabilitation services, but on September 2, 1997, EICN determined that Mr. Chavez was not eligible to receive those services because of his inability to provide certification of U.S. residency. That decision was upheld twice on appeal within the Department of Administration of the State of Nevada. The District court denied judicial review of the administrative decision.

These cases are typical in Nevada. However, disabled undocumented workers have received similar treatment in other states, and every jurisdiction is likely to eventually confront this issue. Virginia is illustrative of jurisdictions that have experienced a recent influx of undocumented immigrants. After many years of confusing and internally inconsistent legal holdings denying coverage to undocumented workers,<sup>10</sup> the Virginia general assembly recently amended the workers' com-

---

9. The District Court later reversed the appeals officer, finding that Mr. Gutierrez was entitled to permanent total disability benefits.

10. *Compare* *Manis Constr. Co. v. Arellano*, 411 S.E.2d 233, 234 (Va. Ct. App. 1991) (ratifying the principle that an employer who knowingly hires an undocumented worker cannot then assert the worker's immigration status as a defense to an "otherwise valid claim" under workers' compen-

pensation statute to include “aliens” whether documented or not.<sup>11</sup> However, the statute continues to deny undocumented workers access to the state’s vocational rehabilitation services, even in cases of severe and lingering disabilities resulting from work-related accidents.<sup>12</sup> Undocumented workers face similar situations in Louisiana,<sup>13</sup> Maryland,<sup>14</sup> and the District of Columbia,<sup>15</sup> three jurisdictions with growing numbers of

---

sation and “benefit from its own illegal act” (internal quotations omitted)), *with Granados v. Windson Dev. Corp.*, 509 S.E.2d 290, 292-93 (Va. 1999) (holding that a claimant’s false representation of his immigration status did not bar recovery under the state workers’ compensation laws, but also holding that a claimant who was an “illegal alien” was not an “employee” under the workers’ compensation laws, despite the fact that the Virginia statute defined employee as “[e]very person, including a minor, in the service of another under any contract of hire,” because IRCA renders their purported contracts of hire void and unenforceable (internal quotations omitted)), *and Mendoza-Garcia v. Cho Yeon Hwi/Best Cleaners*, No. 1257-00-4, 2001 WL 292316, at \*1 (Va. Ct. App. Mar. 27, 2001) (denying a remedy under the state’s workers’ compensation statute to a worker knowingly hired by an employer who had not purchased workers’ compensation insurance, although Granados had not foreclosed a remedy under those facts). In contrast, most other states that had considered the issue did not find a conflict between IRCA and the states’ workers’ compensation laws. *See, e.g., Dowling*, 712 A.2d at 409-11 (reasoning that the question of whether the person’s undocumented status taints the employment relationship so as to render contracts for employment null and void hinges on whether enforcement of the employment contract would contravene the public policy underlying IRCA; finding that the primary purpose of IRCA is to “establish procedures that inhibit the employment of undocumented workers and to punish employers who knowingly offer jobs to those workers,” the court reasoned that to “[permit] employers to avoid liability under the Workers’ Compensation Act, therefore, would . . . provide unscrupulous employers with an incentive to employ undocumented workers” and thereby violate the Immigration Reform Act); *see also supra* note 2 (listing many jurisdictions that have considered the issue).

11. VA. CODE ANN. § 65.2-101 (Michie 2003) (including “aliens . . . whether lawfully or unlawfully employed” within its definition of “employee”).

12. VA. CODE ANN. § 65.2-603(A)(3) (Michie 2003), states in relevant part: “The employer shall also furnish or cause to be furnished . . . reasonable and necessary vocational rehabilitation services; however, the employer shall not be required to furnish, or cause to be furnished, services under this subdivision to any injured employee not eligible for lawful employment.”

13. *See Artiga*, 671 So. 2d at 1139 (concluding that, “The Louisiana Workers’ Compensation Act . . . does not exclude illegal aliens from securing workers’ compensation benefits when justified”). However, the Louisiana Administrative Code denies vocational rehabilitation services to undocumented immigrants. *See* LA. ADMIN. CODE tit. 67, § 109(E)(1)(d) (2003) (stating that “Louisiana Rehabilitation Services does not impose a residence requirement. Illegal aliens, however, cannot be served”).

14. In Maryland no statute prohibits vocational rehabilitation services to undocumented workers. It appears that the state’s workers’ compensation agency simply assumes that such services are not available to that group. *See infra* note 17.

15. An article in the Washington Post discussed the situation faced by undocumented workers in the Virginia/ Maryland/D.C. area. The author tells the stories of Pedro Velazquez, an undocumented construction worker who fell from a roof, suffering a broken leg, a smashed wrist, and a fractured spine; Mario Perez, another undocumented worker whose right pinkie tendon was sliced by a falling piece of plasterboard; and Luis Enrique Bonta, a Peruvian undocumented immigrant who lost three fingers in a printing press accident. Though they could have benefited from vocational rehabilitation, none of these workers were eligible to receive those services because of their undocumented status. *See* Nurith C. Aizenman, *Harsh Reward for Hard Labor; For Many Hispanic Immigrants, Work Injuries End Dreams of a New Life*, WASH. POST, Dec. 29, 2002, at C1. In contrast, legal residents throughout the U.S. are routinely retrained even where the resulting disabilities are not as severe as those mentioned above. *See City of Miami v. Mercer*, 513 So. 2d 149, 150-51 (Fla. Dist. Ct. App. 1987) (approving a lump sum award to pay for aviation training); *Towne v. Bates File Co.*, 497 So. 2d 967, 968 (Fla. Dist. Ct. App. 1986) (reversing denial of vocational rehabilitation request to allow worker with twenty-five percent impairment to temporarily relocate to Las Vegas while enrolled in a casino gambling dealer’s school); *Johnson v. Shaw’s Distribution Ctr.*, 760 A.2d 1057, 1059-62 (Me. 2000) (upholding a rehabilitation award to help the claimant obtain a

undocumented immigrants. Wyoming alone denies every kind of workers' compensation service by statute.<sup>16</sup> The laws in many other states do not seem to address whether undocumented workers are eligible for vocational rehabilitation. Many jurisdictions have not yet had occasion to consider the issue.<sup>17</sup>

The denial of vocational rehabilitation to undocumented workers raises two issues. The first involves the nature of available vocational rehabilitation services, and whether they conflict with IRCA. The second issue is whether state action denying those services is constitutional.

This Article argues that sound public policy supports states providing vocational rehabilitation services to undocumented workers who have been injured in work-related accidents. Part I of the Article provides context by analyzing some of the complexities of undocumented immigrants' lives in the United States. Part II discusses the history and economics of vocational rehabilitation programs established by workers' compensation systems. Part III discusses ways in which immigration law and enforcement contribute to the formation of this shadow population. Part IV analyzes purported conflicts between vocational rehabilitation programs and IRCA as they arose in *Tarango v. State Industrial Commission*,<sup>18</sup> a Nevada case that denied an undocumented worker access to those services. Part V examines preemption of state law by IRCA, concluding that IRCA does not preempt the most crucial parts of those statutes. Part VI explores the constitutional issues that can arise when states act to deny undocumented workers access to those services, suggesting that such denial may be unconstitutional. Part VI also explores exceptions to deferential rational basis review, the continued viability of those exceptions, and application of the exceptions to this issue. Part VII briefly discusses the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*,<sup>19</sup> and argues that *Hoffman* should not result in denial of

---

masters degree in psychology despite the fact that the claimant retained the ability to work full time as a security guard and was found capable of earning more than half of his pre-injury wages).

16. See *Felix*, 986 P.2d at 163-64. Little legislative history exists regarding the passage of the Wyoming statute. However, it is interesting to note that the statute became effective January 1, 1996, around the same time that California was struggling with the passage of Proposition 187, a law designed to deny many state benefits to undocumented immigrants. Initiative Statute, Proposition 187, 1994 Cal. Legis. Serv. (1994). Prior to 1996, the Wyoming statute included "aliens" within the definition of covered employees, without regard to immigration status. See *Felix*, 986 P.2d at 164 (citing 1995 Wyo. Sess. Laws ch. 121, §§ 2, 4).

17. Telephone inquiries in June of 2003 to a number of state workers' compensation agencies revealed the following: Arizona (no retraining available since the agency would not be able to get undocumented workers a job); Colorado (state does not allow it); Connecticut (workers' compensation available, but do not know about vocational rehabilitation); Florida (undocumented workers qualify for workers' compensation, but cannot return to work without a permit; no vocational rehabilitation); Illinois (undocumented workers are eligible for retraining through workers' compensation, but there is no statute or case law on the issue); Maryland (department assumes undocumented workers are not eligible for vocational rehabilitation); New Mexico (worker must be a resident and have a valid social security number to qualify for vocational rehabilitation).

18. 25 P.3d 175 (Nev. 2001).

19. 535 U.S. 137 (2002).

those services. Because vocational rehabilitation is a subset of workers' compensation and parallels other workers' rights legislation, it is hoped that this Article will also help to clarify the availability of workplace protections for undocumented immigrants in other areas.

## I. UNDOCUMENTED IMMIGRANTS IN THE UNITED STATES

The undocumented immigrant population in the United States currently numbers around 8.5 million.<sup>20</sup> Approximately five million undocumented immigrants<sup>21</sup> work in low-paid, menial jobs where the risk of physical injury is high.<sup>22</sup> Many industries consider them "essential workers."<sup>23</sup> These are generally industries where the jobs do not attract

---

20. An estimate by Jeffrey Passel of the Urban Institute, based on 2000 census and INS data placed the number of undocumented immigrants who live in the United States at 8.5 million. Michael E. Fix and Jeffrey S. Passel, Urban Institute, *U.S. Immigration at the Beginning of the 21st Century: Testimony Before the Subcommittee on Immigration and Claims Hearing on "The U.S. Population and Immigration" Committee on the Judiciary U.S. House of Representatives*, (Aug. 2, 2001), at <http://www.urban.org/urlprint.cfm?ID=7321> (last visited February 12, 2004).

21. Most undocumented workers are concentrated in low-wage industries, where the dangers of severe injuries are high, such as agriculture, food processing, meatpacking, garment manufacturing, and construction. A study by the Pew Hispanic Center found that approximately five million undocumented immigrants work in low-wage, high-risk occupations. The manufacturing sector employs approximately 1.2 million undocumented workers; the service industries employ nearly 1.3 million; agriculture employs 1 to 1.4 million; the construction industry employs nearly 600,000; and 700,000 are employed by restaurants. B. Lindsay Lowell & Roberto Suro, Pew Hispanic Center, *How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks*, at <http://www.pewhispanic.org/site/docs/pdf/howmanyundocumented.pdf> (last visited February 12, 2004); see also U.S. Dep't of Labor, *Findings from the National Agricultural Workers Survey (NAWS) 1997-1998*, at 5, 22 (Mar. 2000) (finding that at least half of the agricultural workforce in the United States is not authorized to work in this country).

22. In a recent article in the New York Times, Steven Greenhouse, relying on figures from the Bureau of Labor Statistics, found that Hispanics are much more likely than Whites or Blacks to work at dangerous, low-level jobs. The article also found that Hispanics are twenty percent more likely than Whites or African Americans to die from work-related injuries. The article attributed the differences in death rates to the fact that Hispanic immigrants are over-represented in dangerous occupations because "they will accept . . . poorer working conditions than U.S.-born workers [i.e., legal residents]." Steven Greenhouse, *Hispanic Workers Die at Higher Rate*, N.Y. TIMES, July 16, 2001, at A11 (internal citations and quotation marks omitted). The differences in death rates were also attributed to the fact that Hispanic immigrants are "more likely to be employed by fly-by-night contractors," and to fear of speaking up about dangerous things on the job. *Id.* Of course, the same can be said for other racial or ethnic groups that share characteristics, such as language deficiencies, and fear of deportation with undocumented Hispanics. A Government Accounting Office (GAO) report on meatpacking plants in Iowa and Nebraska describes the dangerous work conditions in the plants thusly: "The work in meatpacking plants is often hard and can be hazardous. The use of knives, hooks, and saws in hot and cold areas on wet floors presents the risk of cuts, lacerations, and slips; and the work presents the risk of repetitive stress injuries." See U.S. GEN. ACCOUNTING OFFICE, COMMUNITY DEVELOPMENT—CHANGES IN NEBRASKA'S AND IOWA'S COUNTIES WITH LARGE MEATPACKING PLANT WORKFORCES 3 (1998). That report also found that "[a]ccording to the Occupational Safety and Health Administration, about 22.7 of every 100 full-time meatpacking plant workers were injured during 1995." *Id.* The exceedingly low wages in many of these industries have been documented by the federal government. A survey by the U.S. Department of Labor found that in 2000, 100 percent of all poultry processing plants were not in compliance with federal wage and hour laws. See U.S. DEP'T OF LABOR, POULTRY PROCESSING COMPLIANCE SURVEY FACT SHEET (2001). Similar findings were made for garment manufacturing. See Labor Department: Close to Half of Garment Contractors Violating FLSA, According to DOL Report, Daily Lab. Rep. (BNA) No. 87, at A-7 to A-8 (May 6, 1996).

23. The Essential Worker Immigration Coalition (EWIC), a group that represents many labor-intensive industries before the U.S. Congress, and advocates for immigration reform, predicts a

legal residents, because of low wages, and because the work is unpleasant, physically demanding, or dangerous.<sup>24</sup>

An understanding of the reality of the lives and interactions of undocumented immigrants in the U.S. is crucial to the analysis of whether vocational rehabilitation and other workplace protections should be made available to undocumented workers. Undocumented immigrants occupy the lowest rung on the United States' social ladder. During difficult economic times they are easy targets for nativist forces looking for scapegoats, condemned for taking jobs and social services away from American citizens and other legal residents. Undocumented immigrants are not eligible for Aid to Families with Dependent Children (AFDC),<sup>25</sup> Medicaid,<sup>26</sup> Food Stamps,<sup>27</sup> and Supplemental Security Income (SSI).<sup>28</sup> However, despite the fact that they are ineligible for public benefits,<sup>29</sup> and that they tend to avoid contact with most state agencies fearing detection, undocumented immigrants also present an easy target for those looking for abusers of public services.<sup>30</sup>

Undocumented immigrants are often depicted as lonesome adventurers who venture into the United States randomly, in search of any kind of work. They are also depicted as criminals who, by definition, embody a violation of the sacredness of the nation's borders, and its sovereignty. Those depictions often serve to depersonalize legal decisions or policies detrimental to that group, and help to avoid consideration of the real human consequences of those decisions.<sup>31</sup>

---

shortage of labor in the next decade. Citing figures from the various industries it represents, EWIC projects that in the next decade there will be a need for an additional 700,000 workers in the lodging and hotel industry; 540,000 workers in the meat processing industry; more than 2 million workers in general construction; 200,000 in home construction; 2 million workers in restaurant work; and 50,000 in roofing. In addition, 99% of chambers of commerce around the country point to the shortage of workers as a priority issue among employers. Essential Worker Immigration Coalition (EWIC), *Documenting the Labor Shortage*, (March 2002), at [http://www.ewic.org/pdf/EWIC\\_Documenting\\_Labor\\_Shortage\\_%203\\_02.pdf](http://www.ewic.org/pdf/EWIC_Documenting_Labor_Shortage_%203_02.pdf) (last visited February 12, 2004).

24. See *supra* note 21.

25. 42 U.S.C. § 602(a)(1)(B)(ii) (2000).

26. 42 U.S.C. § 1396b(v)(1) (2000).

27. 7 U.S.C. § 2015(f) (2000).

28. 42 U.S.C. § 1382c(a)(1)(B)(i) (2000).

29. See Berta Esperanza Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform,"* 71 S. CAL. L. REV. 547, 560 (1998) (describing federal welfare restrictions on aliens as "a replay of the historically recurrent theme of safeguarding national resources from alien free-loaders"). See generally Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995) (analyzing undocumented immigrants' ineligibility to major federal public assistance programs).

30. See Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 265-66, 269-70, 283 (1997) (analyzing the stereotypes that control the debate over unauthorized immigration).

31. See *Chicas v. Hott & Son Excavating, LLC*, VWC File No. 191-21-91, 2000 VA Wrk. Comp. LEXIS 651, at \* 6 (Va. Workers' Comp. Comm'n Feb. 29, 2000) (remarking, after denying benefits to an injured undocumented worker, that "we would find no inequity in failing to reward the claimant for his ongoing illegal acts").

The most common explanation for unauthorized immigration into the U.S. is the “push” and “pull” mechanism. That is, undocumented immigrants are “pushed” toward the U.S. by poverty and dismal economic prospects, and “pulled” to the U.S. by an abundance of low-wage, low-skill jobs that American employers cannot fill. While that explanation helps to understand some of the picture, it is far from complete. The reasons for undocumented immigration to the U.S. are much more complex.

Undocumented immigrants generally arrive in the United States to find well-developed social and economic networks composed of family, friends, and, in many cases, willing employers.<sup>32</sup> Those networks compose a formidable, yet partially hidden segment of the United States’ economy.<sup>33</sup> Their members work, study, shop, and pay taxes.<sup>34</sup> Those networks are only partially hidden because, in addition to the undocumented immigrants themselves, they also contain legal residents and citizens, many of whom are related by blood or marriage to members of this shadow population.<sup>35</sup> The existence of those relationships has prompted a number of prominent commentators to urge decision makers to consider carefully the effect of their decisions upon that vulnerable group.<sup>36</sup> Consideration of those relationships is especially important in the area of workers’ compensation. While United States’ immigration policy has paid little attention to the interests of citizen children born to

---

32. See Michael Fix et al., *Immigration Studies: The Integration of Immigrant Families in the United States* 7 (The Urban Institute, July 2001), at [http://www.urban.org/UploadedPDF/immig\\_integration.pdf](http://www.urban.org/UploadedPDF/immig_integration.pdf) (last visited February, 12 2004); see also Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 615 (1996) [hereinafter Bosniak, *Opposing Prop. 187*].

33. See, e.g., Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protection Legislation*, 103 YALE L.J. 2179, 2180-81 (1994) (analyzing the underground economy, which is driven in large part by undocumented immigrants).

34. See Peter L. Reich, *Jurisprudential Tradition and Undocumented Alien Entitlements*, 6 GEO. IMMIGR. L.J. 1, 1-5 (1992) (discussing the contributions to the economy made by undocumented immigrants, who pay taxes but are ineligible for social services).

35. Fix et al., *supra* note 32, at 14-17, is a demographic study of recent immigrant patterns in the U.S. The study found that one-half of all undocumented immigrant-headed households in the State of New York contain children, most of them citizens. *Id.* at 14. According to the study, eighty-five percent of immigrant families with children are mixed-status families, that is, families where at least one parent is a noncitizen and one child is a citizen. *Id.* at 15. Other findings include:

[1] Nationwide, 1 in 10 U.S. children lives in a mixed status family;

[2] Seventy-five percent of all children in immigrant families (those headed by a noncitizen) are citizens;

[3] Twenty-seven percent of all children in New York City, and 47 percent of all children in Los Angeles, live in mixed status families;

[4] In the state of New York, 70 percent of families with children headed by *undocumented* immigrants contain citizen children;

...

[5] Sixty percent of the poor children in Los Angeles, and 30 percent of New York’s poor children live in mixed status families . . . .

*Id.* at 15-16.

36. *Id.* at 17.

illegal immigrants when considering deportation of their parents,<sup>37</sup> workers' compensation law has retained those relationships as a central focus.<sup>38</sup>

In a growing number of cases, courts and state legislatures have come to realize that the everyday lives of undocumented immigrants in the United States do not differ much from the lives of many legal residents, including citizens.<sup>39</sup> Thus, the United States legal system, particularly the federal system, has adjusted to this permanent presence by creating a series of compromises that enable undocumented immigrants and their children to participate to some extent in American society, even while they retain the status of outsiders under United States' immigration law.<sup>40</sup> Some of these compromises are forward-looking<sup>41</sup> or based on principles of fairness reflecting traditional American values,<sup>42</sup> while others, particularly in the area of workers' rights, also reflect a need to protect the integrity of American laws for the benefit of all workers.<sup>43</sup>

Workers' compensation systems in many states have managed to navigate IRCA without much difficulty. However, problems with immigration status often arise when undocumented workers are injured and cannot return to work because the resulting disability is too severe, and where the worker can only perform modified work or needs vocational

---

37. See Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 492 (1995); Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 36 (1988) (analyzing the constructive deportation of citizen children of undocumented immigrants when their parents are deported).

38. See, e.g., *Turner v. Sunbelt Mfg.*, 763 So. 2d 770, 777 (La. Ct. App. 2000) (holding that supplemental earnings benefits under workers' compensation was not forfeited during claimant's period of incarceration given that claimant had two children who were dependent upon her); *Jurado v. Popejoy Constr. Co.*, 853 P.2d 669, 674 (Kan. 1993) (holding that worker's compensation death benefits serve a dual purpose: first, they serve the employee's interest in assuring that his or her family is protected against the loss of the worker's income (citing *Madera Sugar Pine Co. v. Indus. Accident Comm'n*, 262 U.S. 499, 503-04 (1923)); they also serve the dependent's interests, but the dependent's rights are derived from and dependent upon the employee's right); *Garner v. Shulte Co.*, 259 N.Y.S.2d 161, 162 (N.Y. App. Div. 1965) (holding that the humanitarian purposes of the workers' compensation laws extended to the protection of dependents, granting benefits to dependents after father has become incarcerated and declared "civilly dead"); *Thomas Refuse Serv. v. Flood*, 515 S.E.2d 315, 317 (Va. Ct. App. 1999) (same).

39. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 218 n.17 (1982) (noting the U.S. Attorney General's statement to Congress that the federal government had "neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community" (internal quotations omitted)).

40. *Plyler*, 457 U.S. at 218 n.17.

41. *Id.* at 207-08 ("[U]nder current laws and practices the illegal alien of today may well be the legal alien of tomorrow, and that without an education, these undocumented children, already disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, . . . will become permanently locked into the lowest socio-economic class." (internal citations and quotes omitted)).

42. See *Jurado*, 853 P.2d at 674 (demonstrating that death benefits from workers' compensation reflect a traditional American concern for the workers' families).

43. See, e.g., *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988) (finding that if the Fair Labor Standards Act did not cover undocumented workers, employers might find them economically advantageous to hire them to the detriment of legal resident workers).

rehabilitation to regain earning capacity. Those situations represent the most delicate interaction between systems designed to restore workers' earning capacity, seemingly unforgiving immigration law, and the reality of immigration enforcement. As Nevada demonstrates, the inability to reconcile those apparent conflicting interests can create a disposable workforce.

Nevada depends heavily upon the work of undocumented immigrants. The popularity of the state as a tourist destination has fueled tremendous economic growth in the recent past, creating an insatiable demand for workers in the service and construction industries.<sup>44</sup> Jobs in the mammoth tourism-driven service industry include maid service, kitchen, and custodial work. Those jobs are generally physically demanding with little intellectual or economic reward. Similarly, construction jobs in Nevada call for individuals to spend countless hours working outdoors in extremely high temperatures throughout much of the year. While readily available, these jobs are not always attractive to legal residents or citizens. An Immigration and Naturalization Service ("INS") inspection of eighty-nine construction firms in Las Vegas found that thirty-nine percent of the employees appeared to be unauthorized to work in the United States.<sup>45</sup>

Nevada readily provides medical coverage and lost wages to undocumented employees under its workers' compensation laws,<sup>46</sup> but denies vocational rehabilitation even in cases involving catastrophic work-related injuries that result in severe lingering physical or mental disabilities. Though not required by federal law or state statute, all injured workers in Nevada are required by insurance providers to produce proof of their ability to work in the United States, in the form of an I-9 form, prior to receiving vocational rehabilitation services.<sup>47</sup> Curiously, this check is not made before regular medical care is provided under the state's work-

---

44. A recent study by the Urban Institute tends to show that immigrants are not driven to migrate by the existence of generous public benefits programs. They instead tend to migrate to areas known for economic opportunity. California, a state with generous social assistance programs, for example, experienced a reduction in the number of new arrivals in the 1990s. In contrast, the Southeast, Midwest, and Rocky Mountain Regions, all new growth areas, have experienced a rapid increase in immigrant population. See Urban Institute, *The Dispersal of Immigrants in the 1990s*, (Nov. 2002), at <http://www.urban.org/url.cfm?ID=410589> (last visited February 13, 2004).

45. RICHARD M. STANA, U.S. GEN. ACCOUNTING OFFICE, *ILLEGAL ALIENS—SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED ALIEN EMPLOYMENT EXIST 4* (1999).

46. See NEV. REV. STAT. 616A.105 (2003) ("Employee" includes "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but not exclusively: 1. Aliens and minors.").

47. See *infra* Part IV for an analysis of *Tarango*, 25 P.3d at 175. Professor Linda Bosniak noticed that after the passage of IRCA, private insurance providers began asking injured workers for INS I-9 forms before they would provide job retraining benefits. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1033-34 (1988) [hereinafter Bosniak, *Exclusion and Membership*]. Thus, to many insurance providers and self-insurers, IRCA presented an opportunity to save significant amounts of money by providing a reason to deny vocational rehabilitation benefits.

ers' compensation statute. But, demonstrating that vocational rehabilitation services are inconsistent with the mandates of IRCA, Nevada stopped providing vocational rehabilitation after passage of that statute, even in cases resulting in catastrophic disabilities. In other words, Nevada's workers' compensation system filters out undocumented workers who are no longer productive, while facilitating able-bodied individuals' return to work.

Thus, the most capable among the injured undocumented workers, those whose injuries do not result in total disability and who do not require vocational rehabilitation services, are readily provided medical attention, and are able to return to work where they are sorely needed. And the most vulnerable among them, those whose lingering disabilities rendered them incapable of returning to their former job, and who require vocational rehabilitation in the form of retraining, education, or work-hardening physical therapy, are denied the means to regain their former earning capacity.

An effective examination of the issues that arise in this area depends, in large part, upon a clear understanding of the nature of state vocational rehabilitation programs under workers' compensation, and a clear understanding of IRCA.

## II. THE NATURE OF VOCATIONAL REHABILITATION UNDER STATE WORKERS' COMPENSATION SYSTEMS

### *A. History and Economics of Workers' Compensation and Vocational Rehabilitation*

Vocational rehabilitation benefits are a subset of workers' compensation. Vocational rehabilitation of injured workers who cannot return to their former occupations after a work accident is mandated by statute in just about every jurisdiction.<sup>48</sup> As is the case with workers' compensation, the employer is required by statute to provide vocational rehabilitation through an insurance provider (which in some jurisdictions is a state fund) or through self-insurance.<sup>49</sup> Thus, although embedded in state statutes, neither workers' compensation nor vocational rehabilitation benefits are publicly funded welfare programs.<sup>50</sup> They are instead substitutes

---

48. The State of Texas does not mandate employers to provide worker's compensation benefits. Employees may instead elect to reject workers' compensation benefits and retain their common law rights of action. *See* TEX. LAB. CODE ANN. § 406.034 (Vernon 2003).

49. *See, e.g.,* CAL. LAB. CODE § 3700 (Deering 2003); NEV. REV. STAT. 616B.650 (2003).

50. *See* *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 58-60 (1999) (reasoning that medical treatment under workers' compensation is not a public benefit, but a private insurance obligation); *McInnis v. Town of Bar Harbor*, 387 A.2d 739, 743 (Me. 1978) (noting that "rehabilitation is not a publicly funded program for retraining the handicapped," it is a cost imposed entirely on the employer). *But see* Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law into the Breach Once More*, 21 N.M. L. REV. 219 (1991) (referring consistently to workers' compensation benefits as "state benefits" in its advocacy in favor of making such benefits available to undocumented workers).

for tort remedies for personal injuries incurred on the job. Ordinary tort remedies are available to everyone, including undocumented immigrants.<sup>51</sup>

State workers' compensation statutes were adopted in the United States around the turn of the twentieth century amidst an enormous tide of work-related accidents caused by rapid industrialization.<sup>52</sup> Prior to that time, the traditional defenses of contributory negligence, the fellow servant rule, and assumption of risk doctrines had effectively shielded employers from liability.<sup>53</sup> In the face of these formidable defenses, even victims of catastrophic accidents caused primarily by the negligence of the employer were routinely left without a remedy.<sup>54</sup> Joining a national call for reform, President Roosevelt stated in 1907: "[I]t is neither just, expedient, nor humane; it is revolting to judgment and sentiment alike that the financial burden of accidents occurring because of the necessary exigencies of their daily occupation should be thrust upon those sufferers who were least able to bear it."<sup>55</sup>

Since its inception, workers' compensation law has been predicated on the no-fault principle. That is, employees forego the opportunity to pursue tort remedies for work-related injuries in exchange for a quick and certain resolution of their claims, even though the recovery in some cases would be greater in tort. Under this no-fault scheme employees need only prove: (1) the existence of an employer/employee relationship; (2) that the injury arose during the course of employment; and (3) that the injury is causally related to the employment.<sup>56</sup> The defenses of contributory negligence, assumption of risk, and the fellow servant rule are explicitly abolished by statute in most states.<sup>57</sup> This compromise between employers and employees means that workers' compensation statutes are generally interpreted liberally for the protection of the injured worker.<sup>58</sup>

---

51. *E.g.*, *Maldonado v. Allstate Ins. Co.*, 789 So. 2d 464, 470 (Fla. Dist. Ct. App. 2001) (holding that undocumented alien had right to no-fault automobile insurance benefits as "resident" under state statutes); *Montoya v. Gateway Ins. Co.*, 401 A.2d 1102, 1103-04 (N.J. Super. Ct. App. Div. 1979) (recognizing a body of case law upholding undocumented immigrants' right to access to the courts to enforce an insurance contract that provided coverage for automobile accidents); *Arteaga v. Literski*, 265 N.W.2d 148, 150 (Wis. 1978) (holding that undocumented aliens have a right to sue in tort).

52. Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUS. L. REV. 119, 162-63 (1994) (crediting real catastrophes like the deaths of 361 miners in a coal mining explosion in West Virginia and of 164 women in New York City in the Triangle Shirtwaist Fire, for helping to jolt social consciousness to the need for reform).

53. *See* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967) (analyzing the historical origin of workers compensation).

54. *See* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982).

55. Spieler, *supra* note 52, at 166.

56. *Riddle v. Brevard County Bd.*, 286 So. 2d 557, 561 (Fla. 1973).

57. *See, e.g.*, *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917); *City of Hammond v. Biedron*, 652 N.E.2d 110, 112 (Ind. Ct. App. 1995).

58. *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 414 (1932) (Workers' compensation operates "to relieve persons suffering such misfortunates of a part of the burden and to

Significantly, this compromise received overwhelming support from employers, employees, labor unions, and the insurance industry.<sup>59</sup> The support by employers for workers' compensation has been attributed in part to the need to ensure labor peace, but most commonly to the fact that it essentially cost employers nothing. Initially, the cost to employers of workers' compensation insurance was practically eliminated by reductions in wages paid to employees, and by passing some of the cost to consumers.<sup>60</sup> Workers, on the other hand, did not oppose a reduction in wages because, in return, they received the certainty of recovery for work-related injuries and avoided the uncertainty of tort litigation. Presently, most states require employers to purchase insurance from private insurance companies or to qualify as self-insurers.<sup>61</sup> Employers are free to pass the cost of workers' compensation insurance on to consumers of products or services in the form of increased prices.<sup>62</sup> Of course, workers' wages are also susceptible to manipulation to reflect the cost of doing business. Workers' compensation, therefore, continues to be privately funded.

### *B. Vocational Rehabilitation Services*

Vocational rehabilitation programs are crucial components of state workers' compensation systems. After medical treatment for the work-related injury, vocational rehabilitation programs can help workers and their families avoid life sentences of disability and unemployment. In addition, by helping to restore the injured worker's earning capacity,

---

distribute it to the industries and mediate to those served by them. They are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results."); *Dep't of Indus. Relations v. Circus Circus Enters. Inc.*, 705 P.2d 645, 648-49 (Nev. 1985) (Nevada's "previous decisions have stressed the need for worker's compensation determinations to be consistent with Nevada's public policy of favoring the injured worker, who gives up his or her right to a tort remedy against an employer in exchange for the protections of the worker's compensation system."); *Viriden v. Smith*, 210 P. 129, 130 (Nev. 1922) (stating Workmen's Compensation Act, being remedial in nature, should be given a liberal construction to accomplish the purpose intended).

59. See Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J.L. & ECON. 305, 308-11 (1998).

60. *White*, 243 U.S. at 201-02 ("[J]ust as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale.").

61. See LARSON & LARSON, *supra* note 3, § 2.08.

62. Professors Larson and Larson described the purpose of workers' compensation thusly: The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.

*Id.* § 103[2]. This position is consistent with the opinions of state supreme courts that have decided to award benefits to undocumented immigrant workers. See *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221, 223-24 (N.J. Super. Ct. App. Div. 1996).

those services relieve pressure from state workers' compensation systems.<sup>63</sup>

The purpose of workers' compensation systems is the return of injured workers to gainful employment, whenever feasible (i.e., rehabilitation). In every state system rehabilitation is based on the employee's ability to engage in an occupation earning wages similar to the employee's former occupation.<sup>64</sup> Rehabilitation is composed of two phases: a medical phase and a vocational phase. Once the worker has reached maximum medical recovery or improvement, state vocational rehabilitation statutes mandate a determination of the individual's capacity to work. Permanently disabled individuals returning in a light-duty capacity or after retraining are deemed eligible for vocational rehabilitation. Vocational rehabilitation generally comes in three forms: (1) modified, or light duty work with the same employer; (2) job placement assistance to secure a job with a different employer; or (3) retraining in the form of an educational program.<sup>65</sup> The principal focus of all three types of rehabilitation is restoration of the worker's earning capacity. That is, the eligible worker is entitled to any of the three forms of assistance to enable him to return to work earning a salary similar or substantially similar to the wages he earned in his former job.<sup>66</sup>

To qualify for vocational rehabilitation, the worker must first demonstrate the existence of a permanent disability that has diminished the worker's earning capacity. The disability must manifest itself as a vocational disability. That is, the extent of the worker's disability must be measured by the extent to which the worker's ability to earn wages compares to his former employment. Once the employee has demonstrated the existence of a lingering disability, most vocational rehabilitation statutes require an individualized assessment of the worker's potential to return to gainful employment. The assessment includes an evaluation of the worker's disability, his remaining skills and education, and a deter-

---

63. The objectives of rehabilitation are not restricted to helping injured workers. Rehabilitation also serves to enable employers to avoid making further compensation by assisting the injured employee to regain his earning capacity. See *Lancaster v. Cooper Indus.*, 387 A.2d 5, 9 (Me. 1978); N.D. CENT. CODE § 65-08.1-05 (2002); WYO. STAT. ANN. § 27-14-701 (Michie 2003).

64. See *Ex parte Beaver Valley Corp. v. Priola*, 477 So. 2d 408, 412 (Ala. 1985) (In "choosing the form of vocational rehabilitation which is most likely to restore the employee to suitable gainful employment," consideration should be given to programs "reasonably calculated to restore the employee to suitable employment providing an income comparable to that earned prior to the injury."); *Owens Country Sausage v. Crane*, 594 S.W.2d 872, 874 (Ark. Ct. App. 1980) (granting a former truck driver rehabilitation services in the form of an educational program that would give him "instrument rating" and thus enable him to earn as much as he had as a truck driver; the claimant had earned \$275 a week prior to his injury and \$175 a week after the injury); *Norby v. Arctic Enters., Inc.*, 232 N.W.2d 773, 775 (Minn. 1975) (determining that the test is whether retraining will materially assist in restoring the employee's earning capacity); *Seader v. Clark County Risk Mgmt.*, 906 P.2d 255, 256 (Nev. 1995) (stating that a worker's acceptance of lump sum payment for permanent partial disability did not waive his right to receive vocational rehabilitation benefits).

65. E.g., NEV. REV. STAT. 616C.530 (2000).

66. See *UPS v. Godwin*, 418 S.E.2d 910, 912-13 (Va. Ct. App. 1992).

mination of whether retraining would help the employee regain an earning capacity similar to the one he formerly possessed. Many statutes require the employer to pay additional maintenance during retraining.<sup>67</sup> Many statutes also require that the employer provide an allowance for necessary travel.<sup>68</sup>

### III. THE IMMIGRATION CONTROL REFORM ACT OF 1986 (IRCA) AND SUBSEQUENT LEGISLATION

IRCA was designed to address the problem of unauthorized immigration to the U.S. by two principal means: (1) a massive regularization process for eligible immigrants who had arrived in the country before January 1, 1982; and (2) a mechanism of employer sanctions to deter the knowing employment of undocumented immigrants.<sup>69</sup> IRCA imposes upon employers the duty to verify workers' immigration status, through the INS form I-9,<sup>70</sup> and to keep records of the documents produced to establish eligibility to work. Employers who fail to check workers' immigration status or to keep records expose themselves to civil fines.<sup>71</sup> Those who engage in a pattern or practice of violations by knowingly employing undocumented immigrants can be charged criminally for their conduct.<sup>72</sup>

Since its inception, IRCA has been criticized for turning U.S. employers into immigration deputies. However, in reality, even while prohibiting the hiring of undocumented immigrants and threatening sanctions against employers who hire them, the statute imposed only minimal responsibilities upon employers. Though employers are required to verify the validity of documents presented to establish job applicants' authorization to work, they are not expected to become experts in the inspection of immigration documents. Documents that appear valid on their face suffice to discharge the employers' obligations under the statute.<sup>73</sup> Therefore, employers charged with violations often invoke the "good faith" defense with great success.<sup>74</sup> Employers are further protected by a number of provisions in the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA), which excuse "tech-

---

67. *E.g.*, CAL. LAB. CODE § 139.5(a)(5) (West 2003); NEV. REV. STAT. 616C.555.2 (2001); N.M. STAT. ANN. § 52-3-17 (Michie 2003).

68. *E.g.*, MICH. COMP. LAWS § 418.315 (2003); N.M. STAT. ANN. § 52-3-17(G); WIS. STAT. § 102.61(c) (2003).

69. 8 U.S.C. § 1324(a)(1) (2000).

70. 8 C.F.R. § 274a.2(b)(ii) (2003).

71. 8 U.S.C. § 1324(e)(4)(A) (listing fine range from \$250 to \$10,000).

72. 8 U.S.C. § 1324(f).

73. 8 U.S.C. § 1324a(a)(3) (2000).

74. Between October 1996 and May 1998, 2,100 employers were able to escape sanctions under IRCA because the INS determined that the unauthorized aliens used fraudulent documents to get hired. *See* U.S. GEN. ACCOUNTING OFFICE, *ILLEGAL ALIENS: FRAUDULENT DOCUMENTS UNDERMINING THE EFFECTIVENESS OF THE EMPLOYMENT VERIFICATION SYSTEM 2* (1999). Significantly, the INS is required to give employers three days' notice before it can inspect the employers' premises. 8 C.F.R. § 274a.2.

nical or procedural" failures to verify documents as long as those failures resulted from a "good faith" effort.<sup>75</sup> IIRIRA also requires INS investigators to notify employers of violations they have encountered and to give employers ten days to correct the problems.<sup>76</sup> That reality is not lost on many employers, particularly those who operate businesses that cannot attract a steady supply of legal resident workers because of the nature of the job or the level of pay.<sup>77</sup>

Employees, on the other hand, do not enjoy an equivalent presumption of compliance with the statute once they establish that they are "eligible" to work. Though the statute does not impose continuing obligations upon employers to ensure workers' eligibility, neither does it prohibit further inquiries into their status. The statute prohibits discriminatory immigration-related employment practices.<sup>78</sup> However, any risk of discrimination can be avoided by requiring that all employees, regardless of immigration status, re-establish eligibility to work prior to receiving vocational rehabilitation services. At that time, the insurance provider can perform a more careful inquiry into the worker's immigration status by examining the supporting documents more closely to sort out employees deemed ineligible.

Employers also are able to exploit the unenforceability of the employer sanctions provisions of the statute. For many reasons, workplace enforcement has been used only sparingly since the passage of the statute. Besides the inherent difficulty in prosecuting employers presented by the good faith defense, the task of inspecting every workplace for potential violations of immigration law is enormous. Historically, the INS simply has not had the resources, staffing, or time required for such a task.<sup>79</sup> Because of these factors, immigration enforcement is largely

---

75. 8 U.S.C. § 1324a(b)(6).

76. *Id.*

77. Professor Kitty Calavita conducted a survey of employers who routinely relied upon undocumented workers to fill unattractive jobs in Southern California. Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC'Y REV. 1041, 1051-53 (1990). Many of the employers revealed that though they knew they were hiring undocumented workers and they appreciated the risk of sanctions, their need for workers drove their hiring decisions. *Id.* The work ethic of undocumented workers was characterized by the employers as superior to that of Americans. *Id.* Many of the employers recognized that the jobs they were offering were not particularly desirable and would be difficult to fill were it not for undocumented workers. *Id.* One employer described the work at his plant and the difficulty of filling positions with a domestic work force thusly:

These girls come in at four o'clock in the morning, and it's cold out there in the room that they're working in. There's chicken meat all over the place, and it's not real desirable work. . . . It's hard to find people that will do that. All the girls that we have out there are either resident aliens or of Mexican heritage, and . . . ah . . . they're willing to do it. Consequently, if that's the type of people we have to get to do that type of work . . . we would have to hire them to get the work done.

*Id.* (internal quotations omitted).

78. See 8 U.S.C. § 1324b (2000).

79. See Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 669-72 (1981) (discussing the historical under funding of the border patrol).

restricted to border control.<sup>80</sup> It is therefore widely understood among employers that the odds of a workplace inspection, let alone a workplace raid, or a successful conviction for violations of immigration law are rather small.<sup>81</sup>

In many instances these advantages can translate into economic leverage in the marketplace for unscrupulous employers. Given all the protections offered by federal law, employers can create advantages over their lawful competitors by relying on falsified documents to shield themselves from IRCA liability, and then inquire more carefully into the immigration status of their workers only once they become injured.<sup>82</sup> That tactic can have an effect even in states that allow for workers' compensation benefits. It can be even more pronounced in states that do not provide for such benefits.

#### IV. CONFLICTS BETWEEN STATE LAW AND THE IMMIGRATION REFORM CONTROL ACT OF 1986

The question of whether state vocational rehabilitation programs conflict with IRCA was addressed directly by the Nevada Supreme Court in *Tarango v. State Industrial Insurance System*.<sup>83</sup> The *Tarango* decision illustrates the confusion that can be created by the interaction of a system

---

80. Immigration enforcement takes place primarily at the border. Of the 1,714,035 apprehensions by the INS in fiscal year 1999, 97% were made along the Southwest Border. U.S. DEP'T OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 201, March 2002), at <http://uscis.gov/graphics/shared/aboutus/statistics/FY99Yearbook.pdf> (last visited February 14, 2004). Similarly, in the year 2000, the INS dedicated most of its resources to border enforcement and the removal of criminal immigrants. U.S. DEP'T OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, ENFORCEMENT, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 2-4, at <http://uscis.gov/graphics/shared/aboutus/statistics/ENF00yrbk/ENF2000.pdf> (last visited February 14, 2004). Southwest border apprehensions were 1,643,679, a record high. *Id.* at 173. Removals of criminal immigrants totaled over 71,000 while workplace removals totaled only 1,966. *Id.* For a more detailed study of the impediments placed on the INS to engage in workplace enforcement, see U.S. GEN. ACCOUNTING OFFICE, ILLEGAL ALIENS: STATUS OF SOUTHWEST BORDER STRATEGY IMPLEMENTATION (1999).

81. See Calavita, *supra* note 77, at 1064. A more recent example of IRCA's "good faith" defense is a case involving Tyson Food Inc. Bill Poovey, *Tyson Just the Beginning*, FREEREPUBLIC.COM, Apr. 2, 2003, available at <http://www.freerepublic.com/focus/f-news/883011/posts> (last visited February 14, 2004). In an elaborate sting operation, agents for the Justice Department delivered 136 undocumented employees to Tyson Foods. The Company was charged with conspiracy to smuggle undocumented workers. *Id.* The government also charged top company executives with knowingly hiring unauthorized workers. In defense of Tyson, its attorney told jurors that the company could be hiring a "refugee from the North Pole or the man from Mars" if the documents presented by the worker looked genuine. *Id.* (internal quotations omitted). After deliberating for seven hours the jury found for Tyson. *Id.* One juror commented that there is "too much gray area" for employers to determine who is legal, suggesting that there ought to be "stricter guidelines" than requiring two identifying documents that look genuine. *Id.* (internal quotations omitted).

82. Professor Linda S. Bosniak has explained the shield enjoyed by employers thusly: "In effect, employers who are willing to alter their practices just enough to avoid appearing to disregard the law totally, but who in fact continue to rely on undocumented labor, are insulated from the law's sanctions provisions." See Bosniak, *Exclusion and Membership*, *supra* note 47, at 1017.

83. 25 P.3d 175 (Nev. 2001).

designed to assist the worker to return to gainful employment and a largely unenforceable (and at times purposely unenforced) federal statute that prohibits employing undocumented workers. At first glance the two systems would appear to be in direct conflict. However, much complexity is lurking just beneath the surface. Many of these complexities were manifested in *Tarango*. Thus, the case offers an effective vehicle to examine vocational rehabilitation principles in operation and to analyze this problem.

Tarango, an undocumented worker, injured his back when he fell from an eight-foot ladder while installing sheetrock at a construction site.<sup>84</sup> As a result of the accident Tarango sustained a permanent partial disability.<sup>85</sup> After receiving medical treatment, Tarango was cleared to return to the workforce.<sup>86</sup> However, Tarango's treating physician limited him to permanent medium duty work in which he was to lift no more than fifty pounds.<sup>87</sup> Before his injury, Tarango was a drywall installer.<sup>88</sup> That position required him to handle unwieldy sheets of drywall measuring four feet wide by eight feet long and weighing eighty pounds or more. In a normal day a drywall hanger can install between thirty and forty sheets of drywall on walls and ceilings.

Since Tarango's occupation required more vigorous activity than Tarango's medical clearance would allow, his physician recommended vocational rehabilitation.<sup>89</sup> The employer did not offer Tarango a light-duty job.<sup>90</sup> Though it awarded payment for a ten percent permanent partial disability, the State Industrial Insurance System (SIIS) denied Tarango all vocational rehabilitation benefits, absent proof of a legal right to work.<sup>91</sup> SIIS's determinations were affirmed twice by a hearing examiner, and once again by a Nevada district court.<sup>92</sup> The Nevada Supreme Court affirmed.<sup>93</sup>

To support its denial of vocational rehabilitation services the court relied on a Nevada statute that mandates:

---

84. *Tarango*, 25 P.3d at 177.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *See id.* Light duty work is one of the options available in vocational rehabilitation programs.

91. *Id.* While employers are essentially presumed innocent as long as they review workers' documents in "good faith," employees do not enjoy an equivalent presumption. Beyond the initial review of documents and keeping of records, IRCA does not require employers to reconfirm workers' authorization. However, the state does not prohibit the practice. Therefore, employers or insurance providers are free to revisit the issue of a person's authorization to work at any time. Aware that IRCA prohibits discrimination in its administration against individuals who may "look or sound" foreign, providers require that every applicant provide proof of authorization to work to determine whether the person is eligible for benefits and to what extent.

92. *Id.* at 178.

93. *Id.* at 177.

[T]he following priorities in returning an injured employee to work:

1. Return the employee to the job he had before his injury.
2. Return the injured employee to a job with the employer he worked for before his accident that accommodates any limitation imposed by his injury.
3. Return the injured employee to employment with another employer in a job that uses his existing skills.
4. Provide training for the injured employee while he is working in another vocation.
5. Provide formal training or education for the injured employee in another vocation.<sup>94</sup>

The court found that Tarango was not incapacitated by his inability to lift more than fifty pounds.<sup>95</sup> According to the court, that situation presented SIIS with three options, “[f]irst, SIIS could have returned Tarango to the workforce” as provided by NRS 616C.530 (3), and thereby cause an employer to violate IRCA by hiring Tarango.<sup>96</sup> “Second, SIIS could have ignored the priority scheme established by the legislature in the vocational rehabilitation statute and awarded Tarango formal training based solely on his illegal status.”<sup>97</sup> “[T]hird, SIIS could have denied all vocational rehabilitation benefits.”<sup>98</sup>

Though the Court purported to base its denial of services to Tarango on state law, IRCA was crucial to its analysis. Concluding that denying Tarango vocational rehabilitation benefits was the only logical choice, the court noted that because Tarango was unable to return to his former job due to his disability, the first priority option was never at issue.<sup>99</sup> However, according to the court, Tarango’s ability to return to work in a limited capacity implicated the second and third priorities,<sup>100</sup> which were that the injured employee be returned to work, with the same employer if the disability can be accommodated, or with a different employer in a job that uses his existing skills. Accordingly, in the court’s opinion, were SIIS to exercise either of these choices, it would expose employers to sanctions for knowing violations of IRCA.

---

94. *Id.* at 179 (quoting NEV. REV. STAT. 616C.530).

95. *Id.* at 180.

96. *Id.*

97. *Id.* This distinction was also drawn by *Rivera v. United Masonry, Inc.*, 948 F.2d 774 (D.C. Cir. 1991). However, in *Rivera* the court was careful to note that when the lack of “suitable alternate employment” was a prerequisite to certain workers’ compensation benefits, judges should consider whether someone of like age, education, work experience, or physical disability could find employment. *Rivera*, 948 F.2d at 775.

98. *Tarango*, 25 P.3d at 180.

99. *Id.*; NEV. REV. STAT. 616C.530 (establishes the return of the injured employee to the same employer as the first priority).

100. *Tarango*, 25 P.3d at 180; NEV. REV. STAT. 616C.530(2) (establishing the second priority, which is the return to work to the same employer if the disability can be accommodated, while subsection (3) establishes the third priority, which is the return of the injured employee to employment with another employer in a job that uses his existing skills).

An alternative posed by the court would require SIIS to ignore the priority scheme established by the statute, and to provide Tarango vocational rehabilitation training based solely on his unauthorized immigration status by jumping directly to the lowest priority options of the statute.<sup>101</sup> However, according to the court, subsection (4) “necessitates providing Tarango with formal vocational training that runs concurrent with his employment.”<sup>102</sup> And, because IRCA prohibits Tarango’s employment in the U.S., “SIIS would be required to provide training outside of Nevada,”<sup>103</sup> which the court refused because “[t]he NIIA was not intended as a means to expand the agency’s powers to award vocational benefits beyond the borders of Nevada—let alone the borders of the United States.”<sup>104</sup> In conclusion, the court maintained that Tarango wanted a better career, not the one he left behind.<sup>105</sup>

Importantly, the court based its denial of vocational rehabilitation to Tarango principally on its disbelief that Tarango was incapacitated.<sup>106</sup> Though the court observed that Tarango’s ability to return to the job market was limited by his injury, the court emphasized that Tarango could lift up to fifty pounds.<sup>107</sup> The court’s focus on Tarango’s ability to lift fifty pounds to support its conclusion that he was not incapacitated ignores a crucial element of vocational rehabilitation programs. The question of whether incapacity exists is dependent on the nature of the job and not some arbitrary measure of a person’s strength. Indeed, the court’s observation that Tarango could participate in the job market in a limited capacity is closer to the mark. While a lifting capacity of fifty pounds may appear considerable in sedentary occupations, that limitation essentially precluded Tarango from employment in the physically demanding construction industry.<sup>108</sup>

As stated above, drywall installers must be able to carry and manipulate unwieldy sheets of material throughout the day. Those sheets range in dimensions from four feet wide by twelve feet long, to four feet wide by eight feet long, and, depending on the thickness, can weigh eighty pounds or more. Sheetrock is generally installed on walls and ceil-

---

101. *Tarango*, 25 P.3d at 180.

102. *Id.* at 181.

103. *Id.*

104. *Id.* (citing NEV. REV. STAT. 616C.580 which states that “[e]xcept as otherwise provided in this section, vocational rehabilitation services must not be provided outside of [Nevada]”).

105. *Id.* at 180.

106. *See id.* (“[I]f Tarango was a documented worker, he clearly could have returned to similar employment in the United States. Tarango was not incapacitated. Rather, the record indicates that the only limitation on Tarango’s abilities was that he should lift no more than fifty pounds.”).

107. *Id.*

108. For purposes of this analysis, it is helpful to compare the work Tarango did prior to his injury to work that he may be able to perform afterwards. An interview with Rafael Gomez, an organizer for the Nevada Carpenters’ Union, in November of 2002, revealed that a person with Tarango’s limitations would leave great difficulty finding a job in the construction industry that would equal installing sheetrock. According to Mr. Gomez, Tarango’s lifting limitation of fifty pounds would render him virtually unemployable in construction.

ings. In an eight-hour workday, a drywall hanger can install between thirty and forty sheets of that material. The work of a drywall hanger does not only require a great deal of strength, it also requires a great deal of stamina and precision under tremendous physical stress. The Department of Labor (DOL) classifies the job of drywall applicator as "very heavy work."<sup>109</sup> That category is the most demanding in a list produced by DOL, which is the source used by vocational rehabilitation experts to determine the extent of an injured person's vocational disability.<sup>110</sup>

Given his limitations, Tarango can no longer install drywall. The best job Tarango could hope for in the construction industry would be a clean-up job. However, even that job would require Tarango to lift large amounts of weight numerous times a day. In addition, the pay rate for construction clean up would fall well short of the rate payable for installing drywall. The decision thus ignores the well-established principle that Tarango and workers in his situation are generally entitled to assistance to help them return to an occupation earning substantially similar wages as their pre-injury position. Generally, "[a]n injured worker is not successfully rehabilitated when he or she reaches maximum medical recovery or improvement if the residuals of the injury, however well healed, prevent re-entry into the job market in a position paying as well as, or nearly as well as, his or her former employment."<sup>111</sup>

That principle is consistent with Nevada's workers' compensation law.<sup>112</sup> It is also a principle that is routinely followed in other jurisdictions. Under Nevada law an injured worker is eligible for vocational rehabilitation if he does not have "existing marketable skills."<sup>113</sup> Workers with job-related injuries who do not possess existing marketable skills are entitled to participate in programs designed to train or educate them and to receive job placement assistance.<sup>114</sup> Existing marketable skills are

---

109. U.S. Dep't of Labor, Office of Administrative Law Judges, *Dictionary of Occupational Titles*, at <http://www.oalj.dol.gov/public/dot/REFRNC/DOT08B.HTM> (last visited February 14, 2004).

110. See *id.* at Appendix C. The Department of Labor's Dictionary of Occupational Titles organizes work into four categories. A synopsis of the more general requirements of each category follows: (1) sedentary work requires the exertion of ten pounds of force occasionally, and is generally performed from a sitting position; (2) light work requires an exertion of up to twenty pounds of force occasionally, and/or up to ten pounds of work frequently with some other motion; (3) medium work requires an exertion of twenty to fifty pounds of force occasionally, and/or ten to twenty-five pounds frequently, and/or greater than negligible up to ten pounds of force constantly to move objects; (4) heavy work requires the exertion of fifty to 100 pounds of force occasionally, and/or twenty-five to fifty pounds of force frequently, and/or ten to twenty pounds of force constantly to move objects; and (5) very heavy work requires an exertion in excess of 100 pounds of force occasionally, and/or in excess of fifty pounds of force frequently, and/or in excess of twenty pounds of force constantly to move objects. *Id.*

111. Jane M. Draper, *Workers' Compensation: Vocational Rehabilitation Statutes*, 67 A.L.R. 4th 612, at § 2(a) (1989).

112. NEV. REV. STAT. 616C.555 (2003).

113. *Id.*

114. *Id.* In Nevada "existing marketable skills" include but are not limited to completion of an educational program "if the program or course of study provided the skills and training necessary for

defined as skills that would enable the injured worker to obtain employment at the same or substantially similar wages to those he enjoyed prior to the injury. As the *Tarango* court observed, those skills can be put to use elsewhere.<sup>115</sup>

When injured employees possess existing “marketable skills,” Nevada law restricts the services available under vocational rehabilitation to job placement assistance. One of the most important measures of the existence of “marketable skills” is whether the employee can earn wages equal to or close to pre-injury wages.<sup>116</sup> Though the Nevada statute does not set a threshold of post-injury wages under which a worker will not be considered to possess “marketable skills,” it does establish a goal in job placement assistance, which is “to aid the employee in finding a position which pays a gross wage that is equal to or greater than 80 percent of the gross wage that he was earning at the time of his injury.”<sup>117</sup>

The court’s reliance on *Tarango*’s ability to perform work in a limited capacity as a disqualifier for vocational rehabilitation services is inconsistent with the principal purpose of vocational rehabilitation programs, which is restoration of disabled workers’ earning capacity. The test used to determine eligibility is whether the employee is vocationally incapacitated, not whether the worker is totally incapacitated in a medical sense. To require that the worker have no remaining work capacity to qualify for vocational rehabilitation would fundamentally alter that principle. A test requiring that the worker establish a total medical incapacity before becoming eligible for vocational rehabilitation would result in the denial of services to most injured workers. Such a result could not have been what the Nevada Supreme Court had in mind when ruling against *Tarango*.

Significantly, the court also ignored the fact that *Tarango*’s employer did not tender a light duty offer, nor did it make an offer of proof that another job would have been available to *Tarango* absent his immigration status.<sup>118</sup> Section 2 of the statute is triggered only after the employer has tendered an offer of light-duty employment.<sup>119</sup> To satisfy the

---

the injured employee to be gainfully employed on a reasonably continuous basis in an occupation that is reasonably available in this state.” *Id.* Marketable skills also include completion of a two or four year program at a college or a university, which results in a degree, completion of any portion of a graduate program, or skills acquired in previous employment, including those acquired during an apprenticeship or a program for on-the-job training. *Id.* The statute further states that “[t]he skills set forth in paragraphs (a) to (d), inclusive, must have been acquired within the preceding 7 years and be compatible with the physical limitations of the injured employee to be considered existing marketable skills.” *Id.*

115. *Tarango*, 25 P.3d at 178, 180.

116. See, e.g., *Variano v. Dial Corp.*, 589 N.W.2d 845 (Neb. 1999); *Peabody v. Home Ins. Co.*, 751 A.2d 783 (Vt. 2000).

117. NEV. REV. STAT. 616C.555.2.

118. See generally *Tarango*, 25 P.3d at 175. An offer of proof that a light duty job existed for *Tarango* would have been the subject of intense scrutiny by *Tarango*’s counsel.

119. NEV. REV. STAT. 616C.530.

statute, light duty employment must be similar or substantially similar, wage-wise, to the injured employee's former job.<sup>120</sup> Though Tarango's medical incapacity was not as compelling as one involving a more severely disabled worker, he was not at maximum physical and vocational capacity.<sup>121</sup> That analysis was supported by the dissenting judge, who argued that the proper method to determine whether benefits should be granted to Tarango consisted of an individualized assessment of Tarango's incapacity.<sup>122</sup>

As precedent, the *Tarango* opinion provides little guidance regarding the proper way to decide cases involving the right of undocumented workers to vocational rehabilitation. Much of the case seems to concede that those services can be properly awarded under the right circumstances. First, the court posed the question presented as whether "formal vocational training must be denied if that training is required solely because of immigration status,"<sup>123</sup> suggesting that if training were required because of the worker's inability to regain his earning capacity without retraining, the answer may be in the affirmative. Second, the court also conceded that the Nevada Industrial Insurance Act ("NIIA") covers undocumented workers because it applies to "*every person* in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, *whether lawfully or unlawfully employed.*"<sup>124</sup> Third, the court added with respect to providing vocational rehabilitation services to undocumented workers, "it is our view that although SIIS would be facilitating future employment for an unauthorized alien by providing vocational rehabilitation benefits, there is no indication that SIIS is prohibited or would be punished under the IRCA for its involvement."<sup>125</sup> Finally, the court also seemed to contemplate that vocational rehabilitation training could be put to use elsewhere.<sup>126</sup> However, despite those features, *Tarango* has been consistently interpreted as a complete bar to vocational rehabilitation services for undocumented workers.<sup>127</sup>

Importantly, the court's sharp focus on Tarango's ability to lift up to fifty pounds as evidence that he was not incapacitated<sup>128</sup> appears to indicate that the court sought to limit its decision to the facts before the tribunal. As stated above, *Tarango* contains several strong suggestions that

---

120. *Id.* 616C.555.

121. *Tarango*, 25 P.3d at 177.

122. *Id.* at 184 (Maupin, C.J., concurring in part and dissenting in part).

123. *Id.* at 177.

124. *Id.* at 179.

125. *Id.*

126. *Id.*

127. For example, the Nevada Attorney for Injured Workers reads the opinion as denying all access to vocational rehabilitation to undocumented workers. Interview with the Nevada Attorney for Injured Workers (Jan. 22, 2003) (on file with author).

128. *Tarango*, 25 P.3d at 180.

the court was speaking strictly about a case where it did not believe the claimant was incapacitated because he could lift up to fifty pounds.<sup>129</sup> Given the court's sharp focus on Tarango's lack of incapacitation, a more plausible reading of the case as legal precedent would allow for vocational rehabilitation if: (1) the worker had become incapacitated and could benefit from retraining—though the retraining would be put to use elsewhere; (2) if the need for rehabilitation was not due to the worker's undocumented status; and (3) if the worker intended to return to the same or similar occupation, not a better occupation than the one he left behind. For example, a more compelling case would exist if the undocumented construction worker was rendered physically incapable of lifting more than twenty pounds due to a work-related injury.

#### V. ARE STATE WORKERS' COMPENSATION AND VOCATIONAL REHABILITATION LAWS PREEMPTED BY IRCA?

##### A. State Workers' Compensation Laws and IRCA

The question of whether IRCA preempts states' workers' compensation or vocational rehabilitation statutes that award benefits to undocumented workers will likely continue to cause confusion. The Nevada Supreme Court's analysis of the preemption issue was incomplete. After outlining the federal government's plenary power over immigration, the Court concluded that "because of the federal government's plenary power in the area of alienage, any legislation created by Congress—such as IRCA—preempts Nevada's workers' compensation laws as those laws have an effect on aliens in this state."<sup>130</sup> As will be shown, a reasonable reading of the Court's analysis would lead to the conclusion that IRCA preempts Nevada's workers' compensation laws only to the extent that they conflict with the federal statute. However, such a reading has not been the case. *Tarango* has been consistently interpreted to hold that all vocational rehabilitation benefits are preempted by IRCA.<sup>131</sup> That interpretation of *Tarango* is inconsistent with traditional federal preemption doctrine and holdings of several state courts.<sup>132</sup>

Generally, under principles of federal preemption, when a state law is in actual conflict with a federal statute the state law must yield to the

---

129. See *id.*

130. *Tarango v. State Indus. Ins. Sys.*, 25 P.3d 175, 179 (Nev. 2001).

131. See LARSON & LARSON, *supra* note 3, at § 66.03. The leading treatise on the subject, LARSON'S WORKERS' COMPENSATION LAW, has interpreted the holding in the case to deny all access to vocational rehabilitation benefits on the basis of preemption by IRCA because vocational rehabilitation programs contain job placement components. *Id.* That reading of the case is also shared by the Nevada Attorney for Injured Workers. See Interview with the Nevada Attorney for Injured Workers, *supra* note 127. However, as will be shown, the critical component of vocational rehabilitation services—retraining—is not preempted by IRCA.

132. See, e.g., *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 749 A.2d 1036, 1038 (Pa. Commw. Ct. 2000).

federal scheme.<sup>133</sup> Whether state law is preempted depends on the intent of Congress.<sup>134</sup> Congressional intent may be either express or implied.<sup>135</sup> Express intent to preempt state law is generally contained in preemption clauses within the federal statute.<sup>136</sup> The question of whether implied intent exists to preempt state law is dependent on Congressional intent, as manifested in several sources.<sup>137</sup>

To determine whether Congress has impliedly preempted state law courts can consider the wording of the federal statute itself and its legislative history.<sup>138</sup> Courts may also consider the comprehensiveness of the federal regulatory scheme.<sup>139</sup> In addition, they may consider whether the act of Congress has touched on "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."<sup>140</sup> Finally, courts may consider whether the state law produces a result inconsistent with the objective of the federal statute.<sup>141</sup>

Courts having analyzed the potential conflict between IRCA and state workers' compensation laws have consistently concluded that such laws are not preempted.<sup>142</sup> The most careful preemption analysis to date involving potential conflicts between IRCA and workers' compensation was performed by the Connecticut Supreme Court in *Dowling v. Slotnik*.<sup>143</sup> In *Dowling* the claimant, who had been hired as a live-in housekeeper, severely injured her arm when she slipped on ice that had accumulated on the defendants' driveway while walking to the defendants' mailbox.<sup>144</sup> The claimant's injuries rendered her totally disabled for over one year.<sup>145</sup> Though the defendants had been informed of the claimant's

133. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .").

134. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

135. *Jones*, 430 U.S. at 525 (The intent of Congress may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose.").

136. See *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002).

137. See *Jones*, 430 U.S. at 525.

138. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251-56 (1984) (relying primarily on the text of the statute and its legislative history to hold that a state personal injury claim for based on strict liability and negligence for the escape of plutonium was not preempted by the Atomic Energy Act of 1954).

139. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.").

140. *Rice*, 331 U.S. at 230.

141. *Id.*; see also *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

142. *Reinforced Earth Co.*, 749 A.2d at 1038. The defendant argued that IRCA preempts state workers' compensation statutes and required the court to find that the claimant was not an "employee" under state law. *Id.* The court held that it does not. *Id.*; see also *Dowling v. Slotnik*, 712 A.2d 396 (Conn. 1998) (holding that the Immigration Reform Act does not preempt, either expressly or impliedly, the authority of states to award workers' compensation benefits to undocumented aliens).

143. 712 A.2d 396 (Conn. 1998).

144. *Dowling*, 712 A.2d at 399.

145. *Id.*

undocumented status, they nevertheless agreed to hire her, provide her with health insurance, and pay her a salary of \$400.00 per week.<sup>146</sup> In violation of Connecticut law, the defendants never obtained workers' compensation insurance.<sup>147</sup> The workers' compensation commissioner found that the claimant's injuries had arisen out of and during the course of her employment, and therefore were compensable under state law.<sup>148</sup> The defendants were ordered to pay the claimant disability benefits for the period of total disability, prospective disability benefits subject to medical documentation, interest on the past due disability benefits, and any reasonable medical expenses incurred as a result of the fall.<sup>149</sup>

On appeal the defendants argued that the commissioner's authority was either expressly or impliedly preempted by IRCA.<sup>150</sup> Ruling against express preemption, the Connecticut Supreme Court reasoned that the purposes behind its workers' compensation laws and federal immigration law were not at odds when injured undocumented workers were provided benefits.<sup>151</sup> The defendants argued that the requirement that they pay the cost of medical care for their injured employee in the absence of a workers' compensation policy amounted to a fine for hiring an unauthorized worker and that such a "fine" was the equivalent of the state sanctions preempted by IRCA's express preemption provision.<sup>152</sup> Noting that workers compensation benefits are compensatory in nature rather than "sanctions," the Connecticut Supreme Court swiftly rejected that argument.<sup>153</sup>

Whether IRCA implicitly preempts the provision of benefits under state workers' compensation is another matter. Regarding workers' compensation in general, the court found that benefits under those statutes are not implicitly preempted by IRCA.<sup>154</sup> Reasoning that "'a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively . . . or when state law is in actual conflict with federal law,'"<sup>155</sup> the court noted

---

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 399-400. Prospective disability benefits for undocumented workers are generally available, but recent decisions in Michigan and Pennsylvania may raise questions in other jurisdictions regarding those benefits. For a discussion of the issues raised in those cases, see *infra* notes 481-83 and accompanying text.

150. *Id.* at 400. The defendants also made three other arguments: (1) that "the commission lacked jurisdiction over the . . . claim because [undocumented workers] are not included in the group of 'persons' eligible for workers' compensation benefits;" (2) that the commission lacked jurisdiction over the claim because the claimant's illegality had tainted the employment agreement, rendering it void; and (3) that the claimant's misrepresentations in her employment application regarding her qualifications invalidated the employment agreement. *Id.* Those issues were also decided in favor of the plaintiff. *Id.*

151. *Id.* at 408-09.

152. *Id.* at 403.

153. *Id.*

154. *Id.* at 403-04.

155. *Id.* at 403 (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)).

that the United States Supreme Court has found implied conflict preemption “‘where it is impossible for a private party to comply with both state and federal requirements . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”<sup>156</sup>

Taking notice of the “strong presumption against federal preemption of state and local legislation,”<sup>157</sup> the court pointed out that “[t]his presumption is especially strong in areas traditionally occupied by the states, such as public health and safety.”<sup>158</sup> Noting that nothing in the Act gave any indication “that Congress intended the act to preempt state laws whenever state laws operate to benefit undocumented aliens,”<sup>159</sup> the court further explained that,

‘it is clear from [the] legislative history [of the Immigration Reform Act] that Congress anticipated some conflict between the new statute . . . and various state . . . statutes. . . . As explained in the House Report: ‘It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law. . . .’<sup>160</sup>

As the *Dowling* court observed, IRCA’s legislative history demonstrates that the statute was not intended to deny labor protections to undocumented immigrants when such protections are not in conflict with the statute. In passing IRCA, Congress considered the consequences of maintaining a permanent underclass of people without labor protections. Congress recognized that denying labor protections would make employees without rights more desirable to unscrupulous employers, to the detriment of law-abiding competitors and legal residents, thus promoting unauthorized immigration. Indeed, while addressing this problem, the House Education and Labor Committee made clear that:

It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law.<sup>161</sup>

By safeguarding workers’ protections for undocumented workers, the committee sought to protect employment opportunities for legal residents and to ensure the ability of lawful employers to compete fairly in

---

156. *Id.* (quoting *Freightliner Corp.*, 514 U.S. at 287).

157. *Id.* at 404.

158. *Id.*

159. *Id.*

160. *Id.* (quoting *Montero v. INS*, 124 F.3d 381, 384 (2d Cir. 1997)).

161. H.R. REP. NO. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

the U.S. labor market. Indeed, the committee added that it sought “the wages and employment conditions of lawful residents [not be] adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.”<sup>162</sup> Congress further expressed its desire to deter unauthorized immigration by protecting the rights of undocumented workers when it authorized funds to the Wage and Hour Division of the U.S. Department of Labor to enforce wage and hour laws on behalf of undocumented workers.<sup>163</sup>

*B. Can Vocational Rehabilitation Laws Be Reconciled With IRCA?*

Though the *Dowling* preemption analysis is useful, it is important to note that the *Dowling* court did not have to analyze the full complexity of workers’ compensation under state law to decide that case. As stated above, vocational rehabilitation contains a number of components that raise more of a conflict with IRCA, such as modified employment and job referral assistance. However, the crucial component of vocational rehabilitation programs is the restoration of the injured worker’s earning capacity. Modified employment and job placement assistance (two practices that would violate IRCA) can easily be separated from those services. Job retraining, perhaps the most critical component because it is generally available in cases where the worker is seriously impaired, does not conflict with the immigration statute.

The doctrine of partial preemption provides the best possible resolution to cases that involve partial conflicts between state and federal law. When Congress has not entirely displaced state law over a particular field, the state law is preempted only to the extent that it conflicts with federal law.<sup>164</sup> Silence within a detailed statute is usually interpreted to mean that no federal rule on the matter was intended.<sup>165</sup> Consistent with the doctrine of partial preemption California and North Carolina have been able to navigate the conflicts between vocational rehabilitation and IRCA by carefully separating the components of vocational rehabilitation into job placement programs and training programs.<sup>166</sup> *Foodmaker, Inc. v. Workers’ Compensation Appeals Board* involved an undocumented worker who injured her lower back while attempting to pick up a sixty

---

162. *Id.*

163. See §111(d) of The Immigration Reform & Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C.). IRCA § 111(d) reads:

There are authorized to be appropriated . . . such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.

*Id.*

164. See *Florida Lime & Avocado Growers, Inc., v. Paul*, 373 U.S. 132, 142-43 (1963).

165. See *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 85-87 (1994).

166. See *Foodmaker, Inc. v. Workers’ Comp. Appeals Bd.*, 78 Cal. Rptr. 2d 767, 769 (Cal. Ct. App. 1998); *Gayton v. Gage Carolina Metals Inc.*, 560 S.E.2d 870, 873 (N.C. Ct. App. 2002); *Ruiz v. Belk Masonry Co.*, 559 S.E.2d 249, 251 (N.C. Ct. App. 2002).

pound box of lettuce while working for Jack-in-the-Box.<sup>167</sup> The employee was awarded workers compensation benefits, which were settled by way of a “compromise and release.”<sup>168</sup> The issue in the case was whether the undocumented worker was eligible for vocational rehabilitation benefits, although an offer of proof by the employer indicated that the worker would have been offered a light-duty job absent her undocumented status.<sup>169</sup> Finding against the claimant on this very narrow question, the *Foodmaker* court analyzed the question of whether vocational rehabilitation benefits are generally available to undocumented workers and the effect of IRCA on their availability.<sup>170</sup>

First, following the result in many other states, the court noted that, in general, workers compensation benefits are available to undocumented workers in California<sup>171</sup> because “[t]he act defines ‘employee’ as ‘every person in the service of an employer . . . whether lawfully or *unlawfully* employed, and includes: . . . aliens . . . .’”<sup>172</sup> Second, the court noted that vocational rehabilitation plans are generally designed to return injured employees to gainful employment.<sup>173</sup> However, separating vocational rehabilitation plans into: “(1) plans in which the employee is immediately employable; (2) training plans; and (3) self-employment plans,” the court determined that undocumented workers who fall into the second category should be eligible for vocational rehabilitation.<sup>174</sup>

According to the court, providing vocational rehabilitation services to injured undocumented workers in the first category would clearly violate IRCA.<sup>175</sup> However, the court concluded that training plans for vocationally feasible individuals (the second category) do not violate the immigration statute.<sup>176</sup> In response to an argument that unauthorized workers are “not vocationally feasible” because of their unauthorized immigration status, the court held that nothing in the statute restricted “an injured employee’s potential job market to this country.”<sup>177</sup> Thus, undocumented workers can “market” their work capacity in their country of

---

167. *Foodmaker, Inc.*, 78 Cal. Rptr. 2d at 769.

168. *Id.* at 770.

169. *Id.* at 770-71.

170. *Id.* at 775.

171. *Id.* at 771.

172. *Id.* (quoting CAL. LAB. CODE § 3351(a)); *Royal Ins. Co. v. Workers’ Comp. Appeals Bd.*, 48 Cal. Comp. Cases 104, 105 (Workers’ Comp. App. Bd. Feb. 9, 1982) (declaring that illegal immigrants are entitled to rehabilitation services); *Cabral v. State Bd. of Control*, 112 Cal. App. 3d 1012, 1018 n.1 (Cal. Ct. App. 1980) (Allport, J., dissenting) (stating that illegal immigrants are covered by workers’ compensation). Significantly, courts in other states whose statutes do not specifically cover undocumented workers (with the exception of Virginia) have nevertheless found that they are covered as “persons.” See *Dowling*, 712 A.2d at 409; *Reinforced Earth Co. v. Workers’ Comp. Appeal Bd.*, 810 A.2d 99, 102 (Pa. 2002).

173. *Foodmaker, Inc.*, 78 Cal. Rptr. 2d at 772.

174. *Id.* at 773.

175. *Id.* at 777.

176. *Id.* at 775 n.13.

177. *Id.*

origin. That statement is consistent with many observations made by the Nevada Supreme Court in *Tarango*, and the decisions of other jurisdictions.<sup>178</sup>

Generally, the Supreme Court is especially reluctant to find preemption of state law when the case involves the compensation of victims of tortuous conduct. For example, in *Silkwood v. Kerr-McGee Corp.*,<sup>179</sup> holding that state tort law was not preempted by the Atomic Energy Act of 1954, the Court stated that when there is no indication that Congress intended to preclude a state remedy, “[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.”<sup>180</sup> A similar result was handed down by the Court in *English v. General Electric Company*.<sup>181</sup>

Importantly, though IRCA is designed to occupy the field of employment within the undocumented immigration context, contrary to the potential implications of the opinion of the Nevada Supreme Court in *Tarango*,<sup>182</sup> the statute does not speak to workers’ health, safety, or ability to recover for work-related injuries. Courts that have considered this issue have concluded that denying undocumented immigrants who suffer work-related injuries access to the state workers’ compensation system contradicts the intent of the statute’s employment sanctions provisions. The intent behind those provisions is to discourage employers from hiring undocumented immigrants. Denying workers’ compensation coverage to those workers essentially makes them cheaper to hire, thus making them more attractive to employers who are well aware of the low risk involved in hiring from that group. Such a reading of the statute would also produce negative consequences for legal residents who work alongside undocumented workers. Taking away the obligation to provide workers’ compensation benefits to a class of workers also creates a disincentive to provide safe working conditions, ultimately producing a detriment to all workers.

The intent of Congress regarding benefits available to undocumented workers is further informed by the passage of the Illegal Immi-

---

178. See, e.g., *Garcia v. Dep’t of Labor & Indus.*, 939 P.2d 704 (Wash. Ct. App. 1997) (awarding a vocational rehabilitation lump sum to a worker who was injured in the U.S. but returned to his dairy farm in Mexico).

179. 464 U.S. 238 (1984).

180. *Silkwood*, 464 U.S. at 251.

181. 496 U.S. 72, 90 (1990) (rejecting preemption of a state common law claim protecting whistleblowers, even though the federal government occupies the field of nuclear safety, and cautioning the court against seeking out conflicts between state and federal laws where none exists).

182. Though the *Tarango* court did not state explicitly that Congress had prohibited all manner of vocational rehabilitation for undocumented workers, it appeared to suggest that was the case when it noted that the power of Congress to regulate the conditions of entry and residency of aliens extends not only to the admission and naturalization of aliens, but also to the “regulation of their conduct before naturalization.” *Tarango*, 25 P.3d at 179 (quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948)).

gration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>183</sup> In that statute, Congress limited public benefits made available to legal resident immigrants and also prohibited a number of public services to undocumented immigrants.<sup>184</sup> Nowhere in that statute did Congress mention that workers' compensation benefits should be denied to unauthorized workers.<sup>185</sup> Except for modified work and job placement assistance, there is no indication that IRCA was designed to prevent undocumented workers from receiving workers' compensation benefits, including retraining under vocational rehabilitation programs. Indeed, to deny those benefits would contradict the intent of Congress in passing that legislation.

#### VI. ARE STATUTORY PROHIBITIONS OF WORKERS' COMPENSATION AND VOCATIONAL REHABILITATION BENEFITS FOR UNDOCUMENTED WORKERS CONSTITUTIONAL?

Moving beyond the questions of IRCA preemption of state statutes, some states have attempted to explicitly prevent undocumented workers from obtaining workers' compensation benefits by statute. However, state laws designed to deny worker's compensation benefits, including vocational rehabilitation benefits, to undocumented workers may be vulnerable to equal protection and perhaps due process challenges under the Fourteenth Amendment of the United States Constitution. Unlike prior attempts to protect the rights of undocumented immigrants by arguing for a heightened level of scrutiny of state action designed to discriminate against this vulnerable population, this Article argues that, at least in the context of workers' compensation, rational basis analysis provides the most powerful defense of this group's rights.

The Supreme Court precedent that is commonly invoked by lower courts and commentators to protect this group against discriminatory state action is generally humanitarian and forward-looking, and the arguments have been quite powerful and compelling.<sup>186</sup> However, the cases cited appear either constitutionally vulnerable or incapable of being extended further to protect the rights of undocumented workers. Despite the existence of conflicts between IRCA and some services provided for in vocational rehabilitation statutes, and despite the fact that workers compensation benefits are mandated by statute in most jurisdictions, the private nature of workers' compensation benefits lends itself to a different

---

183. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18, and 28 U.S.C.).

184. See *Lewis v. Grinker*, 111 F. Supp. 2d 142, 157 (E.D.N.Y. 2000), *aff'd in part, rev'd in part*, 252 F.3d 567 (2d Cir. 2001).

185. See *Lewis*, 111 F. Supp. 2d at 157 (analyzing the federal welfare benefit restrictions imposed upon immigrants by IIRIRA).

186. See generally *Plyler v. Doe*, 457 U.S. 202 (1982); *Graham v. Richardson*, 403 U.S. 365 (1971) (supporting equal protection claims in favor of this group).

kind of analysis than other benefits that are truly “public,” and which may constitutionally be denied to undocumented immigrants.

This analysis will assume, as it must, that workers’ compensation benefits and retraining under vocational rehabilitation programs are two integrated components of rehabilitation. Therefore, the phrase “workers’ compensation benefits” includes all benefits that do not directly conflict with IRCA.

#### *A. Equal Protection and Immigration Status*

The equal protection doctrine under the Fourteenth Amendment to the U.S. Constitution is made up of two distinct strands.<sup>187</sup> One strand focuses on the nature of the right at stake, and the other focuses on the status of the group whose rights are being infringed upon.<sup>188</sup> The level of judicial scrutiny of state action grows in accordance with the importance of the right at stake or with the status of the group affected.<sup>189</sup> State statutes that infringe upon fundamental rights receive the strictest level of judicial scrutiny.<sup>190</sup> Strict scrutiny requires that the government demonstrate that its action is necessary or narrowly tailored to achieve a compelling state interest.<sup>191</sup> Among other things, fundamental rights include the right to travel<sup>192</sup> and the right to privacy.<sup>193</sup> Strict scrutiny is also applied to state action that classifies on the basis of “suspect classifications” such as race, color, and national origin, and, in a limited number of cases, alienage.<sup>194</sup> State action reviewed under the strict scrutiny standard rarely survives.<sup>195</sup>

On the other extreme exists the rational basis test, which generally applies when neither a suspect class nor a fundamental interest is involved. In general, that test simply asks whether the government classifi-

---

187. See Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 99 U. ILL. L. REV. 1209, 1210 (1999) (recognizing that “[m]ost Supreme Court decisions invalidating governmental discrimination have depended on the Court’s finding a ‘suspect class’ or a ‘fundamental right’”).

188. *Id.*

189. *Id.*

190. E.g., *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (stating that strict scrutiny applies to classifications affecting fundamental rights).

191. E.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that all racial classifications, including benign ones, are subject to strict scrutiny).

192. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

193. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (declaring a Connecticut law that prohibited the use of distribution of contraceptives unconstitutional as “repulsive to the notions of privacy surrounding the marital relationship”); see also *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (affirming the right to abortion and describing the right to personal privacy as encompassing certain “activities relating to marriage, procreation, contraception, family relationships, and child rearing and education” (internal citations omitted)).

194. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (noting that rational basis “gives way . . . when a statute classifies by race, alienage, or national origin”).

195. See 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 (1972) (commenting that strict scrutiny is often “‘strict’ in theory and fatal in fact”).

cation is rationally related to a legitimate state interest, calling for the most lenient review of state action.<sup>196</sup> The third level of equal protection analysis falls somewhere in between the two extremes, in what is referred to as "intermediate scrutiny." The intermediate scrutiny test requires that the state classification bear a substantial relationship to an important state interest to withstand constitutional scrutiny.<sup>197</sup> Intermediate scrutiny has been applied most commonly to state classifications involving gender<sup>198</sup> and legitimacy.<sup>199</sup> It has also been applied in a limited way to a mix of interests involving the education of undocumented children.<sup>200</sup> Significantly, several state courts have held that equal protection principles under the Fourteenth Amendment protect undocumented immigrants' employment rights.<sup>201</sup> However, those decisions have not elaborated on the proper standard of review.

Though it is well established that undocumented immigrants are not devoid of constitutional protection, they are not considered a "suspect class."<sup>202</sup> However, a coherent constitutional doctrine defining exactly what level of protection is afforded that group based on its status has not been developed. The United States Supreme Court has spoken a great deal to the constitutional rights of immigrants, but its analysis has not been neatly compartmentalized as the above categories suggest, and has rarely included the rights of undocumented immigrants.

Historically, undocumented immigrants have been considered trespassing outsiders with no claim to membership in the U.S. community. Though not completely ignored, they receive much less constitutional protection than legal resident immigrants. Resident immigrants, in turn, do not enjoy full rights until they attain citizenship.<sup>203</sup> Thus, a sliding scale clearly exists with undocumented immigrants at the bottom. However, undocumented immigrants' position at the bottom of the scale does not mean that government actors are free to treat them arbitrarily.<sup>204</sup>

---

196. See, e.g., *Heller v. Doe*, 509 U.S. 312, 319-20 (1993).

197. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976).

198. See, e.g., *Virginia*, 518 U.S. at 533; *Craig*, 429 U.S. at 197.

199. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461-62 (1988).

200. See *Plyler*, 457 U.S. at 223.

201. E.g., *Nizamuddowla v. Bengal Cabaret, Inc.*, 399 N.Y.S.2d 854, 857 (Sup. Ct. 1977); *Dezsofi v. Jacoby*, 36 N.Y.S.2d 672, 676 (Sup. Ct. 1942).

202. *Plyler*, 457 U.S. at 223.

203. Though the Constitution does not bar lawfully admitted non-citizen immigrants from voting, no state allows them to vote. In addition, not all citizens are equal. U.S. CONST. amend. XIV, § 1, recognizes two kinds of citizenship—citizenship by birth and citizenship by naturalization. The only, but perhaps most symbolically powerful, difference between the two kinds of citizenship is eligibility for the presidency. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-18, at 969 n.20 (3d ed. 2000) (noting that the inability of naturalized citizens to gain the presidency as the "lone constitutional distinction between native-born and other citizens"). U.S. CONST. art. II, § 1, cl. 5, provides that "No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . ."

204. In *Wong Wing v. United States*, 163 U.S. 228 (1896), the Court invoked the Fifth and Sixth Amendments to prohibit the punishment of unauthorized Chinese immigrants by imprisonment

The sliding scale of constitutional protection, and its link to membership status, was highlighted in *Mathews v. Diaz*,<sup>205</sup> where the Court observed that “[t]here 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.”<sup>206</sup> Indeed, the Court held that “[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”<sup>207</sup> However, in spite of that pronouncement, *Mathews* did not abolish distinctions between aliens and citizens, or even among classes of aliens. That reality was highlighted by the Court’s observation that:

The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.<sup>208</sup>

The issue in *Mathews* was whether federal Medicare benefits that are awarded to citizens can be constitutionally denied to legal resident aliens.<sup>209</sup> Ruling against the resident aliens, the Court drew a distinction between citizens and aliens by observing that:

In particular, the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for All aliens. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and Some of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country . . . .<sup>210</sup>

Therefore, while noncitizens and even undocumented immigrants enjoy some protections under the Due Process Clause, and under the Four-

---

at hard labor without a judicial trial for violating U.S. immigration law. *Wong Wing*, 163 U.S. at 238. The Court held that all aliens, whether legally or illegally present in the United States, are persons entitled to the protection of due process under the Fifth Amendment. *Id.*

205. 426 U.S. 67 (1976).

206. *Mathews*, 426 U.S. at 77 (citing *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51 (1950); *Wong Wing*, 163 U.S. at 238); see also *Johnson v. Eisentranger*, 339 U.S. 763, 770 (1950) (noting that aliens develop an ascending scale of rights as they increase their identity with U.S. society). See generally *A Theory of Alien’s Rights*, 96 HARV. L. REV. 1292 (1983) (describing the sliding scale of constitutional protections available to immigrants depending on their status).

207. *Mathews*, 426 U.S. at 77.

208. *Id.* at 78.

209. *Id.* at 69.

210. *Id.* at 80.

teenth Amendment, depending on the matter involved, they are not awarded the same protections available to citizens in every case.<sup>211</sup>

Despite its negative result, the *Mathews* decision reinforced the principle that all immigrants within the territories of the United States are protected by the Fourteenth Amendment.<sup>212</sup> That observation was partly responsible for the Supreme Court's decision in *Plyler v. Doe*.<sup>213</sup> Still, the extent to which the Constitution protects undocumented immigrants continues to be a difficult puzzle. Except for the very general observation made in *Mathews* that undocumented immigrants are not devoid of some protection under the U.S. Constitution, the Supreme Court has not spoken in depth to the constitutional protections available to undocumented immigrant adults. The Supreme Court's alienage jurisprudence has been developed primarily in cases involving authorized resident aliens. Those decisions have provided some guidance to courts and commentators in cases or initiatives involving undocumented aliens, but have left many unanswered questions.

The Supreme Court's alienage jurisprudence has been the subject of much study. However, despite the many attempts to explain the Court's approaches in a consistent and coherent manner, exceptions to what appear to be lines of consistent opinions continue to be created. A number of scholars have attempted to explain the Supreme Court's alienage doctrine in terms of two strands.<sup>214</sup> According to these scholars, one strand is represented by *Yick Wo v. Hopkins*,<sup>215</sup> *Graham v. Richardson*,<sup>216</sup> and a line of cases where the Court relied on strict scrutiny to strike down state statutes denying access to economic benefits or limiting participation in private sector economic activity on the basis of alienage.<sup>217</sup> This juris-

---

211. Professor Linda S. Bosniak has described that duality thusly:

Undocumented immigrants live at the boundary of the national membership community. They have long occupied a unique, deeply ambivalent place in the United States. Despite their vital place in the American economy, this country has deprived them of recognition as members in most contexts, but it has also extended them such recognition in others. The law has both created and reflected this ambivalence, according a dual legal identity to the undocumented. They are both outsiders and members, regulated objects of immigration control and subjects of membership in limited but important respects.

Bosniak, *Exclusion and Membership*, *supra* note 47, at 956.

212. *Mathews*, 426 U.S. at 78.

213. 457 U.S. 202 (1982). In *Plyler*, the Court reaffirmed the principle that undocumented immigrants are "persons" under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Plyler*, 457 U.S. at 215. For a more in depth discussion of *Plyler* see *infra* notes 231-306 and accompanying text.

214. See generally Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996); see also Bosniak, *Opposing Prop.* 187, *supra* note 32, at 615; Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 601-16 (1994).

215. 118 U.S. 356 (1886).

216. 403 U.S. 365 (1971).

217. *Graham*, 403 U.S. at 376, 380 (applying strict scrutiny to invalidate a state statute limiting access to welfare benefits for lawfully admitted immigrants); *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977) (finding a statute barring resident aliens from state financial assistance for higher education invalid under strict scrutiny); *Examining Bd. of Eng'rs v. Flores de Otero*, 426 U.S. 572, 601-02

prudential tradition has been characterized as the “personhood paradigm.”<sup>218</sup> The personhood paradigm presumes that citizens and noncitizens share the same rights outside the immigration context.<sup>219</sup> Thus,

[t]he Constitution assures [the alien] a large measure of equal economic opportunity; he may invoke the writ of habeas corpus to protect his personal liberty; in criminal proceedings against him he must be accorded the protections of the Fifth and Sixth Amendments; and, unless an enemy alien, his property cannot be taken without just compensation.<sup>220</sup>

The second strand is represented by dicta in *Sugarman v. Dougall*,<sup>221</sup> where the Court, while striking down a New York law prohibiting access to state civil service positions to noncitizens, nevertheless noted the “State’s interest in establishing its own form of government, and in limiting participation in that government to those who are within ‘the basic conception of a political community.’”<sup>222</sup> The second strand has been described as the “membership paradigm.”<sup>223</sup> The membership paradigm holds that, “[t]he Court will not employ strict scrutiny . . . in cases where the state, by the challenged classification, is merely engaging in the ongoing process of ‘defin[ing] its political community.’”<sup>224</sup> That principle, best known as the “political function” doctrine, is based on the idea that the state has a legitimate interest in reserving positions in the self-governance process for U.S. citizens.<sup>225</sup> Thus, a person must attain full membership status as a condition of eligibility to participate in the formation of the political community. An example is *Foley v. Connelie*,<sup>226</sup> where the Court, applying a rational basis analysis, let stand a state statute prohibiting noncitizens from working as state police officers.<sup>227</sup>

Alienage-based classifications created by federal law represent the more rigid component of the second strand. Because the federal government enjoys plenary power over immigration, federal classifications are subjected to little or no scrutiny under a rational basis review.<sup>228</sup>

---

(1976) (applying strict scrutiny to invalidate statutes prohibiting noncitizens from the practice of licensed professions); *Sugarman v. Dougall*, 413 U.S. 634, 642, 646 (1973) (applying strict scrutiny to invalidate exclusion of noncitizens from state civil service positions); *In re Griffiths*, 413 U.S. 717, 721-22 (1973) (finding alienage to be a suspect classification).

218. Scaperlanda, *supra* note 214, at 712-13.

219. *Id.* at 739.

220. *Id.* (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 586 n.9 (1952)).

221. 413 U.S. 634 (1973).

222. *Sugarman*, 413 U.S. at 642 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)).

223. Scaperlanda, *supra* note 214, at 712-13.

224. *Id.* at 736-37 (quoting *Sugarman*, 413 U.S. at 643).

225. *See id.* at 737.

226. 435 U.S. 291 (1978).

227. *Foley*, 435 U.S. at 299-300.

228. *See Mathews*, 426 U.S. at 84 (noting that illegal or temporary resident aliens could present no substantial claims to participation in a federal medical insurance program); *see also* *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976) (noting that in cases of federal alienage classifications the

Though the concept of “personhood” continues to be invoked at least implicitly from time to time, the “political function” exception to strict scrutiny for state alienage classifications affecting resident immigrants’ economic opportunity has been broadened so much as to hardly resemble its original form.<sup>229</sup> This erosion has created serious doubts regarding the viability of strict scrutiny for this class.<sup>230</sup>

Relying strongly on principles of personhood, the Supreme Court extended the reach of the equal protection doctrine to the most vulnerable subset of the undocumented immigrant population in *Plyler v. Doe*.<sup>231</sup> In *Plyler*, the Court invalidated a Texas statute that withheld funding for primary and secondary education to undocumented children.<sup>232</sup> The Court found the predicament of undocumented children particularly compelling, largely because their presence in the United States was through no fault of their own.<sup>233</sup> Observing that undocumented children denied an education would grow up to become members of a permanent underclass, the Court subjected the state statute to a heightened level of scrutiny.<sup>234</sup> The Court held that the Texas law, which not only withheld funds for the education of children who were not “legally admitted” into the United States, but also authorized local school districts to deny enrollment to such children, violated the Equal Protection Clause of the Fourteenth Amendment.<sup>235</sup> Writing for the majority, Justice Brennan stressed, “even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”<sup>236</sup> Importantly, the purpose of the Texas statute was not to deny the children an elementary and secondary education. Undocumented children who wanted to attend school

---

Court would presume that “any interest which might rationally be served by the rule did in fact give rise to its adoption”). For an article making a strong case for a heightened standard of review for federal alienage classifications, see Tamra M. Boyd, *Keeping the Constitution’s Promise: An Argument for Greater Judicial Scrutiny of Federal Alienage Classifications*, 54 STAN. L. REV. 319, 321 (2001).

229. See Frederick D. Unger, *Constitutional Law—Equal Protection—Cabell v. Chavez-Salido*, 31 EMORY L.J. 707, 739-40, 742 (1982) (tracing the expansion of the “political function” exception to strict scrutiny in alienage classification, and concluding that suspect classification for alienage is waning); Elizabeth Hull, *Resident Aliens and The Equal Protection Clause: The Burger Court’s Retreat from Graham v. Richardson*, 47 BROOK. L. REV. 1, 3-4, 41-42 (1980).

230. Unger, *supra* note 229, at 739-40, 742.

231. *Plyler*, 457 U.S. at 219-20.

232. *Id.* at 230.

233. *Id.* at 220 (“[TEX. EDUC. CODE ANN.] § 21.031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control.”).

234. *Id.* at 222.

235. *Id.* at 221-22.

236. *Id.* at 210.

could do so under the Texas law, but the cost would be \$1,000 per pupil per year.<sup>237</sup>

The *Plyler* Court did not rely on strict scrutiny to review the Texas statute because the case did not involve a “suspect class” or affect a fundamental right.<sup>238</sup> Though the Court did not specifically articulate the level of scrutiny applied to the case, a concurring opinion by Justice Powell clarified that the Court had relied on intermediate scrutiny. According to Justice Powell:

A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment. In these unique circumstances, the Court properly may require that the State’s interests be substantial and that the means bear a “fair and substantial relation” to these interests.<sup>239</sup>

The Court’s focus on the narrow issue of education of undocumented children was highlighted by its care to distinguish education from other forms of governmental social welfare legislation.<sup>240</sup> Justice Powell, too, was careful to keep the interests of undocumented young children separate from those of undocumented mature children and undocumented adults.<sup>241</sup>

Importantly, the Court, including the dissenters, emphatically rejected an argument by the State of Texas that undocumented aliens, because of their status, are not “persons within the jurisdiction” of the state, and therefore have no right to the equal protection of the law.<sup>242</sup> That finding is one of the *Plyler* Court’s most overlooked statements, but perhaps one of the most important. Despite the fact that the statement had been made in the past,<sup>243</sup> it clearly confirmed that the equal protection doctrine “was intended to protect all persons . . . within the territorial boundaries” of the United States, and rejected any notion that they could be treated arbitrarily or invidiously.<sup>244</sup>

---

237. Of course, the \$1,000 cost of tuition essentially denied the students an education. See *Doe v. Plyler*, 458 F. Supp. 569, 575 (E.D. Tex. 1978). Because of their poverty, none of the parents of the children could afford that tuition. *Doe*, 458 F. Supp. at 575.

238. *Plyler*, 457 U.S. at 239 n.2 (Powell, J., concurring).

239. *Id.* at 239 (Powell, J., concurring) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

240. *Id.* at 221.

241. *Id.* at 240 n.5 (Powell, J., concurring) (“A different case would be presented in the unlikely event that a minor, old enough to be responsible for illegal entry and yet still of school age, entered this country illegally on his own volition.”).

242. *Id.* at 210 (internal quotations omitted).

243. See, e.g., *Mathews*, 426 U.S. at 77.

244. Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections On, and Beyond, Plyler v. Doe*, 44 U. PITT. L. REV. 329, 331 (1983).

Unlike other oppressed minority groups in the United States, such as African-Americans, Asian-Americans, and Mexican-Americans, undocumented immigrants have never been able to advocate for equal treatment on the basis of membership in the national community.<sup>245</sup> Thus, many of their small legal victories have been based on the need to protect the integrity of the law, not on their ability to claim the existence of “rights” based on their own worth as human beings. Therefore, the *Plyler* Court’s declaration that they are protected by the Constitution, though limited by the phrase that undocumented status is “not a ‘constitutional irrelevancy,’”<sup>246</sup> represents a step forward for this class of “outsiders.” It enables them to avoid the label of non-persons and recognizes their right to participate in a partial, but meaningful, rights-based discourse.

The Court established that undocumented immigrant adults enjoy some protection under the equal protection and due process doctrines of the Fourteenth Amendment, although the question remains: How much protection? In his *Plyler* dissent, Chief Justice Burger, though agreeing with the spirit of the decision,<sup>247</sup> nevertheless stated unequivocally that the issue at hand was most appropriately reviewed under the rationality test, suggesting strongly that his answer to the question stated above is, “not much.”<sup>248</sup> Despite the compelling nature of the undocumented children’s education, the denial of which may lead to the formation of a permanent underclass, Justice Burger would have deferred to the judgment of the Texas Legislature under that standard.<sup>249</sup> In fact, Justice Burger predicted that *Plyler* would likely stand for little beyond its facts because of the “unique confluence of theories and rationales”<sup>250</sup> manipulated by the majority to arrive at the “right decision.” So far, Chief Justice Burger’s prediction has largely come to pass.

Fearful of the almost certainly negative impact of rational basis analysis on undocumented immigrants, a number of scholars have argued for an extension of *Plyler*’s intermediate scrutiny test to state laws de-

---

245. Professor Linda Bosniak has explained this oddity in American civil rights activism by pointing out that even progressive scholars must confront the fact that the undocumented population does not quite “fit” into traditional civil rights paradigms. See Bosniak, *Opposing Prop. 187*, *supra* note 32, at 594. That is, even the most progressive civil rights advocates tend to have a national identity from which all claims to equal membership are derived. See *id.*

246. *Plyler*, 457 U.S. at 223.

247. Justice Burger prefaced his analysis of the proper role of the Court in this case thusly:

Were it our business to set the Nation’s social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education. I fully agree that it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language.

*Id.* at 242 (Burger, C.J., dissenting).

248. *Id.* at 248 (Burger, C.J., dissenting).

249. *Id.* at 249-53 (Burger, C.J., dissenting).

250. *Id.* at 243 (Burger, C.J., dissenting).

signed to discriminate against that group.<sup>251</sup> Scholars' fear of rational basis review of discriminatory state legislation aimed at undocumented immigrants is well founded. The *Plyler* dissent, and changes in the makeup of the Court since that case was decided, have contributed to that pessimism.<sup>252</sup>

Undocumented immigrants' vulnerability to discriminatory state legislation is particularly evident during periods of economic distress.<sup>253</sup> One recent example of their vulnerability was the passage of California's Proposition 187.<sup>254</sup> That law sought to deny all public social services,<sup>255</sup> public elementary and secondary education,<sup>256</sup> and publicly funded health care<sup>257</sup> to undocumented immigrants. The law, rather awkwardly, also enlisted the state's law enforcement agencies to verify the status of "suspected" undocumented immigrants, to notify them of their apparent status and to inform them that they must either obtain legal status or leave the United States.<sup>258</sup> Public social services agencies<sup>259</sup> and primary and secondary schools<sup>260</sup> were assigned similar responsibilities. In addition, the law also required school officials to verify the immigration status of the parents of all school children.<sup>261</sup>

Alarmed by Proposition 187, several prominent scholars accurately pointed out that despite the neutral language of the legislation, supporters

251. See Randall Kyle Hawes, *California Proposition 187: Will the Populist Mandate Survive Constitutional Scrutiny?*, 37 S. TEX. L. REV. 1391, 1398-1411 (1996) (arguing for the application of *Plyler's* intermediate scrutiny analysis to several sections of California's Proposition 187, with the exclusion of public social services); Stuart Biegel, *The Wisdom of Plyler v. Doe*, 17 CHICANO-LATINO L. REV. 46, 63 (1995) (suggesting that *Plyler's* intermediate scrutiny analysis would be critical in a legal battle to challenge Proposition 187); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1425-26 (1995) (arguing for the application of intermediate scrutiny for state action designed to deny a basic level of governmental services to undocumented immigrants); Mitchell Kurfis, *The Constitutionality of California's Proposition 187: An Equal Protection Analysis*, 32 CAL. W. L. REV. 129, 159 (1995) (arguing for the application of *Plyler's* intermediate scrutiny analysis to the denial of health care and social services benefits).

252. Of the majority that decided *Plyler*, only Justice Stevens remains on the Court. Supreme Court of the United States, *Biographies of Current Members of the Supreme Court*, at [www.supremecourtus.gov/about/biographiescurrent.pdf](http://www.supremecourtus.gov/about/biographiescurrent.pdf) (last visited Feb. 15, 2004).

253. See LEO R. CHAVEZ, *SHADOWED LIVES: UNDOCUMENTED IMMIGRANTS IN AMERICAN SOCIETY* 15 (1992) (discussing that waves of anti-immigrant sentiment tend to follow economic downturns).

254. A copy of Proposition 187 can be found in the Appendix to Lolita K. Buckner Inniss, *California's Proposition 187—Does It Mean What It Says? Does It Say What It Means? A Textual and Constitutional Analysis*, 10 GEO. IMMIGR. L.J. 577, 617-22 (1996). California's Proposition 187 was passed by that state's voters in 1994. *Id.*; see also Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 633 (1995). The statute was enjoined in *Gregorio T. v. Wilson*, 59 F.3d 1002, 1005 (9th Cir. 1995).

255. CAL. WELF. & INST. CODE § 10001.5 (West 1994).

256. CAL. EDUC. CODE § 48215 (West 1994).

257. CAL. HEALTH & SAFETY CODE § 130 (West 1994).

258. CAL. PENAL CODE § 824b (West 1994).

259. CAL. WELF. & INST. CODE § 10001.5.

260. CAL. EDUC. CODE § 48215.

261. *Id.*

of Proposition 187 were driven by racial animus toward immigrants of color, in particular, immigrants from Mexico.<sup>262</sup> The invidious racial discrimination present in Proposition 187 led a number of commentators to argue for a heightened level of scrutiny for certain types of state action directed at undocumented immigrants.<sup>263</sup> Proposing a heightened standard for state laws designed to deny basic governmental services to illegal aliens, Professor Gerald L. Neuman warned that even laws as invidious as Proposition 187 would stand up to rational basis review.<sup>264</sup> Contending that both *Plyler* and *Graham* were correctly decided,<sup>265</sup> Professor Neuman argued for a limited extension of *Plyler* that applies a heightened level of scrutiny to state classifications designed to exclude illegal aliens from a minimal level of government services.<sup>266</sup>

Professor Neuman argued that “the formal equal protection reasoning of the *Plyler* dissent would enable a state to declare ‘illegal’ aliens as de facto outlaws, persons beyond the effective protection of the law.”<sup>267</sup> According to Professor Neuman, under a rational basis analysis, in order to drive out unlawful residents, “the state could withhold constitutionally optional affirmative government services, that is, those services that the Constitution does not oblige the states to provide in the first place.”<sup>268</sup> At that point, the only constitutional objection would take place in the realm of equal protection, where, according to Chief Justice Burger, “the state may reasonably . . . elect not to provide [undocumented aliens] with governmental services at the expense of those who are lawfully in the state.”<sup>269</sup> Professor Neuman therefore warned that a traditional rational basis analysis “would deny [undocumented immigrants] the minimal respect for their humanity that the state owes even to criminals—and even to criminals whose crimes are more serious than the immigration violations of which ‘illegal’ aliens may be guilty.”<sup>270</sup> Similarly, in response to other state laws that discriminate against undocumented immigrants, various commentators have argued for heightened scrutiny, or even strict scrutiny, as the appropriate standard.<sup>271</sup>

---

262. See, e.g., Bosniak, *Opposing Prop. 187*, *supra* note 32, at nn.7-10 (documenting the anti-Mexican rhetoric of proponents of Proposition 187).

263. E.g., Hawes, *supra* note 251, at 1399-1400 (arguing that a heightened level of analysis should be applied to Proposition 187).

264. Neuman, *supra* note 251, at 1445-48.

265. *Id.* at 1425.

266. *Id.* at 1425-26.

267. *Id.* at 1447-48.

268. *Id.* at 1446. Professor Neuman noted that “[m]ost government services are constitutionally optional,” listing education, police protection, fire protection, rescue services, emergency medical care, public transportation, subsistence benefits, and mental health services as examples. *Id.*

269. *Id.* (quoting *Plyler*, 457 U.S. at 250).

270. *Id.* at 1448.

271. See, e.g., Mary K. Shannon, *Jurado v. Popejoy Construction Co.: Determining the Constitutionality of Disparate Awards of Workers' Compensation Death Benefits to Nonresident Alien Dependents*, 39 VILL. L. REV. 705, 736 (1994) (urging courts who have not yet ruled on the constitutionality of disparate death benefit awards to nonresident alien dependents to follow *Jurado v. Popejoy Construction Co.*, 853 P.2d 669 (Kan. 1993), which applied strict scrutiny to such

Driven by similar concerns, two state supreme courts, also taking their lead from *Bernal v. Fainter*,<sup>272</sup> *Yick Wo v. Hopkins*,<sup>273</sup> *Graham v. Richardson*,<sup>274</sup> and *Plyler v. Doe*,<sup>275</sup> have concluded that strict scrutiny is the appropriate standard against which state action discriminating against undocumented workers should be measured.<sup>276</sup> The Kansas Supreme Court, relying strongly on principles of personhood, invoked strict scrutiny to invalidate a Kansas workers' compensation statute that treated nonresident alien dependents differently from other dependents for purposes of death benefits.<sup>277</sup>

In *Jurado*, the Kansas Supreme Court declared unconstitutional a statute that provided for payment of no more than \$750 to nonresident alien dependents, but up to \$200,000 for every other dependent, including resident alien dependents.<sup>278</sup> The Kansas Supreme Court also noted that, "[a]s early as the 1920's, the United States Supreme Court recognized that death benefits serve an *employee's* interest in providing for his or her family."<sup>279</sup> Reasoning that all workers' compensation benefits arise out of the employment contract and workers' compensation laws that preexist a worker's death, the Kansas court ruled that "[t]he dependents' right of action is derivative of and dependent upon the employee's contract of employment," so that "[a]ll considerations focus upon the employee and the rights and laws preexisting the employee's death . . . ."<sup>280</sup> The court therefore found it completely appropriate to "approach a determination of constitutionality upon our consideration of the constitutional rights of the employee . . . ."<sup>281</sup>

The deceased employee in *Jurado* was a resident alien, meaning he was an authorized immigrant.<sup>282</sup> Analyzing briefly the three levels of scrutiny used by the United States Supreme Court in equal protection cases, the Kansas court concluded that strict scrutiny was the appropriate test because the Kansas statute classified on the basis of alienage.<sup>283</sup> Although the statute referred to the alienage of the nonresident *dependents*,

---

*Popejoy Construction Co.*, 853 P.2d 669 (Kan. 1993), which applied strict scrutiny to such classifications); Carrasco, *supra* note 214, at 607-08 (relying partially on *Graham*, 403 U.S. at 372, to argue that state alienage classifications, including both authorized and unauthorized immigrants, must be reviewed under strict scrutiny because aliens compose a "discrete and insular" minority" (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938))).

272. 467 U.S. 216, 219 (1984).

273. See *Yick Wo*, 118 U.S. at 370.

274. *Graham*, 403 U.S. at 371-72.

275. *Plyler*, 457 U.S. at 216-17.

276. *Jurado*, 853 P.2d at 676; *De Ayala v. Fla. Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204, 207 (Fla. 1989).

277. *Jurado*, 853 P.2d at 676.

278. *Id.* at 676-78.

279. *Id.* at 674 (referencing *Madera Sugar Pine Co. v. Indus. Accident Comm'n*, 262 U.S. 499, 503-04 (1923)).

280. *Id.* at 675.

281. *Id.*

282. *Id.* at 672.

283. *Id.* at 675-76.

while the court centered its equal protection analysis on the rights of the resident *decedent*, the court still had no trouble finding that the statute created an alienage-based classification.<sup>284</sup> The court reasoned that because the statute provided less protection to an employee's dependents on the basis of the dependents' alienage, "[b]y doing so, it creates a classification of employees based on alienage even though the classification is not based on the employee's alienage."<sup>285</sup> Relying on *Bernal v. Fainter*<sup>286</sup> and *Graham v. Richardson*,<sup>287</sup> the court concluded that strict scrutiny was the appropriate test.<sup>288</sup> Significantly, the court strongly suggested that the result would have been the same, even if the deceased worker had been undocumented, when it cited *Plyler* for the proposition that such scrutiny applies even to residents who are in this country illegally.<sup>289</sup>

In reaching its conclusion in favor of nonresident families of resident alien workers, the Kansas Supreme Court was obviously moved by notions of fundamental fairness, fair play, and personhood embedded in United States Supreme Court cases.<sup>290</sup> Indeed, the court noted that when it was first enacted in 1911, the Kansas workers' compensation statute provided a death benefit of \$3,600 to the deceased worker's dependents and a death benefit of \$750 for nonresident alien dependents.<sup>291</sup> The court also noted with some dismay that, over the last eighty-one years, amendments to the statute had raised the death benefit to \$200,000, but the \$750 ceiling for nonresident alien dependents had remained static.<sup>292</sup>

A similar situation arose in Florida in the case of *De Ayala v. Florida Farm Bureau Casualty Insurance Co.* where the Florida Supreme Court found that a statute that provided up to \$100,000 in death benefits to U.S. resident dependents, and nonresident Canadian dependents, but that limited death benefits available to all other nonresident alien dependents to \$1,000, violated the equal protection clause of the Fourteenth Amendment.<sup>293</sup> The \$100,000 benefit was available to Canadians even if they were in the country illegally.<sup>294</sup> The *De Ayala* court, again taking a broad view of the meaning of "alienage" classification, found that alienage is "one of the . . . suspect classes."<sup>295</sup> The court therefore rea-

---

284. *Id.* at 676.

285. *Id.*

286. 467 U.S. 216 (1984).

287. 403 U.S. 365 (1971).

288. *Jurado*, 853 P.2d at 676.

289. *Id.* (citing *Plyler*, 457 U.S. at 216-17).

290. *See id.* at 675; *see also* Shannon, *supra* note 271, at 733-35 (recognizing that the Kansas court viewed Mr. Jurado's situation as "unfair").

291. *Jurado*, 853 P.2d at 676-77.

292. *Id.* at 677.

293. *De Ayala*, 543 So. 2d at 205-08.

294. *Id.* at 207.

295. *Id.*

soned that state alienage classifications are subject to strict judicial scrutiny under the Fourteenth Amendment's Equal Protection Clause.<sup>296</sup>

Despite the fundamental fairness of the *Jurado* and *De Ayala* decisions, their reasoning is vulnerable to attack because the U.S. Supreme Court has never held that "alienage" covers every category of immigrant, and has never held that state action affecting nonresident immigrants (i.e., undocumented or unauthorized immigrants) must withstand strict judicial scrutiny to constitute a valid exercise of state power. In fact, the Court has held to the contrary.<sup>297</sup> The Kansas court's analysis is directly contradicted by Justice Brennan's declaration in *Plyler* that undocumented immigrants do not compose a discrete and insular minority,<sup>298</sup> and ignores *Mathews v. Diaz*, which placed undocumented immigrants as a class at the bottom of the sliding scale of judicial scrutiny of state action.<sup>299</sup>

Reliance on *Plyler* and *Graham* to argue that state action involving undocumented immigrant adults must be analyzed under heightened scrutiny must be tempered. Despite its wisdom and humaneness, *Plyler* has been repeatedly criticized as lacking a solid constitutional foundation.<sup>300</sup> Chief Justice Burger's prediction that *Plyler* would be essentially limited to its facts appears to be coming true.<sup>301</sup> Indeed, the Court has refused to extend the holding of that case to other situations involving rather compelling facts.<sup>302</sup>

One of the major weaknesses of *Plyler* is that even though the Court did not identify undocumented children as a suspect class, or identify education as a fundamental right, it nevertheless used heightened scrutiny to invalidate the Texas statute because the children involved found themselves in their condition through no fault of their own.<sup>303</sup> Indeed, if that were enough of a justification to invalidate the statute, why not apply the same reasoning to school financing cases? After all, poor children have absolutely no influence over the financing of their school district. And, like the children in *Plyler*, many poor children find themselves in grossly under-funded schools through no fault of their own, resulting in a

---

296. *Id.*

297. *Plyler*, 457 U.S. at 223.

298. *Id.* at 219 n.19.

299. *See Mathews*, 426 U.S. at 78-79, 82.

300. *See* Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. PITT. L. REV. 409, 428 (1983) (arguing that in order to achieve the result it wanted in *Plyler*, the Supreme Court "did in fact play havoc with traditional equal protection doctrine"); Perry, *supra* note 244, at 341 ("Resolving the issues in *Plyler* by introducing a more activist standard of review out of solicitude for the principle of equal protection made no sense.").

301. *See* Hull, *supra* note 300, at 428.

302. *See* *Kadmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 459 (1988); *Martinez v. Bynum*, 461 U.S. 321, 327-28 (1983).

303. *Plyler*, 457 U.S. at 223-24, 226, 230.

constructive denial of an education.<sup>304</sup> Moreover, unlike the case of undocumented immigrants, the law has not labeled the parents of poor school children "criminals."<sup>305</sup> However, the Court has consistently refused to apply a heightened level of scrutiny to state action discriminating against those children, applying instead the rational basis test, even when it results in a substantial detriment to that vulnerable population.<sup>306</sup>

### *B. Traditional Rational Basis Analysis*

The substantial degree of deference generally given to run-of-the-mill economic or social welfare legislation under rational basis analysis should raise a flag of caution to anyone urging its application to state action that discriminates against undocumented workers.<sup>307</sup> Indeed, in most cases, mounting an equal protection challenge on the theory that a court will find the classification constitutionally irrational would be considered unrealistic.<sup>308</sup> After all, under the rational basis test, a state need only show that the classification has a rational relationship to a legitimate governmental interest to comply with equal protection requirements.<sup>309</sup>

The formidable barrier to a successful challenge to state action posed by the rational basis test was described by Chief Justice Rehnquist in *City of Dallas v. Stanglin*.<sup>310</sup> In that case, Chief Justice Rehnquist noted that, "rational-basis scrutiny . . . is the most relaxed and tolerant form of judicial scrutiny . . . ."<sup>311</sup> Citing *New Orleans v. Dukes* for the proposition that "'in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment,'"<sup>312</sup> the Court upheld a city ordinance setting age limits on attendance to dance halls.<sup>313</sup> An even narrower ver-

---

304. See Amy J. Schmitz, *Providing an Escape for Inner-City Children: Creating a Federal Remedy for Educational Ills of Poor Urban Schools*, 78 MINN. L. REV. 1639, 1662 (1994) (arguing that the issue of unequal educational opportunities for poor urban children should return to the federal courts based on the theory that the Supreme Court adopted a novel equal protection approach in *Plyler*).

305. See *Plyler*, 457 U.S. at 219-20 (noting, with respect to the parents of the children denied public education, that "those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences").

306. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973).

307. Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 KY. L.J. 591, 603 (1999-2000) (recognizing that, under rational basis review, "judicial invalidation of social and economic legislation should be an exceptional event").

308. *Id.* at 599.

309. *Id.* at 624.

310. 490 U.S. 19, 26 (1989).

311. *City of Dallas*, 490 U.S. at 26 (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). In *Dandridge*, the Court stated:

[A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'

*Dandridge*, 397 U.S. at 485 (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)).

312. *City of Dallas*, 490 U.S. at 27 (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976)).

313. *Id.*

sion of rational basis analysis was described by Justice Thomas in *FCC v. Beach Communications, Inc.*, where he stated: “In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”<sup>314</sup> Justice Thomas added further that “those attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it.’”<sup>315</sup> Moreover, according to Justice Thomas, “because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature . . . .”<sup>316</sup> Completing a grim picture, Thomas added: “In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”<sup>317</sup>

### C. Exceptions to Traditional Rational Basis Review

The descriptions of rational basis review by Chief Justice Rehnquist and Justice Thomas depict accurately the period from 1937 to 1976, when virtually every state classification subjected to the rational basis test was upheld.<sup>318</sup> Indeed, it may be said that they reflect much of the work of today’s Court.<sup>319</sup> However, reflecting an evolving sense of a need to develop a meaningful rationality analysis, in a small but growing number of cases since 1976, the Court has deviated from traditional rational basis deference to perform a more searching inquiry into the legitimacy of the justifications for discriminatory classifications not involving a suspect class or a fundamental interest.<sup>320</sup> Contrary to Justice Thomas’s suggestion that under rational basis analysis the Court will not look into the motivation of the legislation, the Court has, on several occasions, searched the record of the case to determine the legitimacy of the relationship between the classification and the stated purpose of the

---

314. 508 U.S. 307, 313 (1993).

315. *Beach Communications, Inc.*, 508 U.S. at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

316. *Id.*

317. *Id.*

318. See Mark D. Perison, *Equal Protection and Medical Malpractice Damage Caps: The Health Care Liability Reform and Quality of Care Improvement Act of 1991*, 28 IDAHO L. REV. 397, 415 (1991-1992) (asking, rhetorically, whether rational basis review is “any more than a mere judicial rubber stamp”).

319. Saphire, *supra* note 307, at 606-08. One of the most dramatic demonstrations of rational basis deference can be found in *Williamson v. Lee Optical*, 348 U.S. 483 (1955), where the court hypothesized the possible goals of the legislature in enacting a statute—essentially denying the plaintiff any meaningful review of the statute. *Williamson*, 348 U.S. at 490. A restrictive view of rational basis analysis was demonstrated more recently in *Heller*, 509 U.S. at 320.

320. See Saphire, *supra* note 307, at 608-09.

statute.<sup>321</sup> In fact, in some of those cases, the Court has virtually ignored justifications that appeared to be legitimate governmental concerns.<sup>322</sup>

Of course, any challenge to state laws denying workers' compensation benefits to undocumented workers on the basis of rational basis analysis could face the formidable wall described by Chief Justice Rehnquist and Justice Thomas.<sup>323</sup> However, an argument based on a heightened level of scrutiny, let alone strict scrutiny, will not see the light of day.<sup>324</sup> *Plyer* represents a historical anomaly, and it is very unlikely that the Court will continue to stretch an already constitutionally unsteady holding.<sup>325</sup> In addition, the application of strict scrutiny to the rights of undocumented individuals as a class, even under compelling circumstances, would be unprecedented.<sup>326</sup> It would mean that the distinction between citizens and non-citizens is beginning to disappear, a development that even progressive scholars seldom seek to achieve.<sup>327</sup> However, a number of developments in modern equal protection doctrine indicate that undocumented immigrants may sometimes have a chance against state power, even under rational basis analysis.<sup>328</sup>

Harmonizing the Court's exceptions to traditional rationality deference into some sort of predictable doctrine has been the subject of much frustration for legal scholars.<sup>329</sup> However, a pattern has been discerned by at least one commentator.<sup>330</sup> Professor Richard B. Saphire has noted that the more significant exceptions to rational basis deference can be catego-

321. See *id.* at 608.

322. See *id.*

323. See *City of Dallas*, 490 U.S. at 26; *Beach Communications, Inc.*, 508 U.S. at 315.

324. See Scaperlanda, *supra* note 214, at 771 (suggesting that in future attempts to exclude noncitizens from state benefits "the Court might overrule *Plyler* or distinguish it").

325. *Id.* at 749.

326. *Plyler*, 457 U.S. at 223.

327. Most civil rights discourse involves rights that belong to all members of a national community. Advocates generally argue that denial of those rights essentially denies membership, or benefits thereof, to the person affected. That argument is seldom made with respect to undocumented immigrants. Instead, a more common argument is that the privilege of membership in the national community would be devalued if all rights were made available to non-members. See Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1, 13 (1989). But see T. Alexander Aleinikoff, *Aliens, Due Process and 'Community Ties': A Response to Martin*, 44 U. PITT. L. REV. 237, 244 (1983) (making a case for an expansive definition of "community").

328. See, e.g., *Zobel v. Williams*, 457 U.S. 55, 71 (1982) (holding that newer residents are entitled to the same full benefits as long-term natives of Alaska); *Song v. INS*, 82 F. Supp. 2d 1121, 1133 (C.D. Cal. 2000) (holding that an INS provision rendering a legal alien convicted of an aggravated felony as ineligible for relief from deportation violates the Equal Protection Clause since illegal aliens are eligible for relief).

329. See, e.g., Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 357-58 (1999) (discussing the ten successful rational basis challenges to state action in the U.S. Supreme Court since 1971, and concluding that the cases have largely stood on their own and did not result in changes to traditional rational basis analysis).

330. Saphire, *supra* note 307, at 608 (identifying the various deviations from traditional rational basis analysis in the U.S. Supreme Court).

rized into three types of cases.<sup>331</sup> The first category announces the adoption of a new standard of review.<sup>332</sup> The second is a category of cases that, in addition to implicating the equality concerns of the Fourteenth Amendment, also implicate other constitutional values.<sup>333</sup> The third, and most important category for purposes of this Article, is composed of cases where the Court has concluded that the challenged classification could not possibly have served a legitimate public purpose.<sup>334</sup>

In several cases, the Court has concluded that the only plausible reason for the passage of the statute is to disadvantage a particular group because of animosity or prejudice toward its members. *United States Department of Agriculture v. Moreno*,<sup>335</sup> *City of Cleburne v. Cleburne Living Center*,<sup>336</sup> and *Romer v. Evans*<sup>337</sup> form the core of that category. In each of those cases, the Court set aside the traditional deferential rational basis analysis in favor of a more searching review of discriminatory governmental action, while professing reliance on rational basis analysis.<sup>338</sup> Significantly, the results in those cases cannot be predicted on the basis of the Justices' political affiliations or perceived legal philosophy.<sup>339</sup> Even Justices who advocate for a restrictive view of rational basis analysis have joined some of the most controversial opinions in that category.<sup>340</sup> Though there is much evidence that those cases have not resulted in a wholesale modification of traditional rational basis review at the United States Supreme Court level,<sup>341</sup> the cases have had a significant impact on lower courts.

Though those cases may be described as anomalies, they do reveal a continued struggle within the Court to define a meaning of "rationality" that reflects a growing understanding of human dignity and values.<sup>342</sup> The cases are only "outliers" because the people in the targeted categories have largely lived outside of United States society, not by their own choice, but because of misconceptions and prejudices that denied their essence as human beings.

---

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. 413 U.S. 528, 534 (1973).

336. *City of Cleburne*, 473 U.S. at 448.

337. 517 U.S. 620, 635 (1996).

338. See Farrell, *supra* note 329, at 374, 398-99, 409.

339. *Id.* at 414.

340. *Id.*

341. See Saphire, *supra* note 307, at 623-25 (asserting that the Court underwent an almost complete retrenchment to traditional rational basis deference when it decided *Heller v. Doe*, 509 U.S. 312 (1993)).

342. See Allison Moore, *Loving's Legacy: The Other Antidiscrimination Principles*, 34 HARV. C.R.-C.L. L. REV. 163, 197 (1999) (noting that *Moreno*, *Cleburne*, and *Romer* expanded the conventional rational basis framework).

### 1. *United States Department of Agriculture v. Moreno*

*United States Department of Agriculture v. Moreno* involved amendment of the Food Stamp Act.<sup>343</sup> The statute itself identified two purposes: the stimulation of the agricultural economy and the alleviation of hunger and malnutrition.<sup>344</sup> As the means to accomplish those goals, Congress chose to exclude from the food stamp program any household containing unrelated individuals.<sup>345</sup> Relying on rational basis review, the Court determined that whether a person is related to other members of a household was clearly irrelevant to those purposes.<sup>346</sup> The Court found evidence of other purposes in the legislative history of the statute, pointing to a Conference Report and a statement on the floor of the Senate revealing that the purpose of the amendment was to exclude “hippies” and “hippie communes” from the food stamp program.<sup>347</sup> Finding that purpose impermissible, the Court declared that “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>348</sup>

Importantly, the Court also dismissed the government’s argument that the statute was designed to minimize fraud in the food stamp program.<sup>349</sup> In support of that position, the government had argued that households with unrelated individuals were more likely to contain persons who would fail to report sources than those households where every member was related, and that those households were “relatively unstable,” thus making it difficult to detect fraud.<sup>350</sup> In response, the Court focused on the statute’s definition of household, which included homes with a single individual, and the ease with which a person could avoid accusations of fraud by simply changing his or her living arrangements.<sup>351</sup> Taking that into account, the Court focused on the worst-case scenario, where people so desperate for help could not afford the relatively simple act of changing their living arrangements to become eligible for food stamps, and found the statute unconstitutional.<sup>352</sup>

### 2. *City of Cleburne v. Cleburne Living Center*

Similarly, in *City of Cleburne v. Cleburne Living Center*, the Court unanimously invalidated a zoning ordinance that required a special permit for a group home for people with mental retardation, but not for simi-

---

343. *Moreno*, 413 U.S. at 529.

344. *Id.* at 533.

345. *Id.* at 530.

346. *Id.* at 533-34.

347. *Id.* at 534 (citing H.R. CONF. REP. NO. 91-1793, at 8 (1970), and 116 CONG. REC. 44,439 (1970) (statement of Sen. Holland)).

348. *Id.*

349. *Id.* at 535-37.

350. *Id.* at 535.

351. *Id.* at 537.

352. *Id.* at 538.

lar housing for other groups.<sup>353</sup> Writing for the majority, Justice White rejected the application of heightened scrutiny by the Fifth Circuit Court of Appeals, emphasizing that different treatment based on mental retardation may be justified in some cases because of the reduced abilities and differing special needs of members of that class.<sup>354</sup> Stressing that its refusal to recognize the mentally retarded as a quasi-suspect class did not leave them entirely unprotected from invidious discrimination, the Court relied on *Zobel v. Williams*<sup>355</sup> and *United States Department of Agriculture v. Moreno*<sup>356</sup> to hold that the “State may not rely on a classification whose relationship” is so attenuated to its asserted goal “as to render the distinction arbitrary or irrational.”<sup>357</sup>

Importantly the Court also agreed with *Zobel* and *Moreno* that some objectives, such as “‘a bare . . . desire to harm a politically unpopular group’ . . . are not legitimate state interests.”<sup>358</sup> However, its search of the record did not appear to reveal such a “bare desire” to harm people with mental retardation, at least not outwardly.<sup>359</sup> Instead, the Court found that the justifications offered by the City Council for requiring a special use permit for a group home for mentally retarded people and not for other similar uses were based on stereotypes of people with mental retardation, paternalism, an unsupported concern about safety in a floodplain, and an unsupported concern regarding overcrowding.<sup>360</sup> Finding that such negative attitudes and fears do not provide legitimate reasons for treating classes of people differently, the Court concluded that the ordinance violated equal protection, even under the rational basis test.<sup>361</sup> In addition, the Court also dismissed concerns over concentration of population, congestion of the streets, worries about fire hazards, and the avoidance of danger to other residents, concluding that requiring the permit in this case appeared to be based on nothing more than irrational prejudice against the targeted group.<sup>362</sup>

Concurring in the judgment and dissenting in part, Justice Marshall reminded the Court that its rational basis analysis was “most assuredly not the rational-basis test of *Williamson v. Lee Optical of Oklahoma, Inc.*,” but was, instead, a much more searching inquiry into the legitimacy of the justifications given by the state for its classifications.<sup>363</sup> Sharing the Court’s opinion of the overly broad lines drawn by the city’s

---

353. *City of Cleburne*, 473 U.S. at 447.

354. *Id.* at 442.

355. *Zobel*, 457 U.S. at 61-63.

356. *Moreno*, 413 U.S. at 535-36.

357. *City of Cleburne*, 473 U.S. at 446.

358. *Id.* at 447 (quoting *Moreno*, 413 U.S. at 534).

359. *See id.*

360. *Id.* at 448-49.

361. *Id.* at 448.

362. *Id.* at 450.

363. *Id.* at 458-60 (Marshall, J., concurring in the judgment in part and dissenting in part).

ordinance, Justice Marshall reminded the Court that despite similar imprecision the Court had held other ordinances to be constitutional under rational basis.<sup>364</sup> Justice Marshall therefore urged the Court to characterize its analysis as heightened scrutiny.<sup>365</sup>

### 3. *Romer v. Evans*

In *Romer v. Evans*, the Court declared unconstitutional an amendment to the Colorado Constitution prohibiting all state and local government offices from enacting laws designed to protect people from discrimination on the basis of sexual orientation.<sup>366</sup> Amendment 2, as the legislation was called, was the result of a statewide referendum undertaken as a response to a number of recently enacted city ordinances banning discrimination on the basis of sexual orientation in housing, employment, education, public accommodations, and health and welfare services.<sup>367</sup>

Amendment 2 not only repealed the ordinances, but also prohibited all legislative, executive, and judicial action at any state level designed to protect the class.<sup>368</sup> Relying primarily on voting rights cases, the Colorado Supreme Court analyzed Amendment 2 under the strict scrutiny test, finding that the law violated equal protection by depriving gays and lesbians the opportunity to participate in the political process.<sup>369</sup> On remand, the state failed to convince the trial court that the statute was narrowly tailored to serve compelling state interests.<sup>370</sup> The trial court enjoined Amendment 2, and the Colorado Supreme Court affirmed the ruling.<sup>371</sup>

The U.S. Supreme Court agreed that Amendment 2 violated equal protection.<sup>372</sup> However, unlike the Colorado Supreme Court, the Court relied on a rational basis analysis.<sup>373</sup> In support of the measure, the state had argued that all it sought was to place gays and lesbians in the same

---

364. *Id.* at 459 (Marshall, J., concurring in the judgment in part and dissenting in part).

365. *Id.* at 469 (Marshall, J., concurring in the judgment in part and dissenting in part).

366. *Romer*, 517 U.S. at 635-36.

367. *Id.* at 623-24.

368. Amendment 2 read as follows:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

*Id.* at 624.

369. *Id.* at 625 (citing *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993)).

370. *Id.* at 625-26.

371. *Id.* at 626 (citing *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994)).

372. *Id.*

373. *Id.* at 635.

position as all other persons.<sup>374</sup> To do that, the state argued that the measure did “no more than deny homosexuals special rights.”<sup>375</sup> Finding such a reading implausible, the Court pointed out the sweeping nature of Amendment 2.<sup>376</sup> The amendment was not only intended to nullify specific legal protections but was also designed to forbid reinstatement of those laws and policies, putting gays and lesbians “in a solitary class.”<sup>377</sup>

Importantly, the Court recognized a modern trend in anti-discrimination laws that reflected Congress’ inability to protect individuals against some types of discrimination.<sup>378</sup> Noting that Colorado’s state and local governments had passed many public accommodations laws prohibiting discrimination against non-suspect groups,<sup>379</sup> the Court stressed that Amendment 2 not only barred homosexuals from securing protection under the public accommodations laws, but also nullified specific legal protections for the class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.<sup>380</sup> The provision had the same effect in the public sector.<sup>381</sup>

To demonstrate the extreme nature of the measure, the Court noted that the amendment could also be read to deprive gays and lesbians the protection of more general laws that prohibit arbitrary discrimination in the public and private sectors.<sup>382</sup> As the Court explained, in the systematic administration of such laws, “an official must determine whether homosexuality is an arbitrary” basis for a decision.<sup>383</sup> Such a decision would itself constitute a policy prohibiting discrimination on the basis of homosexuality under the amendment, denying homosexuals safe harbor even in laws of general application.<sup>384</sup> Rejecting the state’s position that the law did nothing more than deny homosexuals “special rights,”<sup>385</sup> the Court found “nothing special” in the rights denied by the amendment.<sup>386</sup> Instead, the Court pointed out that the amendment withdrew from homosexuals basic protections taken for granted by most people.<sup>387</sup> The amendment thus created a class of outsiders, with few basic protections.<sup>388</sup>

---

374. *Id.* at 626.

375. *Id.*

376. *Id.* at 626-27.

377. *Id.* at 627.

378. *Id.* at 627-28.

379. *Id.* at 628-29 (listing non-suspect categories that had been the subject of non-discrimination measures like age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability, and sexual orientation).

380. *Id.* at 629.

381. *Id.*

382. *Id.* at 630.

383. *Id.*

384. *Id.*

385. *Id.* at 631.

386. *Id.*

387. *Id.*

388. *Id.* at 635.

The Court based its conclusion that Amendment 2 did not satisfy even rational basis analysis on two points. First, the amendment imposed “a broad and undifferentiated disability on a single named group . . . .”<sup>389</sup> And, “[s]econd, the sheer breath [of the amendment was] so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward the class . . . .”<sup>390</sup>

With regard to the first point, the Court seemed to announce a new approach to rational basis analysis when it stressed that even in the most mundane of cases calling for the most deferential standard the Court “insist[s] on knowing the relation[ship] between the classification adopted and the object to be attained.”<sup>391</sup> Citing a number of cases that upheld classifications under the rationality test because they were narrowly drawn and “grounded in . . . sufficient factual context[s]”<sup>392</sup> that enabled the Court to “ascertain some relation between the classification and the purpose it served,” the Court stated that such an inquiry “ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”<sup>393</sup>

Despite a characterization that did not conform to the traditional rational basis test, the Court’s analysis provided some insight into a number of factors that might provoke a more searching inquiry under that test. The Court noted that Amendment 2 was both narrow and broad in its identification of people by a single trait and its blanket denial of protection to that group.<sup>394</sup> Characterizing the amendment as unprecedented, or rare, the Court explained that discrimination of such an unusual character requires special consideration to determine whether it is “‘obnoxious to the constitutional provision.’”<sup>395</sup> Stressing that laws that purport to achieve equal protection “‘through indiscriminate imposition of inequalities’”<sup>396</sup> run contrary to our constitutional tradition of equal protection, the Court concluded that a law making it “more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection . . . .”<sup>397</sup>

On the second point, the Court concluded that Amendment 2, and laws like it, “raise the inevitable inference that the disadvantage imposed is born of animosity toward the class” targeted.<sup>398</sup> In support of Amendment 2 the state offered two justifications. First, was respect for others’ freedom of association, in particular “landlords or employers who have

---

389. *Id.* at 632.

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.* at 633 (citing *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980)).

394. *Id.* at 633.

395. *Id.* (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

396. *Id.* (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)).

397. *Id.*

398. *Id.* at 634.

personal or religious objections to homosexuality.”<sup>399</sup> Second, was the state’s “interest in conserving resources to fight discrimination against other groups.”<sup>400</sup> Focusing on the severity of the harm inflicted upon homosexuals, and stressing that the extreme breadth of the measure was “so far removed from [those] . . . justifications,” the Court found it “impossible to credit” the justifications offered for the amendment.<sup>401</sup>

A recent United States Supreme Court opinion added a measure of vitality to searching rational basis analysis. *Lawrence v. Texas*,<sup>402</sup> involved a challenge to a state statute banning same-sex sodomy.<sup>403</sup> Finding for the petitioners and against the state, the Court overruled *Bowers v. Hardwick*<sup>404</sup> and held that the statute violated the petitioners’ liberty interests under the Fourteenth Amendment.<sup>405</sup> Concurring in the judgment, but declining to join the Court in overruling *Bowers*, Justice O’Connor argued that the case was more properly decided under the equal protection doctrine.<sup>406</sup> Relying on *Moreno*, *Cleburne*, and *Romer*, Justice O’Connor reminded the Court that, “some objectives, such as ‘a bare . . . desire to harm a politically unpopular group,’ are not legitimate state interests.”<sup>407</sup> Noting that the state’s justification was the promotion of morality, Justice O’Connor argued that moral disapproval by itself does not constitute the legitimate state interest required to justify a ban on homosexual sodomy but not heterosexual sodomy.<sup>408</sup> Scrutinizing the justifications offered by the state, Justice O’Connor reasoned that because the law was so seldom enforced with respect to private, consensual acts, “the law serv[ed] more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior,”<sup>409</sup> raising “‘the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.’”<sup>410</sup> Justice O’Connor, therefore, reached the same result, but with a completely different analysis, confirming the viability of the exceptions to deferential rational basis review reflected in *Moreno*, *Cleburne*, and *Romer*.

---

399. *Id.* at 635.

400. *Id.*

401. *Id.*

402. 123 S. Ct. 2472 (2003).

403. *Lawrence*, 123 S. Ct. at 2475.

404. 478 U.S. 186 (1986) (declining to recognize constitutionally protected right to engage in homosexual sex).

405. *Lawrence*, 123 S.Ct. at 2484.

406. *Id.* (O’Connor, J., concurring).

407. *Id.* at 2485 (O’Connor, J., concurring) (quoting *Moreno*, 413 U.S. at 534).

408. *Id.* at 2486 (O’Connor, J., concurring).

409. *Id.*

410. *Id.* (quoting *Romer*, 517 U.S. at 634).

*D. Adding Meaning to "Legitimate State Purpose" Under Rational Basis Analysis*

Instances when the Court will invalidate a state law designed to discriminate against an unpopular but non-suspect group are rare. However, *Moreno*, *Cleburne*, *Romer*, and Justice O'Connor's concurring opinion in *Lawrence* demonstrate that there are times when the Court will act to protect unpopular groups, even when indicia of the need for heightened review are not present.

Those cases also demonstrate an evolution, albeit a slow one, of the Court's understanding of modern notions of morality and fair play, and of a related need to critically analyze the legitimacy of state action when it harms politically unpopular yet non-suspect groups. Each of the cases involved attempts to legislate against a perceived moral or character flaw that does not generally exist in the realm of "traditional" (but sadly uninformed) societal values. The decisions reveal that many of the negative attitudes about those groups are based on prejudice and stereotypes, which have been largely discredited by modern society. The cases demonstrate the Court's insistence that society adjust its attitudes and treat those groups with respect and dignity, reflecting an evolving sense of morality and fair play. At their core, all three cases reject the state's irrational disapproval of the moral worth of an unpopular group.

A major key in the decisions is the Court's rejection of unsupported explanations for the discriminatory state action. An amorphous religious objection to homosexuals in *Romer* was not enough to justify state action that, not only denied protections, but also allowed invidious discrimination against that group.<sup>411</sup> An unsupported belief that people with mental illness were dangerous did not suffice to support state discrimination in *Cleburne*.<sup>412</sup> And the stereotypical image of the moral superiority of a nuclear family versus a household composed partly of unrelated people did not support denying food stamps in *Moreno*.<sup>413</sup> In each of the three cases, the nature of the discrimination, and the magnitude of the harm, provided the Court early notice that it should engage in a searching inquiry of the justifications offered by the state. Those factors also put the Court on notice that it should not engage in making up unsupported justifications on behalf of the state. Instead, when indicia of invidious discrimination are present, courts must "insist on knowing the relation[ship] between the classification adopted and the objective to be attained."<sup>414</sup> If, as in *Romer*, the statute is "a status-based enactment divorced from any factual context from which [courts] could discern a relationship to le-

---

411. See *Romer*, 517 U.S. at 635.

412. *City of Cleburne*, 473 U.S. at 446-47.

413. *Moreno*, 413 U.S. at 538.

414. *Romer*, 517 U.S. at 632.

gitimate state interests,”<sup>415</sup> the statute must be found to violate the rationality test under equal protection.<sup>416</sup>

Given the randomness of the three cases and the Court’s reluctance or unwillingness to follow them with similar decisions in other compelling areas, some may fairly argue that the Court has been inconsistent in its function as America’s conscience. While that may be partly true, it does not mean that the cases have lost their vitality. One of the true strengths of the decisions, and a sign that they may endure and continue to evolve, is that they were not the result of the usual five to four split along ideological or political lines. Most significantly, lower courts’ reliance on these cases has resulted in a growing array of lower court decisions consistent with those principles.<sup>417</sup>

The theme of *Moreno*, *Cleburne*, and *Romer* that the bare desire to harm a politically unpopular group does not constitute a rational basis is fully applicable to efforts to deny undocumented immigrants workers’ compensation benefits, including rehabilitation services. The *Moreno*, *Cleburne*, and *Romer* line of equal protection cases would have been aptly applied to California’s Proposition 187, except that the close fit with *Plyler* essentially ended the equal protection analysis.

Although there have been several episodes of state-sponsored discrimination against undocumented immigrants in the nation’s history, Proposition 187 may be the most egregious example of state action against that group in modern times. Most of Proposition 187 was defeated on the basis of federal preemption.<sup>418</sup> Only the section of Proposition 187 that prohibited primary and secondary education to undocumented children was subjected to what appeared to be equal protection

---

415. *Id.* at 635.

416. *Id.* at 631 (stating that the Court has “attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, [it] will uphold the legislative classification so long as it bears a rational relation to some legitimate end”).

417. The following cases relied on the combination of *Moreno*, *Cleburne*, and *Romer* to justify a searching rational basis analysis: *Stemler v. City of Florence*, 126 F.3d 856, 873-74 (6th Cir. 1997) (selective prosecution on the basis of sexual orientation violates the Equal Protection Clause); *Esperanza Peace & Justice Ctr. v. City of San Antonio*, Cause No. SA-98-CA-0696-OG, 2001 U.S. Dist. LEXIS 6259, at \*87-\*103 (W.D. Tex. 2001) (invalidating a decision by the City of San Antonio to remove funding to the plaintiff because of its support of gay and lesbian issues); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1287-88 (D. Utah 1998) (finding that retaliation against a teacher-coach’s public expression of her sexual orientation violates the Equal Protection Clause); *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1276 (S.D. Cal. 1997); *Baker v. Vermont*, 744 A.2d 864, 872 (Vt. 1999). A KeyCite® search of the three cases separately revealed that *Moreno* has been cited negatively ten times, and has been referenced positively 426 times; *Cleburne* has been referenced negatively thirty-one times and positively 1,983 times; and *Romer* has been cited negatively fourteen times, and positively 278 times. Search of WESTLAW, KeyCite Service (Nov. 1, 2003). Though a careful analysis of those trends is beyond the scope of this Article, they tend to suggest strongly that, contrary to some scholars’ pessimism, searching rational basis review is alive and growing in the lower courts.

418. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 771 (S.D. Cal. 1995).

analysis.<sup>419</sup> That section was overturned when the court invoked the *Plyler* standard without much discussion.<sup>420</sup> Therefore, one might reasonably conclude that *Plyler*'s heightened standard of review was crucial to the Court's decision. However, a close reading of Section 7 reveals that California's law was far more egregious than the Texas statute at play in *Plyler*.<sup>421</sup> Proposition 187, therefore, may have been a likely subject for a more searching rational basis analysis even in the absence of a case such as *Plyler*.

Much like those who advocated the deportation of Mexican citizens in the early part of the twentieth century,<sup>422</sup> the proponents of Proposition 187 did not consider the high degree of harm that would be inflicted on Americans. The Texas statute at play in *Plyler* amounted to the functional denial of an education to young children because of the prohibitive cost and the typically small incomes of the undocumented children's parents.<sup>423</sup> However, unlike Proposition 187, the Texas statute was not designed to force the undocumented children to self-deport.<sup>424</sup> Also, unlike the Texas statute, Proposition 187 required citizen children to report the immigration status of their parents to facilitate their deportation.<sup>425</sup> It further required untrained civilian teachers and school administrators to report "suspected" undocumented children, parents, or guardians, while failing to provide any standards to determine legal status.<sup>426</sup> The statute also presumed that the state could arrange an orderly transition to the school in the child's country of origin within a period of ninety days but made no provision for the administration of its mandates.<sup>427</sup> Implementation of Proposition 187 would have been devastating to undocumented children, and many citizen children.<sup>428</sup> The choice for undocumented children and their families would have been obvious—the children would have been kept from attending school.<sup>429</sup> Implementation of Proposition 187 would have also resulted in the same treatment for many citizen children of undocumented parents.<sup>430</sup> The creation of a cornered, unprotected, and easily exploited underclass would have had a

---

419. *Wilson*, 908 F. Supp. at 774.

420. *See id.* at 774, 785 (invalidating Section 7 of Prop. 187, Exclusion of Illegal Aliens From Public Elementary and Secondary Schools, on the basis of a conflict with *Plyler*).

421. *See id.* at 785.

422. *See generally* JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980) (discussing in great detail the repatriation of Mexican immigrants in 1954 by the U.S. government, which included many American citizens).

423. *Plyler*, 457 U.S. at 228.

424. *Wilson*, 908 F. Supp. at 785 n.36.

425. *Id.* at 786.

426. *Id.*

427. *Id.* at 774, 790 (citing CAL. EDUC. CODE §§ 48215(d), (f)).

428. *Id.* at 774. Section 7 of Proposition 187 required schools to verify the immigration status of children for "purposes of denying access to public elementary and secondary education." *Id.*

429. *Id.*

430. *Id.* Section 7, subsection (d) required the verification of the immigration status of undocumented parents rather than children, which defeats the purpose of Section 7 "because the state has no need to know the immigration status of *parents* in order to deny benefits to *children*." *Id.*

devastating societal impact, creating an even worse situation than that which the Court sought to prevent in *Plyler*. Moreover, the potential savings associated with that initiative would have been much less than the costs the state would have incurred to implement it,<sup>431</sup> suggesting strongly that the initiative was driven by a strong animus toward a defenseless, politically unpopular group, rather than a desire to conserve state resources. Such a result would have been inconsistent with the searching rational basis review espoused in *Moreno*, *Cleburne*, and *Romer*.

*E. Searching Rational Basis Analysis Invalidates State Laws Denying Workers' Compensation and Vocational Rehabilitation Services to Undocumented Workers*

Significantly, though misstating the appropriate degree of scrutiny in cases involving undocumented workers, the Kansas decision in *Jurado* and the Florida decision in *De Ayala* offer powerful hints as to the proper constitutional analysis in workers' compensation cases involving that group. The *De Ayala* court suggested the proper analysis when it noted that "[i]t is apparent from the face of the statute that it cannot pass a rational basis test, much less the heightened scrutiny applicable when official discrimination occurs based on alienage."<sup>432</sup> Perhaps hinting that the motive behind the statute was race-based, the court stated with some frustration: "What possible state purpose would justify giving a benefit to nonresident Canadians that is denied Mexicans?"<sup>433</sup> The court found that the proffered explanation, that "this is not an unreasonable distinction given the fact that the U.S. and Canada share one of the largest unprotected borders in the entire world," did not satisfy the rational basis test.<sup>434</sup>

The *Jurado* court's analysis of the constitutional issues provides a more careful dissection of the critical factors that should control judicial review of state laws designed to deny workers' compensation benefits to undocumented workers. In *Jurado*, the defendants, a construction company and the workers' compensation insurance provider, argued that the statute in question would withstand "even the strictest scrutiny."<sup>435</sup> In support, the defendants cited the "insurmountable task" that the state would be forced to face of "administering benefits to citizens of foreign countries, dealing with foreign governments, ascertaining choice of law rules with regard to issues such as marriage and paternity, and insuring dependents received the benefits to which they are entitled."<sup>436</sup> In addi-

---

431. Professor Kevin Johnson revealed that the savings derived from Proposition 187 were far less than the costs of implementation. See Johnson, *supra* note 30, at 1568.

432. *De Ayala*, 543 So. 2d at 207.

433. *Id.*

434. *Id.* (internal quotations omitted).

435. *Jurado*, 853 P.2d at 677.

436. *Id.*

tion, the defendants cited the “prevention of fraud and extreme financial hardship on the citizens, employers, and insurance carriers of Kansas as compelling interests that justify the statute’s classification.”<sup>437</sup>

In response, the court showed little sympathy for claims of administrative efficiency, noting that the workers’ compensation system already awarded some benefits to people in situations similar to Jurado’s family.<sup>438</sup> The court also noted that the burden of proof regarding the need for workers’ compensation benefits was on the claimant, dismissing many of the defendant’s concerns over the difficulties of administering the system’s requirements to people in a foreign country.<sup>439</sup> In addition, reflecting the private nature of workers’ compensation coverage, the court emphasized that the interests represented were those of the employer and the insurance provider and not those of the State of Kansas.<sup>440</sup>

The most common characteristics shared by *Moreno*, *Cleburne*, and *Romer* are the Court’s refusal to accept mere animosity against an unpopular group as a legitimate state interest and the Court’s willingness to review the justifications offered by the state once it has been alerted that the classification affects a politically unpopular group. Because of the group’s inability to defend itself in the political process, mere animosity has driven many government initiatives against undocumented immigrants.

### 1. Animus

Whether state action is driven by antipathy and a bare desire to harm a politically unpopular group is difficult to determine by a literal reading of legislation. However, the Court has demonstrated that animus toward a politically unpopular group can also be identified by analyzing societal attitudes and conduct toward the targeted group. Unlike the homophobic tone of the initiative campaign against homosexuals in *Romer*, and the revealing statements against “hippies” in the legislative history of the Food Stamp Act in *Moreno*, the Court in *Cleburne* could not point to a “smoking gun” to demonstrate that the zoning ordinance in the case was specifically designed to ostracize people with mental retardation.<sup>441</sup> The *Cleburne* Court instead focused almost entirely on the negative attitudes toward people with mental retardation held by a number of groups

---

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.*

441. *City of Cleburne*, 473 U.S. at 473 (Marshall, J., concurring in the judgment in part and dissenting in part).

*Cleburne*’s ordinance sweeps too broadly to dispel the suspicion that it rests on a bare desire to treat the retarded as outsiders, pariahs who do not belong in the community. The Court, while disclaiming that special scrutiny is necessary or warranted, reaches the same conclusion. Rather than striking the ordinance down, however, the Court invalidates it merely as applied to respondents.

*Id.*

such as neighboring property owners and elderly residents, as well as concerns over possible harassment of the residents by students, and concerns over legal responsibility and overcrowding, demonstrating that animus toward a politically unpopular group can take on many forms, and can come from different directions.<sup>442</sup>

Today, few groups can claim to be closer to the bottom than undocumented immigrants. No other group faces more barriers to participation in the political process. They cannot vote, and political mobilization only exposes them to detection and possible separation from friends, family, and jobs.<sup>443</sup> They are especially vulnerable when they are perceived to be benefiting from social programs while draining resources that should only be made available to citizens.<sup>444</sup> As Proposition 187 demonstrated, even though they are ineligible for most public services and benefits, and they pay taxes, undocumented immigrants have been easy targets for those looking for “scapegoats” for states’ economic troubles.<sup>445</sup>

As recently as 1982, the State of Texas argued that undocumented immigrants were not persons “within its jurisdiction.”<sup>446</sup> While it is difficult to imagine that the State of Texas sought the full consequences of such a finding, such as the ability to discriminate arbitrarily or even invidiously against that segment of the population, the state’s willingness to raise that argument demonstrated its low opinion of the group. A similar observation can be made about Proposition 187. That law was passed while its proponents were fully aware that much of the initiative conflicted with the U.S. Supreme Court’s decision in *Plyler*. In fact, the initiative may be fairly interpreted as a challenge to the *Plyler* Court based on the idea that states should be free to legislate against this unpopular group, notwithstanding the invidiousness of that discrimination.

## 2. Legitimate State Purpose?

Determining whether a legitimate state purpose is involved when undocumented workers are denied access to workers’ compensation benefits requires a careful review of the economics of workers’ compensation. As previously explained, workers’ compensation benefits are private benefits.<sup>447</sup> Although they are embedded in state statutes, those benefits, unlike education, food stamps, or Medicare, are not public benefits.<sup>448</sup> The state’s economic interests are not implicated when workers’ compensation benefits are provided. The cost of workers’ compensa-

---

442. *Id.* at 448-49.

443. Johnson, *supra* note 30, at 1514.

444. *Id.* at 1512-13.

445. *Id.* at 1571.

446. *Plyler*, 457 U.S. at 211 (internal quotations omitted).

447. *See supra* note 50.

448. *Id.*

tion reflects the employers' cost of doing business. That cost can both be passed to the consumer and reflected in workers' wages.<sup>449</sup> Every claim denied represents a potential windfall for the insurance provider or self-insurer and a potential rebate of premiums to the employer.<sup>450</sup>

The private nature of state workers' compensation systems was highlighted in *American Manufacturers Mutual Insurance Co. v. Sullivan*.<sup>451</sup> In that case, the plaintiff attempted to establish that denial of benefits by the private insurer was attributable to state action in an equal protection claim pursuant to the Fourteenth Amendment.<sup>452</sup> The plaintiff argued that "workers' compensation benefits are state-mandated 'public benefits,' and that the State has delegated the provision of these 'public benefits' to private insurers."<sup>453</sup> The Federal District Court disagreed, dismissing the private insurers from the case because they were not state actors.<sup>454</sup>

Despite the longstanding view that state workers' compensation benefits are private obligations, the Third Circuit Court of Appeals reversed the trial court, holding that insurers "'providing public benefits which honor State entitlements . . . become an arm of the State, fulfilling a uniquely governmental obligation . . .'"<sup>455</sup> The U.S. Supreme Court reversed, rejecting the authority offered by the Third Circuit because the case cited involved the delegation to private physicians of a constitutional obligation to provide treatment to injured inmates.<sup>456</sup> In contrast, according to the Court, nothing in the Pennsylvania Constitution obligated the state to provide medical treatment or workers' compensation benefits to injured workers.<sup>457</sup> Instead, the state "workers' compensation law impose[d] that obligation on employers."<sup>458</sup>

---

449. See *supra* note 60.

450. Workers' compensation policies are generally experience-rated. Their cost rises or drops dependent on the number of accidents reported. See LARSON & LARSON, *supra* note 3, at § 150.06.

451. 526 U.S. 40 (1999).

452. *Sullivan*, 526 U.S. at 47-48.

453. *Id.* at 55 (citing *West v. Atkins*, 487 U.S. 42 (1988)).

454. *Id.* at 48.

455. *Id.* at 55 (quoting *Sullivan v. Barnett*, 139 F.3d 158, 168 (3d Cir. 1998)). Curiously, the belief that workers' compensation payments are public benefits continues to be held by a number of jurists. See *Alvarez Martinez v. Indus. Comm'n*, 720 P.2d 416, 418 (Utah 1986) (concerning death benefits, where the court erroneously characterized workers' compensation benefits as "part of several interrelated social welfare enactments"). *Alvarez Martinez* involved the Utah workers' compensation statute, which treated U.S. and Canadian residents the same but provided for one-half the death benefit for residents of any other country. See *Alvarez Martinez*, 720 P.2d at 417 (citing to UTAH CODE ANN. § 35-1-72 (1953)). The statute applies to citizens of all countries unless a treaty overrides it. See UTAH CODE ANN. § 35-1-72. The court found that equal protection principles are not violated by the statute because the equal protection clause does not reach outside of U.S. territory. *Alvarez Martinez*, 720 P.2d at 418; see also *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 810 A.2d 99, 102 (Pa. 2002) (Newman, J., dissenting) (arguing that a Pennsylvania statute should yield to IRCA, and that benefits for illegal aliens were not intended by the legislature).

456. *Sullivan*, 526 U.S. at 55.

457. *Id.* at 55-56.

458. *Id.* at 56.

Workers' compensation benefits and services are generally provided through privately funded insurance, paid for by employers who may then pass the cost on to the consumers of products or services, or to their employees through adjustments in wages.<sup>459</sup> Therefore, state action denying workers' compensation benefits (including vocational rehabilitation) to undocumented employees does not protect the state's economic interests. It protects strictly private interests. In fact, denying workers' compensation coverage to undocumented workers may implicate the state's interest in a negative way. Private responsibility for workers' compensation benefits has been deemed to serve the important purpose of encouraging employers to take steps to promote workplace safety for all workers. Given the large numbers of undocumented immigrants in the country who are willing to work in high-risk occupations that many legal residents find undesirable, denying this benefit effectively acts as a disincentive to promote safe working conditions for everyone. In addition to that, the unavailability of this remedy effectively reduces the cost of undocumented labor, creating incentives to hire more undocumented immigrants, in violation of U. S. immigration policy.<sup>460</sup>

### 3. A Fate Worse Than Civil Death

The situation faced by undocumented workers who are injured on the job may find a parallel in the now largely discredited doctrine of "civil death."<sup>461</sup> Civil death is a vestige of early English law.<sup>462</sup> It originated from the practice of "outlawry," which divested convicted criminals of all civil and proprietary rights, rendering them "civilly dead."<sup>463</sup> As a result of their conviction and incarceration, individuals were deemed to stand outside of the reach of most laws, losing the right to the most basic protections. Outlawry was a kind of moral condemnation that was imposed upon convicted criminals in addition to the punishment meted by the criminal courts. The practice of "outlawry" was adopted in

---

459. In *De Ayala* where speaking about a deceased worker's right to compensation, the court stated:

One of the primary benefits that an employee works for is the satisfaction and well-being of providing for his or her family. The law did not afford petitioner's deceased husband different treatment while he was alive and working. He shared the same "burdens" as his fellow employees. He paid taxes and contributed to the growth of his company and the general economy. His labor, along with that of his American or Canadian co-workers, helped pay for the employer's insurance premiums required under the worker's compensation law. Common sense dictates that he should be entitled to the same "benefits," regardless of the residence or status of his dependents.

*De Ayala*, 543 So. 2d at 207.

460. See *Dowling v. Slotnik*, 712 A.2d 396, 404 (Conn. 1988) (stating that if employers realize they could be relieved of the burden of providing workers' compensation coverage with an illegal alien workforce, they would have strong incentives to hire such workers); *Fernandez-Lopez v. Jose Cervino, Inc.*, 671 A.2d 1051, 1055-56 (N.J. Super. Ct. App. Div. 1996) (same).

461. Walter Matthews Grant et al., *Special Project—The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 943 (1970).

462. *Id.* at 942-43.

463. *Id.* at 942.

the United States early in its history without much deliberation.<sup>464</sup> The practice evolved along two lines.

One line involved specific civil disabilities as a consequence for a criminal conviction, like the loss of the right to vote, the right to hold public office, the right to serve as a juror, and the denial of professional or occupational licenses.<sup>465</sup> Many of those laws continue to exist today. The other line involved a more comprehensive loss of civil rights, or what has come to be known as "civil death," which deprived the individual convicted of a crime of rights while he was serving a prison sentence.<sup>466</sup> Early in the history of the U.S. the legislatures of every state enacted some sort of civil disability statute.<sup>467</sup> By 1970, only thirteen states retained civil death statutes.<sup>468</sup> By 1996, only four such statutes remained. Three of these remaining statutes only apply to felons sentenced to life in prison.<sup>469</sup>

Civil death statutes denying access to workers' compensation benefits have been found unconstitutional in a variety of contexts. In *Delorme v. Pierce Freightlines Co.*,<sup>470</sup> the court held that a civil death statute suspending the civil rights of people convicted of a felony violated the Equal Protection Clause.<sup>471</sup> In that case a person convicted of a felony requested a hearing before the Workmen's Compensation Board to argue that an award for a pre-incarceration injury was inadequate.<sup>472</sup> The federal district court found that the Oregon civil death statute, which suspended the right of a convicted felon to litigate his legal claims, violated the Equal Protection Clause even under rational basis analysis.<sup>473</sup> The court found the state's justification, which consisted of preventing pointless or frivolous litigation, was not rationally related to the suspension of a prisoner's right to litigate legal claims.<sup>474</sup> Importantly, the court found

---

464. *Id.*

465. *Id.* at 951-52.

466. *Id.* at 950.

467. *Id.*

468. *Id.*

469. See Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10, 13-14 (1996). Importantly, even states that maintained a civil death statute sometimes found a way to separate the moral consequences of incarceration for a crime from the real world consequences of work-related injuries. See *Garner v. Shulte Co.*, 259 N.Y.S.2d 161, 162 (N.Y. App. Div. 1965) (holding that the humanitarian purposes of the workers' compensation laws extended to the protection of dependents, granting benefits to dependents after their father has become incarcerated and declared "civilly dead"). In other jurisdictions, imprisonment of the claimant has not required suspension of benefits, as long as the claimants were able to establish the wages they could have earned had they not been incarcerated. See *United Riggers Erectors v. Indus. Comm'n*, 640 P.2d 189 (Ariz. Ct. App. 1981); *King v. McClanahan*, 3 La. App. 117 (La. Ct. App. 1925); *Sims v. R. D Brooks, Inc.*, 204 N.W.2d 139 (Mich. 1973).

470. 353 F. Supp. 258 (D. Or. 1973).

471. *Delorme*, 353 F. Supp. at 259-60 (referring to OR. REV. STAT. § 137.240 (1973)).

472. *Id.* at 259.

473. *Id.* at 260 (referring to OR. REV. STAT. § 137.240) (citing *Reed v. Reed*, 404 U.S. 71 (1971)).

474. *Id.*

that delays attendant to the suspension of a prisoner's right to litigate legal claims often resulted in a complete denial of legitimate claims, a result that could not be supported by the state's justifications.<sup>475</sup>

The criminalization of labor under U. S. immigration law, the unenforceability of the laws, the need for low-wage workers, and the protections available to U. S. employers who rely on these workers have combined to produce a class of workers who occupy not only an inferior political status but also an inferior moral status. That status denies the workers the dignity of their labor, and in many cases, is used to deny them the very fruit of their work. Given the unpopularity and vulnerability of undocumented immigrants, Professor Neuman's warning that reliance on the rational basis analysis of the *Plyler* dissent could result in denial of protections provided even to criminals continues to have great force.<sup>476</sup> Though they make important contributions to the United States economy and add to the public treasury, undocumented immigrants have historically been viewed with a level of contempt reserved only for the most morally reprehensible criminals. Fortunately, as many jurisdictions have shown, it is possible to separate the moral blame that attaches to the commission of a felonious crime from the very real world consequences involved in the denial of workers' compensation. Even in cases where individuals are convicted of violent crimes, many states have managed to safeguard access to workers' compensation benefits in the interest of the workers and their dependents. Importantly, many of those cases have involved crimes far more serious than crossing a border without authorization in search of a job.

Reliance on the power of the state to deny a private property interest to this vulnerable population, its effect on the workers' health and safety and on the well-being of even more vulnerable dependents, as well as the potential windfall to insurers and employers resulting from that practice should put courts on notice that a more searching review under the rational basis test is required.

#### VII. A NOTE ABOUT *HOFFMAN PLASTIC COMPOUNDS, INC. V. NLRB*

The issues raised in this Article, and many more involving the question of the extent to which workers' rights legislation protects undocumented immigrants, may soon become more complicated as a result of the Supreme Court's recent decision in *Hoffman Plastic Compounds, Inc. v. NLRB*.<sup>477</sup> In *Hoffman*, the Supreme Court ruled that undocumented workers who are illegally discharged in violation of the National Labor Relations Act (NLRA) for engaging in protected concerted activity can-

---

475. *Id.*

476. See Neuman, *supra* note 251, at 1448.

477. 535 U.S. 137 (2002).

not be awarded backpay.<sup>478</sup> Conceding that undocumented workers are covered by the NLRA, the Court nevertheless denied backpay remedies to the illegally discharged employees.<sup>479</sup> Ignoring the fact that undocumented immigrants are valued in many industries, and perform essential functions in the U.S. economy, the Court simply refused to provide a remedy for “years of work not performed, [and] for wages that could not lawfully have been earned . . . .”<sup>480</sup> By focusing strictly on the workers’ violation of immigration law, while ignoring the employers’ violation of labor law, *Hoffman* may have already contributed to the perpetuation of this disposable workforce.

Though *Hoffman* may appear to be limited to the denial of backpay remedies in the labor relations context, the decision has already created confusion in the area of workers’ compensation, and may soon influence other areas. Relying partly on *Hoffman*, a Michigan court of appeals recently decided to limit workers’ compensation benefits for undocumented workers to medical care, eliminating crucial wage-loss benefits.<sup>481</sup> Similarly, the Pennsylvania Supreme Court has ruled that a person’s undocumented status may cause disability benefits to be suspended.<sup>482</sup> Though both cases purport to merely suspend benefits while the workers are undocumented, the practical implications of immigration law generally mean that the benefits are permanently denied.<sup>483</sup>

*Hoffman* should not cause any confusion in the area of workers’ compensation. If that case stands for anything positive, it stands for the proposition that employers and insurance providers cannot withhold from undocumented workers wages and other employment benefits that they have earned. Much like earned wages, workers’ compensation benefits accrue at the time of the work-related injury. So far, lower courts have limited *Hoffman* such that those benefits are not precluded by the Court’s reasoning in that case. That case should have no effect on whether undocumented workers are eligible for workers’ compensation benefits.<sup>484</sup>

---

478. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 150-52.

479. *Id.* at 144, 151.

480. *Id.* at 149.

481. See *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510 (Mich. Ct. App. 2003) (involving two consolidated cases, in which the Michigan Court of Appeals ruled that undocumented workers are not eligible for wage-loss remedies under the Michigan workers’ compensation statute, which prohibits payment to individuals who have committed a crime).

482. *Reinforced Earth Co. v. Workers’ Comp. Appeal Bd.*, 810 A.2d 99, 109 (Pa. 2002).

483. For example, immigrants who have entered the country without authorization and wish to regularize their status must go to the U.S. Consulates in their country to file their immigration documents. Pursuant to IIRIRA, however, those who have been unlawfully present in the U.S. for six months to a year may not return for three years, and those who have been in the U.S. for one year or more may not return for ten years. 8 U.S.C. § 1182(a)(9)(B) (2000). This government-enforced separation creates a strong disincentive to file for permanent residency.

484. For a thorough analysis of *Hoffman* and its impact beyond labor law, see Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103 (2003).

## CONCLUSION

This Article has demonstrated that workers' compensation benefits and vocational rehabilitation services that do not conflict with IRCA's prohibitions against hiring undocumented workers should be made available to those workers. Workers' compensation statutes are designed to be construed liberally for the benefit of employees who give up their right to seek tort remedies in exchange for the opportunity for a quick and easy resolution to their claims. The nation's public policy is not promoted by denying those services to undocumented workers. Undocumented immigrants do not live their lives in isolation, and policy decision involving workplace rights must take into account the fact that the real social and economic consequences are not restricted to the workers but will also affect their families. Moreover, in the area of workers' compensation, denial of coverage poses not only a detriment to the worker, but also a potential windfall to employers and insurance providers. That dynamic will act not only as an economic incentive but also as an incentive to avoid costs of doing business by skirting workplace safety standards.<sup>485</sup>

Worker's compensation benefits cannot be treated as state funded public benefits programs. They are private insurance commitments paid for by employers, who can not only pass on the cost of the benefit, but also enjoy the certainty of a reduced recovery for work-related injuries while avoiding potentially greater liability in tort. Courts must take those factors into account as they consider state action designed to deny this crucial safety net. Courts must also take into account the real human consequences to the workers and to their families that result from the denial of medical treatment or vocational rehabilitation for work-related injuries. Finally, courts must consider the social and economic realities present in this shadow population's everyday lives, and the economies to which they contribute.

---

485. See *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221, 248 (N.J. Super. Ct. App. Div. 1996) (concluding that denying compensation to undocumented workers may have the effect of encouraging employers to hire undocumented workers and take less care to provide safe workplaces).

