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Plyler and Proposition 187

By John Rohe

The Proposition 187 debate will inescapably cause federal courts to revisit the frequently cited "Plyler case" [*Plyler v Doe and Texas v Certain Named and Unnamed Undocumented Alien Children*, 457 US 202; 102 S Cr 2382; 72 L Ed 2d 786 (1982)]. This pivotal 1982 U.S. Supreme Court decision requires states to provide free public education to illegal alien children pursuant to the Equal Protection Clause of the 14th Amendment. The court was divided 5 to 4. This article analyzes the Plyler facts, the issues, the law, the court and present considerations.

Facts

The Texas legislature revised its education laws in May, 1975 in two notable respects: first, state funds would no longer be used to subsidize local school districts for the education of children not legally admitted to the United States; and second, local school districts could deny public school enrollment to children not legally admitted to this country. A class action suit was filed in the U.S. District Court for the Eastern District of Texas in September, 1977 on behalf of Mexican school-age children unable to establish legal admission into the United States. They sued the school superintendent and members of the board of school trustees. Plaintiffs asked the court to require the defendants to provide free education to members of plaintiff's class in this "class action" suit. The State of Texas was allowed to intervene as a defendant in this action.

Plyler was not, however, the only suit filed. Similar suits may be consolidated by the courts in the interest of judicial economy and efficiency. Therefore, in November, 1979, the Plyler case was consolidated with several other federal court cases assailing the same Texas statute.

Issues

There were two fundamental issues in the Plyler case. Both issues arose under the Fourteenth Amendment to the United States Constitution which, in part, states: "No State shall … deny to any person within its jurisdiction the equal protection of the law." The first issue was whether an illegal alien qualifies as a "…person within its (the state) jurisdiction." If yes, then the second issue is whether the equal protection clause precludes a state from discriminating against illegal alien school age children by denying them the same educational opportunities provided children legally in this country.

The Law

The five justices concurring in the majority opinion and the four dissenters unanimously agreed that the Equal Protection Clause applies to aliens gaining entry into the United States and physically "within the jurisdiction" of a state. Having concluded that the Equal Protection Clause of the Fourteenth Amendment applies to illegal alien school age children, the court then addressed the more divisive issue: whether the Fourteenth Amendment prohibits a state from discriminating against illegal aliens in funding public schools.

The Equal Protection Clause presents an interesting intellectual challenge since, as a practical matter, every law treats some people differently than others. For example, traffic laws treat speeders and intoxicated persons differently than other drivers, yet the Equal Protection Clause is not offended. Criminal laws discriminate against murderers and rapists. If every system of classification were suspect under the Equal Protection Clause, no laws would survive constitutional muster.

If a law impinges upon a fundamental right explicitly or implicitly guaranteed by the Constitution, then only a compelling state interest would enable this law to survive constitutional scrutiny. For example, gender- or race-based classifications 9cases known as "suspect classifications") will seldom be found constitutional. Only compelling state interests would permit such legal classifications. On the other hand, if the classification does not impair a "fundamental right" then the Equal Protection Clause may be satisfied if there is a legitimate basis for the legislative distinction. A rational relationship to a legitimate state purpose will then suffice for Equal Protection purposes.

Are illegal aliens a "suspect classification", much like gender- or race-based classifications? All nine members of the U.S. Supreme Court in 1982 agreed than an illegal alien classification is not a "suspect classification." Accordingly, a "compelling state interest" is not required to sustain this legislative classification.

Is free education a "fundamental right" explicitly or implicitly guaranteed by the Constitution? Eight justices in Plyler concluded free public education is not a fundamental right. Justice Marshall's concurring opinion found education to be a fundamental right. He reaches this decision by relying upon "the unique status accorded public education by our society, and by the close relationship between education and some of our

most basic constitutional values."

"Eight justices in Plyler concluded free public education is not a `fundamental right'"

If illegal aliens are not a "suspect class" and if free public education is not a "fundamental right", then just how persuasive must the state interest be to justify the classification under the Equal Protection Clause? Is a "compelling state interest" required? Or will a legitimate state interest suffice? According to Justice Brennan, author of the majority opinion:

> *If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.*

Accordingly, the answer is neither on the compelling state interest nor on the legitimate state interest end of the spectrum. Justice Brennan would require a "substantial state interest."

The majority did not find a "substantial state interest" in any of the following justifications proposed by Texas:

1. The state's attempts to protect itself from the influx of illegal immigrants.

2. Illegal immigrants impose "special burdens" on the "State's ability to provide high-quality public education".

3. Undocumented children are "less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State."

A majority of the court determined equal protection rights of the illegal alien children to have been violated since they were denied the same free public education afforded other persons in the state's jurisdiction.

The majority expressed concern over the creation of a perpetual underclass deprived of educational opportunities. The court determined many illegal alien children would either remain in this country illegally or would eventually become naturalized citizens. Indeed, the majority claims they enjoy an "inchoate federal permission to remain." Imposing a lifetime hardship upon these citizens could handicap the na-tion, according to the majority. Justice Brennan states:

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

The majority also considered it unfair to visit the migratory sins of the parents upon their innocent children. Shortcomings in the control of our borders should not, according to the majority, be remedied by withholding educational funding.

Chief Justice Burger was joined in his dissent by Justices White, Rehnquist and O'Connor. The dissent acknowledged it may 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." In fact, Justice Burger's dissent states: "Denying a free education to illegal alien children is not a choice I would make were I a legislator. Apart from compassionate considerations, the long-range costs of excluding any children from the public schools may well outweigh the costs of educating them." Nevertheless, Justice Burger and the other three dissenters recognized a distinction between legislative functions and judicial functions. According to the dissent, a decision to exclude illegal aliens from public education is properly relegated to the legislature and not to the courts.

The dissenters were also critical of the majority's creation of a "quasi-suspect class" and a "quasi-fundamental rights" analysis. "If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example", according to Justice Burger's dissent. He writes:

> *Without laboring what will undoubtedly seem obvious to many, it simply is not "irrational" for a state to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in this state and this country is illegal as it does to provide for persons lawfully present. By definition, illegal aliens have no rights whatever to be here, and the state may reasonably, and constitutionally, elect not to provide them with governmental services at the expense of those who are lawfully in the state.*

The Court

The nine members of the U.S. Supreme Court in this 1982 decision divided their vote five to four. The five members of the majority opinion were: Justices Brennan, Marshall, Blackmun, Powell and Stevens. The dissenters were Chief Justice Burger, joined by Justices White, Rehnquist, and O'Connor. Of the five members requiring states to provide free public education to illegal immigrants, only Justice Stevens remains on the court today. Of the four dissenters, Chief Justice Rehnquist and Justice O'Connor are still on the bench.

Present Considerations

Plyler will be fundamental and precedential in the judicial appeal of California's Proposition 187. Current

facts and considerations warrant a re-evaluation of this 1982 decree. For example:

1. **Court composition**. As indicated above, since 1982, six of the nine faces on the U.S. Supreme Court are new. When the nine justices discuss this case, two voices from 1982 will likely favor reversing Plyler and one may recommend it be affirmed.

2. **Heightened sensitivity.** Plyler analyzed a right to education which was admittedly neither explicitly protected by the Constitution nor deemed "fundamental" and it did not discriminate against a "suspect class" (illegal entrants). The decision invoked subjective analysis. Immigration reform is now recognized as a far more prominent national issue. The six new members inescapably will have a heightened sensitivity to the consequences of their decisions.

3. **Protection against invasion**. It's not particularly surprising that the Supreme Court would afford a certain measure of protection for free public education. Education is, after all, essential for our children to perpetuate a tradition, or even a civilization. It is, however, astonishing that the U.S. Supreme Court was incapable of identifying any countervailing public policies. For example, Article IV, §4 of the U.S. Constitution states:

> *The United States shall … protect each State against invasion…*

The massive wave of legal and illegal immigration presents unprecedented environmental and fiscal pressures. The "invasions" of colonial times pale by comparison in scale and effect.

The Supreme Court also did not consider Article IV, § 2 of the U.S. Constitution, the "comity clause" which states: "…the Citizens of each State shall be entitled to all the Privileges and Immunities of the Citizens in the several States." The framers could have said "the citizens of each State *and all immigrants* shall be entitled…, but they chose not to.

4. **Educational incentives**. The majority opinion in Plyler recognized the importance of an informed electorate in the democratic process. Since, as the majority concluded, many of the illegal immigrant children would remain in this country, it was believed to be in the nation's best interest to assure their education. Does only the state have an incentive to educate children? Don't the parents have an even greater commitment to provide education to their offspring? If free education were not provided by the state, would not the parents have the incentive to return their children to their country of origin where public education would be provided?

5. **Lax enforcement.** Brennan's majority opinion partially relies upon "…lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens." This 1982 opinion preceded the Immigration Reform and Control Act of 1986, which bars the hiring of undocumented persons. The increasing appropriations for the Border Patrol and efforts to enforce the 1986 statute justify revisiting Brennan's 1982 determination.

6. **Pull factor**. The court fails to consider the "pull factor" provided by free public education on the decisions of parents to migrate.

7. **Fiscal limitations.** As states cannot sustain the cost of migration, the Supreme Court may be more sensitive to fiscal limitations. In 1982, Brennan stated "There is no evidence in the record suggesting the illegal entrants impose any significant burden on the State's economy … To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc." Whatever economic perceptions were prevalent in 1982, one and a half decades later it's difficult to ignore the economic strains imposed on the states. Ultimately this involves an issue of fiscal as well as environmental carrying capacity. The courts are not well-suited to tinker with these legislative issues. Our system of government was designed to respect a separation of legislative and judicial functions.

Conclusion

It will be interesting and instructive to watch the progress of the education provisions of California's Proposition 187 through the courts. Citizens may be granted the opportunity to participate in the process by filing amicus curiae briefs. ■