PLYLER AT THE CORE: UNDERSTANDING THE PROPOSITION 187 CHALLENGE

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I. INTRODUCTION

California Proposition 187 mandates a series of actions by state and local officials to end services to undocumented immigrants and their children. In particular, Proposition 187 calls for the removal of undocumented immigrant children from elementary and secondary schools in the face of a 1982 United States Supreme Court ruling denying Texas' efforts to do precisely the same thing.[1]

Many forces have propelled Proposition 187 to the forefront of current debate—all extremely volatile in political terms. There is the "strategic wedge" argument, which holds that Proposition 187 was a device to aid the reelection of California Governor Pete Wilson by focusing voter attention and anger on a problem for which the incumbent could not be held responsible. There is the "Network" argument, the idea that Proposition 187 captured the sense of an electorate which was, as the actor in the film "Network" proclaimed, "mad as hell and . . . not going to take it anymore," whatever "it" is. There is the simmering tension over the rising Latino population in a state that has more than once bubbled over with racial and ethnic reaction—consider the waves of anti-Asian sentiment from the late nineteenth century through the World War II Japanese internment, and the more contemporary reactions against Vietnamese, Chinese, and Cambodian refugees.

Whatever forces drove the campaign, there is no question that Proposition 187, at its core, was a direct challenge to *Plyler v. Doe* (*Plyler*),[2] the 1982 United States Supreme Court case overturning a Texas law banning the children of undocumented immigrants from attending public schools. Despite efforts to distinguish the California initiative from its Texas predecessor, the California action was a deliberate challenge to the current

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1. Plyler v. Doe, 457 U.S. 202 (1982).
2. *Id.*

Supreme Court to overturn the opinion written by Justice William Brennan over a decade ago.

The challenge to *Plyler* was not a matter for political insiders alone, since it was an initiative before the voters. The Legislative Analyst's summary provided in the California Ballot Pamphlet stated, "The exclusion of suspected illegal immigrant children from public schools would be in direct conflict with the United States Supreme Court's ruling in Plyler versus Doe that guarantees access to public education for all children in the United States. Consequently, this provision of the initiative would not be effective."[3] If the school restriction provisions were to go into effect, the Legislative Analyst assumed that up to 300,000 students in grades K-12 could be removed from school (out of a total of 5.3 million students in the state).[4] Moreover, if the federal courts were to conclude that the provisions to exclude students or to use students to inform on parents violated civil rights laws, the result could be a loss of $2.3 billion in federal aid.

As the legal challenge to Proposition 187 moves forward, and as other states consider their own actions, it is important to better understand the process behind the 1982 *Plyler* decision. It was carefully considered dialogue and compromise between conservative "local control of schools" champion Justice Lewis Powell and the more liberal Justice William Brennan that brought about the opinion. The lesson from *Plyler* is that, aside from being a soft-hearted liberal mandate, it was a carefully and pragmatically reasoned decision that brought liberals, moderates, and conservatives together. Notwithstanding the current makeup of the Court, this article contends that *Plyler* should survive.

To understand *Plyler*, it is essential to step back in time to the 1970s and follow the development of the Texas policy and the legal challenges that it engendered. This Article tells the story of the development of the *Plyler* opinion and illustrates the nature of the discussion between Justice Powell and Justice Brennan that shaped that ruling. An understanding of that story is essential to a proper examination of the legal challenges to Proposition 187.

II. THE TEXAS CHALLENGE TAKES SHAPE

The litigation that became *Plyler v. Doe* emerged from two sets of legal challenges to Texas efforts to remove the children of

3. CALIFORNIA BALLOT PAMPHLET GENERAL ELECTION: Nov. 8, 1994, at 51.
4. *Id.* at 52.

undocumented immigrants from the public schools: *Doe v. Plyler*[5] and *In re Alien Children Education Litigation.*[6]

A. *The Tyler, Texas Battle*

Prior to 1975, all children who resided in Texas were able to attend public schools.[7] Those schools received state funds based solely upon the number of students attending, without regard to their immigration status.[8] In 1975, the State Commissioner of Education sought an opinion from the state attorney general as to the status of undocumented children in Texas schools. The opinion plainly found that there was no basis for denying educational opportunities to any children in the state, and specifically concluded that the words of the state education statute "do not permit exceptions to be created by local boards."[9] The attorney general also raised two important points. First, the position of the legislature, as well as two prior attorney general opinions dating back to 1921, were consistent with the present interpretation.[10] Second, there was a serious question as to whether the state legislature could take action to exclude undocumented immigrant children in light of federal law.[11]

Despite the warning, the Texas legislature moved to exclude the children of undocumented immigrants from public schools within a month of the attorney general's pronouncement. The legislature amended the education code by adding, after the words "all children" in the provision permitting students to attend free public school, the critical qualifying language "who are citizens of the United States or legally admitted aliens."[12] While local school districts were given the discretion to decide whether to admit other students on a tuition-paying basis, undocumented immigrant children would not be counted in average daily attendance figures for purposes of state financial aid. The act passed on a voice vote with no debate, no studies prior to its passage, and no documentation of a legislative history.[13]

The reactions by school districts to the legislative changes were uneven. For example, the Tyler District continued to admit undocumented children until 1977. District officials determined at that time that there was an increase in the number of undocu-

5. 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980).
6. 501 F. Supp. 544 (S.D. Tex. 1980), *aff'd*, 457 U.S. 202 (1982).
7. TEX. EDUC. CODE ANN. tit. 2, § 21.031 (West 1972).
8. TEX. EDUC. CODE ANN. tit. 2, § 15.01(b) (West 1972).
9. 586 Op. Att'y Gen. 3 (1975).
10. *See Alien Children*, 501 F. Supp. at 554 n.15.
11. *Id.*
12. TEX. EDUC. CODE ANN. tit. 2, § 21.031 (West 1980).
13. *Alien Children*, 501 F. Supp. at 555 n.19.

mented children attending area schools. Concerned that their policy of admitting undocumented children would attract additional undocumented immigrants to the community, the District Board of Trustees adopted a policy, beginning with the 1977-78 school year, that prohibited undocumented children from attending school unless their parents paid the full cost of tuition—$1,000 per year. They reached that amount by dividing the total cost of district operations by 16,000—the number of students then attending. The total number of undocumented immigrant children in the district at the time was less than 50.

In September of 1977, the Mexican American Legal Defense and Educational Fund (MALDEF) filed a class action suit for the parents of over a dozen named children, on behalf of all undocumented children in the district. The suit sought a preliminary injunction to allow the students to attend school on the grounds that the Texas statute and its implementation in Tyler's policy violated the Equal Protection Clause of the Fourteenth Amendment and was preempted by federal immigration law. The suit was the leading edge of a wave of legal challenges to come over the next eighteen months.

Judge Justice of the Tyler Division of the Eastern District of Texas recognized the potential importance of the case and immediately informed the state attorney general and the United States Department of Justice of the litigation. The state was allowed to intervene as a defendant and the Civil Rights Division of the Department of Justice entered the case as *amicus curiae.*

The district court granted the preliminary injunction on September 12, 1978 and moved forward to hearings on a permanent injunction, held in December. The state expressed concerns that an examination of the situation in Tyler was not a fair context in which to judge the state statute, given that other regions of the state were far more likely to experience the effects of large numbers of undocumented children than the Tyler District.

Judge Justice found that the children involved in *Doe v. Plyler* came from families who had lived in the community for three to thirteen years. Some of the families included children born in the United States who were citizens, but whose parents and siblings were undocumented immigrants. If not for the new Texas and Tyler District policies, all of the children would be attending local schools. The court found that none of the families were able to pay the $1,000 tuition charge required in order to admit their children in school.

Judge Justice acknowledged a number of studies submitted by Texas indicating a significant increase in the immigrant school age population. The evidence demonstrated that the influx of

new immigrants caused serious problems in the border areas and larger cities.[14] The studies also found that these children presented special needs:

> [T]he children generally speak little or no English and are badly educated and over age for their grade level. Special bilingual education for these children is indispensable, yet it is difficult to find qualified personnel for such programs, which also require a disproportionate amount of teacher attention. Additionally, these children tend to come from poor families. Their residence in a school district thus does little to offset the additional cost by adding to the tax base.[15]

Most of the children, however, came from legal immigrant families and the findings did not distinguish between legal and illegal immigrants. The comments about poverty were irrelevant to the availability of public education. There were any number of poor children in the schools with a host of needs without regard to their immigration status. No one argued that poor children, as such, could be excluded from the public schools simply because of their special educational problems.

Judge Justice also found that calculating the impact of undocumented immigrant children was very difficult given that more than a quarter of Texas' education budget consisted of fixed costs. Furthermore, the actual financial burden from undocumented immigrants was unevenly distributed within the state. Additionally, it was difficult to calculate how much would be saved by excluding these children. Even with teacher salary cuts, one of the few areas where substantial savings might be realized, reductions in staff would assume relatively even distributions of students in sufficient concentrations to justify the elimination of teacher positions.[16] Moreover, presumed savings from teacher salary cuts would not be uniform since the more expensive tenured teachers would not be terminated until all of the much lower paid nontenured entry level or temporary instructional staff were terminated.[17] The Houston Associate Superintendent testified that in the urban setting each Mexican child, whether legal or illegal, could cost approximately $400 to $500 more per year to educate than other students. On the other

14. *Plyler*, 458 F. Supp. at 576.

15. *Id.*

16. If the reductions in grades and in student attendance were focused in a few schools, then reductions might be possible. If, however, there were modest reductions distributed over many schools and grades, then it would be unlikely that districts would be able to eliminate teaching positions, given the marginal reduction in workload.

17. Since these decisions are made by individual schools and districts, there might be some decisions that cut senior teachers, but most would eliminate more junior and therefore less costly employees.

hand, the federal government paid for a number of the programs, including breakfast, lunch, and clothing support programs as well as nearly half the cost of bilingual instruction.

At the same time, Judge Justice recognized that 50% to 60% of legal immigrants were at one point undocumented. Thus, there was a strong possibility that substantial numbers of the undocumented children would become legal residents for life. Nonetheless, whether they obtained legal status or not, they were likely to remain in the United States for the foreseeable future. Given that reality, there were consequences to denying these children an education. "[A]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, these children, without an education, will become permanently locked into the lowest socio-economic class."[18]

The court also took interest in the complex problem of illegal immigration and its impact on the state and its communities. There was no denying the state's argument that the undocumented immigrant population had grown over the years and that Texas felt a significant portion of the impact of that migration. It was not entirely clear, however, what that impact was or would be:

> The vast majority of illegal Mexican immigrants are young adult males (averaging around thirty years old) seeking employment opportunities in this country. Indeed, the great majority of the illegal alien class is not of concern in this case, since these workers are either single or leave their families in Mexico and come to the United States for short periods of time.[19]

Moreover, as Judge Justice found, it was dangerous to make assumptions that, because they were poor, undocumented immigrants presented a major drain on the welfare system. He noted that undocumented immigrants tended to be (1) "unwilling to risk exposure and hence sh[ied] away from any institutional involvement; and (2) there [was] no welfare tradition in Mexico to which they may have become accustomed."[20] Additionally, undocumented immigrants contributed to the tax base because consumer taxes and rents, which incorporated property taxes, were paid by virtually all residents regardless of their immigrant status.

On the merits, Judge Justice found that the Texas and Tyler policies violated both the Equal Protection Clause and the Supremacy Clause of the United States Constitution. The court began by finding that the Equal Protection Clause plainly ap-

18. *Plyler*, 458 F. Supp. at 577.
19. *Id.* at 578.
20. *Id.*

plied to "all persons," including undocumented immigrants. The court then addressed the standard two-tier test for equal protection, but found no need to establish a foundation for strict judicial scrutiny because the policies failed the far more lenient rational basis test. While there was a solid basis for heightened judicial scrutiny, given the condition and historic treatment of undocumented immigrants, this was an instance of a complete deprivation of a government benefit on the grounds of status, for which there was no rational basis. The arguments the state advanced about burdens on programs applied with equal force to legal immigrants. Since all residents pay consumption taxes that support public schools, there was no clear difference in terms of support.

Further, the policy penalized the children "who are not in a position to prevent the wrongful acts of their parents."[21] It was the parents, not the children, who made the decision to immigrate to Texas. He quoted Justice Powell's opinion in *Weber v. Aetna Casualty*, "Visiting condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ."[22]

The court found that the Texas policy, as implemented in *Doe v. Plyler*, also violated the Supremacy Clause because it was "inconsistent with the federal scheme and 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' . . . as expressed not only in the Immigration and Nationality Act but also in federal laws relating to funding and discrimination in education."[23] In addition to these two sets of domestic law, Judge Justice cited the United States' obligations under the Protocol of Buenos Aires to provide free public education to all children in member states.[24]

In January 1978, the state argued that it had understood the *Doe v. Plyler* case to be limited to the Tyler District alone and did not want the attorney general's arguments in that case to be interpreted to address all state-wide issues.[25] At the same time, the United States Department of Justice filed briefs arguing that the statute violated equal protection, but contending that the state had not violated preemption boundaries.

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21. *Id.* at 582.
22. 406 U.S. 164, 175 (1972).
23. *Plyler*, 458 F. Supp. at 590.
24. *Id.* at 592.
25. A state case was decided while the *Doe v. Plyler* suit was pending but there was no attempt to challenge the federal action on that ground. Hernandez v. Houston Indep. Sch. Dist., 558 S.W.2d 121 (Austin 1977).

B. *The Emerging Pattern of Challenges*

Following *Doe v. Plyler*, multiple challenges were brought in federal courts throughout Texas seeking a broader prohibition against the state policy. These cases were consolidated by the Judicial Panel on Multi-district Litigation into a proceeding entitled *In re Alien Children Education Litigation*, heard before Judge Seals in the Houston Division of the Southern District of Texas and ultimately decided in July, 1980. Judge Seals rejected both the State's effort to dismiss on abstention grounds[26] and plaintiffs' attempt to obtain summary judgment on collateral estoppel grounds in light of the earlier *Doe v. Plyler* ruling.[27]

In *Alien Children*, Judge Seals agreed with much of Judge Justice's *Doe v. Plyler* opinion with two notable exceptions. First, where Judge Justice had rejected the Tyler District policy using a rational basis test, Judge Seals went further and applied strict judicial scrutiny, which required the state to show that its policy was supported by a compelling state interest and that it employed means which were narrowly tailored to achieve those interests.[28] Judge Seals found that Texas failed to meet this burden. In so doing, he found that Texas was in the ironic position of counting undocumented children in its reporting to the federal government, which increased its Title I funds under the Elementary and Secondary Education Act of 1965,[29] while simultaneously denying those same children access to the state's schools.[30] The state failed to demonstrate that the basis for, or effect of, the statute substantially improved the quality of education. It was clear from the record that substantial numbers of innocent children suffered both educational and psychological injuries as a result of exclusion from school. Moreover, many of those children would ultimately remain residents of the United States. A significant number of them would perhaps later convert to legitimate status, but would suffer from their inability to participate effectively in the community, particularly in terms of exercising their First Amendment rights to participation in political discourse.[31]

Second, unlike Judge Justice, Judge Seals did not find the Texas program preempted by specific congressional legislation or by international law. Judge Seals specifically rejected the applicability of the Buenos Aires Protocol cited in the *Doe v. Plyler* opinion.[32] He found that international accords had not been im-

26. *Alien Children*, 501 F. Supp. at 551.
27. *Id.* at 552-53.
28. *Id.* at 582.
29. 20 U.S.C. § 2701, *et seq.* (1978).
30. *Alien Children*, 501 F. Supp. at 586.
31. *Id.* at 558-62.
32. *Id.* at 590.

plemented by domestic United States statutes and were not self-executing with respect to state or federal actions.

Texas appealed Judge Justice's decision to the Fifth Circuit. Like Judge Seals, the Fifth Circuit rejected the preemption ruling by Judge Justice, but affirmed the equal protection decision overturning the Texas policy.[33] While indicating that it could justify the application of strict scrutiny, the Fifth Circuit, like Judge Justice, found it unnecessary to do so. Finding none of the justifications offered by Texas adequate, the court concluded:

> This Court is acutely aware that Texas is suffering the local effects of a national problem. When national immigration laws are not or cannot be enforced, it is the states, most particularly the border states, that bear the heaviest burden. This Court can readily understand the problems faced by a state such as Texas. However, this Court cannot suspend the operation of the Constitution to aid a state to solve its political and social problems.[34]

In the midst of this appeal, Texas received a negative signal from the Supreme Court. Pending appeal, the state had obtained a stay of the injunction issued by Judge Justice in the *Doe v. Plyler* case from a panel of the Fifth Circuit. However, Justice Powell vacated the stay, and in so doing wrote:

> Although the question is close, it is not unreasonable to believe that five members of the Court may agree with the decision of the District Court . . . . (This vacation) recognizes that the [district] Court's decision is reasoned, that it presents novel and important issues, and is supported by considerations that may be persuasive to the Court of Appeals or to this Court. Further, it may be possible to accept the District Court's decision without fully embracing the full sweep of its analysis.[35]

III. The Supreme Court Odyssey

Justice Lewis Powell and Justice William Brennan played central roles in the Supreme Court's *Plyler v. Doe* decision. Justice Powell's actions were key because of his position on the Court and his pivotal role in education-related cases since 1973. His experience on local and state school boards in Virginia, and the fact that he clearly possessed the critical swing vote on a number of cases, made his views extremely important. Consider Justice Powell's key role in setting the context of *Plyler*, the handling of the case in the Supreme Court, and Justice Brennan's

33. Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980).
34. *Id.* at 461.
35. *Id.* at 450 n.5.

ultimately successful effort to obtain a majority against the Texas statute.

A. *Powell,* Rodriguez *and the Setting for* Plyler

Justice Powell was a critical player in Supreme Court rulings on education policy during the 1970s and 1980s. First, to many observers, he was an important conservative outsider on the Court (an important factor in his nomination to the Supreme Court).[36] Chief Justice Warren Burger, by the time of his own appointment, was a predictable inside Washington conservative, having served for some time on the D.C. Circuit. Justice Harry Blackmun was another court of appeals judge who, during his first years on the Court, also seemed a predictable conservative vote. Justice William Rehnquist was a Nixon administration insider and a conservative ideologue. Justice Powell, by contrast, came to the Court from private practice and was a solid defender of the prerogatives of the states. As a former member of the Board of Education in Richmond, Virginia, he could be counted on to defend local control.

Justice Powell came to the Supreme Court at a critical juncture. In an opinion by Chief Justice Burger, the Court had upheld broad remedial powers for federal courts in such school desegregation cases as *Swann v. Charlotte-Mechlenburg.*[37] In *Swann*, the Court, on a tie vote, remanded Richmond, Virginia's multi-district remedy for prior discrimination. Justice Powell could not participate in that decision because of his prior association with the Richmond School Board.[38] The crucial Texas school finance case of *San Antonio Independent School District v. Rodriguez*[39] followed.

By the late 1960s, the National Association for the Advancement of Colored People (NAACP) and other groups had finally managed to convince the Court to end school districts' use of the *Brown II* "all deliberate speed" language to avoid stronger school desegregation mandates.[40] The Court announced that delays were no longer acceptable. These groups then turned their attention to challenges of Northern school desegregation[41] and to charges that state school finance formulas, based upon local property taxes, were discriminatory.

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36. *See generally* JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. (1994).
37. 402 U.S. 1 (1971).
38. School Bd. of Richmond v. State Bd. of Educ., 412 U.S. 92 (1973) (judgement affirmed by equally divided court); *see generally* JEFFRIES, *supra* note 36.
39. 411 U.S. 1 (1973) (Marshall, J., dissenting).
40. Alexander v. Holmes Cty. Bd. of Educ., 396 U.S. 19, 20 (1969).
41. Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

In deciding *Rodriguez*, the members of the Court learned about the disparities within the state's educational services and the arguments within the state about the relationship between poverty and ethnicity. Justice Powell was not only the critical vote in support of the state, he authored the Court's opinion.

The opinion in *Rodriguez* was extremely important for several reasons. First, in its terms and tone, it asserted the primacy of local control of schools against a twenty year history of rulings, usually unanimous, supporting various remedial involvement of federal courts in the operation of school districts.[42] Second, it rejected an assumption dominant since 1954. In *Brown I*, Chief Justice Warren wrote:

> Today, education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[43]

In *Rodriguez*, Justice Powell wrote: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[44]

The decision not to regard education as a constitutionally protected right was critical for reasons beyond the obvious. In framing the analysis of the Texas education finance process, Justice Powell grounded the discussion in the two-tier test for equal protection. Under that standard, state action that denied equal treatment on the basis of a suspect classification, or that resulted in the deprivation of a fundamental right, triggered strict judicial scrutiny. In such a situation, the general presumption of validity of the state action would be rejected, and the burden of justifying the inequality would shift to the state, which would have to demonstrate a compelling state interest and means narrowly tailored to achieve that interest. The Court found that education was not a fundamental right and that differential opportunities in education based upon wealth did not present a suspect classification. Strict judicial scrutiny, therefore, did not apply; the state needed only to show that its action was rationally related to a legitimate state interest.

The *Rodriguez* Court was sharply divided with Justices Marshall, Brennan, White, and Douglas dissenting. It marked a shift from the rulings of 1950s and 1960s in terms of an expansive in-

42. *Rodriguez*, 411 U.S. at 70.
43. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
44. *Rodriguez*, 411 U.S. at 35.

terpretation of the Equal Protection Clause. It was also the beginning of a number of rulings that cautioned district courts to intervene less and show more deference for local control.[45]

B. Plyler *in the Supreme Court*

Justice Powell's conference notes in *Plyler* foreshadowed what was to come. Indeed, Justice Powell's position began to become clearer to his colleagues during the conference after the case was heard in December of 1981. Justice Powell favored a decision to affirm, but it was hard for him. While he still did not think education was a fundamental right, he was bothered by the fact that these children "had no responsibility for being there." He found it "[h]ard to think of [a] category more helpless than children."[46]

Justice Brennan assigned to himself the task of writing the opinion and knew that even though he had the votes of Justices Powell, Stevens, Blackmun, and Marshall, it would be a complex task to construct an opinion that could command a majority. Holding Justice Powell's crucial vote, while keeping the others on board, was one of Justice Brennan's more interesting challenges of the previous twenty years, almost as complex as getting and maintaining a Court in *Baker v. Carr*.[47]

Thus began a process of discussion and compromise that lasted from the issuance of the first draft of the opinion in January through June, 1982. Justice Brennan began with an exploratory effort, attempting to make certain that his initial votes were solid. He wrote to Justice Marshall:

> I am taking what is for me the unusual step of circulating only to you, Harry [Blackmun], Lewis [Powell], and John [Stevens] an unproofread draft of a proposed opinion for the Court in the *Alien Children* cases. My conference notes show no clear consensus with respect to the level of scrutiny to be afforded the Texas statute. But my impression was that those who voted with me to affirm shared my particular concern with a statute, such as this, that sought to deprive innocent children[,] not remotely responsible for their plight[,] of their right to an education.[48]

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45. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974).

46. Conference notes from Lewis F. Powell, Jr., U.S. Supreme Court Justice, to the U.S. Supreme Court Justices, *In re* Plyler v. Doe, *Library of Congress* Nos. 80-1538 & 1934 (on file with author).

47. 369 U.S. 186 (1962); *see* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT 410-428 (1983).

48. Letter from William J. Brennan, Jr., U.S. Supreme Court Justice, to Thurgood Marshall, U.S. Supreme Court Justice, THURGOOD MARSHALL PAPERS at Library of Congress Box 271 [hereinafter T.M.P.], (Jan. 25, 1982) at 1 (on file with author).

Justice Brennan did not want to hang the opinion solely on the issue of attacking the "innocent children." He relied on "both the nature of the classification, and on the importance of education within the framework of the Equal Protection Clause."[49] He cautioned Justice Marshall, and the other members of his group, that "[e]xclusive reliance on the 'innocent children' rationale, would truncate our real concern here — that whatever else the state may do with respect to illegal aliens, barring the innocent children among them from basic education is most perverse."[50]

Justice Brennan decided early that the equal protection issue was the determining question and it was unnecessary to discuss the preemption issue.[51]

Although Justice Brennan, like Judge Seals at the district court level, determined that the state policy would fail under strict or intermediate standard of review, he thought it important to apply the strict scrutiny standard. He added that while he was applying the stricter standard, he also recognized the historic discretion possessed by the states in educational policy. Notwithstanding his use of strict scrutiny, Justice Brennan noted, "[I]t seems to me that the historical approach of this draft, although leading to strict scrutiny here, is for that very reason largely self-limiting and unlikely to force us down any uncharted paths in the future."[52]

Justice Brennan knew how strongly Justice Powell felt about harsh classifications imposed upon children, but he also knew how much Justice Powell disagreed with his views as to the status of education under the Fourteenth Amendment. Justice Brennan arrayed a set of options before his colleagues that could be woven together to fashion a sufficiently strong statement, but one with enough flexibility to avoid the strictures of *Rodriguez*. Despite their many differences on the facts and the merits, there was no avoiding the obvious relationships between the problems at issue in *Rodriguez* and those in *Plyler*. In fact, both Judge Justice and Judge Seals observed in their respective opinions that the state seemed to be arguing the *Rodriguez* case all over again.[53]

As a contingency, in the event that Justice Powell's *Rodriguez* sentiments simply would not permit him to go as far as Jus-

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49. *Id.*
50. *Id.* at 2.
51. William J. Brennan, Jr., U.S. Supreme Court Justice, Plyler v. Doe: Draft for Circulation, T.M.P., (Jan. 25, 1982) at 7 n.8 (unpublished opinion, on file with author).
52. Brennan, J., to Marshall, J., *supra* note 48.
53. *Alien Children*, 501 F. Supp. at 581; *Plyler*, 458 F. Supp. at 589.

tice Brennan thought appropriate, the draft was constructed to permit the elimination of pages 23 to 34, which would then focus on an intermediate standard of review.[54]

Justice Brennan's draft began the discussion of the merits by disposing of the state's argument that illegal immigrants were not protected by the Equal Protection Clause. "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary usage of that term."[55] Citing *Yick Wo v. Hopkins*[56] and *Matthews v. Diaz*,[57] Justice Brennan observed that the Court had long considered due process and equal protection arguments available for their support.

The case for strict scrutiny was not thoroughly settled by *Rodriguez*. Two things were different. First, *Plyler* involved undocumented children who represented a discrete minority suffering unequal treatment by virtue of decisions over which they had no control. Second, unlike *Rodriguez, Plyler* presented a situation in which there was a "complete deprivation" of a state service rather than merely inequality in the level of service provided.

As to the former, Justice Brennan quoted Justice Powell's language from *Weber* regarding the inherent injustice in visiting disadvantages on children who were not in a position to govern their parents' behavior, in this case the decision to come to the United States illegally. "In addition, the classification at issue in the Texas scheme adversely targets a discrete class exhibiting many of the characteristics of powerlessness and vulnerability that have previously evoked special constitutional solicitude."[58] The Texas statute, as it relates to these children, represents the kind of " 'class or caste' legislation with which the Equal Protection Clause has historically been most directly concerned."[59]

The second aspect of *Plyler* was the absolute deprivation problem. It was one thing in *Rodriguez* for the debate to rage concerning how much educational support students were entitled to expect, but quite another to completely deprive them of the opportunity for an education. Indeed, Justice Powell's *Rodriguez* opinion specifically reserved that issue for another day.[60] Given that reality in *Plyler*, Justice Brennan was prepared to reinforce *Brown* and make the argument that a complete deprivation of educational opportunity required strict judicial scrutiny.

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54. Brennan, J., to Marshall, J., *supra* note 48, at 1.
55. Brennan, J., *supra* note 51, at 8.
56. 118 U.S. 356, 369 (1886).
57. 426 U.S. 67, 77 (1976).
58. Brennan, J., *supra* note 51, at 23.
59. *Id.*
60. *Rodriguez*, 411 U.S. at 37.

Justice Brennan made two arguments. First, education may not be a fundamental right explicitly articulated in the Constitution, but it has historically been regarded as extremely important in the Court's rulings. Second, there is no doubt that educational access was an important consideration for the framers of the Fourteenth Amendment.

Justice Brennan knew that his strict scrutiny argument might not garner a Court majority, and he began again on page 35 of the draft with an alternative approach. He started by differentiating Justice Powell's *Rodriguez* ruling:

> This case lies far on the other end of the equal protection spectrum from *Rodriguez*. We are not presented here with a complex scheme of finance and funding indirectly resulting in comparative disadvantages for a fluid group, definable for purposes of equal protection analysis only by presence within a less favored geographic area. Rather, § 21.031 is expressly structured to impose direct and substantial disabilities on a discrete and historically demeaned group, solely on the basis of personal status.[61]

Notwithstanding the latitude of the states to make important decisions that may not always affect every group in a similar fashion, this was an extreme situation. "Absent the assurance that the classification embodied in § 21.031 advances some vital state need, it cannot withstand review."[62]

It was not enough for the state simply to argue that it wanted to keep out undocumented immigrant children. "If strict scrutiny is to have meaning, it must be that the important interest that the State seeks to further, is one independent of the distinction itself."[63] As to the financial argument, the Court had already rejected the claim that it alone would be sufficient to satisfy a strict scrutiny standard.[64] However, Justice Brennan identified three arguments advanced by the state that required closer examination.

First, the idea that the policy would impede illegal immigration simply did not seem to square with the facts of the case. The impact of illegal immigrants on the state and on the schools was at best uncertain, given that most illegal immigrants were working aged men who came for jobs. The fact was that the immigrant families paid taxes when they lived in the area and tended to underutilize services because of their fear of apprehension. Justice Brennan concluded that it was one thing to focus on em-

61. Brennan, J., *supra* note 51, at 35-36.
62. *Id.* at 36.
63. *Id.* at 38.
64. *Id.*, *accord* Graham v. Richardson, 403 U.S. 365, 375 (1970).

ployment, but quite another to use education as an indirect means to affect the flow of illegal immigrants.[65]

Second, the claim that the policy would protect the quality of education found no support in the record below. If anything, the questions of burden on the system applied with equal weight to the children of legal immigrants.[66]

Finally, the assertion that these children are "less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State"[67] did not pass muster. The record was clear that many of these children would remain in the United States, and the state could not discriminate among benefits to the state as compared to the nation in such a nebulous and uncertain gamble.[68]

In short, Justice Brennan found that "[t]he justifications offered by the State in support of § 21.031 do not approach the showing of compelling need required if a State is to deny to this discrete group of children the free public education it offers to every other child residing within its borders."[69]

C. *Reactions to the First Draft*

Justice Powell summarized his position succinctly in his reply to Justice Brennan's draft:

> As I indicated at Conference, I view this case in rather simplistic terms. The children are victims of a combination of circumstances. Access from Mexico into this country, across our 2,000 mile border, is readily available and could not be controlled if the entire armed forces of the United States were assigned the task. Aliens are attracted by our vastly superior employment opportunities, not to mention other benefits. Congress, has been unwilling to make unlawful the employment of such aliens. In these circumstances, they will continue to enter the U.S., and a certain percentage of them will remain here. Their children should not be left on the streets uneducated.[70]

While Justice Powell found Justice Brennan's draft "an impressive piece of work," he concluded that it swept too broadly and "leaves me a little uneasy as to inferences that may be drawn from it in other connections not clearly foreseeable."[71] He

65. *Id.* at 39.
66. *Id.* at 39-40.
67. *Id.*
68. *Id.* at 40-41.
69. *Id.* at 41.
70. Letter from Lewis F. Powell, Jr., U.S. Supreme Court Justice, to William J. Brennan, Jr., U.S. Supreme Court Justice, T.M.P., (Feb. 2, 1982) at 1 (on file with author).
71. *Id.* at 3.

agreed to join the judgment, but would wait to see if Justice Brennan could narrow his opinion enough to relieve his uneasiness. More specifically, Justice Powell could not accept the proposition that the children constituted a suspect class for purposes of triggering strict scrutiny, though he did think that more than a rational basis standard was needed and suggested Justice Brennan's own intermediate standard announced in *Craig v. Boren*:[72]

> As the class is composed of innocent children, uniquely postured, I would agree that a "heightened" level of scrutiny is required. Thus, the state must establish a substantial interest to justify the discrimination. In a sense, this may be viewed as middle-tier analysis. It is, however, one we have reserved for certain situations, e.g., *Craig v. Boren*. As Texas has advanced no interest that I consider sufficiently substantial to justify the discrimination, I agree that there has been a violation of the Equal Protection Clause.[73]

Ultimately, Justice Powell concluded that the middle section of Justice Brennan's opinion had to go.

Although he had served for nineteen years on the Richmond Public School Board and Virginia State Board of Education, Justice Powell did not believe in a constitutional right to education. In his judgment, it was like other public services and programs. "Thus, I would rest our holding squarely on the Equal Protection Clause — though emphasizing generally the importance of education."[74] For Justice Powell, this case presented an obvious irony. While much of the effort was being expended to address standards, the plain fact was that the Texas action, stripped of its justificatory rhetoric, was simply irrational:

> In weighing the state interests, you have mentioned — and I would emphasize even further — the insubstantiality of its asserted interest as compared with the state's own interest in not *creating* a subclass of illiterate persons many of whom may remain in Texas, adding to the problems and costs of unemployment, welfare, and crime.[75]

Justice Brennan immediately set to work to meet Justice Powell's concerns. He wrote Justice Powell indicating that while he understood the concerns, he still felt that it would be most important to apply strict scrutiny in this situation. He removed much of the language in section IIIA of the draft that highlighted the "suspect class" or reduced it to footnotes, but he had reserva-

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72. 429 U.S. 190 (1976).

73. Letter from Lewis F. Powell, Jr., U.S. Supreme Court Justice, to William J. Brennan, Jr., U.S. Supreme Court Justice, WILLIAM J. BRENNAN PAPERS at Library of Congress Box 590 [hereinafter W.J.B.P.], (Jan. 30, 1982) at 1 (on file with author).

74. *Id.* at 2.

75. *Id.*

tions about applying a *Craig v. Boren* heightened scrutiny approach as opposed to strict scrutiny.[76]

As to Justice Powell's problems with his handling of education, Justice Brennan tried to accommodate Justice Powell's concerns from *Rodriguez*, but reminded his colleague that he specifically reserved the question of an absolute deprivation of education and this case presented just that problem. Justice Brennan was open to Justice Powell's suggestions as to how to bridge what appeared to be a relatively modest difference in their views:

> But, I do think it important that the history also *confirms* our shared view that we are to look closely on the absolute denial of education to certain discrete groups of children. It is that confirmation that I wish to preserve; and then to make clear that the group of undocumented children is precisely such a discrete grup [sic].[77]

With his modified section IIIA, Justice Brennan sent the opinion to print and distributed the first circulation on February 8, 1982. He modified his response to the Texas arguments citing Justice Powell's concerns. "It is difficult to understand precisely what the State hopes to achieve by promoting the creation, and perpetuation, of a subclass of illiterate persons who might remain within its boundaries, adding to the problems and costs of unemployment, welfare, and crime."[78]

Justice Brennan had not solved all the problems. Justice Powell immediately circulated a draft concurring opinion. He anchored his ruling in the decisions concerning the treatment of illegitimate children, including his own opinion in *Weber*.[79] It was an innocent children argument from beginning to end in which the state punished children for the behavior of their parents. Even with that attempt to keep the opinion exceedingly narrow, Justice Powell added: "A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment."[80] Justice Powell concluded by repeating language from his earlier memorandum to Justice Brennan, which they both ultimately used in their draft opinions,

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76. Letter from William J. Brennan, Jr., U.S. Supreme Court Justice, to Lewis F. Powell, Jr., U.S. Supreme Court Justice, T.M.P., (Feb. 2, 1982) at 2 (on file with author).

77. *Id.* at 3.

78. William J. Brennan, Jr., U.S. Supreme Court Justice, Plyler v. Doe: First Printed Draft, T.M.P., (Feb. 8, 1982) at 34 (unpublished opinion, on file with author).

79. *Plyler*, 458 F. Supp. at 577.

80. Lewis F. Powell, Jr., U.S. Supreme Court Justice, Plyler v. Doe: Concurring Opinion Draft, T.M.P., (Feb. 9, 1982) at 4 (unpublished opinion, on file with author).

about the creation of a subclass that would add to the problems of unemployment, welfare, and crime.[81]

Justices Rehnquist and Burger immediately signalled their intention to prepare dissents, though Justice O'Connor decided to wait for further opinion development.

Justice Blackmun then entered the picture in an attempt to find accommodation between Justices Brennan and Powell. Justice Blackmun argued that he would not join Justice Brennan's opinion at that point because there was not a majority. He suggested the elimination of the suspect class of illegitimate children argument and instead recognize a right to education as fundamental:[82]

> In short, one could say that the reason education is fundamental is that it is preservative of other rights. The reason that it is fundamental to this group is that some of these children will be here permanently. And it is for the Federal Government, rather than the States, to determine which children will be allowed to remain in the United States.[83]

Justice Marshall immediately agreed with Justice Blackmun.[84] Justice Stevens also saw an opportunity to get a consensus. He wrote to Justice Brennan urging him that he could either join Justice Blackmun's suggestion or an argument on rational basis grounds. In either argument, he believed it was appropriate and useful to maintain "the analogy of illegal alien children to illegitimate children."[85]

Justice Blackmun's intervention also prompted Justice Powell to think through his own position somewhat differently as well. He could not accept Justice Blackmun's argument that education is a fundamental right. He preferred Justice Stevens' rational basis argument:

> Texas is *penalizing* these children. The asserted state interest (expense of educating them) is insubstantial as compared with the eventual cost to the state of dealing with the serious

81. *Id.* at 7.

82. Letter from Harry A. Blackmun, U.S. Supreme Court Justice, to William J. Brennan, Jr., U.S. Supreme Court Justice, T.M.P., (Mar. 10, 1982) at 2 (on file with author).

83. *Id.*

84. Letter from Thurgood Marshall, U.S. Supreme Court Justice, to William J. Brennan, Jr., U.S. Supreme Court Justice, T.M.P., (Mar. 10, 1982) (on file with author).

85. Letter from John Paul Stevens, U.S. Supreme Court Justice, to William J. Brennan, Jr., U.S. Supreme Court Justice, T.M.P., (Mar. 10, 1982) (on file with author).

> problems that will result from the alien children who will remain in the state without even a grade school education.[86]

He also appreciated Justice Stevens' support for the use of the illegitimate children analogy. "I agree with John [Stevens] that the illegitimacy cases lend substantial support. The children there also were penalized and stigmatized."[87] Even though he was absolutely confident of the judgment in the case, he was beginning to doubt that a opinion for the Court was possible.[88]

Justice Brennan persisted and issued a significantly revised draft in early April, 1982. He wrote Justice Powell, essentially abandoning most of Part III of his original opinion:

> The somewhat more 'measured' response to the equal protection problem outlined in your draft concurrence—which I have largely incorporated—no longer required any lengthy discussion of legislative material or any complex analytic framework. But I do continue to think that it is important to explain clearly why the Texas approach is unreasonable as a matter of established constitutional principle, and not merely as an idiosyncratic policy judgment on our part.
>
> The draft *is* extended in one respect. I agree with you that this case cannot be resolved on preemption grounds. But I believe Harry [Blackmun] is correct about the importance of preemption concerns in this respect: The Chief takes the view in his memorandum that undocumented status, without more, carries with it a State prerogative to deny these children an education. I think this assertion rests, at heart, on the implications of federal law; but whatever weight the predominantly federal interests at stake in the treatment of aliens may have in other contexts, it does not support the State's action here. Hence, Part IV. In addition, while I thought it inappropriate in a Court opinion to take Congress to task for its failures in this field, Part IV does offer an opportunity to emphasize Congress' pre-eminent authority—and to suggest that while at present we must muddle through these questions as a matter of Fourteenth Amendment law, we would much prefer to hear from Congress.[89]

Justice Brennan continued to argue that the policies that Texas pursued created an underclass of children. He applied Justice Powell's language from the illegitimate children cases, as Justices Powell and Stevens both urged. Turning to the question

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86. Letter from Lewis F. Powell, Jr., U.S. Supreme Court Justice, to Harry A. Blackmun, U.S. Supreme Court Justice, T.M.P., (Mar. 12, 1982) at 1 (on file with author).

87. *Id.*

88. *Id.* at 2.

89. Letter from William J. Brennan, Jr., U.S. Supreme Court Justice, to Lewis F. Powell, Jr., U.S. Supreme Court Justice, W.J.B.P., (Apr. 5, 1982) (on file with author).

of the status of education under the Equal Protection Clause, Justice Brennan took the position that equal educational opportunity may not be a right, "[b]ut neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction."[90] He concluded, as Justice Powell urged, that although the children did not constitute a suspect class, and education was not a fundamental right within the meaning of the two-tier test for equal protection, that was merely the beginning of the problem:

> Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.[91]

Justice Brennan then turned to the argument that the courts below labelled circular—the idea that it was rational to discriminate against these children merely because they were undocumented immigrants. Without making a preemption argument as such, Justice Brennan engaged a strong line of cases that insisted that the federal government may perhaps make those distinctions but the states may not. Similarly, the mere assertion of an economic justification is not enough. "Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."[92] His attack on the arguments advanced to support rationality remained as they had been in his first draft.

Justice Powell wrote thanking Justice Brennan for his effort to accommodate Powell's thinking but still calling for additional changes on one page. In the end, however, he said: "I appreciate, Bill [Brennan], that my concerns are addressed only to a very minor portion of your well written revised opinion. Nor will these changes affect your analysis or the force of your opinion.

90. William J. Brennan, Jr., Plyler v. Doe: Second Printed Draft, T.M.P., (Apr. 7, 1982) at 17 (unpublished opinion, on file with author).

91. *Id.* at 20.

92. *Id.* at 24.

They will, however, make me feel more comfortable about joining it."[93]

Justice Brennan's task was not yet complete; he labored until he resolved the remaining smaller issues. In June, 1982, Justice Powell wrote Justice Brennan:

> You are to be congratulated on *Plyler* — especially on the painstaking and generous way you wrote an opinion that accommodated our several differing views, and finally obtained a Court.
>
> Your final product is excellent and will be in every text and case book on Constitutional law.
>
> I also was proud of your verbal summary from the Bench Tuesday A.M.[94]

In that presentation from the bench, Justice Brennan made it unmistakably clear that, whatever philosophical or technical issues might be presented by the case, there was no question that the State had singled out innocent children to be penalized in an arbitrary manner, without any seriously developed rationale. This thrashing seemed to be one response to the frustration with the issue of illegal immigration:

> Whatever the reason, the problem of illegal aliens raises the spectre of a permanent caste of undocumented aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a nation that prides itself on adherence to principles of equality under law.[95]

Justice Brennan said it is irrational to lash out at innocent children who were not responsible for the decision made to bring them to this country. It is not only irrational because it blames the children for the decisions of their parents, but also because its results are perverse:

> Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, 'education prepares individuals to be self-reliant and self-sufficient participants in society.' Illiteracy is an enduring disability. The inability to read and

93. Letter from Lewis F. Powell, Jr., U.S. Supreme Court Justice, to William J. Brennan, Jr., U.S. Supreme Court Justice, W.J.B.P., (Apr. 7, 1982) (on file with author).

94. Letter from Lewis F. Powell, Jr., U.S. Supreme Court Justice, to William J. Brennan, Jr., U.S. Supreme Court Justice, W.J.B.P., (June 16, 1982) (on file with author).

95. Letter from William J. Brennan, Jr., U.S. Supreme Court Justice, to Thurgood Marshall, U.S. Supreme Court Justice, *Presentation Script for Plyler v. Doe*, W.J.B.P., (Jan. 25, 1982) at 3 (on file with author).

> write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation of the social, economic, intellectual and psychological well-being of the individual, and the obstacle it poses to individual achievement, makes it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.[96]

III. CONCLUSION: *PLYLER* OUGHT TO STAND AND ITS LESSON SHOULD BE LEARNED

If those who supported Proposition 187 did so on the theory that *Plyler* was a weak ruling based upon extreme constitutional arguments, they were wrong. Although there was strong argument for a more expansive ruling, one that explored both the issue of a fundamental right to education and the application of suspect class status to undocumented immigrants, the ultimate decision was much narrower and employed a much more limited approach.

Proposition 187, like the Texas statute before it, significantly focuses on children whose parents make the decision to enter the United States illegally. The attempt to punish the children, and indeed in the California case, to use them as informants against their loved ones, continues to be both unjust and irrational if the basic purpose is to impede the flow of undocumented immigrants.

Moreover, it can hardly be regarded as rational to place up to 300,000 children in circumstances that all four courts warned about in the *Plyler* and *In re Alien Children* cases. The attempt to take this sad step will not sustain even a rational basis review standard. Unless there is a carefully articulated rationale that is derived from more than fear and anger, a complete deprivation of education raises a serious constitutional problem as articulated in *Plyler*.

There is no doubt that the states have reasons for their frustration with the federal government's behavior with respect to immigration policy over the years. But, as the Fifth Circuit explained in the earlier case, "This Court can readily understand the problems faced by a state such as Texas. However, this Court cannot suspend the Constitution to aid a state to solve its political and social problems."[97]

Despite the differences in the wording of the policy and the times, the core of the Supreme Court's opinion in *Plyler v. Doe* is

96. *Id.* at 6 (citation omitted).
97. *Plyler*, 628 F.2d at 461.

as valid today as it was in 1982. Indeed, its framework and scope were in many respects conservative, which is what allowed the Court's leading advocate of local control of schools to support it. That core opinion is clearly applicable to Proposition 187. The damage that would be done to the children will be as great, if not greater, and the foundations of the states actions are at least as arbitrary.