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STUDIES IN LAW, POLITICS, AND  
SOCIETY VOLUME 76

# STUDIES IN LAW, POLITICS, AND SOCIETY

EDITED BY

**AUSTIN SARAT**

*Department of Law, Jurisprudence & Social Thought and  
Political Science, Amherst College, USA*



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# LIST OF CONTRIBUTORS

<i>Harold Braswell</i>	Albert Gnaegi Center for Health Care Ethics, Saint Louis University, Saint Louis, MO, USA
<i>Robbie Eyles</i>	University of Bristol, Bristol, UK
<i>Stuart W. Flint</i>	School of Sport, Leeds Beckett University, Leeds, UK
<i>Jessica Hambly</i>	University of Bristol Law School, Bristol, UK
<i>Katharina Heyer</i>	Department of Political Science, University of Hawai'i at Mānoa, Honolulu, HI, USA
<i>Peter McTigue</i>	Nottingham Law School, Nottingham Trent University, Nottingham, UK
<i>Devyani Prabhat</i>	University of Bristol Law School, Bristol, UK
<i>Jeremé Snook</i>	The Department of Law, Sheffield Hallam University, Sheffield, UK

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# CHAPTER 1

## TO WHAT EXTENT IS *PLYLER v. DOE* AN EFFECTIVE PROTECTION FOR THE RIGHT TO EDUCATION FOR IRREGULAR MIGRANT CHILDREN IN CONTEMPORARY US?

Robbie Eyles

### ABSTRACT

*Education is both a human right and an indispensable means of achieving other rights. Provision of education for irregular status migrant children tests the commitment of nation states to this basic right even as states curb irregular immigration. In the US, the right to go to school was guaranteed to irregular migrant children, by the case of Plyler v. Doe in 1982. This article argues that the right enshrined in that decision faces considerable risk of being eroded in the current political context. The article presents a detailed critical analysis of the rationale in the case, with a full consideration of the shaky constitutional framework on which the decision was based.*

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*It also examines the direct legal challenges to the right to education since Plyler, and the potential impact of new political and legal changes in contemporary times.*

**Keywords:** Undocumented immigrants; education; children's rights; constitutional law; irregular migration; *Plyler v. Doe*

## INTRODUCTION

This paper focusses on the landmark case on right to education of *Plyler v. Doe* which the US Supreme Court decided in 1982.<sup>1</sup> Although the case has celebrated its 35th anniversary in 2017, it is still the foremost case on the right of every child in the US, irrespective of their immigration status, to attend a US public school from kindergarten to 12th grade (K-12). *Plyler* is much celebrated for what it has achieved; the majority's decision granted millions of undocumented children in the US the right to education. As Justice Brennan put it, the case averted the "inestimable toll [...] on the social, economic, intellectual, and psychological wellbeing"<sup>2</sup> of millions of children. Yet, changes in current US politics threaten the viability of *Plyler* and have the potential to expose the shaky constitutional foundations of the decision. The *Plyler* decision exists in a somewhat paradoxical position – it is a hugely important right and has been relied upon by millions, but remains precarious due to the grounds on which it was based.

This study seeks to act as a warning as to the robustness of the *Plyler* decision and its susceptibility to future challenges. Protections which are now taken for granted may in fact rest on weak foundations. Through its reliance on an amalgamated and unclear standard of heightened rational constitutional scrutiny as well as its dependence on empirical claims which have since become outdated, *Plyler* does not in fact constitute an effective protection for the right to education for irregular migrant children in contemporary US. It is important, therefore, for those interested in children's education, not to rest on the laurels of the *Plyler* decision but to continue to work for a stronger legal framework for the right to education. A strong constitutional basis for this right for all children will be able to withstand better the challenges on the ground for irregular status children who are politically placed in precarious conditions under the current Trump administration.

To demonstrate this argument, I first look at the preliminary considerations and then lay out some current threats to undocumented students. Next, I set out the theoretical background of immigration and children's rights

and the legal bases for the right to education. A detailed legal analysis of the *Plyler* case follows. Finally I assess the challenges to *Plyler* since it was decided and conclude with an evaluation of its vitality as a protector of the right to education.

## PRELIMINARY CONSIDERATIONS

In this article, children without full legal immigration status in the US will be referred to as “undocumented” or “irregular” as these terms refer to their legal status rather than dehumanizing them as “illegal.” Although there is no clear or universally accepted definition of irregular migration, the International Organization of Migration regards irregularity from the perspective of the receiving country as “entry, stay or work in such a country without the necessary authorization or documents required under immigration regulations.”<sup>3</sup> A considerable number of irregular migrant children are present in the US today. The estimates range from 1.8 million to nearly 5 million but data about the exact numbers is hard to acquire as they are a diverse group who often move out of parental households or are simply hidden from public authorities.<sup>4</sup>

The US operates on the basis of *jus soli* – any child born on US soil is automatically an American citizen. Thus, the subject of this study is children who are themselves irregular as per law, not merely those with parents who are irregular in status. In addition, although higher education is an important part of the right to education, this essay only considers the right of irregular migrants to K-12 education.<sup>5</sup>

## CURRENT THREATS TO THE RIGHT TO EDUCATION FOR IRREGULAR IMMIGRANT CHILDREN

The threat to the right to education for irregular immigrants is heightened by the current political climate. As well as curbing regular immigration through the Muslim travel ban<sup>6</sup> and talk of a “merit-based” system,<sup>7</sup> the current Presidential regime is broadly hostile to all kinds of irregular immigration. Starting in the campaign promise of a wall between Mexico and the US to effectively block further irregular immigration, President Trump has repeatedly tried to curb immigration of an “undesirable” kind. During his campaign Trump also proposed setting up a deportation force to deport all immigrants

living in the US illegally and has continued on this trajectory since coming to power. In January, Trump issued an executive order<sup>8</sup> which denies Federal grants to “sanctuary cities”<sup>9</sup> and contains powers which vastly expand the authority of individual immigration officers.<sup>10</sup> These have consisted of, for example, plans to publicize crimes by undocumented immigrants, strip such immigrants of privacy protections, build new detention facilities, and speed up deportations.<sup>11,12</sup> Indeed, in the first 100 days after Trump signed the executive order, federal agents arrested more than 41,000 people for civil immigration offences, a 38% increase on the same period in 2016.<sup>13</sup>

State laws have also become more restrictive in step with the Federal mood. For instance, over April–May 2017 Texas has legislated a “sanctuary cities” ban (Senate Bill 4) that lets police ask during routine stops whether someone is in the US legally and threatens sheriffs with jail if they do not cooperate with federal immigration agents.<sup>14</sup>

These anti-immigration measures have often come despite the lack of wrongdoing on the part of undocumented children. In September, Trump announced the ending of the Deferred Action for Childhood Arrivals, the Obama-era scheme which shields as many as 800,000 young undocumented immigrants from deportation.<sup>15</sup> At the time of writing, its future remains very much in doubt,<sup>16</sup> thereby generating tremendous anxiety for affected children who do not know what to anticipate in the near future.

Deportations and detentions have also hurt those who seek protection from abuse. Some examples are: an undocumented woman seeking domestic violence help,<sup>17</sup> a woman awaiting emergency brain surgery,<sup>18</sup> and a 10-year-old patient, whose ambulance was followed. Immigration officials waited for her to receive surgery, and then took her to a juvenile detention facility.<sup>19</sup>

Trump’s immigration executive order also revives a program which trains local police officers in immigration enforcement and gives them federal authority. Since these police departments also deploy officers to schools, civil rights activists are concerned that they could become a conduit for personal information about undocumented students and their families.<sup>20</sup> The heightened anxiety has seen marked drops in school attendance of undocumented children, as parents worried about their child’s presence exposing their own uncertain immigration status.<sup>21</sup>

Taken together with the surrounding demonizing rhetoric about immigrants and immigration, these measures have combined to create an atmosphere of almost unparalleled hostility towards undocumented immigrants and thereby constituted a real threat to the education rights of undocumented students.

## IMMIGRATION AND CHILDREN'S RIGHTS

Why does the hostile environment particularly put at risk the education rights of children? The provision of education rights for children without legal immigration status is a contested issue located in the fault lines between state sovereignty, the universality of human rights, and the special rights of children.<sup>22</sup> Universal human rights should be available to all, but in reality, the claims and delivery of rights are often limited by the nation state structure. Therefore, state membership becomes of critical importance for rights claimants. Philosopher Hannah Arendt has argued that those who do not belong to a state do not have any way to exercise rights claims.<sup>23</sup> Her arguments were framed in the context of the difficulties of the stateless fleeing war and persecution. Arendt herself had fled Nazi Germany and thus understood from personal experience that the position of those located outside a political community was precarious. Being outsiders, the stateless had no recognition of their rights and were deprived of even the basic right to have any rights (what Arendt famously calls the “right to have rights”). Undocumented migrants share this rightlessness, as they are present on a territory but not recognized as nationals. Krause calls this the “limit function of their political existence.”<sup>24</sup> The rise of sovereignty and its exercise in controlling migration has further disempowered the stateless. In fact, to a large extent, exclusionary immigration policies have come to symbolize the strong exercise of sovereign power. Sylvia da Lomba has demonstrated that curtailing social rights for irregular migrants has become “essential components of restrictive immigration policies.”<sup>25</sup> In the present era of globalization, control over the movement of people, and the statist border assumption, has arguably become the last bastion of sovereignty.<sup>26</sup>

A lack of “right to have rights” which arises out of undocumented status also affects children specifically. There is widespread recognition in human rights law that children have certain special claims to rights.<sup>27</sup> One view is this, because they are vulnerable and require special protection. Another is that they have capacity to flourish, and such capacity should be nurtured.<sup>28</sup> A third view is children are innocent of any wrongdoing and should therefore not bear the brunt of any adverse actions taken by adults in their lives.<sup>29</sup> These claims of children expand upon and add to the general framework of universal human rights which are available to both children and adults.

Jacqueline Bhabha has illustrated that irregular migration status increases the risk of invisibility as children are not able to access rights in practical terms. Fear of being discovered as undocumented often means they cannot exercise the rights guaranteed in theory to all children; they cannot demand

these from the nation to which they do not legally belong.<sup>30</sup> As a result, states implement a variety of strict measures on immigration depriving undocumented children of their basic rights.<sup>31</sup>

## LEGAL GUARANTEES OF THE RIGHT TO EDUCATION

Education of irregular migrant children is of fundamental importance at both normative and pragmatic levels as education is both a human right in itself and an indispensable means of realizing other rights.<sup>32</sup> There are fundamental inherent benefits of education to the human experience, by serving as a vehicle to understanding the world. It also delivers potential for economic empowerment, access to further public services, and participation in political decision making.<sup>33</sup> Education is the key for irregular migrants to pursue a better life than that they left behind.<sup>34</sup>

Although the right to access to primary and secondary education for everyone is a matter of widely respected international law<sup>35</sup> (for instance, UNDHR Article 26),<sup>36</sup> the US has failed to ratify the treaties – including the Convention on the Rights of the Child<sup>37</sup> and the International Covenant of Social, Economic and Cultural Rights<sup>38</sup> – which would impose an international law obligation on the US for provision of education rights for irregular migrant children. With rare exceptions, the international human rights play no overt role in the discussion around rights in the US.<sup>39</sup> International human rights principles usually find their way to domestic courts only when linked to specific domestic legislation. The unwillingness of the US to hold itself accountable to international human rights obligations, particularly regarding social rights, means that unlike in most other countries the debate over education for irregular migrant children has been conducted purely at the domestic rights level.

### *PLYLER v. DOE*

Having established the current context of the rights of undocumented children, it is time to undertake a detailed analysis of the Plyler case. *Plyler v. Doe*,<sup>40</sup> is such an important case as it was the first time that the US Supreme Court upheld the right of every child, no matter their immigration status, to attend a US public school from kindergarten to 12th grade (K-12). Seen by many as the “high-water mark” of the constitutional protection of



irregular migrants in the US,<sup>41</sup> the case has meant that millions of undocumented children have had access to education in the past 35 years.

However, despite these undoubted achievements, the way *Plyler* was decided leaves it vulnerable to being challenged and overturned. Most obviously, the majority decision has attracted accusations of judicial activism because of the unusual method of constitutional scrutiny to which it held the statute, retrospectively termed “heightened rational basis.” This has led scholars such as Livingston to argue that the case has left an “unsound and inconsistent judicial mandate” because it failed to establish comprehensible constitutional standards.<sup>42</sup> He stresses that it left unresolved nearly as many constitutional questions as the case attempted to answer.<sup>43</sup> The majority contorted the usual categories of constitutional scrutiny in order to fit the morally appealing result. In addition, the majority erred in its use of empirical evidence by reversing the burden of proof for the finding of evidence in the case. This evidence has since then been upstaged by the dramatic increase in the numbers of irregular migrant children.

## FACTS

In 1975, the Texas State Legislature passed Texas Education Code § 21.031, which withheld state funding for children not “legally admitted” into the US, and made it possible for local districts to deny enrolment for those children. In 1977, the Tyler district of Texas imposed a \$1,000 tuition on those students who could not prove their legal residence. A class action lawsuit against this statute, supported by the Mexican American Legal Defense and Educational Fund, was brought to the federal district court and declared unconstitutional, a decision which was upheld by the Fifth Circuit of the Court of Appeals. By 1982, the case had reached the Supreme Court.

Justice William Brennan, who wrote the leading judgment for the majority, started by establishing that the undocumented students were “persons within the jurisdiction” of the State of Texas under the Equal Protection clause of the Fourteenth Amendment of the US constitution.<sup>44</sup> Regardless of a migrant’s immigration status, he was “surely a ‘person’ in any ordinary sense of the term.”<sup>45</sup> In that case “jurisdiction” had a purely geographical connotation.<sup>46</sup> This finding was straightforward – as Brennan put it, but it “only begins the inquiry.”<sup>47</sup> This acknowledgement was the minimum subject location, the ground floor. They were on the field, but their place in the game was a very different matter.<sup>48</sup> The more contentious determination was the level of judicial review applicable to the case.

## ANALYSIS OF *PLYLER v. DOE*

### *Heightened Rational Basis: A Shaky Foundation*

When deciding on the constitutionality of government action under the Equal Protection clause, the courts have adopted different levels of analysis depending on the nature of the right and the classification of those alleging the unlawful action.<sup>49</sup> Where the law disadvantages a “suspect class,” or impinges upon a “fundamental right,” the court will invoke its most stringent analysis, the “strict scrutiny” test. Without either, the general rule is that the court will use the “rational basis” review.<sup>50</sup> This standard of constitutional review is highly deferential to legislative action and seldom invalidates a statute.<sup>51</sup> It merely requires there to be a “reasonably conceivable state of facts that could provide a rational basis for the classification.”<sup>52</sup> The level of judicial scrutiny in between these two is termed “intermediate scrutiny” but is very tightly controlled in its applications to classifications, and normally applied to issues of gender.<sup>53</sup> To pass under intermediate scrutiny, the government action must be “substantially related to an important government purpose.”<sup>54</sup>

Brennan forwarded a number of reasons for his decision. First, Brennan held that strict scrutiny was not the correct test. On classification, he acknowledged that “undocumented status [is not] an absolutely immutable characteristic, since it is the product of conscious, indeed unlawful action.”<sup>55</sup> Thus, the children could not be considered a “suspect class.” This supported the Court’s previous action, as the “suspect classification” doctrine had been developed to apply to those laws which specifically infringed the rights of a single racial group.<sup>56, 57</sup>

Second, in a similar vein, the Court followed its own jurisprudence to decide that education did not constitute a “fundamental right.” In *San Antonio Independent School Dist. v. Rodriguez*,<sup>58</sup> the Court had held that the Equal Protection Clause did not entitle poor urban students to a “fundamental right” to the same educational opportunities as their wealthier counterparts.<sup>59</sup> Court precedent therefore suggested that the Court should have analyzed the Texas statute under a rational basis standard.<sup>60</sup> However, instead of applying this extremely deferential test, it opted to create an amalgamated level of scrutiny which could not be seen as constituting any of the standards established in the court’s previous jurisprudence.

The language used by Brennan to examine the validity of the state’s action indicates this muddled or conflated assessment: “the discrimination can hardly be considered rational unless it furthers some *substantial goal* of the state.”<sup>61</sup> The use of the word “rational” clearly indicates his intention to

use – or be seen to use – rational basis, yet equally “substantial” suggests the use of the intermediate level of scrutiny. Instead, this new level of analysis has been described as “Rational Basis with Bite”<sup>62</sup> or “Heightened Rational Basis.”<sup>63</sup>

Justice Brennan used two justifications for the heightened level of scrutiny. The first was that the children in fact constituted a “quasi-suspect class” because of their inherent innocence. While he acknowledged that “a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct,”<sup>64</sup> he stated that “these arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants.”<sup>65</sup> In fact, his judgment went as far as declaring that blaming children for their parents’ conduct “does not comport with fundamental conceptions of justice.”<sup>66</sup> Thus, for Brennan, the children’s innocence justified in this case departing from the usual standard.

The second of Brennan’s justifications concerned the nature of education as a right. As stated above, in 1973 the Supreme Court had declared in *Rodriguez* that education did not qualify as a fundamental right deserving of strict scrutiny analysis. The author of the leading judgment in the case was Justice Powell. Archived documents from deliberations in *Plyler* indicate that Powell, who was the pivotal fifth vote for the majority, was keen to strike down the statute, but wanted to ensure that it was struck down with a rationale that was consistent with his stance in *Rodriguez*.<sup>67</sup> It was therefore imperative that Brennan, who had drafted and redrafted his opinion to win Powell’s support,<sup>68</sup> followed the Court’s jurisprudence on this issue and as a result, he made sure that he did not explicitly regard education as a fundamental right.

Instead, he confusingly granted it “quasi-fundamental” status. Brennan stated, “Public education is not a ‘right’ granted to individuals by the Constitution. But neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”<sup>69</sup> In fact, the importance of education was such that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”<sup>70</sup> He also cited the seminal education case *Brown v. Board of Education*,<sup>71</sup> which had said that “education is perhaps the most important function of state and local governments.”<sup>72</sup> In addition, Blackmun, in his short judgment concurring with Brennan, used the right to vote as an analogous right to the right to education to justify the heightened scrutiny. Both rights, Blackmun said, while not being constitutionally protected, place those who do not receive it at “a permanent and insurmountable

competitive disadvantage.”<sup>73</sup> Brennan asserted that “education has a *fundamental* role in maintaining the fabric of society.”<sup>74</sup>

This method of judicially repositioning rights and creating new standards of scrutiny has left the decision open to attack for judicial activism.<sup>75</sup> The first hint of this appears in the dissenting judgment. Indeed, more than a hint, as Chief Justice Burger directly accuses the majority of “spinning out a theory custom-tailored to the facts of these cases.”<sup>76</sup> He addresses Brennan’s two justifications directly. First, on the culpability of the children as to their situation, he countered that “illegality of presence in the United States does not – and need not – depend on some amorphous concept of ‘guilt’ or ‘innocence’ concerning an alien’s entry.”<sup>77</sup> Second, Burger refers to the majority’s assertion of education’s “quasi-fundamental” status as an “opaque observation” with “no bearing on the issues at hand”<sup>78</sup> and questions whether the majority regards education as “more fundamental than food, shelter, or medical care?”<sup>79</sup> Ultimately, the dissent regarded the Court as excessively focused on achieving a particular decision, “if ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example.”<sup>80</sup>

Having rejected Brennan’s heightened scrutiny as an appropriate level of analysis, Burger proceeded to analyze the statute through the standard “rational basis” test and did not strike down the statute. He declared that:

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 the state and thus country is illegal as it does to provide for persons lawfully present.<sup>81</sup>

Chief Justice Burger’s criticism has a sound basis as perhaps, as Tom Gerety has put it, “[*Plyler* was] too easy a case,” in that while it was intuitively obvious to protect the illegal alien children, the majority struggled to reconcile the *right* answer and the *legal* answer.<sup>82</sup> Brennan’s judgment has been described as unmistakably and fundamentally activist in nature.<sup>83</sup> Moreover, Peter Schuck has argued that “the Court felt obliged to turn conventional legal categories and precedents inside out in order to reach a morally appealing result.”<sup>84</sup>

It seems plain that *Plyler* used unclear constitutional analysis. The case has been said to illustrate that the Court had yet to evolve a coherent or comprehensible equal protection doctrine,<sup>85</sup> and that the innovative constitutional reasoning gives the judges “unbridled freedom” which creates confusion for subsequent cases.<sup>86</sup>

These criticisms, both from the dissent and from scholars, point out the flaws in the majority’s constitutional analysis, and evince that the rationale in *Plyler* was made on an unsound basis. With its muddled and conflated test,

the Court created its own method of constitutional scrutiny which is likely to struggle for legitimacy in the face of subsequent direct challenges.

If the issue were to arise again, the Court would have to determine again the correct test to use, and it would likely use the rational basis review. This is for a number of reasons. Firstly, in *Plyler*, as the majority correctly asserted, and as discussed *supra*, the facts of the case do not warrant strict scrutiny analysis, nor intermediate scrutiny. The courts have determined that undocumented students do not constitute a “suspect class.”<sup>87</sup> Similarly, education has not been regarded as a fundamental right. Moreover, there have not been any circumstances since the case which have changed sufficiently to *now* warrant the Court using strict scrutiny. The lack of these factors triggers the use of rational basis review, and Brennan’s use of “quasi” categories would likely be regarded as contortions of constitutional rules to strive for a particular result.

As a result, because of the deferential nature of the rational basis review, so long as the state could prove some saving of fiscal resources in the pursuit of the legitimate governmental interest, the Court would be unlikely to strike down the legislation. Thus, the decision itself, with all its consequences for the education rights of irregular migrant children, is not on a sure footing, and is in danger of being overturned.

### *Texas’s Arguments*

In another section of the judgment, Brennan addressed the arguments put forward by the State of Texas in the case. Close analysis of Brennan’s rebuttal reveals a further risk to the viability of *Plyler*. By placing the burden for proving the empirical evidence of the impact of undocumented immigrant children upon the State, he derogated from constitutional practice. This evidence has also changed dramatically in the more than 30 years since the case was decided, exposing Brennan’s reliance upon them.

Firstly, Texas had argued that Congress’ disapproval of the presence of these children and their inherent ‘illegality’ provided the authority for the statute. For them, the State was entitled to act in a manner which was consistent with federal policy. This had been recognized in the case of *De Canas*.<sup>88</sup> In the case, the Supreme Court had reversed a finding of unconstitutionality for a Californian labor law which had stipulated that employers should not hire undocumented workers, on the basis that it mirrored federal policy. However, Brennan distinguished the education rights at issue in *Plyler* from the workers’ rights in *De Canas*. He stated that whereas it had been clear Congress had

indicated an intention to bar from employment those who did not have the right to work, he could not find any “indication that the disability imposed by § 21.031 corresponds to any identifiable congressional policy.”<sup>89</sup> He was therefore “reluctant to impute to Congress the intention to withhold from these children...access to basic education.”<sup>90</sup>

The second of Texas’s arguments contended that the classification furthered its interests in “the preservation of the state’s resources for the education of its lawful residents.” However, the Court said there was a lack of “evidence in the record suggesting that illegal entrants impose any significant burden on the State’s economy.”<sup>91</sup> Instead, Brennan found that, in terms of educational cost, “undocumented children [were] basically indistinguishable from legally resident alien children.”<sup>92</sup> Brennan also rebuffed the assertion that the prospect of free education constituted an important incentive for irregular immigration.<sup>93</sup>

On a similar note, the third argument put forward by the state of Texas was that by reducing the number of students in the public education system, the state could provide a better service for those whose presence was lawful. Justice Brennan countered this on an empirical basis: “the record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the state.”<sup>94</sup> Moreover, claimed Brennan, even if the state were to show this was the case, they would also have to “support its selection of this group as the appropriate target for exclusion.”<sup>95</sup>

Texas responded by claiming that the undocumented children were less likely “to remain within the boundaries of the State, and to put their education to productive social or political use within the State.”<sup>96</sup> But Brennan pointed out that Texas in fact had no assurance that *any* child, documented or otherwise, would “employ the education provided by the State within the confines of the State’s border.”<sup>97</sup> Moreover, the savings from denying education to undocumented students were “wholly insubstantial in light of the costs involved to these children, the State and the Nation.”<sup>98</sup>

Brennan erred in his application of these arguments and again went against settled constitutional practice. In dismissing Texas’s justifications, he stressed that the burden was on the state to prove evidence to back up its assertions, both that irregular migrant children impose significant costs over-and-above lawfully resident children, and that the state would provide a better service by excluding irregular migrant children. In fact, however, instead of requiring the evidence from Texas, the burden should have fallen on the Plaintiff children to demonstrate those claims. That is, that the special costs of irregular migrant children were negligible, and that no benefit would accrue from their exclusion.<sup>99</sup>

This rule can be seen in the case of *Nguyen v. INS*,<sup>100</sup> which stated that “the defender of the classification has no obligation to produce evidence to sustain the rationality of a statutory classification.”<sup>101</sup> The burden falls upon “the one attacking the legislative arrangement to negate every conceivable basis which might support it, whether or not the basis has a foundation in the record.”<sup>102</sup>

A further flaw in the case’s reasoning is exposed by the dramatic change in the scale of the empirical situation of undocumented immigrant children. In 1980, two years before *Plyler*, the total number of undocumented immigrants in the US was put at two million.<sup>103</sup> It is estimated there are now approximately eleven million undocumented immigrants.<sup>104</sup> The total number of US schoolchildren who are irregular is approximately 700,000.<sup>105</sup> There is also a heavy burden on particular states with high numbers of undocumented migrants, for example, California, Nevada, Texas, and New Jersey all have undocumented populations of higher than 5%, compared to a national average of 3.5%.<sup>106</sup>

As a result, critics of the case argue that Brennan’s empirical premises are inaccurate and outdated,<sup>107</sup> and that the case is no longer viable because of the dramatic increase in the burden to public schools because of irregular immigration, which is stretching public resources beyond the limit and thus denigrating the quality of public education.<sup>108</sup>

There are pertinent policy arguments against overturning the decision, most obviously the cost of not educating this number of children. However, Brennan relied on some claims of an empirical nature in his rebuttal of Texas’s justifications for the statute, and the evidence behind those claims has changed in the 35 years since the case. He also reversed consistent constitutional practice on the burden of proof. These factors could prove simply too persuasive to ignore should the issue arise in a case before the current Supreme Court, or in discussions in Congress.

A re-visitation of the case, perhaps brought on by an executive order, could mean that the Supreme Court revisit Brennan’s improvisational “heightened rational basis” constitutional analysis and view it as inadequate. It may find persuasive the arguments that circumstances have changed sufficiently and that the case should be viewed in a new light. The chances of this are heightened as Republican appointee judge Neil Gorsuch has filled the current vacancy in the Court. It leaves the Court with five justices appointed by Republican presidents, who have taken a much tougher line on immigration measures, as opposed to four from Democrats.

Attitudinal model theories such as those forwarded by Howard Spaeth and Jeffrey Segal posit that judges make their decisions through a combination

of his or her ideological views, policy preferences, and the law.<sup>109</sup> Given the change in the composition of the Supreme Court, the irregularity of the confused constitutional method of Brennan's majority could be the justification needed to allow the ideologies of this more right-leaning Court's to come to the fore in its decision making.

A further potential risk to *Plyler* is exposed by examining the relationship between the branches of the state. Critics such as Livingston have argued that constitutional attack based on *Plyler v. Doe* would fail if a statute were authorized expressly by Congress, as the judiciary would likely be required to defer to it.<sup>110</sup> This, he argues, is because the constitution gives Congress exclusive authority to regulate the entry and deportation of aliens within the US<sup>111</sup> and Congress is given greater deference than the State Legislatures over the regulation of illegal aliens.<sup>112</sup>

However, these criticisms underestimate the way the Court has found ways of circumventing or simply overruling Congressional legislation when it feels strongly enough. Nevertheless, a key facet of Justice Brennan's rejection of Texas's arguments in the case was that he could not find evidence of Congressional intention to ban irregular migrant children from the classroom. As such, the State could not argue that they were following federal policy by enacting § 21.031. Therefore, if Congress were to pass a bill explicitly restricting these rights, although it is misguided to say that the judiciary would be automatically required to defer, it would – at the very least – undermine a key argument made in *Plyler* by its majority. The Republican Party now controls both houses of Congress and does not fear a Presidential veto. Congressional action remains a real threat to the decision.

### *The Situation Since Plyler*

As is evident from its position as the leading case since 1982, the case has proved unexpectedly resilient.<sup>113</sup> But the challenges *Plyler* has faced since the decision was reached further illustrates how it has been – and will likely continue to be – under threat.

In 1983 the Supreme Court heard *Martinez v. Bynum*,<sup>114</sup> and considered the Texas law that allowed public school districts to deny tuition-free admission to minors living apart from their parents, if the child lived in the district mainly to attend school for free.<sup>115</sup> The case is the only K-12 residency-related immigration case the Supreme Court has heard since *Plyler*, and although it was held that he could not attend, the case did not limit *Plyler's* application. The other challenges thus far have been predominantly legislative.



Two states have passed laws which have directly threatened the decision in *Plyler*. The laws, by California in 1994, and Alabama in 2011, are described by Ben Winograd as “naked efforts to return the issue to the Supreme Court.”<sup>116</sup> On a wave of anti-immigrant sentiment, the California State Legislature approved Proposition 187<sup>117</sup> by 59% to 41%, which prohibited state and local governments from providing education – as well as health care and other social services – to irregular migrants.<sup>118</sup> The proposition also required schools to report unauthorized parents or guardians to immigration authorities. It was declared unconstitutional by District Court Judge Pfaelzer<sup>119</sup> and although an appeal to the Court of Appeals was filed, the election of Democratic Governor Gray Davis saw the appeal dropped.<sup>120</sup> Alabama State Legislature enacted the HB 56 Bill in 2011, requiring school districts to determine the immigration status of all newly enrolling students and report the findings to state authorities each year.<sup>121</sup> Although the bill did not actually ban undocumented students from attending school, it had a significant impact, and more than 13% of Latino children withdrew in the first six months of the school year.<sup>122</sup> The Court of Appeals temporarily blocked the provision and in October 2013 a settlement was reached which permanently blocked the measure.<sup>123</sup> The bill was, however, extremely popular among Alabama voters. In a poll commissioned by the Federation for American Immigration Reform, 75% of voters supported HB 56, with 52% indicating a strong level of support.<sup>124</sup>

In 1996, Republican California Representative Elton Gallegly proposed an amendment to an immigration bill explicitly overruling *Plyler*, to deny a free public education to undocumented students.<sup>125</sup> It was a bold attempt to challenge *Plyler* and would have barred 700,000 current students, and millions to follow, from the classroom. However, after a lengthy debate, an effort led by Democrats – but joined by a few Republicans – defeated the amendment after President Clinton had indicated his intention to veto the bill.<sup>126</sup> Many of the Republicans who joined the Democrats in campaigning against the amendment still supported the substance of Gallegly’s intervention, but once it was clear that Clinton would veto, preferred to allow the amendment to fail in order to pass the entire bill.<sup>127</sup> The bill, even without the amendment, remained significantly restrictive in terms of irregular migrant’s rights.<sup>128</sup>

Although these measures were eventually thwarted by the various checks and balances of the American system, their initial popularity and success serve as warnings of the populist threat to *Plyler*.<sup>129</sup> They also illustrate that such threats find their root at every level of the political system.<sup>130</sup>

This is compounded by the fact that tackling the costs of irregular migrants in the US remains popular, and thus the parties could view denial

of education rights as politically expedient. In a poll of American adults, 55% opposed providing free public education to irregular migrant children,<sup>131</sup> while as many as 62% viewed irregular migrants more generally costing the taxpayers too much through their use of public services.<sup>132</sup>

As already discussed, there have also been a number of legislative acts in recent years which indicate the extent of anti-immigrant feeling in the US and the translation of that into policy. The most prominent of these is the Arizona SB 1070, described as “the broadest and strictest immigration measure in generations.”<sup>133</sup> It did not touch on the issue from *Plyler v. Doe*, but it did impose several measures which were extremely restrictive in the name of enforcing federal immigration laws, such as requiring a law enforcement agent who has a reasonable suspicion that an individual is an illegal alien to request proof that the individual is within the US lawfully,<sup>134</sup> and allowing an individual to sue local officials for failing to enforce the immigration laws.<sup>135</sup> Several other states have enacted “copy-cat” laws which are equally restrictive.<sup>136</sup>

## CONCLUSION

The implicit inclusion of the right to education often comes under explicit threats in present times; whether through plans to expressly exclude them from the provision of education or through practical obstacles placed in their enjoyment of the right. It is true that *Plyler* has thus far proved resilient in resisting attempts to overturn it. However, the drastic change in the political situation, the vulnerability of *Plyler*'s constitutional position, and contemporary attitudes towards immigration combine to suggest that current conditions place education rights enshrined in *Plyler* at risk. Despite the many legal sources that declaim and uphold the right, political developments have brought challenges to both the scope and extent of the right and its qualitative content. Sometimes there are barriers which are not designed to fail irregular migrant children specifically, but result from measures which are not considerate of the special needs of irregular migrant children and their specific vulnerabilities as undocumented people.

The situation of irregular children today is much changed and this creates doubt about the continued application of *Plyler*. *Plyler* lacks a robust constitutional framework to constitute a sound legal basis which when put together with its reliance on claims of an empirical basis, threaten its legitimacy. It remains susceptible to more anti-immigrant Congressional legislation.

And, it faces a contemporary context of anti-immigrant sentiment, a significant portion of which has been, and is being translated, into law.

In short, *Plyler v. Doe* is not an effective protection for the right to education for irregular migrant children in contemporary US. Should the issues arise again, the right to education enshrined in *Plyler* faces considerable risks. Congressional legislation which may proclaim the right would be a stronger protection for undocumented children and their access to education. Alternatively, a future case which upholds *Plyler* while clarifying the appropriate constitutional standard of review and utilizing up-to-date empirical evidence would also provide a healthier framework for the right to education. Given current conditions these alternatives do not seem likely, but the suggestions are forwarded as future circumstances may yet change and bring better promise for undocumented migrant children.

## NOTES

1. 457 U.S. 202 (1982).
2. *Plyler* at 204.
3. International Organization of Migration. Key Migration Terms. Retrieved from <http://www.iom.int/key-migration-terms>. Accessed on February 28, 2017.
4. See data presented by Center for Migration Studies. Retrieved from <http://cmsny.org/publications/warren-usbornchildren/> Accessed on June 2, 2017.
5. For discussion on higher education, see [Olivas, M. \(2009\)](#) and [Nguyen and Serna \(2014\)](#).
6. For an account of the ban see [Talbot \(2017\)](#).
7. See [Bierman \(2017\)](#).
8. Executive Order 13768 ‘Enhancing Public Safety in the Interior of the United States’. Enforcement of the withdrawing of federal funds for sanctuary cities has since been halted by a nationwide preliminary injunction in the face of judicial challenges, see [Ford \(2017\)](#).
9. A sanctuary city is one which refuses to cooperate with national government in implementing immigration policies. See generally [Villazor \(2008\)](#).
10. See [Kopan \(2017\)](#).
11. Section 6 of the order also significantly expanded the category of people classified as “priorities for removal” to include making all aliens who have been charged with a crime, or even those believed could have been charged with a crime.
12. See [Shear and Nixon \(2017\)](#).
13. See [Hing \(2017\)](#).
14. This has also since been blocked by the judiciary, see [Fernandez \(2017\)](#).
15. See [Shear and Hirschfield Davis \(2017\)](#).
16. See [Alcindor and Gay Stolberg \(2017\)](#). Congress has until 5th March 2018 to legislate.

17. See [Dart \(2017\)](#).
18. See [LA Times \(2017\)](#).
19. See [Neuman and Burnett \(2017\)](#).
20. See [Keierleber \(2017\)](#).
21. *Ibid.*
22. See [Radoff \(2011\)](#) at 438.
23. See [Arendt \(1951\)](#) at 230.
24. See [Krause \(2008\)](#).
25. See [Da Lomba in Cholewinski \(2005\)](#).
26. See [Dauvergne \(2004\)](#) at 588.
27. See [Worsfold \(1974\)](#).
28. See [Federle \(1992\)](#).
29. See [Freeman \(1992\)](#).
30. [Bhabha \(2009\)](#).
31. *Ibid.*
32. Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education (Twenty-first session, 1999) U.N. Doc. E/C.12/1999/10.
33. Lee, S. E. Education as a human right in the 21st century. *Democracy & Education*, 21(1).
34. See [Drachmann \(2006\)](#) at 91.
35. Bhabha, *supra* note 11 at 439.
36. “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.”
37. Article 28: “States Parties recognize the right of the child to education.”
38. Articles 13 and 14 recognise “the right of everyone to education.”
39. See [Dembour and Kelly \(2011\)](#).
40. 457 U.S. 202 (1982).
41. See [Motomura \(2014\)](#).
42. See [Livingston \(1984\)](#) at 601.
43. *Ibid.*
44. Section 1: “No State shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws.”
45. *Plyler*, 457 U.S. at 210.
46. *Ibid.*, at 212.
47. *Ibid.* at 215.
48. [Bosniak \(2010\)](#).
49. See [Soleimani \(2010\)](#).
50. See [Grandrath \(2011\)](#) at 777.
51. See [Holozyc-Pimentel \(2015\)](#).
52. *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).
53. Soleimani, *supra* note 49 at 198.
54. See, e.g. *United States v. Virginia*, 518 U.S. 515 (1996).
55. *Plyler*, 457 U.S. at 219.
56. See e.g., *Korematsu v. United States* 323 U.S. 214 (1944). The courts were meant to view these laws as “immediately suspect.”
57. See [Pettinga \(1987\)](#) at 781.
58. 411 U.S. 1 (1973).

59. See [Lynch \(1998\)](#) at 954.
60. Soleimani, *supra* note 49 at 199.
61. *Plyler* at 225. Emphasis added.
62. Holoszyk-Pimentel, *supra* note 26.
63. Soleimani, *supra* note 49.
64. *Plyler*, 457 U.S. at 220.
65. *Ibid.*
66. *Ibid.* at 221.
67. [Del Dickson Ed. \(2001\)](#).
68. Motomura, *supra* note 41.
69. *Plyler* at 222.
70. *Ibid.* at 224.
71. 347 U.S. 483 (1954).
72. *Ibid.* at 494.
73. *Plyler* at 235.
74. *Ibid.* at 222. Emphasis added.
75. Soleimani, *supra* note 49 at 207.
76. *Plyler* at 247.
77. *Ibid.*
78. *Ibid.* at 248.
79. *Ibid.* at 249.
80. *Ibid.* at 245.
81. *Ibid.* at 251.
82. See [Gerety \(1983\)](#) at 379.
83. [Perry \(1983\)](#) at 329.
84. [Schuck \(1984\)](#).
85. [Moltenbrey \(1983\)](#) at 1366.
86. Pettinga, *supra* note 57 at 802.
87. *John Doe No. 1 v. Georgia Dept. of Public Safety* 147 F. Supp. 2d 1369 (2001).
88. *De Canas v. Bica* 424 U.S. 351 (1976).
89. *Plyler* at 226.
90. *Ibid.*
91. *Ibid.* at 229.
92. *Ibid.*
93. *Ibid.*
94. *Ibid.*
95. *Ibid.*
96. *Ibid.* at 230.
97. *Ibid.*
98. *Ibid.*
99. Soleimani, *supra* note 49 at 210.
100. 533 U.S. 53 (2001).
101. *Ibid.* at 75.
102. *Ibid.*
103. See [Chapa \(2008\)](#) at 186.
104. See [Migration Policy Institute \(2016\)](#).

105. See [National Center for Education Statistics \(2016\)](#) and [Pew Research Center \(2014a\)](#).
106. See [Pew Research Center \(2016\)](#).
107. See [Rosen \(1995\)](#).
108. See [Butler \(1996\)](#).
109. See [Spaeth and Segal \(2002\)](#).
110. Livingston, *supra* note 42 at 624.
111. US Constitution. Art. 1, s8, clause 4. "Congress shall have the power to... establish a uniform rule of naturalization."
112. Livingston, *supra* note 42 at 626.
113. See [Olivas \(2010\)](#).
114. 461 U.S. 321 (1983).
115. *Ibid.*
116. See [Winograd \(2012\)](#).
117. Cal. Ed. Code §§ 48215, 66010.8 (1994).
118. See [Del Olmo \(1996\)](#).
119. League of United Latin American Citizens v. Wilson 908 F. Supp. 755 (1995).
120. See [McDonnell \(1999\)](#).
121. Winograd, B., *supra* note 116.
122. See [Perez \(2012\)](#).
123. American Immigration Council.
124. Federation for American Immigration Reform.
125. The Amendment section 7 read: "States should not be obligated to provide public education benefits to aliens who are not lawfully present in the United States."
126. See [Wroe \(2008\)](#) at p. 138.
127. See [Schrag \(2000\)](#) at 180.
128. *Ibid.*
129. Soleimani, *supra* note 49 at 205.
130. *Ibid.* at 206.
131. See [PDK/Gallup \(2013\)](#).
132. Gallup, June 2010. Retrieved from <http://www.gallup.com/poll/1660/immigration.aspx>. Accessed on July 3, 2017.
133. See [Archibald \(2010\)](#).
134. S.B. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Sess. Laws I.
135. See [Behrends \(2012\)](#) at 81.
136. See [Gordon and Raja \(2012\)](#).

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