

## Extending *Plyler v. Doe*<sup>1</sup> to the Twenty-First Century

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### I. Introduction

Countless of studies have shown that an individual's ability to climb the socioeconomic ladder is strongly correlated with their educational background, particularly whether they have obtained higher education.<sup>2</sup> However, despite the great influence that higher education has on individuals' careers, economic security, and overall wellbeing, undocumented immigrants in the United States continue to face serious restrictions in accessing higher education due to their immigration status. In particular, although the U.S. Supreme Court's landmark decision in *Plyler v. Doe*<sup>3</sup> guaranteed all children equal access to K-12 education and dramatically shaped their inclusion into the country's legal and cultural framework,<sup>4</sup> the twenty-first century's socioeconomic realities present a serious need to extend this guarantee to higher education. As such, this paper will discuss the Supreme Court's decision in *Plyler*<sup>5</sup> and the significant governmental barriers on undocumented immigrants ability to access higher education. Moreover, this paper will explain the need to extend the Court's guarantee of equal access to

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<sup>1</sup> 457 U.S. 202 (1982).

<sup>2</sup> See U.S. Dep't of Treasury, *The Economics of Higher Education* (Dec. 2012), [https://www.treasury.gov/connect/blog/Documents/20121212\\_Economics%20of%20Higher%20Ed\\_vFINAL.pdf](https://www.treasury.gov/connect/blog/Documents/20121212_Economics%20of%20Higher%20Ed_vFINAL.pdf); See also Organisation for Economic Co-operation and Development, *A Family Affair: Intergenerational Social Mobility across OECD Countries* (2010), <http://www.oecd.org/tax/public-finance/chapter%205%20gfg%202010.pdf>.

<sup>3</sup> 457 U.S. 202 (holding that a Texas statute denying undocumented children free public school primary and secondary education violated the Equal Protection Clause of the Fourteenth Amendment).

<sup>4</sup> Gonzales, Roberto G. et. al, *Untangling Plyler's Legacy: Undocumented Students, Schools and Citizenship*, 86 Harv. Educ. Rev. 318, 319 (2015).

<sup>5</sup> 457 U.S. 202.

education beyond K-12 schooling and how such a decision would truly conform to the Equal Protection Clause of the Fourteenth Amendment.

## II. The U.S. Supreme Court's Decision in *Plyler v. Doe*

In the 1982 case *Plyler v. Doe*, the Supreme Court held that a Texas statute denying undocumented children access to free public primary and secondary education violated the Equal Protection Clause of the Fourteenth Amendment.<sup>6</sup> Writing for the majority, Justice Brennan first found that “the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory.”<sup>7</sup> As such, regardless of how undocumented immigrants entered the United States, they are “persons within the jurisdiction” of the State and may claim the benefit of the Fourteenth Amendment’s guarantee of equal protection of the laws.<sup>8</sup>

Second, in considering which standard of review should be applied to the case, Justice Brennan adopted an intermediate standard of review and determined that Texas bore the burden of proving that its statute “further[ed] some substantial goal of the State.”<sup>9</sup> Specifically, he emphasized that although undocumented children are not a suspect class and education is not a fundamental right, denying access to education to “a discrete class of children not accountable for their disabling status” imposes a lifetime hardship and forecloses any possibility that they can contribute to the progress of the nation.<sup>10</sup> In particular, Justice Brennan reasoned that education is the primary vehicle for transmitting societal values, preparing citizens to participate effectively

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<sup>6</sup> *Plyler*, 457 U.S. at 210.

<sup>7</sup> *Id.* at 215.

<sup>8</sup> *Id.* at 215-16.

<sup>9</sup> *Id.* at 224.

<sup>10</sup> *Id.* at 222.

and intelligently in our political system, teaches individuals to be self-reliant and self-sufficient, prevents illiteracy, and etc.<sup>11</sup> Most notably, however, Justice Brennan stated that “education provides the basic tools by which individuals might lead economically productive lives,” and governmental barriers that present unreasonable obstacles to advancement on the basis of individual merit should be abolished.<sup>12</sup> Thereafter, he alluded to the Court’s statement in *Brown v. Board of Education* that “[i]n 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.”<sup>13</sup>

The majority concluded that State failed to justify its denial of public primary and secondary education to undocumented children because it failed to show that it furthered some substantial state interest.<sup>14</sup> Importantly, the Court rejected each of the State’s justifications for its law, namely that it would protect the State from an influx of immigrants; undocumented children posed special burdens on the State’s ability to provide high quality education; they posed a significant burden on the state’s economy; and that they were less likely to stay in the United States and put their education to use.<sup>15</sup>

### **III. Current Threats to the Equal Protection of the Laws in Higher Education**

The Supreme Court’s decision in *Plyler* continues to be a special and monumental case to the undocumented immigrant community not only because it guarantees the community’s children the ability to receive public K-12 education, but also because it recognizes the

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<sup>11</sup> *Plyler*, 457 U.S. at 221-22.

<sup>12</sup> *Id.* at 221.

<sup>13</sup> *Id.* at 222.

<sup>14</sup> *Id.* at 230.

<sup>15</sup> *Id.* at 229.

community's entitlement to equal protection of the laws.<sup>16</sup> Unfortunately, because *Plyler* only contemplated undocumented *children* and equal access to K-12 education, *Plyler's* protections have not been construed to carry over once undocumented immigrant students graduate from high school.<sup>17</sup> Moreover, it does not appear that any court has addressed whether equal access to higher education for undocumented immigrants falls under the Equal Protection Clause.<sup>18</sup>

Higher education is a state responsibility.<sup>19</sup> While some States have severely limited undocumented students' access to higher education by denying them in-state tuition,<sup>20</sup> three States – Georgia, Alabama, and South Carolina – have exploited the lack of U.S. Supreme Court case law and have passed institutional regulations and state laws that outright deny undocumented students the ability to attend public colleges and universities.<sup>21</sup> Specifically, in Georgia, undocumented students are not only barred from receiving in-state tuition,<sup>22</sup> but are also

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<sup>16</sup> See Fitz, Marshall, *Triumphs and Challenges on the 30<sup>th</sup> Anniversary of Plyler v. Doe*, Center for American Progress (June 2012), <https://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/plyler.pdf>.

<sup>17</sup> Nguyen, David H.K. & Martinez Hoy, Zelideh R., *'Jim Crowing' Plyler v. Doe: The Resegregation of Undocumented Students in American Higher Education Through Discriminatory State Tuition and Fee Legislation*, 63 *Clev. St. L. Rev.* 355, 359 (2014-2015).

<sup>18</sup> Manuel, Kate M., *Unauthorized Aliens, Higher Education, In-State Tuition, and Financial Aid: Legal Analysis*, Congressional Research Service (Jan. 11, 2016), <https://www.fas.org/sgp/crs/misc/R43447.pdf>.

<sup>19</sup> Yates, Laura S., *Plyler v. Doe and the Rights of Undocumented Immigrants to Higher Education: Should Undocumented Students Be Eligible for In-State College Tuition Rates?*, 82 *Wash. U. L. Q.* 585, 586 (2004).

<sup>20</sup> See Mendoza, Gilberto Sonia & Shaikh, Noor, *Tuition Benefits for Immigrants*, National Conference of State Legislatures (Jul. 15, 2015), <http://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx>.

<sup>21</sup> Vasilogambros, Matt, *The Folly of Under-Educating the Undocumented*, *The Atlantic* (Mar. 15, 2016), <http://www.theatlantic.com/politics/archive/2016/03/the-folly-of-under-educating-the-undocumented/473877/>.

<sup>22</sup> Georgia Board of Regents Policy 4.3.4; See Jackson, Abby, *This student's state barred her from its best public universities, so she went to the Ivy League instead*, *Business Insider* (Jan. 6, 2016), <http://www.businessinsider.com/valentina-garcia-gonzalez-undocumented-student-could-not-attend-the-georgia-university-system-2015-12>.

barred from applying to Georgia's top five public universities.<sup>23</sup> And in Alabama and South Carolina, undocumented students are strictly prohibited from attending all public colleges and universities.<sup>24</sup>

Unsurprisingly, the reasoning behind these state measures that bar undocumented immigrants from public institutions of higher education are almost identical to the reasoning that the Supreme Court rejected in *Plyler*. For instance, Alabama HB 56 § 2 indicates that the law was created because

The State of Alabama finds that illegal immigration is causing economic hardship and lawlessness in this state and that illegal immigration is encouraged when public agencies within this state provide public benefits without verifying immigration status . . . . The State of Alabama further finds that certain practices currently allowed in this state impede and obstruct the enforcement of federal immigration law, undermine the security of our borders, and impermissibly restrict the privileges and immunities of the citizens of Alabama.

Nevertheless, despite the reminiscent rationale behind these laws, no court has found these laws to be impermissible on equal protection grounds.<sup>25</sup> Moreover, existing cases relating to undocumented immigrant's access to higher education have only been brought under preemption grounds, not under equal protection.<sup>26</sup>

Although the national trend over the last decade shows that more states are introducing and passing laws that favor equal access to higher education,<sup>27</sup> the number of undocumented immigrants affected by Georgia, Alabama, and South Carolina's adverse laws are non-trivial. Moreover, it is also important to consider that although most states do allow undocumented

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<sup>23</sup> Georgia Board of Regents Policy 4.1.6; *See Jackson, supra* note 19.

<sup>24</sup> *Mendoza & Shaikh, supra* note 20; Alabama HB 56 § 8 (2011); South Carolina H 4400 § 17 (2008).

<sup>25</sup> *Manuel, supra* note 19.

<sup>26</sup> *Manuel, supra* note 19; *See Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 611 (E.D. Va. 2004); *See also Hispanic Interest Coal. of Alabama v. Governor of Alabama*, 691 F.3d 1236, 1240 (11th Cir. 2012).

<sup>27</sup> *Vasilogambros, supra* note 20.

students to attend public universities,<sup>28</sup> the lack of established precedent in the judicial, executive and legislative branches of the federal government,<sup>29</sup> combined with the presently hostile political environment against immigration, substantially threatens the equal protection of the law in higher education for undocumented immigrants.

#### IV. The Need to Extend *Plyler v. Doe* to Higher Education

It is widely recognized that to have any chance of succeeding in the twenty-first century's highly competitive labor market, a high school diploma is no longer sufficient to compete.<sup>30</sup> Because society is much more technologically advanced and complex than three decades ago when *Plyler* was decided, higher education is now perceived as part of a "complete education"<sup>31</sup> and is deemed to not only be essential but necessary.<sup>32</sup> Therefore, although Supreme Court's reasoning in *Plyler* still applies in today's world, the notion that primary and secondary education is sufficient to enable undocumented immigrants to become economically independent and competitive is far outdated in the current labor market.

"Higher education is a critical mechanism for socioeconomic advancement among aspiring individuals . . . ."<sup>33</sup> It provides individuals with greater work opportunities and provides them with the opportunity to develop skills that can be applied in different work settings and geographic locations, contributing to their income stability in changing times.<sup>34</sup> In fact, the

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<sup>28</sup> Vasilogambros, *supra* note 19.

<sup>29</sup> Manuel, *supra* note 18.

<sup>30</sup> Nguyen & Martinez Hoy, *supra* note 17, at 359.

<sup>31</sup> Yates, *supra* note 19, at 604.

<sup>32</sup> *Id.*

<sup>33</sup> U.S. Dep't of Treasury, *supra* note 2, at 2.

<sup>34</sup> University of Southern California Center for Higher Education and Policy Analysis, *Why is Education Important for your Future and How Can Education IDAs Help you Reach your Educational Goals?*, [https://www.usc.edu/dept/chepa/IDApays/resources/education\\_important.pdf](https://www.usc.edu/dept/chepa/IDApays/resources/education_important.pdf) (last visited: May 14, 2016).

Georgetown Public Policy Institute estimates that by 2020, sixty-five percent (65%) of jobs in the United States would require higher education and training beyond high school.<sup>35</sup> In another study by the U.S. Department of Treasury, the Department found that individuals who have some form of higher education “typically earn more and have a lower likelihood of being unemployed.”<sup>36</sup> In particular, in 2011, the median weekly earnings of a full-time, bachelor’s degree holder “were 64 percent higher than those of a high school graduate (\$1,053 compared to \$638).”<sup>37</sup> Further, individuals with higher education were not only found less likely to be unemployed, but also more likely to have jobs that provide additional non-wage compensation such as paid vacation and employer-provided health insurance.<sup>38</sup> Moreover, college educated workers have also been found to be more likely to be self-employed than those with lower levels of education.<sup>39</sup> Consequently, like the Supreme Court’s reasoning in *Plyler*, access to higher education can be a turning point for many undocumented immigrants, many of whom come from poverty, as it would provide them with the opportunity to be self-sufficient and self-reliant in this challenging economy.

In addition, higher education is also an important driver of intergenerational economic mobility in our society.<sup>40</sup> The U.S. Department of Treasury’s report highlights the stark

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<sup>35</sup> Carnevale, Anthony P. et al, *Recovery: Job Growth and Educational Requirements through 2020*, Georgetown Public Policy Institute (2014), [https://cew.georgetown.edu/wp-content/uploads/2014/11/Recovery2020.ES\\_Web\\_.pdf](https://cew.georgetown.edu/wp-content/uploads/2014/11/Recovery2020.ES_Web_.pdf).

<sup>36</sup> U.S. Dep’t of Treasury, *supra* note 2, at 2.

<sup>37</sup> *Id.* at 3.

<sup>38</sup> *Id.*

<sup>39</sup> Erisman, Wendy & Looney, Shannon, *Opening the Door to the American Dream: Increasing Higher Education Access and Success for Immigrants*, Institute for Higher Education Policy (April 2007), <http://files.eric.ed.gov/fulltext/ED497030.pdf>.

<sup>40</sup> U.S. Dep’t of Treasury, *supra* note 2, at 15.

difference in the ability of college and high school graduates to climb the socioeconomic ladder.<sup>41</sup> Specifically, the report indicates:

[w]ithout a college degree, children born in the lowest income quintile have a 45 percent chance of remaining in the bottom quintile as adults and a nearly 70 percent chance of ending up in the bottom two quintiles. With a college degree, children born in the bottom quintile have less than a 20 percent chance of staying in the bottom quintile of the income distribution and about an equal chance of ending up in any of the higher income quintiles.<sup>42</sup>

As a result, the children of more affluent and better-educated parents tend to lead “healthier lives, perform better in school, and go on to postsecondary education themselves.”<sup>43</sup> Thus, by providing undocumented immigrants with access higher education, they will have a better opportunity of bettering their financial situation that will very likely enhance their children’s lives as well.<sup>44</sup> On the other hand, when they are foreclosed of the ability to obtain a higher education, it not only affects their own ability to attain brighter and more affluent futures, but also affects the lives of their future generations – undocumented or not, and immigrant or natural-born.

Like the Supreme Court’s reasoning in *Plyler*,<sup>45</sup> the grave long-term effect of denying undocumented immigrants access to higher education will be to keep them trapped in a permanent underclass. Doing so would disadvantage both the undocumented community and the government, as it would likely add to problems and costs of unemployment, welfare, and crime.

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<sup>41</sup> U.S. Dep’t of Treasury, *supra* note 2, at 15.

<sup>42</sup> *Id.*

<sup>43</sup> Erisman & Looney, *supra* note 39, at 17.

<sup>44</sup> *Id.*

<sup>45</sup> *Plyler*, 457 U.S. at 230 (holding that denying undocumented children access to primary and secondary education promotes the “creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.”)



## V. Extending *Plyler v. Doe* Comports with the Equal Protection Clause

Although the Supreme Court's decision in *Plyler* was limited to primary and secondary education, the Court's reasoning is nevertheless equally applicable to higher education. Like undocumented children's access to primary and secondary education, intermediate scrutiny should continue to apply in Equal Protection challenges for undocumented immigrants access to higher education. Specifically, although the main reason the Court decided to adopt intermediate scrutiny is because undocumented children are not culpable for their parents' actions,<sup>46</sup> it would likewise be illogical to punish the same 1.8 million undocumented children living in the United States once they reach college.<sup>47</sup>

Moreover, like *Plyler*, States that bar undocumented immigrants from public colleges and universities cannot adequately show an important governmental purpose that would outweigh the costs of not providing undocumented immigrants access to higher education. In particular, the Court in *Plyler* previously rejected the same arguments that are now presented by States that currently bar undocumented immigrants from higher education. Specifically, they argue that barring undocumented individuals access to higher education would preserve limited resources and prevent the influx of unlawful immigration.<sup>48</sup> However, not only did the the *Plyler* Court reject these arguments,<sup>49</sup> but studies have shown that the "American economy has reaped major benefits from immigrants over the past three decades through tax payments, job creation,

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<sup>46</sup> *Plyler*, 457 U.S. at 219.

<sup>47</sup> Hernandez, Laura A., *Dreams Deferred - Why In-State College Tuition Rates are Not a Benefit under the IIRIRA and How This Interpretation Violates the Spirit of Plyler*, 21 Cornell J. L. & Pub. Pol'y 525, 533 (Spring 2012); See also Gonzales, Roberto G., *Young Lives on Hold: The College Dreams of Undocumented Students*, College Board Advocacy (Apr. 2009), <https://secure-media.collegeboard.org/digitalServices/pdf/professionals/young-lives-on-hold-undocumented-students.pdf>.

<sup>48</sup> See Alabama HB 56 § 2.

<sup>49</sup> *Plyler*, 457 U.S. at 227-28.

entrepreneurial activity, consumer spending, and neighborhood revitalization.”<sup>50</sup> Moreover, unlike public primary and secondary education that is free, undocumented immigrants are required to pay tuition to attend public colleges and universities. Furthermore, providing undocumented immigrants access to higher education would not promote unlawful immigration as “individuals do not immigrate to the United States in order to take advantage of public education and public services; rather, they come to seek employment and reunite with family members who are already here.”<sup>51</sup>

Additionally, the benefits of primary and secondary education that the Court outlined by in *Plyler* are almost identical to the benefits of higher education. The Court noted in *Plyler* that primary and secondary education should be equally accessible because it preserves a “democratic system of government” and is “necessary to prepare citizens to participate effectively and intelligently in our open political system.”<sup>52</sup> Similarly, researchers have repeatedly found that “more educated citizens are more likely to vote in elections and participate in campaigns,”<sup>53</sup> thereby preserving our freedom and independence. Furthermore, like primary and secondary education, higher education also prepares individuals for professional training, to be self-reliant and self-sufficient participants in society, and provides them the basic tools to “lead economically productive lives.”<sup>54</sup> As explained above, higher education provides individuals with significant economic benefits that will enable them to lead financially independent lives and

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<sup>50</sup> Stewart, David W., *Immigration and Education: The Crisis and the Opportunities* 213 (1993).

<sup>51</sup> Yates, *supra* note 19, at 606.

<sup>52</sup> *Plyler*, 457 U.S. at 221.

<sup>53</sup> Berinsky, Adam J. & Lenz, Gabriel S., *Education and Political Participation: Exploring the Causal Link*, 33 *Polit. Behav.* 357 (2010).

<sup>54</sup> *Plyler*, 457 U.S. at 222.

contribute to the nation's economy. These include greater work opportunities, financial stability, higher income, and better intergenerational socioeconomic mobility.<sup>55</sup>

## VI. Conclusion

Undocumented students in the United States, particularly those in Georgia, Alabama, and South Carolina, are presently trapped in a legal paradox. While they have been afforded the right to primary and secondary education, their right immediately ceases once they graduate from high school. Although three decades ago, higher education was simply seen as a privilege and an unnecessary path, the advancements that our society has made demand that our laws also adapt to these changes. Justice Brennan would likely agree that, in today's world, undocumented immigrants' access to higher education is necessary to avoid them slipping into a permanent underclass and a lifetime of hardship.<sup>56</sup>

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<sup>55</sup> See U.S. Dep't of Treasury, *supra* note 2; See also University of Southern California Center for Higher Education and Policy Analysis, *supra* note 34; See also Erisman & Looney, *supra* note 39; See also Carnevale, *supra* note 35.

<sup>56</sup> Nguyen & Martinez Hoy, *supra* note 17, at 359.