PLYLER v. DOE—EDUCATION AND ILLEGAL ALIEN CHILDREN

Recent Supreme Court opinions have shown increasing dissatisfaction with the rigid two-tier equal protection analysis developed by the Warren Court.[1] The Burger Court has not rejected this analysis outright. Instead, the present court has continued to apply the two-tier approach in form. However, in practice, the Court has employed various levels of scrutiny depending upon "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[2] The Court's refusal to explicitly adopt a sliding scale approach to equal protection has brought forth a number of opinions which apply more searching scrutiny under the usually deferential rational relation standard. These opinions have not provided any real indication as to when this closer nexus requirement between legislative goals and means will be required.

The apex of these decisions is *Plyler v. Doe*,[3] where the Court found a "quasi-suspect class" and a "quasi-fundamental right" to justify close scrutiny of legislation denying free public education to illegal alien children. While many would agree that there are serious constitutional issues raised when denying education to any class of children, the Court's analysis in *Plyler* contributes little to the larger questions this case presents. As the dissent argues, the case "rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in these particular cases."[4]

The specific issues presented in *Plyler* are whether the Texas legislature could constitutionally withhold from local school districts state funds for the education of children not legally admitted into the United States, and could that legislature constitutionally authorize school districts to deny enrollment to children not legally admitted into the country.[5] The case is actually a consolidation of two suits attacking the legislation. One suit was a class action on behalf of certain school age children of Mexican origin residing in Smith County, Texas who could not establish that they had been legally admitted into the United States. The other suit challenged the constitutionality of the statute and various local practices undertaken on the authority of the provision. The district court granted a preliminary injunction to enjoin the defendants[6] from denying free education to the plaintiffs. The court ultimately held that illegal aliens were entitled to the protection of the Equal Protection Clause and that the Texas statute did not pass even a minimal

1. Guther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, HARV. L. REV. 1, 17 (1972).

2. San Antonio School District v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J. dissenting).

3. 102 S. Ct. 2382 (1982).

4. *Id.* at 2408-09.

5. The Supreme Court did not reach the question whether the Texas statute was preempted by federal law and policy which was discussed by the lower courts. *Id.* at 2391 n.8.

6. The defendants were the State of Texas, and the Texas Education Agency and local officials.

level of scrutiny.[7] The Court of Appeals for the Fifth Circuit affirmed, agreeing with the lower court that the statute was "constitutionally infirm regardless of whether it [was] tested using the mere rational basis standard or some more stringent test."[8]

The Supreme Court opinion also evidenced a similar reluctance to decide the appropriate standard of review. However, the threshold question was whether the Equal Protection Clause even covered illegal aliens. The Court quickly rejected the contention that the Equal Protection Clause did not extend to illegal aliens, reasoning that aliens have long been guaranteed due process by the fifth and fourteenth amendments. The Court reasoned that the due process and equal protection "provisions were fashioned to protect an identical class of persons and to reach every exercise of State authority."[9] Not only is this decision supported by the policy of the Equal Protection Clause but it is well-supported by cases involving aliens.[10]

The central issue in *Plyler v. Doe* is the state's responsibility to provide free education to illegal alien children. Under traditional equal protection analysis, cases are basically decided when the Court resolves the standard of review to be employed. Strict scrutiny is usually fatal in fact and rational relation is usually a rubber stamp for legislative action.[11] However, early in the *Plyler* opinion the Court states that this decision involves neither a suspect class[12] nor a fundamental right.[13] The plurality states that the legislative classification "while not facially invidious, nevertheless give[s] rise to recurring constitutional difficulties. . . ."[14] Furthermore, the Court has "sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State."[15] Therefore, in order for the statute to be a rational exercise of the state power it had to further a substantial state interest. This is in essence a middle level of scrutiny.

Middle level scrutiny is not a novel idea in constitutional analysis,[16] but the substantial state interest is a very new aspect of the rational basis test. The manner in which the Court determines this level of scrutiny is also unique. Instead of focusing on the nature of a classification involving illegal alien children,[17] the Court draws an analogy to the classifications based on illegitimacy and the importance of education to justify heightened scrutiny—neither of which has ever been singularly sufficient for heightened

7. *Plyler*, 102 S. Ct. at 2390.

8. Doe v. Plyler, 628 F.2d 448, 458 (1980).

9. *Plyler*, 102 S. Ct. at 2392.

10. *Id.* at 2391 citing cases involving aliens and due process where the reasoning is the same; Shaughnessy v. Mezei, 345 U.S. 206 (1953); Wong Wing v. United States, 163 U.S. 228 (1896); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Mathews v. Diaz, 426 U.S. 67 (1976).

11. *See generally* Guther, *supra* note 1, at 1.

12. *Plyler*, 102 S. Ct. at 2396, n.19.

13. *Id.* at 2397 citing *San Antonio School District*, 411 U.S. at 35.

14. *Id.* at 2395.

15. *Id.*

16. Craig v. Boren, 429 U.S. 190 (1976).

17. Court has usually looked at whether the classification involved a discrete and insular minority; whether it involved an immutable characteristic; and the history of discrimination against the group. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

scrutiny.[18] Close analysis of *Plyler* therefore reveals the extent relative constitutional importance plays in the decision. Indeed the opinion only makes sense when viewed from the perspective demonstrated by history and experience that a classification involving aliens and education generally is in contradiction of equal protection principles.[19] The conclusion the Court reaches is sensible but is logically inconsistent and therefore can stand for little beyond its specific facts.

ILLEGITIMATES AND EQUAL PROTECTION

While the Court rejects the idea that illegal aliens are a suspect class,[20] it finds constitutionally disturbing that the result of the legislation is "the spector of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents."[21] However, it is the fact that the effect of the laws falls mainly on the children, who have not "elect[ed] to enter our territory by stealth and in violation of our law"[22] that is ultimately used to justify the higher level of scrutiny and the striking down of the law. Because the children can affect neither their parents' conduct nor their own status, the Court finds that penalizing the child is an ineffective as well as unjust way of deterring parental conduct. Hence, the Court concludes that the legislation is irrational. The justification for the Court's rationale concerning a child's inability to affect his status is drawn from decisions involving illegitimacy.

It is ironic that part of the Court's reasoning is based on drawing an analogy between alien children and illegitimate children because the illegitimacy cases have been anything but clear and consistent in their use of heightened scrutiny. The illegitimacy cases[23] as discussed herein, are another example of the Court's use of the sliding scale approach in practice if not in form. Although not subjected to strict scrutiny as a suspect class, the fact that children suffer for the action of their parents have made courts look more closely at this type of classification. It seems logical that the state should be prevented from using classifications based on characteristics not controlled by the individual but this element alone does not require heightened scrutiny of the classification. Wealth, for example, is not something controlled by the individual and yet is is not a suspect classification.[24]

The Court also fails to recognize the distinctions which can be drawn between the illegitimacy cases and education for illegal alien children. The aspect of the illegitimacy doctrine which the Court finds most convincing is the children's lack of control over the status which results in the discrimination. This is clearly a strong argument against the statute but an idea whose parameters are not adequately explored. The Court has also upheld a par-

18. As described herein illegitimacy has been subjected to heightened scrutiny, but it seems to be because of the privacy interests involved.

19. *See Plyler*, 102 S. Ct. at 2398.

20. *Id.* at 2396 n.19.

21. *Id.* at 2396.

22. *Id.*

23. Levy v. Louisiana, 391 U.S. 68 (1968); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Trimble v. Gordon, 430 U.S. 762 (1977).

24. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970).

ent's right to make certain decisions regarding a child even though others might believe that it is the child who will suffer. For example, *Wisconsin v. Yoder* gave Amish parents the ability to discontinue their child's education in public school after the eighth grade.[25] The child's education is thus viewed as an extension of the parents' freedom of religion. To a certain extent *Yoder* is indicative of the social and judicial idea that children do not enjoy the same level of individualized constitutional rights as adults.[26] This is not to suggest that in the case of classifications based on illegitimacy, the Court is not justified in employing special judicial scrutiny; it suggests only that the doctrines developed in this area do not automatically apply to illegal alien children.[27]

There are other aspects of illegitimacy which might make it distinguishable from illegal alienage. An illegitimate child is totally without control over his status. His status—his very existence depends on the actions of others. On the other hand, children who are illegal aliens have actually committed an illegal act by entering the country without the proper papers. It is true that as a practical matter the children had little or no control over entering the United States, but whether this is of constitutional significance remains unanswered by the Court. It is this type of failure which results from a refusal to recognize the sliding scale approach. Under a more penetrating balancing of the interests involved, the Court would probably have made a more careful assessment of the issues.

Another aspect of the illegitimacy cases which makes them of limited value is the privacy issue involved. These cases involve more than state action based on classifications of illegitimate children, because the laws were intended to have an impact on sexual and familial relations.[28] In *Levy v. Louisiana*,[29] the Court reiterated that it is usually deferential to economic and social legislation, but extremely sensitive when the classifications involve basic civil rights such as the "intimate, familial relationship between a child and his own mother."[30] It is within the context of due process litigation that the Court has developed the idea that privacy[31] and family relationships[32] are fundamental rights deserving of closer scrutiny. However, fundamental rights recognized under the Due Process Clause should also be recognized under the Equal Protection Clause.

The birth control and abortion cases have been interpreted as restricting the state's ability to interfere with the individual decisions of whether or when to have a child.[33] As an extension of this reasoning the Court would also have to look more closely at laws burdening the children born as a result of the individual decision-making. Thus, an implicit rationale behind

25. Wisconsin v. Yoder, 406 U.S. 205 (1972).

26. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1077-82 (1978).

27. Court cites the illegitimacy cases without discussion.

28. The state goal often cited in these cases is the restriction of extra-marital sex and preservation of the family.

29. 391 U.S. 68 (1978).

30. *Id.* at 71.

31. *See* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Whalen v. Roe, 97 S. Ct. 869 (1979).

32. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

33. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

higher scrutiny in the illegitimacy cases—privacy, is absent in the *Plyler* decision.

The above analysis highlights the difficulty of using some of the doctrines developed in another area without full analysis. Citing *San Antonio School District v. Rodriguez*[34] for the proposition that "[p]ublic education is not a 'right' granted to individuals by the Constitution,"[35] the Court goes on to cite cases from various contexts to prove the importance of education. The initial problem is that the Court fails to deal with the most obvious distinction between the cited education cases and the issue in *Plyler*. In the cited cases education is involved, but so are other fundamental rights which are sufficient to evoke a higher level of scrutiny, such as freedom of religion,[36] racial discrimination,[37] and freedom of speech.[38] Education was the issue in the cited cases but only to the extent it interfaced with a denial of these other fundamental rights. It is somewhat disingenuous to suggest that these decisions were intended to raise education above the level of other social benefits such as housing and food.

It is interesting that the majority chooses this manner of explaining the heightened scrutiny of education rather than developing some of the avenues left open in *Rodriguez*. *Rodriguez* specifically states that the decision is restricted to situations where there is at least a minimal level of education provided.[39] The Court refused to decide what would happen if the state denied a class of children any free education at all. In *Plyler*, illegal alien children were denied enrollment and the local school districts were denied funds. It is thus particularly strange that the Court did not proceed on an absolute deprivation theory.

The deprivation theory would also be more in line with other social benefit cases. Although the government generally has no affirmative duty to provide social benefits under the deprivation theory, once a program is established which serves a basic need, the Court will closely consider government procedures which result in the absolute deprivation of those needs. In *Sniadach v. Family Finance Corp.*,[40] *Fuentes v. Shevin*,[41] and *Goldberg v. Kelly*,[42] the Court protected individuals from deprivation of wages, household goods, and welfare payments respectively through procedural safeguards. In *Shapiro v. Thompson*,[43] and *Memorial Hospital v. Maricopa County*,[44] the Court was concerned that the selection criteria for benefits was one which focused on the need for welfare and medical services. Like education, there was no fundamental right to these services, but rather the Court was concerned with the repercussions if classes of persons were denied these services. This reasoning seems just the type to support a greater scrutiny of a classification which absolutely deprives one class of children a benefit as

34. 411 U.S. 1 (1973).
35. *Plyler*, 102 S. Ct. at 2397.
36. Wisconsin v. Yoder, 406 U.S. 205 (1972).
37. Brown v. Board of Education, 347 U.S. 483 (1954).
38. Meyer v. Nebraska, 262 U.S. 390 (1923).
39. *San Antonio School District*, 411 U.S. at 37.
40. 395 U.S. 337 (1969).
41. 407 U.S. 67 (1972).
42. 397 U.S. 254 (1970).
43. 394 U.S. 618 (1969).
44. 415 U.S. 250 (1974).

important as education. It is unclear why the Court did not delve into this reasoning but perhaps it is another example of the less than complete analysis which results when the Court merely pays lip service to the two-tier analysis of equal protection.

CONCLUSION

This casenote has been highly critical of the opinion in *Plyler v. Doe*, however it should be stressed that it is the reasoning rather than the result which is disturbing. For blacks and other minorities it is encouraging that the Court has recognized, at least implicitly, that equal protection is a far more complex concept than simply whether a suspect class or a fundamental right is involved. But a badly reasoned opinion such as *Plyler v. Doe* does little to advance that idea.

RUTH JONES