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IS EDUCATION A FUNDAMENTAL RIGHT?

The history of an obscure Supreme Court ruling sheds light on the ongoing debate over schooling and immigration.

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A Supreme Court decision about the right of undocumented immigrants to attend school may yet prove significant. Illustration by Woody Harrington

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Before sunrise on a morning just after Labor Day, 1977, Humberto and Jackeline Alvarez, Felix Hernandez, Rosario and Jose Robles, and Lidia and Jose Lopez huddled together in the basement of the United States Courthouse in Tyler, Texas, the Rose City, to decide just how much they were willing to risk for the sake of their children, for the sake of other people's children, and for the sake, really, of everyone. Among them, the Alvarezes, Hernandez, the Robleses, and the Lopezes had sixteen children who, the week before, had been barred from entering Tyler's public schools by order of James Plyler, Tyler's school superintendent. On the first day of school, Rosario Robles had walked her five children to Bonner Elementary, where she was met by the principal, who asked her for the children's birth certificates, and, when she couldn't provide them, put her and the kids in his car and drove them home.

This hadn't been the principal's idea, or even Plyler's. In 1975, when Texas passed a law allowing public schools to bar undocumented immigrants, Plyler ignored it. "I guess I was soft-hearted and concerned about the kids," he said. Also, there weren't many of them. About sixteen thousand children went to the schools in the East Texas city of Tyler, which considered itself the rose-growing capital of America and was named for John Tyler, the President of the United States who had pushed for the annexation of Texas in 1844, which led to a war with Mexico in 1846. Of those sixteen thousand students, fewer than sixty were the children of parents who had, without anyone's permission, entered the United States from Mexico by crossing a border established in 1848, when the war ended with a treaty that turned the top half of Mexico into the bottom third of the United States. Jose Robles worked in a pipe factory. Humberto Alvarez worked in a meatpacking plant. They paid rent. They owned cars. They paid taxes. They grew roses.

Nevertheless, in July of 1977 Tyler's school board, worried that Tyler would become a haven for immigrants driven away from other towns, insisted that undocumented children be kicked out of the city's schools unless their parents paid a thousand dollars a year, per child, which few of them could afford, not even the Robleses, who owned their own home. Turned away from Bonner Elementary, the Robleses sent some of their kids to a local Catholic school—Jose did yard work in exchange for tuition—but they were put in touch with the Mexican American Legal Defense and Educational Fund, which sent an attorney, Peter Roos, who filed a lawsuit in the U.S. Eastern District Court of Texas. It was presided over by a judge whose name was Justice. "There were two judges in Tyler," Roos liked to say. "You got Justice, or no justice."

Participating in a lawsuit as an undocumented immigrant is a very risky proposition. In a closed-door meeting, Roos asked that the parents be allowed to testify in chambers and so avoid revealing their identities, which could lead to deportation. They had come to the courthouse knowing that, at any moment, they could be arrested, and driven to Mexico, without so much as a goodbye. Judge William Wayne Justice refused to grant the protective order. "I am a United States magistrate and if I learn of a violation of the law, it's my sworn duty to disclose it to the authorities," he said. Roos went down to the basement, near the holding cells, to inform the families and give them a chance to think it over. They decided to go ahead with the suit, come what may. Justice did make efforts to protect them from publicity, and from harassment, decreeing that the proceeding would start before dawn, to keep the press and the public at bay, and that the plaintiffs' names would be withheld.

Roos filed a motion requesting that the children be allowed to attend school, without paying tuition, while the case unfolded, which was expected to take years. "An educated populace is the basis of our democratic institutions," his brief argued, citing Brown v. Board of Education. "A denial of educational opportunities is repugnant to our notions that an informed and educated citizenry is necessary to our society." The case was docketed as Doe v. Plyler. "This is one that's headed for the United States Supreme Court," Justice told his clerk. Five years later, the appeal, Plyler v. Doe, went to Washington.

Some Supreme Court decisions are famous. Some are infamous. Brown v. Board, Roe v. Wade. But Plyler v. Doe? It's not any kind of famous. Outside the legal academy, where it is generally deemed to be of limited significance, the case is little known. (Earlier this year, during testimony before Congress, Betsy DeVos, the Secretary of Education, appeared not to have heard of it.) The obscurity of the case might end soon, though, not least because the Court's opinion in Plyler v. Doe addressed questions that are central to ongoing debates about both education and immigration and that get to the heart of what schoolchildren and undocumented migrants have in common: vulnerability.

Plyler is arguably a controlling case in Gary B. v. Snyder, a lawsuit filed against the governor of Michigan, Rick Snyder, by seven Detroit schoolchildren, for violating their constitutional right to an education. According to the complaint, "illiteracy is the norm" in the Detroit public schools; they are the most economically and racially segregated schools in the country and, in formal assessments of

student proficiency, have been rated close to zero. In Brown, the Court had described an education as "a right which must be made available to all on equal terms." But the Detroit plaintiffs also cite Plyler, in which the majority deemed illiteracy to be "an enduring disability," identified the absolute denial of education as a violation of the equal-protection clause, and ruled that no state can "deny a discrete group of innocent children the free public education that it offers to other children residing within its borders." Dismissed by a district court in June, the case is now headed to the Sixth Circuit on appeal.

Plyler's reach extends, too, to lawsuits filed this summer on behalf of immigrant children who were separated from their families at the U.S.-Mexico border. In June, the Texas State Teachers Association called on the governor of the state to make provisions for the education of the detained children, before the beginning of the school year, but has so far received no reply. Thousands of children are being held in more than a hundred detention centers around the country, many run by for-profit contractors. Conditions vary, but, on the whole, instruction is limited and supplies are few. "The kids barely learn anything," a former social worker reported from Arizona.

Court-watchers have tended to consider Plyler insignificant because the Court's holding was narrow. But in "The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind" (Pantheon) Justin Driver, a law professor at the University of Chicago, argues that this view of Plyler is wrong. "Properly understood," Driver writes, "it rests among the most egalitarian, momentous, and efficacious constitutional opinions that the Supreme Court has issued throughout its entire history."

Driver is not alone in this view. In "No Undocumented Child Left Behind" (2012), the University of Houston law professor Michael A. Olivas called Plyler "the apex of the Court's treatment of the undocumented." In "Immigration Outside the Law" (2014), the U.C.L.A. law professor Hiroshi Motomura compared Plyler to Brown and described its influence as "fundamental, profound, and enduring." Even people who think the case hasn't been influential wish it had been. "Plyler v. Doe may be irrelevant in a strictly legal sense," the legal journalist Linda Greenhouse wrote last year, "but there are strong reasons to resurrect its memory and ponder it today." Because, for once, our tired, our poor, our huddled masses—the very littlest of them—breathed free.

Laura Alvarez, ten years old, rode in the family's battered station wagon to the courthouse in Tyler, for a hearing held on September 9, 1977, at six in the morning. (During a related Texas case—later consolidated with Plyler—a nine-year-old girl spoke to the judge in chambers and told him that, since being barred from school, the only learning she was getting came from poring over the homework done by a younger sibling—an American citizen.) In Tyler, the assistant attorney general for the State of Texas showed up wearing bluejeans. She'd flown in late the night before, and had lost her luggage. After an attorney from the Carter Administration said that the Justice Department would not pursue the litigants while the trial proceeded, during which time the students would be able to attend school, Judge Justice issued the requested injunction.

Witnesses presented testimony about economies: educating these children cost the state money, particularly because they needed special English-language instruction, but not educating these children would be costly, too, in the long term, when they became legal residents but, uneducated, would be able to contribute very little to the tax base. The Judge had a policy preference: "The predictable effects of depriving an undocumented child of an education are clear and undisputed. Already 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." But the question didn't turn on anyone's policy preferences; it turned on the Fourteenth Amendment.

The Fourteenth Amendment, ratified in 1868, guarantees certain rights to "citizens" and makes two promises to "persons": it prohibits a state from depriving "any person of life, liberty, or property, without due process of law," and prohibits a state from denying "any person within its jurisdiction the equal protection of the laws." Before Plyler, the Supreme Court had established that the due-process clause applied to undocumented immigrants, who are, plainly, "persons," but it had not established that the equal-protection clause extended to them, and the State of Texas said that it didn't, because undocumented immigrants were in the state illegally. Judge Justice disagreed. "People who have entered the United States, by whatever means, are 'within its jurisdiction' in that they are within the territory of the United States and subject to its laws," he wrote.

But how to apply that clause? The courts bring a standard known as "strict scrutiny" to laws that abridge a "fundamental right," like the right to life, liberty, and property, and to laws that discriminate against a particular class of people, a "suspect class," like the freed slaves in whose interest the

amendment was originally written—that is, any population burdened with disabilities "or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Is education a fundamental right? The Constitution, drafted in the summer of 1787, does not mention a right to education, but the Northwest Ordinance, passed by Congress that same summer, held that "religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." By 1868 the constitutions of twenty-eight of the thirty-two states in the Union had provided for free public education, open to all. Texas, in its 1869 constitution, provided for free public schooling for "all the inhabitants of this State," a provision that was revised to exclude undocumented immigrants only in 1975.

Justice skirted the questions of whether education is a fundamental right and whether undocumented immigrants are a suspect class. Instead of applying the standard of "strict scrutiny" to the Texas law, he applied the lowest level of scrutiny to the law, which is known as the "rational basis test." He decided that the Texas law failed this test. The State of Texas had argued that the law was rational because undocumented children are expensive to educate—they often require bilingual education, free meals, and even free clothing. But, Justice noted, so are other children, including native-born children, and children who have immigrated legally, and their families are not asked to bear the cost of their special education. As to why Texas had even passed such a law, he had two explanations, both cynical: "Children of illegal aliens had never been explicitly afforded any judicial protection, and little political uproar was likely to be raised in their behalf."

In September, 1978, Justice ruled in favor of the children. Not long afterward, a small bouquet arrived at his house, sent by three Mexican workers. Then came the hate mail. A man from Lubbock wrote, on the back of a postcard, "Why in the hell don't you illegally move to mexico?"

"The Schoolhouse Gate" is the first book-length history of Supreme Court cases involving the constitutional rights of schoolchildren, a set of cases that, though often written about, have never before been written about all together, as if they constituted a distinct body of law. In Driver's view, "the public school has served as the single most significant site of constitutional interpretation

within the nation's history." Millions of Americans spend most of their days in public schools—miniature states—where liberty, equality, rights, and privileges are matters of daily struggle. Schools are also, not incidentally, where Americans *learn* about liberty, equality, rights, and privileges. "The schoolroom is the first opportunity most citizens have to experience the power of government," Justice John Paul Stevens once wrote.

The Supreme Court paid relatively little attention to public schools until after the Second World War, but, since then, it has ruled on a slew of cases. Do students have First Amendment rights? In Tinker v. Des Moines Independent Community School District (1969), the Court said yes. Three students had sued when they were suspended for wearing black armbands to school to protest the Vietnam War. In a 7–2 opinion, the Court sided with the students, affirming that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and that public schools, though not democracies, "may not be enclaves of totalitarianism," either. Justice Hugo Black issued a heated dissent. "It may be that the Nation has outworn the old-fashioned slogan that 'children are to be seen not heard,' " he wrote, but he hoped it was still true that we "send children to school on the premise that at their age they need to learn, not teach." A still more strident version of Black's position was taken by Justice Clarence Thomas, in Morse v. Frederick (2007), a case involving a student who, when a parade passed in front of the school, waved a banner that read "BONG HiTS 4 JESUS." Writing for the majority, Chief Justice John Roberts marked an exception to the free-speech rights established in Tinker: students are not free to endorse drug use, but Thomas, concurring, used the occasion to wax nostalgic: "In the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed."

Just because the courts have recognized students' First Amendment rights, it doesn't follow that students have other rights. Do students have Fourth Amendment protections against "unreasonable searches and seizures"? Do they have Fifth Amendment protections against self-incrimination? Do they have Eighth Amendment protections against "cruel and unusual punishment"? In Goss v. Lopez (1975), the Court ruled that students cannot be suspended or expelled without at least some form of due process, but, two years later, in Ingraham v. Wright, it said that schools could punish children, physically, and without any procedure at all. This shift took place amid a growing conservative reaction that viewed the Court's schoolhouse opinions as an example of judicial overreach, as a violation of states' rights, and as part of the rise of permissiveness and the decline of order. Lopez had

extended to students a Fourteenth Amendment right to due process, partly on the back of the argument that granting students rights is a way of teaching them about citizenship, fairness, and decency. “To insist upon fair treatment before passing judgment against a student accused of wrongdoing is to demonstrate that society has high principles and the conviction to honor them,” the legal scholar William G. Buss wrote, in an influential law-review article in 1971.

Plenty of teachers and school administrators think that students don’t have any rights. “I am the Constitution,” Joe Clarke, the principal of a high school in Paterson, New Jersey, liked to say, roaming the hallways with a Willie Mays baseball bat in the nineteen-eighties. This was an era that Driver describes as marking a Reagan Justice Department campaign for “education law and order.” The era produced a 1985 decision, T.L.O. v. New Jersey, in which the Court ruled that schools require only reasonable suspicion, not probable cause, to search students and their backpacks and lockers and other belongings.

Together, the education law-and-order regime and the rise of school shootings, beginning with Columbine in 1999, have produced a new environment in the nation’s schools, more than half of which, as of 2007, are patrolled by police officers. It was a police officer’s closed-door questioning of a seventh grader, taken out of his social-studies class in Chapel Hill, that led to the Court’s 2011 decision, in J.D.B. v. North Carolina, establishing that only in certain circumstances do students have Fifth Amendment rights. Do students have Second Amendment rights? Not yet. But last year a Kentucky congressman introduced a Safe Students Act that would have repealed the 1990 Gun-Free School Zones Act, and allowed guns in schools. Meanwhile, more and more schools are surveilled by cameras, and bordered by metal detectors. If the schoolhouse is a mini-state, it has also become, in many places, a military state.

Few discussions of Plyler are more keenly sensitive to its ambiguities than Ana Raquel Minian’s “Undocumented Lives: The Untold Story of Mexican Migration” (Harvard), a revealing study that, because “undocumented lives” are nearly impossible to trace in the archives, relies on hundreds of oral histories. For Minian, Plyler, by its very casting of undocumented children as innocents, underscored the perception of undocumented adults as culpable—criminals to be arrested, detained, prosecuted, and deported.

As Texas appealed to the Fifth Circuit, Woodrow Seals, a district judge in Houston, ruled for the children in a related case. Seals didn't agree that the undocumented children were a suspect class, but he didn't need to, because he believed the Texas statute was not rational, and, in any case, he thought that absolute denial of an education was so severe a harm that, on its own terms, it required strict scrutiny. Public school is "the most important institution in this country," Seals wrote, and "the Constitution does not permit the states to deny access to education to a discrete group of children within its border." Seals handed down his opinion in July, 1980, just months before the Presidential election. He wrote in a letter, "I hate to think what will happen to my decision if Governor Reagan wins the election and appoints four new justices to the Supreme Court."

Carter's Justice Department had supported the plaintiffs. Reagan's did not. The Supreme Court heard oral arguments in Plyler v. Doe on December 1, 1981. The Mexican American Legal Defense and Educational Fund considered the case to be as important as Brown v. Board of Education, which, in 1954, Thurgood Marshall, then the head of the N.A.A.C.P. Legal Defense and Educational Fund, had argued before the Court. Marshall had presented Brown as a Fourteenth Amendment, equal-protection case. The plaintiffs in Plyler were making, essentially, the same argument. Conceivably, their case could realize the promise of Brown by establishing a constitutional right to an education. They could even press the claim that undocumented immigrants were not only persons under the equal-protection clause of the Fourteenth Amendment but also, doctrinally, a suspect class. None of these objectives were politically within their reach, however, given the makeup of the bench.

During oral arguments, Marshall peppered John Hardy, representing Plyler, about what the State of Texas did and did not provide for undocumented immigrants:

Marshall: Could Texas deny them fire protection?

Hardy: Deny them fire protection?

Marshall: Yes, sir. F-i-r-e.

Hardy: Okay. If their home is on fire, their home is going to be protected with the local fire services just—

Marshall: Could Texas pass a law and say they cannot be protected?

HARDY: —I don't believe so.

MARSHALL: Why not? If they could do this, why couldn't they do that?

HARDY: Because . . . I am going to take the position that it is an entitlement of the . . . Justice Marshall, let me think a second. You . . . that is . . . I don't know. That's a tough question.

MARSHALL: Somebody's house is more important than his child?

Later, Marshall came back at him, asking, "Could Texas pass a law denying admission to the schools of children of convicts?" Hardy said that they could, but that it wouldn't be constitutional. Marshall's reply: "We are dealing with children. I mean, here is a child that is the son of a murderer, but he can go to school, but the child that is the son of an unfortunate alien cannot?"

Three days later, the Justices held a conference. According to notes made by Justice Lewis F. Powell, Jr., Chief Justice Warren Burger said, "14A applies as they are persons but illegals are not entitled to E/P." Marshall said, "Children are *not* illegals. . . . E/P means what it says." Five Justices wanted to uphold the lower court's opinion, four to reverse it. Justice William J. Brennan, Jr., volunteered to write the majority opinion. He circulated a draft that called for strict scrutiny, deeming the children "a discrete and historically demeaned group." Powell said that he couldn't sign it.

Powell, appointed by Nixon in 1971, had been, for a decade, the chair of the school board of Richmond, Virginia. Sometimes known as "the education justice," he was deeply committed to public schools. But, because he was also committed to judicial restraint, he was opposed to declaring education to be a constitutional right. "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws," he had written in 1973, in San Antonio Independent School District v. Rodriguez, a case that was widely seen as having shut the door on the idea. For Powell, establishing education as a fundamental right invited claims: are health care, food, and shelter fundamental rights, too?

Powell was unwilling to sign Brennan's first draft, not only because it went against his opinion in Rodriguez but also because the draft contained language "that will be read as indicating that all illegal aliens, adults as well as children, may be 'discrete and insular minorities for which the Constitution offers a special solicitude.' " Brennan wrote a second draft; Powell once again asked him to narrow his opinion. But other Justices, who wanted to uphold the lower court's decision, sought to move Brennan

further to the left. After reading a draft of Burger's dissent ("The Constitution does not provide a cure for every social ill," the Chief Justice wrote, "nor does it vest judges with a mandate to try to remedy every social problem"), Justice Harry Blackmun circulated a proposal for issuing a different opinion, arguing that education has a special status because it's foundational to all other political rights, being necessary "to preserve rights of expression and participation in the political process, and therefore to preserve individual rights generally." Marshall, Brennan, and Stevens were prepared to join that opinion. But Blackmun needed Powell to make five. And Powell wouldn't sign on. "As important as education has been in the life of my family for three generations," he wrote to Blackmun, "I would hesitate before creating another heretofore unidentified right."

In the end, Brennan crafted a compromise. Education is not a constitutional right, he wrote, "but neither is it merely some governmental 'benefit.' " Undocumented migrants are not a suspect class, but their children are vulnerable, and laws that discriminate against them, while not subject to strict scrutiny, deserved "heightened scrutiny." Powell wrote to Brennan after reading the draft, "Your final product is excellent and will be in every text and case book on Constitutional law."

And yet its interpretation remains limited. "Powell wanted the case to be about the education of children, not the equal protection rights of immigrants, and so the decision was," Linda Greenhouse remarked in a careful study of the Court's deliberations, published a decade ago. For many legal scholars, Plyler looks like a dead end. It didn't cut through any constitutional thickets; it opened no new road to equal rights for undocumented immigrants, and no new road to the right to an education. It simply meant that no state could pass a law barring undocumented children from public schools. But that is exactly why Driver thinks that Plyler was so significant: without it, states would have passed those laws, and millions of children would have been saddled with the disability of illiteracy.

In 1994, when Californians were contemplating Proposition 187, which would have denied services to undocumented immigrants, a reporter for the Los Angeles *Times* was able to track down thirteen of the original sixteen Plyler children. Ten had graduated from high school in Tyler. Two worked as teacher's aides. Laura Alvarez and all six of her brothers and sisters stayed in Tyler after Judge Justice issued his opinion in Plyler. She became a legal resident of the United States under the terms of the 1986 Immigration Reform and Control Act, graduated in 1987 from John Tyler High School, and spent a decade working for the Tyler school district. "Without an education, I don't know where I'd be right now," she said.

"I'm glad we lost," James Plyler said in an interview in 2007, when he was eighty-two, and long since retired, and enjoying his grandchildren, who are themselves of Mexican descent.

Lewis Powell retired from the Court in 1987. He was replaced by Anthony Kennedy. In another opinion, Powell had written that children should not be punished for the crimes of their parents. "Visiting this condemnation on the head of an infant is illogical and unjust," because "legal burdens should bear some relationship to individual responsibility or wrongdoing." It's hard to know what Kennedy's likely replacement, Brett Kavanaugh, would say about whether the Constitution guarantees undocumented migrant children the equal protection of the law. He's never cited Plyler in his scholarship and, in opinions issued from the bench, has cited it only once. He hasn't written much about equal protection, either, though he has said, in passing, that he finds the equal-protection clause ambiguous. As for undocumented migrant children, he has issued one important opinion, a dissent in Garza v. Hargan, last year, that, while not citing Plyler, described the plaintiff in the case, an undocumented immigrant minor in Texas, as particularly vulnerable.

"The minor is alone and without family or friends," Kavanaugh wrote. "She is in a U.S. Government detention facility in a country that, for her, is foreign. She is 17 years old." The reason for her vulnerability? "She is pregnant and has to make a major life decision." She wanted to have an abortion; Kavanaugh had earlier joined a decision ruling that she must first leave detention and find a sponsoring foster family. When, in a further appeal, the D.C. court vacated that ruling, Kavanaugh dissented, arguing that the court had acted on "a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand." Her name was kept out of the proceedings. She was another Doe. It is not clear whether she ever finished her education. ♦

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