

PLYLER'S PARADOX: PROTECTING ACCESS TO PUBLIC EDUCATION FOR NON-RESIDENT SCHOOLCHILDREN

MICHAEL RODRIGUEZ*

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INTRODUCTION

“Education then, beyond all other devices of human origin, is a great equalizer of the conditions of men—the balance wheel of the social machinery.”¹⁴⁶

Horace Mann, a pioneer for universal, public, and secular education, argued that education was the great equalizer for society, and thus, the bedrock for democracy, as early as 1848. When the Puritan settlers initially created the first public schools in America in 1635, the seeds for this nation’s ideal, were planted.¹⁴⁷ Soon, America came to believe that education could ensure that all children, of any demographic, could have a chance for success.¹⁴⁸ 163 years later, Arne Duncan (President Obama’s U.S. Secretary of Education) affirmed this proposition, stating, “In America, education is *still* the great equalizer.”¹⁴⁹ Is education truly the great equalizer in society, or is the ability to access education

* Juris Doctor Candidate, South Texas College of Law Houston, 2019.

¹⁴⁶ Horace Mann, *Report for 1848*, IN 3 LIFE AND WORKS OF HORACE MANN (Mary Mann ed., Boston, Horace B. Fuller 1868) 640, 669 <https://archive.org/details/lifeworksofhorac03manniala/page/n6> [<https://perma.cc/H3AY-L9JG>]

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*, See e.g., Roslin Growe & Paula S. Montgomery, *Education Equity in America: Is Education the Great Equalizer?* 25 PROF. EDUCATOR, Spring 2003 at 23, <https://files.eric.ed.gov/fulltext/EJ842412.pdf> [<https://perma.cc/ZX3G-4Z7X>].

¹⁴⁹ David Rhode, Kristina Cooke, & Himanshu-Ojha, *The Decline of the ‘Great Equalizer*, THE ATLANTIC (Dec. 19, 2012), <https://www.theatlantic.com/business/archive/2012/12/the-decline-of-the-great-equalizer/266455/> [<https://perma.cc/5C4P-WVB2>].

beneficial for those who are already of a position of an advantage within society?

*Plyler v. Doe*¹⁵⁰ articulated that undocumented children have a right to access public education without regard to their immigration status. However, *Plyler*'s initial holding has transcended its original context—it became a yardstick for how society should treat its immigrant and new American children. With a growing animus towards immigration in the 21st century¹⁵¹, the status of the some of the most vulnerable, and rapidly growing, population of school children seems tenuous, at best.

If there is any truth to Horace Mann's words—the inverse of his proposition must also be true—those populations who have no meaningful ability to access and maximize the benefit of education suffer from more handicaps. The inability to attend school is the great destabilizer in society. The ability to access free public education—as promised in *Plyler*—is also undercut by subsequent legislation and policies which have slowly eroded its initial promise. This enmity, coupled with congruous legislation, has rendered the access to education—the bedrock of a thriving democracy—ostensibly unattainable for a vulnerable population with no control of their immigration status. This begs the question—

¹⁵⁰ *Plyler v. Doe*, 457 U.S. 202 (1982).

¹⁵¹ See e.g., “White nationalist, white supremacist, Western civilization — how did that language become offensive?” Mr. King said. “Why did I sit in classes teaching me about the merits of our history and our civilization?” (Rep Steve King (R-IA) in an interview with the *New York Times* (Trip Gabriel, *Before Trump, Steve King Set the Agenda for the Wall and Anti-Immigrant Politics*, N.Y. TIMES (Jan. 10, 2019), <https://www.nytimes.com/2019/01/10/us/politics/steve-king-trump-immigration-wall.html> [<https://perma.cc/E6AQ-NS7J>]); “Democratic and Republican voters do not simply disagree about what the government should do on racially charged issues like immigration and affirmative action, they now inhabit increasingly separate realities about race in America.” (Thomas B. Edsall, *The Deepening ‘Racialization’ of American Politics*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/opinion/trump-obama-race.html> [<https://perma.cc/L3U4-PMW7>] (Citing Michael Tesler, *Racial Attitudes and American Politics* (Forthcoming); See also, President Trump has relied on weary tropes, which include depicting immigrants as criminals and invaders (“At this very moment, large, well-organized caravans of migrants are marching towards our southern border. Some people call it an “invasion. It’s like an invasion. They have violently overrun the Mexican border.”) (Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy* (citing Donald Trump, Remarks on the Illegal Immigration Crisis and Border Security (Nov. 1, 2018);

has the promise of Plyler been rendered as a paradox for immigrant schoolchildren?

This article will argue that the rights granted to undocumented children to access public education has not been realized, but instead directly contradicts the intent of *Plyler*, and subsequent state action has led to the creation of a permanent underclass within the United States. Despite the Court's attempt at avoiding such a situation, there is no longer a specter of a permanent underclass of undocumented residents¹⁵²—it is now reality. Undocumented residents have been referred to as a “class within a class”¹⁵³ and this relegation to a secondary status has detrimental effects on this already vulnerable population. This new phenomenon contradicts the Nation's ideal of equality.¹⁵⁴ With an estimated 11 million undocumented residents within the U.S.¹⁵⁵—675,000 of which are under 18 years of age¹⁵⁶—the lack of legal mechanisms to accommodate access to public education encourages cheap labor, among other things, but denies them the right extended to citizens and lawful residents.¹⁵⁷ Without any legal mechanisms to meaningfully achieve the right of access to public education, it remains enshrined only on paper.

I. UNDOCUMENTED STUDENTS' RIGHT TO ACCESS PUBLIC EDUCATION

A. Plyler v. Doe

In 1982 the United States Supreme Court, in a 5-4 decision, held in *Plyler v.*

¹⁵² *Plyler*, 457 U.S. at 218-19.

¹⁵³ Leo R. Chavez, *Mexican Immigration and Health Care: A Political Economy Perspective*, 45 HUMAN ORG. 344, 350 (1986).

¹⁵⁴ *Plyler*, 457 U.S. at 219.

¹⁵⁵ Jeffrey S. Passel & D'vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, (Nov. 27, 2018), <http://www.pewhispanic.org/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/> [https://perma.cc/4VZY-EBQV]

¹⁵⁶ *Id.*

¹⁵⁷ *Plyler*, 457 U.S. at 219.

Doe that undocumented children have a right to free public education and cannot be denied from enrolling in local school districts.¹⁵⁸ In May 1975, the Texas Legislature revised its education laws¹⁵⁹ to withhold state funds from local school districts for the education of undocumented students and authorized local school districts to deny enrollment to undocumented students.¹⁶⁰ In 1977, Tyler Independent School District began requiring undocumented students to pay tuition in order to enroll in its schools.¹⁶¹ Following the implementation of this policy, a class action lawsuit was filed in the United States District Court for the Eastern District of Texas “on behalf of certain school-age children of Mexican origin . . . who could not establish that they had been legally admitted in the United States seeking injunctive and declaratory relief.”¹⁶² The district court held the law was unconstitutional because the state and local government could not demonstrate a rational basis for the state law or school policy.¹⁶³ The Court of Appeals for the Fifth Circuit affirmed the district court ruling, concluding that Section 21.031’s “statutory classification may be deserving of strict judicial scrutiny . . . [it] is constitutionally infirm regardless” of whether rational basis or strict scrutiny is applied.¹⁶⁴

Prior to *Plyler*, the Supreme Court had not taken the question of whether non-residents were entitled to Fourteenth Amendment equal protection.¹⁶⁵ In its decision, the Supreme Court articulated the Equal Protection Clause of the Fourteenth Amendment protected undocumented persons.¹⁶⁶ The Fourteenth Amendment provides, “[n]o state shall . . . deprive any person life, liberty, or

¹⁵⁸ 457 U.S. 202 (1982).

¹⁵⁹ TEX. EDUC. CODE ANN. § 21.031 (2018).

¹⁶⁰ *Plyler*, 457 U.S. at 205.

¹⁶¹ *Id.* at 206 n.2.

¹⁶² *Id.* at 206.

¹⁶³ *Doe v. Plyler*, 458 F.Supp. 569, 585 (1978).

¹⁶⁴ *Doe v. Plyler*, 528 F.2d 448, 458 (1980).

¹⁶⁵ MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED SCHOOL CHILDREN 20. (2012).

¹⁶⁶ *Plyler*, at 213.

property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹⁶⁷ The appellants argued that the immigration status of undocumented aliens rendered them outside the purview of the protection of the Fourteenth Amendment because they were not “persons within its jurisdiction.”¹⁶⁸ The Court in *Plyler* dismissed the appellant’s argument, and determined that even undocumented aliens are “persons” thus protected by the Fourteenth Amendment.¹⁶⁹ The Court noted that non-residents—even when their presence inside a country is unlawful—are person “in the ordinary sense of the word” and are “guaranteed due process of law by the Fifth and Fourteenth Amendments.”¹⁷⁰

Additionally, the appellants argued that the Equal Protection clause directed the state to afford protection to those within its jurisdiction, while the Fifth Amendment and the Due Process clause of the Fourteenth Amendment, contained no such limiting language.¹⁷¹ Again, the Court rejected the appellant’s arguments stating, “We have never suggested that the class of persons who might avail themselves of the equal protection guarantee is less than coextensive with that entitled to due process . . . both provisions were fashioned to protect an identical class of persons, and to reach every exercise of state authority.”¹⁷²

¹⁶⁷ U.S. CONST., XIV Amend.

¹⁶⁸ *Plyler*, 457 U.S. at 210.

¹⁶⁹ *Id.* at 210; *See e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹⁷⁰ *Plyler*, 457 U.S. at 210 (citing, *Shaughnessy v. United States*, 345 U.S. 206, 212 (1953) (“But an alien on the threshold of initial entry stands on a different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.’”), *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (“ . . . all persons within the territory of the United States are entitled to the protection guaranteed by those amendments [Fifth and Sixth Amendments], and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.”), *Yick Wo*, 118 U.S. at 369 (1886) (“These provisions (the Equal Protection clause) are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”).

¹⁷¹ *Plyler*, 457 U.S. at 211.

¹⁷² *Id.* at 210-211.

Adopting a view of the Equal Protection and Due Process clauses, as suggested by the appellants, would defy both the Court's prior jurisprudence and the logic of the Fourteenth Amendment.¹⁷³ Ultimately, the Court concluded the Equal Protection clause was in fact applicable to the undocumented students, because the Fourteenth Amendment was "intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection."¹⁷⁴

After concluding that the Equal Protection Clause applied to undocumented students, the Court then determined the level of judicial scrutiny to apply. The Court in *Plyler* determined strict scrutiny was not applicable because undocumented residents are not a suspect class.¹⁷⁵ The Court discussed that in no prior case defining a suspect class had it addressed the status of a person *unlawfully* in the country.¹⁷⁶ Other classifications which are recognized as suspect are distinguishable from the classification at issue here—improper entry into the United States is a product of voluntary action and itself a crime.¹⁷⁷ However, Justice Brennan did have to justify why a more demanding level of scrutiny than rational basis was applied. While Justice Brennan rejected treating residency status as a suspect classification, he nevertheless concluded that treating the children as the Texas finance law envisioned would not "comport with fundamental conceptions of justice."¹⁷⁸

A perfect storm of a "quasi-suspect" class and the "quasi-fundamental" right of education led to the determination that the appropriate level of scrutiny would be a heightened rational basis standard. Justice Brennan was ultimately

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 211.

¹⁷⁵ *Plyler*, at 223.

¹⁷⁶ *Plyler*, 457 U.S. at 219 n. 19 (emphasis added).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 220.

concerned with the right and access to public education. Citing an earlier decision in *San Antonio Independent School Dist. v. Rodriguez*,¹⁷⁹ Justice Brennan articulated that because public education is not a fundamental “right” granted to individuals by the constitution,¹⁸⁰ the government does not have to show a least restrictive alternative.¹⁸¹ In his *Rodriguez* dissent, Justice Brennan stated “fundamentality is . . . a function of the right’s importance in terms of the effectuation of those rights which are constitutionally guaranteed.”¹⁸² However, in his *Rodriguez* dissent, Justice Brennan argued “any classification affecting education must be subjected to strict judicial scrutiny.”¹⁸³

As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.¹⁸⁴

Justice Brennan, who wrote the majority in *Plyler*, did not have the votes to overturn *Rodriguez* which he dissented in.¹⁸⁵ Justice Brennan’s majority opinion reaffirmed that public education was not a fundamental right (which was likely included to attract the vote of Justice Powell, the author of the majority opinion in *Rodriguez*).¹⁸⁶ This view from his *Rodriguez* dissent was reflected in *Plyler*—even though strict scrutiny was deemed not applicable to Texas’ law.

In striking down the Texas statute, Justice Brennan characterized Texas’

¹⁷⁹ 411 U.S. 1, 35 (1973) (holding that public education is not a “right” granted to individual by the Constitution).

¹⁸⁰ *Plyler*, 457 U.S. at 221.

¹⁸¹ *Id.* at 223.

¹⁸² *Rodriguez*, at 62.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 102-03 (Marshall, J., dissenting).

¹⁸⁵ See generally Mark Tushnet, [Justice Lewis F. Powell and the Jurisprudence of Centrism](#), 93 MICH. L. REV. 1854, 1862-74 (1995) (discussing the deliberations that took place during the drafting of the *Plyler* decision).

¹⁸⁶ Olivas, *supra* note 20, at 21.

arguments for charging tuition as, “nothing more than an assertion that illegal entry, without more, prevents a person from becoming a resident for the purposes of enrolling his children in public schools.”¹⁸⁷ In his equal protection analysis, Justice Brennan found that the state could not enact a discriminatory classification “merely by defining a disfavored group as non-resident.”¹⁸⁸ While not necessarily a suspect class, the undocumented students were more of a “quasi-suspect” class because they cannot “affect neither their parents conduct nor their own status.”¹⁸⁹ Moreover, Justice Brennan also emphasized that education is not “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”¹⁹⁰ Justice Brennan concluded in *Plyler* that education has a fundamental role in maintaining the fabric of our society¹⁹¹ because of its significance in maintaining our basic institutions and how depriving a child of an education has significant societal costs that cannot be ignored.¹⁹²

Through education, individuals prepare to become self-reliant and self-sufficient as members of society.¹⁹³ Justice Brennan also describes illiteracy as an enduring disability which will handicap the individual deprived of a basic education and will also have an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual.¹⁹⁴ This imposition of a special disability upon a group because of a status they cannot change is the

¹⁸⁷ *Plyler* 457 U.S. at 227, n. 22.

¹⁸⁸ *Plyler* 467 U.S. at 227, n. 22 (During oral arguments, counsel for the State tried to argue that this classification as necessary to provide public education to lawful residents, in the face of resource constraint, but the Court had earlier denied this line of reasoning in *Graham v. Richardson*, 403 U.S. 365, 375 (1971) where the Court had held that the concern for the preservation of Arizona’s resources *alone* could not justify alienage classification used in allocating welfare benefits; *See also* *Olivas*, *supra* note 20, at 20.

¹⁸⁹ *Plyler*, at 220.

¹⁹⁰ *Plyler* at 221.

¹⁹¹ *Id.* at 221.

¹⁹² *Id.*

¹⁹³ *Plyler* at 222 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 221).

¹⁹⁴ *Id.*

kind of treatment the Equal Protection Clause of the Fourteenth Amendment was designed to abolish.¹⁹⁵ Thus, it would be unfair to punish them for their parents' sins.¹⁹⁶ Therefore, Justice Brennan's view of education as "perhaps the most important function of state and local governments,"¹⁹⁷ coupled with the quasi-suspect class of undocumented students, the Court applied rational basis with a bite (though the Court's opinion articulates the traditional rational basis standard was applied).¹⁹⁸

Justices Marshall, Blackmun, and Powell each authored a concurrence in *Plyler*. Justice Marshall reiterated his view from *Rodriguez* that "education is fundamental."¹⁹⁹ Justice Blackmun concurred because a significant portion of undocumented children will remain in the country permanently as citizens, legal residents, or undocumented residents²⁰⁰ and denying them an education converts them into a discrete underclass—"denial of an education is the analogue of denial of the right to vote: the former relegates the individual to a second-class social status; the latter places him at a permanent disadvantage."²⁰¹ Lastly, Justice Powell wrote that regardless of the federal government's lack of effective leadership in dealing with immigration, undocumented children, who are innocent, should not be punished by being denied a public education that is offered to all residents.²⁰² Additionally, Justice Powell had a direct impact on the majority opinion, so much so it was considered a "reflection of Powell's views of social policy."²⁰³ This reflection left the majority opinion open to criticism

¹⁹⁵ *Id.* at 218 n. 14.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 222, (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)).

¹⁹⁸ María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1388 (2005).

¹⁹⁹ *Plyler*, at 230.

²⁰⁰ *Id.* at 235.

²⁰¹ *Id.* at 234.

²⁰² *Id.* at 237-38.

²⁰³ Tushnet, *supra* note 40, at 1866-73.

from the dissent because it lacked “generative or doctrinal significance.”²⁰⁴

The fact that *Plyler* was a 5-4 decision along with Chief Justice Burger’s vigorous dissent—he views the majority as abusing the Fourteenth Amendment²⁰⁵ and guilty of taking an unabashedly result-oriented approach²⁰⁶—clearly indicates a deeply divided court. While the dissent agreed that depriving children of an education would create an underclass of U.S. residents, they argue the Constitution does not grant them the authority to strike down Texas’ law even though it is “senseless” and “wrong to tolerate”.²⁰⁷ Chief Justice Burger argued the majority’s “custom-tailored [theory]”²⁰⁸ short circuits the political process²⁰⁹—which foreshadows how ineffective *Plyler* has become without proper recourse within the political process.

II. LACK OF MECHANISMS TO ACTUALIZE RIGHTS GRANTED TO UNDOCUMENTED STUDENTS BY *PLYLER* HAVE LED TO A PERMANENT UNDERCLASS

A. Federal & State Legislation Which Directly Undermines Plyler

Plyler lacks a proper mechanism to enforce the constitutional right to access the public education it articulated and without such a mechanism there have been federal and state legislation proposals intended to undermine or overturn it. Despite the consistent theme of xenophobia and anti-immigrant sentiment

²⁰⁴ *Id.*

²⁰⁵ *Plyler*, at 243.

²⁰⁶ *Id.* at 244.

²⁰⁷ *Id.* at 242.

²⁰⁸ *Id.* at 244.

²⁰⁹ *Id.* at 254.

throughout American history,²¹⁰ through the U.S. Supreme Court's jurisprudence,²¹¹ it has asserted the right to educational opportunities to marginalized students.²¹²

At the federal level, the Gallegly "Amendment"²¹³ to the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA")²¹⁴, was sponsored by California Congressman Elton Gallegly in 1996. The IIRIA was enacted to amend the Immigration and Nationality Act of 1952 to remedy illegal immigration and more effectively manage legal migrations.²¹⁵ Specifically, the Amendment contradicted *Plyler* because it would have allowed states to deny undocumented students a free public education.²¹⁶

The Amendment implicates, and contradicts, the *Plyler* decision, and states that *Plyler*, "promotes violations of the immigration laws and because such a free public education for such aliens creates a significant burden on States' economies and depletes States' limited education resources . . ." ²¹⁷ Further, it would have allowed states to charge undocumented students tuition fees—explicitly contravening *Plyler*.²¹⁸ The Amendment, if successful, would have denied a public education to an estimated 700,000 undocumented students.²¹⁹

²¹⁰ Dan Soleimani, *Plyler in Peril: Why the Supreme Court's Decision in Plyler v. Doe Is at Risk of Being Reversed and What Congress Should Do About It*, 25 GEO. IMMIGR. L.J. 195, 203 (2010); Olivas, *supra* note 20.

²¹¹ See e.g., *Brown*, 347 U.S. 483 (1954); *Regents of Uni. of California v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Lau v. Nichols*, 414 U.S. 563 (1974).

²¹² David H.K. Nguyen and Zelideh R. Martinez Hoy, "Jim Crowing" *Plyler v. Doe: The Re-Segregation of Undocumented Students in American Higher Education through Discriminatory State Tuition and Fee Legislation*, 63 CLEV. ST. L. REV. 355, 358 (2015).

²¹³ H.R. 4134 Section 1, 104th Cong. (1996).

²¹⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sep. 30, 1996).

²¹⁵ Daniel Stein & Terri M. Burton, *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Notable Changes for Restoring Integrity and Credibility to U.S. Immigration Policy*, 1 RUTGERS RACE & L. REV. 111, 111 (1998).

²¹⁶ H.R. 4134 § 1, 104th Cong. (1996).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Soleimani, *supra* note 65 at 204.

Only after fierce opposition from President Clinton,²²⁰ Texas Senators Kay Bailey Hutchison and Phil Gramm, along with various public interest groups, was the amendment dropped.²²¹

At the state level, California came the closest to negating *Plyler* when its voters approved Proposition 187²²² in 1994. Section 7 of Proposition 187 denied undocumented children from attend public schools.²²³ In the event a school reasonably suspected a student was in violation of immigration laws it was required to notify the federal government once it was unable to confirm his/her legal status.²²⁴ The proposition was subsequently challenged and invalidated in *League of United American Citizens v. Wilson* (“LULAC”).²²⁵ California Governor Pete Wilson appealed to the U. S. Court of Appeals for the Ninth Circuit though his successor, Gray Davis, would eventually drop the appeal causing most of Proposition 187’s provisions to be nullified.²²⁶

In 2010 Arizona enacted one of the strictest immigration measures which sought to find and deport undocumented immigrants.²²⁷ While it did not directly implicate *Plyler*, it was another attack that revealed *Plyler’s* vulnerability. Measures such as Arizona’s law, which increase the scope of immigration and rely on deportation, create a climate which is strained, and often hostile towards a migrant population. Bills such as this, that target undocumented immigrants for prosecution and deportation, will continue to appear so long as there is no federal immigration law codifying the rights of immigrants and their children.

²²⁰ Jaclyn Brickman, *Educating Undocumented Children in the United States: Codification of Plyler v. Doe through Federal Legislation*, 20 GEO. IMMIGR. L.J. 385, 391 (2006).

²²¹ Pabón López, *supra* note 53, at 1396.

²²² CAL. EDUC. CODE § 48215(a) (West 1996).

²²³ *Id.*

²²⁴ *Id.* at § 48215(e).

²²⁵ 997 F. Supp. 1244 (C.D. Cal. 1997); 908 F. Supp. 755 (C.D. Cal. 1995).

²²⁶ Patrick J. McDonnell, *Davis Won’t Appeal Prop. 187 Ruling, Ending Court Battles*, L.A. TIMES (July 29, 1999), <https://www.latimes.com/archives/la-xpm-1999-jul-29-mn-60700-story.html> [https://perma.cc/6C68-4X2R].

²²⁷ Randal C. Archibald, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES (Apr, 23, 2010), <http://www.nytimes.com/2010/04/24/us/politics/24immig.html> [https://perma.cc/P8K9-82Y9].

Without such a law, *Phylar* remains susceptible to state legislation.

B. *External Policies That Directly Undermine Phylar*

i. Trauma & Fear of Deportation

Children are resilient. And undocumented children are especially resilient, but there is no doubt their migration experience will have a lasting effect on them. The freight train, “La Bestia,” is probably one of the most notorious methods migrants from Central America use to get to the United States, but in reality most undocumented migrants and their children use smugglers.²²⁸ Regardless of the route, the journey is nonetheless perilous, especially for children as they risk kidnapping, human trafficking, forced disappearance, sexual assault, forced prostitution and extortion.²²⁹ Therefore, it is not surprising the trauma and stress of migrating goes unaddressed among undocumented students exposing them to a higher risk of developing a lifelong impediment.²³⁰ The American Academy of Pediatrics recognized “[undocumented] children’s mental health needs are secondary only to their legal needs”.²³¹ A study found that among a “sample of Latino adolescents, of which 93% were not US citizens,

²²⁸ See Rodrigo Dominguez Villegas, *Central American Migrants and “La Bestia”: The Route, Dangers, and Government Responses*, MIGRATION INFO. SOURCE (Sept. 10, 2014), <http://www.migrationpolicy.org/article/central-american-migrants-and-la-bestia-route-dangers-and-government-responses> [https://perma.cc/5S3X-W9EU].

²²⁹ Camilo Vargas, *Coyotes: The Smugglers that Bring Kids to the Border*, LATINO USA (Sept. 12, 2014), <http://latinousa.org/2014/09/12/smugglers/> [https://perma.cc/V8GT-FD34].

²³⁰ Patrick D. Murphree, *For the Least of These Brothers and Sisters of Mine: Providing Mental Health Care to Undocumented Immigrant Children*, 15 SEATTLE J. FOR SOC. JUST. 65, 73 (2016).

²³¹ Peter Cooch & Fukuda Yasuko, *Resolution: Addressing the Legal and Mental Health Needs of Undocumented Immigrant Children*, Am. Acad. Pediatrics – Cal. Chapter 1 (Nov. 24, 2014), https://www.aapcal.org/sites/aapcal/files/u34/final_resolution_addressing_the_legal_and_mental_health_needs_of_undocumented_immigrant_children.pdf [https://perma.cc/SEF5-4BXF].; See also, Melissa Jenco, *Needs of Undocumented Children Tops AAP Annual Leadership Forum Resolution List*, Am. Acad. Pediatrics – D.C. Chapter, <http://www.aapdc.org/newsletter/2015.04.01.html#update8> (last visited Sept. 23, 2018) [https://perma.cc/7C8P-GB4C].

31% displayed clinical levels of anxiety and 18% exhibited symptoms of depression.”²³²

Unfortunately, once in the United States the stressors continue. There is the feeling of abandonment when children are separated from their parents,²³³ the fear of deportation, which can manifest as anxiety and depression,²³⁴ and depending on how local and state policies are implemented, and how they interact with each other, this fear can also extend to the context of schools and education. For example, in Virginia, public employees were encouraged to report whether a student was undocumented.²³⁵ Additionally, there are clear effects on a child’s academic performance if schools are no longer safe-zones for undocumented parents or their children. When parents are more involved in their child’s education, it increases the chance of strong academic performance.²³⁶ The more parents are involved, the more likely the student is to get higher grades, have better social skills, and continue on to postsecondary education.²³⁷ Furthermore, the fear of deportation seeps into all aspects of an undocumented student’s life, even when they are playing. A focus group of

²³² Krista M. Perreira & Catinca Buscan, Carolina Population Center, *LATINO IMMIGRANT PARENTS: ACCESSING MENTAL HEALTH SERVICES FOR THEIR ADOLESCENTS* (2008), https://www.cpc.unc.edu/Plone/projects/lamha/LAMHA_ServiceUse_Reportv2.pdf [https://perma.cc/V9ZN-SSYE]

²³³ Murphree, *supra* note 86, at 77.

²³⁴ See Kris Anne Bonifacio, *Undocumented Youth Struggle with Anxiety, Depression*, IMMIGRANT CONNECT (last visited June 1, 2019), <http://immigrantconnect.medill.northwestern.edu/blog/2012/12/18/undocumented-youth-struggle-with-anxiety-depression/> [https://perma.cc/N6QU-76MA].

²³⁵ Memorandum from Alison P. Landry, Assistant Attorney General, to Presidents, Chancellor, Rectors, Registrars, Admissions Directors, Domicile Officers and Foreign Student Advisors (INS Designated School Officials) and the Executive Director of the State Council for Higher Education in Virginia (Sept. 5, 2002), <https://www.stetson.edu/law/conferences/highered/archive/2003/911ImmigrationLawCompliance.pdf> [https://perma.cc/Z43A-87L4].

²³⁶ See Anne T. Henderson & Karen L. Mapp, Nat’l Ctr. for Family and Community Connections with Schools, *A NEW WAVE OF EVIDENCE: THE IMPACT OF SCHOOL, FAMILY, AND COMMUNITY CONNECTIONS ON STUDENT ACHIEVEMENT* (2002), <http://www.sedl.org/connections/resources/evidence.pdf> [https://perma.cc/QT9Y-BYTQ].

²³⁷ *Id.*

teachers participating in a study to shed light on the real world effects of *Plyler*, described seeing their students playing “‘la migra’ on the school playground—a version of cops and robbers with border patrol replacing the cops.”²³⁸

ii. *Migrant Students' Instability and Lack of Mobility*

Additionally, it is not uncommon for Latino undocumented students to travel with their families according to the seasons so they can harvest crops.²³⁹ The constant changing of schools negatively impacts their ability to get a proper education.²⁴⁰ This impact is compounded by the fact that many undocumented students do not speak fluent English, making it no surprising that immigrants have a higher high school dropout rate.²⁴¹ Immigrants are twice as likely to drop out of high school than native-born Americans—for Hispanic students, the rate is close to 45%.²⁴²

However, a unique characteristic of being an undocumented immigrant within the United States is that they are unable to freely cross the U.S.-Mexico border. Initially, many undocumented immigrants are reluctant to cross because of a fear of deportation and apprehension.²⁴³ The inability to freely enter and exit the United States isolates the undocumented immigrant from family often creates an emotional distance between those who travel to, and remain in, the U.S.²⁴⁴ Once an undocumented immigrant remains in the U.S. marginalization

²³⁸ Nina Rabin, Mary Carol Combs & Norma González, *Understanding Plyler's Legacy: Voices from Border Schools*, 37 J. L. & EDUC. 15, 36 (2008).

²³⁹ Pabón López, *supra* note 53, at 1382.

²⁴⁰ *Id.*

²⁴¹ Jennifer M. Chacón, *Race as a Diagnostic Tool: Latinas/os and Higher Education in California, Post-2009*, 96 CAL. L. REV. 1215, 1240 (2008).

²⁴² Michelle A. Wheelhouse, *Second Class Students: Federal Limits on State Benefits for Higher Education*, 12 J. GENDER RACE & JUST. 655, 667-68 (2009).

²⁴³ Margaret M. Sullivan & Roberta Rehm, *Mental Health of Undocumented Mexican Immigrants: A Review of the Literature*, 28 ADVANCES IN NURSING SCI. 240, 247 (2005).

²⁴⁴ *Id.*

and isolation, because of their status, has a unique effect on their mental health, and can result in feelings of loneliness, disorientation, and depression.²⁴⁵ Marginalization can reinforce the ambiguousness of being “illegal” while feeling unwelcomed and blocked because of economic barriers.²⁴⁶ In effect, the undocumented immigrant is barred from complete integration into American society, which only reinforces marginalization and integration, thus creating a vicious, self-sustaining cycle detrimental to mental health.²⁴⁷

iii. Poverty & Re-segregation

In *Grutter v. Bollinger*, the Supreme Court cited data showing that most Latino students attended schools where minority students made up the majority of the student population.²⁴⁸ Minority students, such as undocumented children, generally reside in poorer school districts where they perform below average on tests.²⁴⁹ Because schools are not required to have equal financing throughout a state, the only way to address equity concerns are with state constitutional provisions.²⁵⁰ If a state constitution does not specifically address equity in school financing, there is no recourse.²⁵¹

Poverty exacerbates the disadvantages for undocumented students in high-poverty schools, defined as schools with 75% or more, students qualify for a reduced or free lunch.²⁵² High-poverty schools are unable to offset the disadvantages because of how they are funded.²⁵³ With socioeconomic

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ 539 U.S. 306, 345 (Ginsburg, J., concurring)

²⁴⁹ Pabón López, *supra* note 52, at 1383.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Barbara Fedders, *Schooling at Risk*, 103 IOWA L. REV. 871, 884 (2018).

²⁵³ Laurie Reynolds, *Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. DAVIS L. REV. 1835, 1838-40 (2007).

segregation increasing, high-poverty schools, which are generally in low property tax areas cannot offset the disadvantages the way their wealthier counterparts can.²⁵⁴

Despite the *Plyler* decision, which was meant to prevent undocumented students from becoming an underclass, its creation was inevitable. Because undocumented children are treated as second class students, it is not surprising that when they graduate from high school they become the very underclass which *Plyler* sought to prevent. Poverty, fear of deportation, and trauma, all function to deny undocumented children their right to public education. Although federal and state governments cannot deny these students the right to access public education, they are not required to ensure that the students are given access to fulfil the promise of public education.

III. FULFILLING THE PROMISES OF *PLYLER*

A. Mechanisms to Actualize Plyler's Right to Access Public Education

Justice Brennan concluded in *Plyler* that education has a fundamental role in maintaining the fabric of our society²⁵⁵ because of its significance in maintaining our basic institutions and because depriving a child of an education has significant societal costs that cannot be ignored.²⁵⁶

i. Federal & State Codification of Plyler

Codifying *Plyler* in a federal statute would be the most effective way to guarantee undocumented children the right to public education. A federal

²⁵⁴ *Id.*, at 1838 n.5.

²⁵⁵ *Id.* at 221.

²⁵⁶ *Id.*

statute would make future federal proposals, such as the Gallegly Amendments, difficult to implement and will not undermine *Plyler*.²⁵⁷ Further, federal immigration law preempts state law—through Congress’ powers to make a uniform law of naturalization enumerated in the Constitution—and would thus withstand challenges at the state level such as the Texas law in *Plyler* or California’s Proposition 187. While states are permitted to legislate matters of immigration it cannot conflict with congressional immigration policy.²⁵⁸ Considering the conservative bent of the Supreme Court, the Justices would most likely defer to Congress as it is not the Court’s role to make policy.²⁵⁹

Pragmatically, codifying the right to public education at the state level would be the most realistic outcome, even if it would be more costly, time consuming and subject to preemption by federal law. Every state’s constitution has an education clause to determine whether students have a fundamental right to education at the state level.²⁶⁰ Seven states²⁶¹ have held that education is not a fundamental right whereas sixteen states²⁶² have made this recognition. Education clauses in state constitutions, even those which have not yet ruled on whether education is a fundamental right, are likely to support the right to public

²⁵⁷ Jaclyn Brickman, *Educating Undocumented Children in the United States: Codification of Plyler v. Doe Through Federal Legislation*, 20 GEO. IMMIGR. L.J. 385, 395 (2006).

²⁵⁸ See generally *DeCanas v. Bica*, 424 U.S. 351 (1976) (discussing federal preemption of state law with regard to employment of illegal aliens).

²⁵⁹ *Plyler*, at 242 (CJ Burger dissenting).

²⁶⁰ Robyn K. Bitner, *Exiled from Education: Plyler v. Doe's Impact on the Constitutionality of Long-Term Suspensions and Expulsions*, 101 VA. L. REV. 763, 779 (2015).

²⁶¹ The seven states are: Colorado, Georgia, Idaho, Illinois, Indiana, Massachusetts, and Rhode Island. See *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1018-19 (Colo. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156, 167 (Ga. 1981); *Thompson v. Engelking*, 537 P.2d 635, 647 (Idaho 1975); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1194 (Ill. 1996); *Bonner v. Daniels*, 907 N.E.2d 516, 522 (Ind. 2009); *Doe v. Superintendent of Sch. of Worcester*, 653 N.E.2d 1088, 1095-97 (Mass. 1995); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 55 (R.I. 1995).

²⁶² The sixteen states are: Arizona, California, Connecticut, Kentucky, Minnesota, Mississippi, New Hampshire, New Jersey, North Carolina, North Dakota, Pennsylvania, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

education and any attempt to deny undocumented students would be evaluated with a heightened level of scrutiny.²⁶³

ii. *The Right to Parent*

Another alternative to ensuring undocumented children are guaranteed access to public education could be through a parent's right to direct their children's education. The right to parent, much like undocumented children's right to public education, is derived from the Due Process Clause of the Fourteenth Amendment,²⁶⁴ and as such, would also apply to parents who are also undocumented because they are "persons" as defined by the Constitution.²⁶⁵ In *Wisconsin v. Yoder*, the Court held there is a "fundamental interest of parents, as contrasted with that of the state, to guide the religious future and education of their children."²⁶⁶ The Supreme Court later clarified, in *Troxel v. Granville*, that parents have a fundamental right to "make decisions concerning the care, custody, and control of their children."²⁶⁷ Therefore, undocumented parents should be provided different avenues to assert their rights. It is a smart policy position to promote the right of parents as it would encourage them to be more involved in their children's education, which has clear benefits.

One method to increase parental involvement of undocumented parents is

²⁶³ María Pabón López & Diomedes J. Tsitouras, *From the Border to the Schoolhouse Gate: Alternative Arguments for Extending Primary Education to Undocumented Alien Children*, 36 Hofstra L. Rev. 1243, 1270 (2008).

²⁶⁴ U.S. CONST., XIV Amend.

²⁶⁵ *Plyler*, at 212; *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (The Supreme Court decided in both *Meyer* and *Pierce* that the Court concluded that the state laws unreasonably interfered with the liberty of parents to direct the upbringing and education of their children).

²⁶⁶ 406 U.S. 205, 232-35 (1972) (holding that the State could not compel Amish children to attend school beyond eighth grade in contradiction to their parents' wishes).

²⁶⁷ 530 U.S. 57, 63 (2000).

by extending to them the right to vote on school board elections.²⁶⁸ Having a voice, even if on a limited basis, could help both undocumented parents and students better assimilate as they would now be able to participate in their respective communities.²⁶⁹ Clearly, undocumented parents would then have the ability to hold local school boards accountable if the needs of their children, which are considerably different given their legal status, are not being met.²⁷⁰ School boards hold an incredible amount of power when making decisions on teachers, policies, and the allocation of funds.²⁷¹ This limited voting right would give undocumented parents agency and voice to hold such persons in power accountable.²⁷²

Another alternative to giving undocumented parents a voice and increasing their involvement, could be through a “school-based management initiative.”²⁷³ This system is led by a council of parents, teachers, and administrators making decisions on budgets, personnel, and curriculum.²⁷⁴ As long as the selection process for a parent to be on such a council is not limited to citizens or documented parents, undocumented parents would have their voices heard and an ability to direct their child’s education. While it is not a fundamental right, education is not merely an ordinary government benefit. Thus, parents should not be deprived of the ability to direct their children’s education, nor the opportunity to give their children the benefit of a public education.²⁷⁵

²⁶⁸ Pabón López & Tsitouras, *supra* note 119, at 1255.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ See, e.g., Alief Independent School District, Understanding Your School Board, <https://www.aliefisd.net/Page/5536> (last visited June 11, 2019) [<https://perma.cc/BP4K-XTRS>].

²⁷² Pabón López & Tsitouras, *supra* note 119, at 1255-56.

²⁷³ William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 190 (2000).

²⁷⁴ *Id.*

²⁷⁵ Pabón López & Tsitouras, *supra* note 119, at 1249.

iii. Mental Health

If the promise of *Plyler* is to be fulfilled, the mental health of undocumented children must be addressed. Research suggests that undocumented Mexican immigrants generally have distinct characteristics compared to their documented counterparts and are often relegated to a “second class” status, or pariah, which leads to lasting effects because of stigmatization.²⁷⁶ Undocumented students are more likely to struggle with post-traumatic stress disorder (PTSD) and other mental health issues because of their traumatic experience migrating to the U.S.²⁷⁷ This is compounded with higher levels of anxiety and depression, debilitating poverty, racism, and discrimination. PTSD negatively impacts the undocumented child’s ability to recall leading to poor academic performance and a higher likeliness to drop out of school.²⁷⁸ If undocumented children have access to mental health care they will truly be able to exercise their right to a public education.

Extending Medicaid and the Children’s Health Insurance Program (CHIP)²⁷⁹ to undocumented children will provide them with the mental health coverage needed to be good students while also becoming productive members of society when they reach adulthood. Medicaid will do for undocumented children what it did for children from low income families, provid access to a

²⁷⁶ Margaret M. Sullivan & Roberta Rehm, *Mental Health of Undocumented Mexican Immigrants: A Review of the Literature*, 28 *ADVANCES IN NURSING SCIEN.* 240(3), 240 (2005).

²⁷⁷ See Murphree, *supra* note 86, at 77.

²⁷⁸ Erin Digitale, *Brain Imaging Shows Kids' PTSD Symptoms Link Poor Hippocampus Function in Stanford/Packard Study*, STANFORD MED. (Dec. 8, 2009), <https://med.stanford.edu/news/all-news/2009/12/brain-imaging-shows-kids-ptsd-symptoms-linked-to-poor-hippocampus-function-in-stanfordpackard-study.html> [<https://perma.cc/Y4VP-997Y>]; See, e.g., Off. Of Special Educ. & Rehabilitative Services, U.S. Dep’t Educ., 35TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 2013, at 220 (2014), <http://www2.ed.gov/about/reports/annual/osep/2013/parts-b-c/35th-idea-arc.pdf> [<https://perma.cc/LU35-6TRM>]. (“[A]n estimated one-third of students with ADHD ultimately drop[] out of high school.”).

²⁷⁹ 42 C.F.R. § 457.80

wide range of services they would not have otherwise.²⁸⁰ While it is likely that most undocumented children would qualify for Medicaid because of their low income status, CHIP would benefit those undocumented children whose families are not eligible for Medicaid but are still unable to afford private insurance.

Currently, the Medicaid and CHIP programs are limited to citizens and “qualified aliens” such as lawful permanent residents, asylees, and refugees.²⁸¹ One possible way to make undocumented children eligible for Medicaid and CHIP is to apply the equal protection analysis in *Plyler*.²⁸² The Equal Protection Clause is triggered when a law (1) treats one group different from another and (2) when it is adopted with the intention of discriminating against, and does affect, that group more than another group.²⁸³ Federal law distinguishes between children with legal status and children without legal status when it denies Medicaid’s mental health services to undocumented students but is made available to citizens or documented children.²⁸⁴ Because mental health is vital to a child’s ability to learn, using *Plyler* to extend these programs to undocumented students the promise to fully access and participate in their right to public education will be realized.

IV. CONCLUSION

Almost 40 years ago in *Plyler v. Doe*, the Supreme Court held undocumented

²⁸⁰ See Diane Rowland and Rachel Garfield, *Health Care for the Poor: Medicaid* at 35, 22 HEALTH CARE FINANCING REV., Fall 2000, at 23, 27, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/HealthCareFinancingReview/Downloads/00Fallpg23.pdf> [<https://perma.cc/7GJN-73GQ>]

²⁸¹ 8 U.S.C. § 1611(a), 1641 (2012).

²⁸² Murphree, *supra* note 86 at 84.

²⁸³ See *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that a state court practice of denying a parent custody of a child because the parent had married a person of a different race was unconstitutional).

²⁸⁴ Murphree, *supra* note 86, at 86.

children had a right to public education. In the years since there has been legislation, at both the federal and state level, which directly contradicted or attempted to overturn the decision in *Plyler*. However, the growing animus and disdain for immigrants in this country puts the well-being of some of the most vulnerable populations at risk in our society. There are also outside factors such as trauma, fear of deportation, poverty, and mental health which have affected the level of access an undocumented student has to their constitutional right to public education.

The Supreme Court's decision in *Plyler* became the apex of how our society treated un-documented residents. However, without any legal mechanisms to ensure this right, a permanent underclass has been created—*Plyler* has become a paradox. In order to dissolve this underclass, *Plyler* must be fortified. This can be accomplished through a number of methods. While federal codification of the right to public education is perhaps the best method, it may be the least possible considering the current political climate. State legislation would be incremental progress, but progress nonetheless. Possibly, the most effective way to fortify *Plyler* is through a combination of state legislation, promoting parental rights, and extending Medicaid and CHIP. The right to public education is constitutional law but it has not been treated or revered as such. There is no way to turn the clock back and provide adults who were undocumented students their full right to public education, but there is no reason a society cannot ensure that future undocumented students are not destined to become an underclass.