

FROM THE BORDER TO THE SCHOOLHOUSE
GATE: ALTERNATIVE ARGUMENTS FOR
EXTENDING PRIMARY EDUCATION TO
UNDOCUMENTED ALIEN CHILDREN

*María Pabón López**
*Diomedes J. Tsitouras***

I. INTRODUCTION

The current legal and political landscape in the United States reveals the challenges posed by the broken immigration system and its concomitant result, the high levels of unauthorized or undocumented migration to the country. While many local civic institutions are impacted daily by unauthorized immigration, statewide educational systems in particular have found themselves squarely in the fray on this matter. Whether children lacking legal immigration status, typically denominated undocumented students, are able to attend public primary school gratis has been a settled question for the last twenty-five years. In 1982, the Supreme Court held in its landmark decision *Plyler v. Doe* that undocumented students cannot be deprived by a state of a free public K-12 education without violating the Equal Protection Clause.¹ Thus, it has been the law of the land since then that these children have been able to access primary education.

Since then, attempts have been made to pass legislation that would overrule the decision. For instance, at the federal level, the Gallegly amendments proposed in 1995 and 1996 would have removed states'

* B.A. Princeton University, J.D. University of Pennsylvania Law School, Professor of Law, Indiana University School of Law, Indianapolis. The research assistance of Miriam Murphy, Associate Director, Ruth Lilly Law Library, Indiana University School of Law, Indianapolis and of Donna Johnsen Close is greatly appreciated.

** B.S. Cornell University School of Labor Relations, M.P.A. Cornell Institute for Public Affairs, J.D. 2009 (expected) Indiana University School of Law, Indianapolis.

1. *Plyler v. Doe*, 457 U.S. 202, 210, 221-22, 230 (1982).

obligation to educate undocumented children.² In 1994, California voters approved Proposition 187, the “Save our State” initiative, which required school districts to notify federal immigration authorities of children who were unable to verify their immigration status.³ Parts of the provision were ruled unconstitutional, as they were in conflict with *Plyler*.⁴

While the Court decided *Plyler* on Federal Equal Protection grounds, this Article identifies alternative sources of law, both in state constitutions and at the federal level as well, that secure the right to access education for undocumented children. Specifically, a large number of state constitutions have both equal protection clauses and education clauses, which can be used to secure this right. Further, the Supreme Court has found that the right to parent is a fundamental one.⁵ Thus, this right should also be used as an alternative federal constitutional argument to secure the ability to access education.

This Article proceeds in four parts. Part I identifies the challenges, present and future, to the Supreme Court’s decision in *Plyler*. These challenges have come in the form of proposed federal amendments. Part II analyzes the right to parent under the federal law which has been identified by the United States Supreme Court as existing under the United States Constitution. We contend that such right extends to undocumented fathers and mothers present here in the United States. This Part further explores legal and policy aspects to the management of the right to parent, including the potential for immigrant voting in local elections. This Part also considers the consequences of the use of the right to parent for undocumented parents to access free public education for their undocumented children. Part III analyzes the rights of undocumented children under the equal protection clauses of both the United States and Texas Constitutions. This Part also hazards a prediction regarding the current Supreme Court and how it might rule on the Federal Equal Protection arguments as litigated in *Plyler*. Finally, Part IV concludes that while *Plyler* has been criticized doctrinally, it should also be seen as a decision that could stand on alternative constitutional bases in order to allow undocumented students access to a

2. María Pabón López, *Reflections On Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1395-96 (2005) (citing H.R. 4134, 104th Cong. (1996)). The amendments did not pass. *See id.*

3. *See id.* at 1396-97; *see also* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 763-65 (C.D. Cal. 1995).

4. *League of United Latin Am. Citizens*, 908 F. Supp. at 786 & n.38, 787.

5. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

free primary education. Rather than taking a narrow view of the border meeting the schoolhouse gate, and in order to afford undocumented students the opportunity for a free public education, this Article proposes a more expansive view, where the whole of the educational and parenting experience should be considered in determining the contours of the rights for undocumented students and their parents.

II. CHALLENGES TO *PLYLER V. DOE*

While *Plyler v. Doe* represents a high water mark in immigrants' rights jurisprudence, it has suffered criticism and challenges. The *Plyler* opinion, decided by a close 5-4 vote, was criticized at the time as being "result-oriented,"⁶ and because it "appear[ed] to be ad hoc and divorced from other related bodies of law created by the Court."⁷ The challenges then to the holding of *Plyler* have been found in the legislative realm. At the federal level, California Congressman Elton Gallegly introduced an addition to the Illegal Immigrant Reform and Responsibility Act ("IIRARA").⁸ Title VI of the amendment reads:

(a) Statement of Policy.—Because Congress views that the right to a free public education for aliens who are not lawfully present in the United States promotes violations of the immigration laws and because such a free public education for such aliens creates a significant burden on States' economies and depletes States' limited educational resources, Congress declares it to be the policy of the United States that—(1) aliens who are not lawfully present in the United States are not entitled to public education benefits in the same manner as United States citizens, nationals, and lawful resident aliens; and (2) States should not be obligated to provide public education benefits to aliens who are not lawfully present in the United States.

(b) Construction.—Nothing in this section shall be construed as expressing any statement of Federal policy with regard to—(1) aliens who are lawfully present in the United States, (2) benefits other than public education benefits provided under State law, or (3) preventing

6. *Plyler*, 457 U.S. at 244 (Burger, C.J., dissenting).

7. Philip B. Kurland & Dennis J. Hutchinson, *The Business of the Supreme Court*, *O.T.* 1982, 50 U. CHI. L. REV. 628, 650 (1983). In fact, Professor Hutchinson took his critique further, stating that "*Plyler* cut a remarkably messy path through other areas of the Court's jurisprudence." Dennis J. Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167, 184 (1982).

8. López, *supra* note 2, at 1396.

the exclusion or deportation of aliens unlawfully present in the United States.⁹

The amendment “would have allowed states to regulate for themselves the conditions under which undocumented children” could access public schools.¹⁰ Thus, a state could even ban such children from its schools. The House of Representatives approved IIRARA, including the Gallegly amendment.¹¹ When President Clinton threatened a veto, it was dropped from the Act.¹² There was also opposition by Texas Senators Kay Bailey Hutchison and Phil Gramm, and a publicity campaign by public interest groups, both of which led to the dissolution of the amendment.¹³ While such a provision may appear to be less likely today, with Congress in Democratic control and at least some Republican support for more immigrant-friendly reforms, it is a fact that immigration is even more a “hot” issue than it was eleven years ago.¹⁴ Immigration has grown more in the last seven years than at any other time in United States’ history.¹⁵ Federal legislation such as this one could resurface at any time, thus making it analytically useful to explore alternative grounds for undocumented students to have access to free public education in the United States.

III. AN UNDOCUMENTED ALIEN’S RIGHT TO PARENT

A. *Early Origins of the Right to Parent*

The Supreme Court reasoned in *Plyler* that it would be unfair to punish children for the illegal acts of their parents.¹⁶ This argument was adopted from earlier illegitimacy cases. Justice Powell made this clear in his concurring opinion:

9. H.R. 4134, 104th Cong. § 1 (1996). The amendment was also introduced in 1995. H.R. 1377, 104th Cong. (1995).

10. Jaelyn Brickman, Note, *Educating Undocumented Children in the United States: Codification of Plyler v. Doe Through Federal Legislation*, 20 GEO. IMMIGR. L.J. 385, 391 (2006).

11. *Id.*

12. *Id.*

13. López, *supra* note 2, at 1396 (citing Sidney Weintraub et al., *Responses to Mitigation Issues*, in U.S. COMM’N ON IMMIGRATION REFORM, MEXICO-U.S. BINATIONAL MIGRATION STUDY REPORT 437, 468 (1997), available at <http://www.utexas.edu/lbj/uscir/binpapers/v1-5weintraub.pdf>).

14. See Julia Preston, *Immigration is Defying Easy Answers*, N.Y. TIMES, Dec. 30, 2007, at A17.

15. Julia Preston, *7-Year Immigration Rate is Highest in U.S. History*, N.Y. TIMES, Nov. 29, 2007, at A20.

16. *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

Although the analogy is not perfect, our holding today does find support in decisions of this Court with respect to the status of illegitimates. In *Weber v. [sic] Aetna Casualty & Surety Co.*, we said: “[V]isiting . . . condemnation on the head of an infant” for the misdeeds of the parents is illogical, unjust, and “contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”¹⁷

Plyler is driven considerably by the public policy reason of society’s interest in educating children as well as notions of equal protection.¹⁸ However, alternative grounds for the continued access of education to undocumented children exist. Although children have no right to education in the Federal Constitution, there is a “fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children.”¹⁹ Thus, parents have a right to direct the education of their children free from unreasonable state mandates. This right is focused on the parent’s choice, rather than the children’s right to education.

Further, aliens²⁰ are “persons” within the meaning of the Fourteenth Amendment of the Constitution.²¹ Thus, because the right to parent is largely derived from the Due Process Clause of the Fourteenth Amendment, it can be said to apply to undocumented aliens.

Meyer v. Nebraska is the first case where the right to parent was expressed by the Supreme Court.²² In *Meyer*, the Nebraska legislature had enacted a law which prohibited the teaching of foreign language below the eighth grade.²³ In the wake of post-World War I nativism, twenty-two other states also passed such laws.²⁴ The purpose of the law,

17. *Id.* at 238 (Powell, J., concurring) (internal citation omitted).

18. *Id.* at 221-22.

19. *Wisconsin v. Yoder*, 406 U.S. 205, 232-35 (1972) (holding that the State could not compel Amish children to attend school beyond eighth grade in contradiction to their parents’ wishes).

20. “Alien” is the term in the Immigration and Nationality Act for “any person not a citizen or national of the United States.” Immigration and Nationality Act, 8 U.S.C. § 1101(a)(3) (2000). It is used in this Article interchangeably with “noncitizen,” another term with the same meaning.

21. *Plyler*, 457 U.S. at 212.

In concluding that “all persons within the territory of the United States,” including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government, we reasoned from the understanding that the Fourteenth Amendment was designed to afford its protection to all within the boundaries of a State. *Id.* (citing *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)).

22. 262 U.S. 390, 399-400 (1923).

23. *Id.* at 397.

24. See William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. CIN. L. REV. 125, 133 (1988).

according to Nebraska's attorney general at the time, was "to create an enlightened American citizenship in sympathy with the principles and ideals of this country, and to prevent children reared in America from being trained and educated in foreign languages and foreign ideals before they have had an opportunity to learn the English language"²⁵

The Court held that the Nebraska statute violated the Due Process Clause of the Fourteenth Amendment.²⁶ The Court stated that, "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws."²⁷ Thus, the right to parent includes the ability to direct the education of the child. Prohibiting foreign language instruction interferes with this duty. An additional basis for the holding in *Meyer* was that the law interfered with the right of teachers "to pursue their vocations" on a freedom of contract theory.²⁸ This basis was subsequently overruled.²⁹

The right to parent was reaffirmed in the case of *Pierce v. Society of Sisters*.³⁰ In this case, the Supreme Court enjoined the enforcement of Oregon's Compulsory Education Act of 1922.³¹ The Act required every parent to send any child between the ages of eight and sixteen to public school.³² The Society of Sisters operated many private primary and secondary schools.³³ Parents, as a result of the Act, withdrew their children from the private schools operated by the Society of Sisters.³⁴ The Society of Sisters brought suit seeking an injunction and claimed that the Act interfered with "the right of parents to choose schools where their children will receive appropriate mental and religious training"³⁵

The Court relied on its precedent of the *Meyer v. Nebraska* case, and stated that the Act "unreasonably interferes with the liberty of

25. Brief and Argument of State of Nebraska, Defendant in Error at 12-13, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (No. 325).

26. *See Meyer*, 262 U.S. at 399, 402.

27. *Id.* at 400.

28. *See id.* at 393, 399.

29. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (holding there is no due process freedom of contract claim, so long as the regulation is reasonably related).

30. 268 U.S. 510 (1925).

31. *Id.* at 534-36.

32. *Id.* at 530.

33. *Id.* at 531-32.

34. *Id.* at 532.

35. *Id.*

parents and guardians to direct the upbringing and education of children under their control.”³⁶ It further stated that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”³⁷

As the original right to parent case, the *Plyler* Court relied on *Meyer* in explaining that while there is no federal constitutional right to education, it is not any ordinary governmental benefit:

Public education is not a “right” granted to individuals by the Constitution. But neither is it merely some governmental “benefit” indistinguishable from other forms of social welfare legislation. 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. The “American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.” We have recognized “the public schools as a most vital civic institution for the preservation of a democratic system of government”³⁸

Thus, while education is not a fundamental right, its paramount importance suggests that parents retain some degree of control and do not abdicate all responsibility to the state. By excluding undocumented children from primary education, parents would be deprived of the ability to give their children the benefits of America’s “most vital civic institution.”³⁹ Not merely the prohibition of teaching a foreign language would be at stake, but most likely the ability to learn any language or any academic subject at all.

Several decades later in *Wisconsin v. Yoder*, the Supreme Court elaborated on the natural duty a parent has to educate a child.⁴⁰ It explained that “[t]he duty to prepare the child for ‘additional obligations,’ referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship.”⁴¹ While the last obligation, that of “good citizenship,” would not apply to an alien, there is nothing in the Court’s opinion to suggest that this is the only public policy justification for compulsory

36. *Id.* at 534-35.

37. *Id.* at 535.

38. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963); *Meyer*, 262 U.S. at 400 (Brennan, J., concurring)).

39. *Id.*

40. *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972).

41. *Id.* at 233.

education. Further, such an obligation may be a means to better integrate noncitizens into the national community and prepare them for our country's ultimate form of participation: citizenship.

When decisions of the parent will "jeopardize the health or safety of the child, or have a potential for significant social burdens" the obligation and right of the parent is limited.⁴² In *Yoder*, the Court held that the State of Wisconsin breached the Free Exercise Clause of the First Amendment when it required Amish parents to comply with a compulsory attendance law.⁴³ Amish parents claimed that their religion expressly prohibited secondary education.⁴⁴ The Court ruled that the State's interest in compulsory education must be balanced with the interests of the free exercise of religion.⁴⁵

Some state courts have narrowed the application of the right to parent in terms of the ability to direct a child's education, by limiting that right to cases that concern a religious conflict with the parent's religious beliefs. For example, the Michigan Supreme Court held that there was no fundamental right to parent under the Fourteenth Amendment in the case of *Michigan v. Bennett*.⁴⁶ In addition, it narrowly read *Pierce* and *Yoder* as only having application in a religious context.⁴⁷ As a result, the court upheld a statute which required certification for those parents who teach their children at home.⁴⁸

Finally, the Supreme Court has recently clarified the fundamental right to parent in *Troxel v. Granville*.⁴⁹ It stated, "we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children."⁵⁰ In *Troxel*, the Court struck down a Washington statute that allowed child visitation for "[a]ny person" at "any time."⁵¹ The grandparents of two children petitioned the Washington Superior Court for increased visitation with their grandchildren.⁵² Over the mother's objections, the court granted the order.⁵³ The Washington Supreme Court reversed the order because it was an unconstitutional infringement on the mother's care, custody, and

42. *Id.* at 233-34.

43. *Id.* at 234-36.

44. *Id.* at 215-18.

45. *Id.* at 215.

46. 501 N.W.2d 106, 108 (Mich. 1993).

47. *Id.* at 112-13.

48. *Id.* at 120.

49. 530 U.S. 57, 63 (2000).

50. *Id.* at 66.

51. *Id.* at 61, 75.

52. *Id.* at 61.

53. *Id.*

control of her children.⁵⁴ The United States Supreme Court ruled the visitation statute violated the right to parent and was not in the best interest of the child.⁵⁵ This was based on the presumption that fit parents act in the best interest of their children and should be able to determine with whom they associate.⁵⁶

While the Court found a right in this circumstance, it is not clear precisely where the limits of parents' rights lie. Courts have been reluctant to give parents authority in curriculum decisions. For example, courts have rejected parental rights with respect to objection to compulsory community service, academic testing, and mandatory sex education.⁵⁷

*B. Other Constitutional Grounds:
Ninth Amendment, Natural Law, and Original Intent*

All cases so far have viewed the right to parent via the Fourteenth Amendment. However, the right to parent may also derive from the Ninth Amendment.⁵⁸ The Ninth Amendment instructs, “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁵⁹ The Ninth Amendment implies rights that are not explicitly spelled out in the Constitution.⁶⁰ Even in *Troxel*, in his dissenting opinion, Justice Scalia stated that the Ninth Amendment is a better fit for protecting the right to parent than the Fourteenth Amendment using similar reasoning.⁶¹

54. *Id.* at 63.

55. *Id.* at 72-73.

56. *Id.* at 68-69.

57. *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461-62 (2d Cir. 1996); *Hubbard v. Buffalo Indep. Sch. Dist.*, 20 F. Supp. 2d 1012, 1014-17 (W.D. Tex. 1998); *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340, 341, 344 (D. Md. 1969), *aff'd*, 428 F.2d 471, 472 (4th Cir. 1970) (*per curiam*).

58. See Daniel E. Witte, Comment, *People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. REV. 183, 210.

59. U.S. CONST. amend. IX.

60. Howard J. Vogel, *The “Ordered Liberty” of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme From Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1477 (2006).

61. *Troxel*, 530 U.S. at 91 (Scalia, J., dissenting).

In my view, a right of parents to direct the upbringing of their children is among the “unalienable Rights” with which the Declaration of Independence proclaims “all Men . . . are endowed by their Creator.” And in my view that right is also among the “othe[r] [rights] retained by the people” which the Ninth Amendment says the Constitution’s enumeration of rights “shall not be construed to deny or disparage.”

Id.

Usually, these rights are articulated by means of natural law theory or original intent.⁶² Natural law theory suggests that these are rights that are “unalienable Rights,” arising from the laws of nature.⁶³ These have included life, liberty, and the pursuit of happiness.⁶⁴ The Supreme Court has expressed this notion in terms of natural law theory: “The [Supreme] Court has frequently emphasized the importance of the family. The rights to conceive and raise one’s children have been deemed ‘essential,’ ‘basic civil rights of man,’ and ‘[r]ights far more precious . . . than property rights.’”⁶⁵ The child’s “favored, beneficent status in our social and legal systems does not detract from the well-settled rule that the right of parents to the custody of minor children is both a natural and a legal right.”⁶⁶ Thus, because the right to parent is one that is unalienable, it can be implied to exist under the Ninth Amendment.

However, there may be a slight complication in applying the Ninth Amendment to undocumented aliens because the Supreme Court has ruled that they cannot be considered “people” unless they have a “sufficient connection” to the United States.⁶⁷ This holding pertains to undocumented persons under the Fourth Amendment,⁶⁸ but since both amendments use the term “people,” it may be found by implication applicable to the Ninth Amendment. Thus, it is not entirely clear whether an alien who voluntarily enters the country, maintains a job or home, pays taxes, and builds credit would have a “sufficient connection” with the United States. While the United States Supreme Court has not ruled on this topic, lower court cases have held that lawful border crossings and legal entry could constitute voluntary acceptance of societal obligations, and thus a sufficient connection to the national community.⁶⁹ Further, even an unlawful status in the United States may meet this standard.⁷⁰

62. Witte, *supra* note 58, at 210.

63. *Id.* (citation omitted).

64. *Id.*

65. *Id.* at 212 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)) (alterations in original).

66. *Ariz. State Dep’t of Pub. Welfare v. Barlow*, 296 P.2d 298, 300 (Ariz. 1956).

67. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

68. *Id.* at 261.

69. See *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006) (“regular and lawful entry of the United States pursuant to a valid border-crossing card and her acquiescence in the U.S. system of immigration constitute her voluntary acceptance of societal obligations”); *United States v. Tehrani*, 826 F. Supp. 789, 794 n.1 (D. Vt. 1993) (finding that temporary tourist visas qualified as a substantial connection).

70. *United States v. Atienzo*, No. 2:04-CR-00534(PGC), 2005 U.S. Dist. LEXIS 31652, at *14-15 (D. Utah Dec. 6, 2005) (granting a motion to suppress after holding that undocumented status alone constituted “sufficient connections” with the United States and thus Fourth Amendment).

The right to parent can also be considered to be a right the founders contemplated when they wrote the Constitution. The United States Supreme Court recognized such original intent in *Yoder*, stating that “[the] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”⁷¹ It further noted, “Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”⁷² This quote may also be interpreted to apply to noncitizens because the distinctions between citizen and noncitizen were small at the time. For example, the colonies did not all follow the English tradition to exclude aliens from voting and holding public office.⁷³ In addition, because it took nearly thirty years for the new federal government to exercise its power to naturalize, many noncitizens were allowed to vote at both local and national levels.⁷⁴ Such rights were granted on the basis of race and property ownership, rather than citizenship.⁷⁵ Finally, early in United States history, notions of state citizenship were more important than national citizenship.⁷⁶

In addition, an original intent argument is evident in *Meyer*, where the Supreme Court stated:

The Ordinance of 1787 declares, ‘Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.’ Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.⁷⁷

Thus, the right to parent can be considered one that has been deeply rooted in our history and tradition, and thus should be implied via the Ninth Amendment.

protection could be applied). *But see* United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1271-74 (D. Utah 2003) (denying a motion to suppress after holding that a previously removed alien felon did not have “sufficient connection” with the United States and thus could not receive Fourth Amendment protection).

71. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

72. *Id.* at 221.

73. Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271, 273 (2000).

74. *Id.* at 274.

75. *Id.* at 275.

76. *Id.* at 274.

77. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

C. *The Right to Parent as an Alternative Basis for Plyler*

The right to parent, whether existing in the Ninth Amendment or the Fourteenth Amendment, can be applied as an alternative basis for holding that the children of undocumented aliens have a right to access primary education.⁷⁸ Supreme Court cases such as *Pierce* and *Meyer* involved absolute educational restrictions: a prohibition on sending children to private school, and the teaching of a foreign language in the public school, respectively. Both cases were examples of unreasonable interferences with the ability of parents to direct their children's education. Further, if a state was to charge an undocumented alien parent with an unaffordable amount of tuition, this would be an unreasonable interference because it would be akin to requiring the child be sent to private school or be home-schooled. In light of *Pierce*, a state law forcing a child to go to private school should similarly be unconstitutional because it would be directing his or her education in contradiction with the parents' wishes.

And unlike *Yoder*, where Amish parents opted not to send their children to school in contravention to the state interest of universal education, undocumented parents choosing to send their child to public school is consistent with such a state interest. In fact, Justice White's concurring opinion in *Yoder* quoted the same language from *Brown v. Board of Education* as the *Plyler* Court in acknowledging the significance of education.⁷⁹ He acknowledged that "[t]oday, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society."⁸⁰ Thus, because the state's interest furthers the parent's right to the education of his or her child, the state interest and that of the parent should be one and the same. The interests may only diverge over specific issues like bilingual education and other special education. A school district may want to pursue an immersion type education or cut back on existing resources targeted to

78. There is some disagreement as to whether a heightened form of scrutiny should always be used with respect to parental rights and education. See *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461 (2d Cir. 1996) (applying rational-basis review); see also *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) ("[T]he Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny.").

79. *Wisconsin v. Yoder*, 406 U.S. 205, 238 (1972) (White, J., concurring).

80. *Id.* (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)); see also *Plyler v. Doe*, 457 U.S. 202, 222-23 (1982) (same).

undocumented students. A parent of an undocumented child would usually want the opposite.

The right to parent is also beneficial in the reinforcement of encouraging parents to be involved in their children's education. Studies show that parental involvement increases the chance of strong academic performance.⁸¹ Students with involved parents are more likely to get higher grades, pass classes, have better social skills, and go on to postsecondary education.⁸²

D. Mechanisms for Promoting the Right to Parent

Extending the right to vote in school board elections is one method to increase parental involvement of undocumented parents in public schools. There are three reasons why extending such a parental right would be a good policy: It would assist in assimilating new student populations, provide more equity by requiring that all voices be heard, and hold local school boards accountable for special student needs.

Allowing undocumented parents voting rights encourages the new student assimilation. Such a right would be a first step in civic participation, and it would symbolize the democratic freedom for which the United States stands.⁸³ In a more practical sense, it would encourage undocumented persons to take part in their communities, and create a sense of ownership that may not exist otherwise. Finally, the special needs undocumented children have in terms of special education and bilingual education/immersion programs would be better maintained through advocacy at the school board level.

Equity requires that everyone's voice be heard.⁸⁴ Without a vehicle to express their frustrations, people become disillusioned. Sometimes this dissatisfaction grows into anger, divisiveness, and violence. The recent riots in France involving immigrant youths are one such example.⁸⁵ It is estimated that in a lifetime an average undocumented alien will pay "\$80,000 more in taxes than [he or she] will receive in

81. See ANNE T. HENDERSON & KAREN L. MAPP, NATIONAL CTR. FOR FAMILY AND CMY. CONNECTIONS WITH SCH., A NEW WAVE OF EVIDENCE: THE IMPACT OF SCHOOL, FAMILY, AND COMMUNITY CONNECTIONS ON STUDENT ACHIEVEMENT 7 (2002), available at <http://www.sedl.org/connections/resources/evidence.pdf>.

82. *Id.*

83. Bryant Yuan Fu Yang, Note, *Fighting for an Equal Voice: Past and Present Struggle for Noncitizen Enfranchisement*, 13 ASIAN AM. L.J. 57, 62 (2006).

84. *Id.* at 63.

85. *Id.* at 62.

local, state, and federal benefits.”⁸⁶ Hence, in order to avoid an unfair taxation without representation, undocumented parents should have limited right to vote in school board elections.

In addition, the right to access education can be more fully enjoyed when those accessing education have a say in how it is administered. School boards approve of new teachers, set policy, decide curriculum, and appropriate money.⁸⁷ Courts routinely give deference to school boards with respect to these decisions.⁸⁸ With local boards yielding so much power, undocumented parents should be able to hold such power accountable. Perhaps if undocumented parents could vote, they could discourage school board members from ineffective measures such as when the Anaheim School Board attempted to bill Mexico fifty million dollars for the cost of educating its undocumented children.⁸⁹

Despite being sound policy, extending the right to vote in school board elections is unlikely to occur. There are those who fear that allowing persons who are not citizens to take part in the duties of citizenship devalues citizenship so that less potential applicants will be likely to pursue a pathway to citizenship in the future.⁹⁰ Further, some cities have experienced mixed results in extending the right to noncitizen legal permanent residents (“LPRs”). Chicago extends this right to noncitizen LPRs.⁹¹ New York City provided the same right until 2002 when it abolished its school boards.⁹² San Francisco also attempted to grant LPRs this right.⁹³ However, voters rejected this proposal known as

86. *Id.* at 63. (quoting STEPHEN MOORE, NAT’L IMMIGRATION FORUM, A FISCAL PORTRAIT OF THE NEWEST AMERICANS 4 (1998), available at <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=277>).

87. See, e.g., Alief Independent School District, Understanding Your School Board, <http://www.alief.isd.tenet.edu/understand.htm> (last visited June 29, 2008); Bryan Independent School District Board Responsibilities, <http://www.bryanisd.org/default.asp?pageID=55> (last visited June 29, 2008); District of Columbia School Board, <http://www.dcwatch.com/archives/election2000/survey03.htm> (last visited June 29, 2008); Mercer Island School District, The Responsibilities of School Boards, <http://www.misd.k12.wa.us/board/meminfo/role.html> (last visited June 29, 2008).

88. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (“States and local school boards are generally afforded considerable discretion in operating public schools.”) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (recognizing the autonomy of school boards in regulating their schools)).

89. Lisa Richardson, *High School District Mulls Suing Mexico; Restitution: Proposal Under Debate Would Demand \$50 Million for Education of Mexican Children in Anaheim. Racism is Charged*, L.A. TIMES, May 28, 1999, at 11.

90. Yang, *supra* note 83, at 70-71.

91. *Id.* at 60.

92. *Id.*

93. *Id.* at 58.

“Proposition F” on November 2, 2004.⁹⁴ In Maryland, the city of Takoma Park allows noncitizens to vote in local elections, and in fact, does not require proof of legal residence.⁹⁵ With the mixed record regarding attempts to extend the right to vote for noncitizens, extending such a right specifically to the undocumented would face an even greater challenge.

Thus, because extending the right to vote is likely untenable, schools should seek alternative forms of governance that allow for high parental involvement, but also allow for undocumented parent inclusion. One such alternative is a “school-based management initiative.”⁹⁶ In this form, decisions over budget, curriculum, and people are decided by a council of parents, teachers, and administrators.⁹⁷ Such a council would be an excellent way to include undocumented parents because it is possible to engineer such a body without an election.

E. Possible Negative Consequences of Expanding the Right to Parent

There are drawbacks to using the right to parent as a justification for extending the access of primary education to undocumented children. There is danger that by shifting the focus from the child to that of the parent, the parent is not a suspect class and thus under equal protection would receive only a lower level of scrutiny.⁹⁸ Although some alienage classifications are subject to strict scrutiny, undocumented persons’ unlawful entry is not a “constitutional irrelevancy,” so they are not considered a suspect class.⁹⁹

Another criticism when using the right to parent as means to justify access to schooling is that a “privatization” of education would occur.¹⁰⁰

94. *Id.*

95. Eunice Moscoso, *In Maryland Town, Noncitizens Are Encouraged to Vote*, DAYTON DAILY NEWS, Nov. 8, 2007; *see also* Rachel L. Swarns, *Immigrants Raise Call for Right to be Voters*, N.Y. TIMES, Aug. 9, 2004, at A13 (noting the “[e]fforts” of cities to “expand the franchise to noncitizens”). *See generally* RON HADYUK, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES* (2006) (discussing history and current trends in noncitizen voting); María Pabón López, *Noncitizens and the Franchise*, in *AMERICAN ENCYCLOPEDIA OF CIVIL LIBERTIES* (Paul Finkelman ed., 2006).

96. William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 190 (2000).

97. *Id.*

98. Luke van Houwelingen, Note, *Tuition-Based All-Day Kindergartens in the Public Schools: A Moral and Constitutional Critique*, 14 GEO. J. ON POVERTY L. & POL’Y 367, 380 (2007).

99. *Plyler v. Doe*, 457 U.S. 202, 219 (1982).

100. Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1356-57 (2005).

This is because it suggests that parents have a greater choice of schools.¹⁰¹ Schemes that allow corporations to run schools, encourage charter schools, and the extending of vouchers to parents, would all favor the idea of a private notion of education as opposed to a public one.

Parents would argue that if they have the right to send their children to school, such a right should mean they are entitled to charter schools or a voucher system. By channeling money away from public schools, voucher systems and corporate-run schools harm public education. In the long run, profit motives, combined with competitive forces, create disparities within a single system in terms of quality. Such disparities could then cause a separation between good and bad students, between groups of parents, or even along race- or class-based lines. Parents would retreat from certain schools and segregate themselves from certain populations they view as unfavorable to their children's education.¹⁰²

In addition, vouchers give rise to Establishment Clause issues, and to the state's prohibition on funding sectarian schools.¹⁰³ Parents using the *Meyer* and *Pierce* cases to buttress an argument for school choice based on the right to parent would also have to address the difference between these cases and any voucher schemes. There is a large distinction between a parent not wanting to send a child to public school for religious reasons and the state declining to provide funds for children to go to a nonpublic school.¹⁰⁴ Hence, school choice advocates cannot derive the full benefit of parental rights.

Another negative consequence of enlarging parent control is that it may give parents veto power over certain educational curricula and programs. In the late 1990s, many grassroots religious organizations lobbied state legislatures to pass "Parental Rights Amendments."¹⁰⁵ These amendments sought to enhance the power of parents to be able to choose the curricula and programs to which their children would be exposed.¹⁰⁶ These initiatives are particularly favored by parents who morally object to sexual education, evolution, and other curricula.¹⁰⁷ The

101. *Id.*

102. *Id.*

103. Ross, *supra* note 96, at 199-201.

104. *Id.* at 197.

105. Jennifer L. Sabourin, Note, *Parental Rights Amendments: Will a Statutory Right to Parent Force Children to "Shed Their Constitutional Rights" at the Schoolhouse Door?*, 44 WAYNE L. REV. 1899, 1899 (1999) (citation omitted).

106. *Id.* at 1900-02.

107. *Id.* at 1901-02.

New York City School District's plan to distribute condoms, and other attempts to teach students about sexual orientation with books such as *Heather Has Two Mommies*¹⁰⁸ and *Daddy's Roommate*,¹⁰⁹ caused an uproar among these parents.¹¹⁰ Most attempts at enacting such legislation have failed. Congressional attempts at passing legislation have also failed.¹¹¹ In 1996, a Colorado initiative was defeated by a fifty-two to forty-eight percentage vote.¹¹² Currently, Texas is the only state to codify a right to parent;¹¹³ however, Hawaii, New York, Michigan, and Arizona have recently considered parental rights bills in their legislatures.¹¹⁴

Parental Rights Amendments present many problems. Schools would be on the defensive in deciding school curriculum, and teachers might be forced to drop subjects they may have taught for years.¹¹⁵ Further, such a right would create more opportunities for litigation and its resulting legal fees, which would be an additional expense for school systems.¹¹⁶ Finally, parental rights weaken the state's power to protect children in child-abuse cases.¹¹⁷ However, while as a policy matter there may be potential risks in the use of the right to parent, it is part of the legal landscape in the United States and could serve as an alternative ground for *Plyler*, as discussed above.

IV. EQUAL PROTECTION AND UNDOCUMENTED ALIEN CHILDREN

Under the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court has developed an analysis that scrutinizes state action on three grounds, depending on the nature of the action. Under the rational basis standard, a state action must bear a rational relationship to

108. LESLÉA NEWMAN, *HEATHER HAS TWO MOMMIES* (1989).

109. MICHAEL WILLHOITE, *DADDY'S ROOMMATE* (1990).

110. Sabourin, *supra* note 105, at 1906.

111. Parental Rights and Responsibilities Act of 1995, H.R. 1946, 104 Cong. (1995); *see also* Sabourin, *supra* note 105, at 1900, 1901 n.14.

112. Ross, *supra* note 96, at 186.

113. Parents in Texas have the right to review all teaching materials used in the classroom, a right to remove the child from lessons that are objectionable because of moral or religious reasons, a right of prior consent before a child may be videotaped by a school employee, and the right to file a grievance before the school board. TEX. EDUC. CODE ANN. § 26.001-.011 (Vernon 2007); *see also* TEX. FAM. CODE ANN. § 151.001 (Vernon 2007) (recognizing a parent's right to direct education).

114. S.B. 1392, 48th Leg., 2d Reg. Sess. (Ariz. Feb. 4, 2008); H.R. 41, 24th Leg. (Haw. Jan. 17, 2008); S.R. 41, 24th Leg. (Haw. Feb. 25, 2008); H.J.R. 40, 94th Leg. (Mich. Jan. 23, 2008); S.B. 452, 230th Ann. Legis. Sess. (N.Y. 2007).

115. *See* Ross, *supra* note 96, at 186-87.

116. *Id.* at 187.

117. *Id.* at 186.

a legitimate state interest in order to be constitutional.¹¹⁸ Under intermediate scrutiny, state action has to have a substantial relationship to an important state interest.¹¹⁹ And under strict scrutiny, a state action must further a compelling state interest that cannot be accomplished by less intrusive means.¹²⁰ A federal court will typically apply a rational basis standard, unless a “heightened” form is necessary. A strict scrutiny form is needed when a state action burdens a fundamental right.¹²¹ These have included the right to interstate travel and the right to access the courts, among others.¹²² Strict scrutiny is employed when there is a suspect classification, such as race or ethnicity.¹²³ There are also quasi-suspect classifications, such as gender.¹²⁴

The Court in *Plyler* used the rational basis standard, albeit “with a bite.”¹²⁵ This was a function of a compromise.¹²⁶ Justice Brennan, who authored the majority opinion, used rational basis scrutiny “with a bite” instead of strict scrutiny in order to attract Justice Powell’s vote for the majority.¹²⁷ Justice Powell had written the decision in *San Antonio Independent School District v. Rodriguez* and was a firm believer in its holding that education was not a fundamental right.¹²⁸ The rest of the majority consisted of Justices Marshall, Blackmun, and Stevens.¹²⁹ Chief Justice Burger filed a dissent, with Justices O’Connor, Rehnquist, and White joining.¹³⁰ Today, Justice Stevens is the only remaining member of the Court since 1982.

118. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) (defining the “traditional standard of review” as requiring a showing that the state system bears some “rational relationship” to the state’s goal).

119. See *Plyler v. Doe*, 457 U.S. 202, 217, 218 & n.16 (1982).

120. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 127 S. Ct. 2738, 2751-52 (2007).

121. Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 248 (1999); see also *Rodriguez*, 411 U.S. at 37 (rejecting lower court findings that education is an appropriate issue for application of strict scrutiny review).

122. Jeffrey, *supra* note 121, at 248.

123. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

124. See *United States v. Virginia*, 518 U.S. 515, 533 (1996).

125. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972).

126. See *id.* at 12, 46-47; Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1862-74 (1995).

127. *Plyler v. Doe*, 457 U.S. 202, 203 (1973); see generally Tushnet, *supra* note 126, at 1862-74 (discussing the deliberations of the *Plyler* decision).

128. 411 U.S. 1, 2, 38 (1973).

129. *Plyler*, 457 U.S. at 203.

130. *Id.* at 242 (Burger, C.J., dissenting).

If today's Court were deciding a similar provision to that which was enacted by the Texas legislature in *Plyler v. Doe*, Justices like Alito, Scalia, and Thomas would be likely to align with the dissenters in *Plyler*. Justices Breyer and Ginsburg would likely side with the *Plyler* majority. However, Chief Justice Roberts is more likely to lean towards the dissent, based on the position he held while working for the United States Attorney General at the time *Plyler* was decided.¹³¹

Further, it is possible that the Court may try to narrow the applicability of the Equal Protection Clause. If a state interest is an important one or satisfies the "rational basis with a bite" standard, a state may be able to pass heightened scrutiny when excluding undocumented children from a free public primary education. A state would have to show that exclusion of such children may be the only way to fulfill such interest.

The *Plyler* majority did not find that the cost of education was a valid reason for denying undocumented children an education.¹³² It stated, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."¹³³ Further, it noted, "[t]here is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc."¹³⁴ The debate as to whether undocumented aliens are a net gain or a net loss to the economy continues raging today.¹³⁵ How in fact the undocumented children fare with regard to using state educational resources may convince today's Supreme Court that the state interest is important enough to warrant the exclusion of undocumented children from public schools. Perhaps, a state could show that circumstances have changed since 1982, by drawing on twenty-five years of expenses related to educating an increasingly greater population of undocumented children.

It is also possible that the holding in *Plyler v. Doe* may be limited to its particular facts. One case illustrative of this notion is *Kadrmas v.*

131. See Memorandum from John Roberts and Carolyn Kuhl to the Attorney General, *Plyler v. Doe*, "The Texas Illegal Aliens Case" 1-2 (June 15, 1982), available at <http://www.archives.gov/news/john-roberts/accession-60-98-0832/036-chron-file-3-1-82-8-31-82/folder036.pdf> (claiming that Justice Powell would have been on the side of the dissent if the State of Texas had done more research on the "values of judicial restraint" in writing its brief).

132. *Plyler*, 457 U.S. at 227-28.

133. *Id.* at 227.

134. *Id.* at 228.

135. See Brickman, *supra* note 10, at 389.

Dickinson Public Schools.¹³⁶ In this case, a student challenged the constitutionality of a North Dakota statute permitting school districts to charge a user fee for bus transportation.¹³⁷ The trial court dismissed the suit and it was appealed to the North Dakota Supreme Court.¹³⁸ The North Dakota Supreme Court ruled that the statute was a “purely economic” one and did not violate the Equal Protection Clause.¹³⁹ The United States Supreme Court agreed.¹⁴⁰ It held that there was no need to apply strict scrutiny to the statute because there was no fundamental right nor suspect class present and that raising funds from fees was a rational basis for the statutory scheme.¹⁴¹

The Court declined to “extend the requirements of the Equal Protection Clause beyond the limits recognized in our cases”¹⁴² The plaintiffs relied on *Plyler*, and argued the same “heightened” form of review from that case should be applied to the North Dakota statute.¹⁴³ However, the Court was not persuaded, stating that “[w]e have not extended this holding beyond the ‘unique circumstances’ that provoked its ‘unique confluence of theories and rationales.’”¹⁴⁴ Further, the Court distinguished *Plyler* from the facts before it, and stated “[u]nlike the children in that case, Sarita Kadrmas has not been penalized by the government for illegal conduct by her parents.”¹⁴⁵ Instead, the child was denied education only because her parents refused to pay the same user fee that all other families paid that accessed the service.¹⁴⁶ Further, unlike the *Plyler* Court, the *Kadrmas* Court was not convinced that the user fee would “promote the creation and perpetuation of a subclass of illiterates within our boundaries”¹⁴⁷ Thus, it is unclear whether *Plyler* will be extended to any other educational cases.

The Supreme Court has been reluctant to extend the Equal Protection Clause to protect many so-called economic rights claims, and has declined to give heightened scrutiny to cases involving welfare,

136. 487 U.S. 450 (1988).

137. *Id.* at 455.

138. *Id.*

139. *Id.* (citing *Kadrmas v. Dickinson Pub. Schs.*, 402 N.W.2d 897, 902 (N.D. 1987)).

140. *Id.* at 456.

141. *Id.* at 457-58.

142. *Id.* at 458.

143. *Id.* at 459-60.

144. *Id.* at 459 (internal citations omitted).

145. *Id.*

146. *Id.*

147. *Id.* (internal citations omitted).

housing, and education financing.¹⁴⁸ In the case of education financing, *San Antonio Independent School District v. Rodriguez*, the Court held that an equally funded education is not a fundamental right.¹⁴⁹ The Court stated that there was no complete deprivation of education, and that dictating to the legislature on how to fund its schools would cause further harm.¹⁵⁰ For this reason, the Court used a rational basis form of scrutiny and held that there was a legitimate state interest in the manner in which the schools were funded.¹⁵¹ As a result, many cases involving economic rights, such as education, are often adjudicated on the state level.¹⁵² Thus, although under the United States Constitution education is not a fundamental right, there are alternative avenues for this holding under state constitutions.

A. Using State Constitutions

State constitutions have two important clauses that may be used to secure the right to access education for undocumented children. Forty-nine states include constitutional articles establishing common public school systems within their borders.¹⁵³ Only Iowa does not have a constitutional clause or statute which provides for a unified public school system.¹⁵⁴ Alabama has a constitutional provision which establishes public schools but includes language preventing the interpretation of the State's constitution as establishing a right to education.¹⁵⁵

When these state constitutional articles have been challenged, state courts of last resort have upheld the constitutional language and interpreted the constitutional clauses in support of education as a

148. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973); *Jefferson v. Hackney*, 406 U.S. 535, 546-49 (1972); *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970).

149. *Rodriguez*, 411 U.S. at 37-38.

150. *Id.* at 37-38, 58.

151. *Id.* at 55.

152. See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 105-10 (1995).

153. Memorandum of Donna Johnsen Close to María Pabón López, July 15, 2008 (on file with authors). For a review of the historical dimensions of the state constitutions protection of public education, see Stephen G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?* (Northwestern University School of Law Public Law and Legal Theory Series, No. 08-06), TEXAS L. REV. (forthcoming).

154. IOWA CONST. art. IX, § 12.

155. ALA. CONST. art. XIV, § 256.

fundamental and inalienable right and applied the principle of equal access for the state residents.¹⁵⁶

Courts in forty-eight states have interpreted their constitutions to guarantee equal protection.¹⁵⁷ Twenty-one of these forty-eight states provide greater equal protection than the Federal Constitution.¹⁵⁸ The other twenty-seven states have held their equal protection guarantee to be equivalent to that of the Federal Constitution.¹⁵⁹ Certain states that have provided greater protection than the Federal Constitution have developed their own tests for deciding cases.¹⁶⁰ The states that have largely tied their equal protection to the federal guarantee only provide such protection in cases where there is federal court jurisprudence stating that a right exists.¹⁶¹

Many state courts differ from the federal courts in how they determine when a fundamental right exists.¹⁶² Some tests include that the right is “central to freedom and representative democracy,” “essential to individual liberty,” or “at the heart of the relationship between an individual and the state.”¹⁶³ Other courts use an ad hoc basis.¹⁶⁴ Fifteen states have held that state funded education is a fundamental right in their constitutions.¹⁶⁵ Six states have held that a state funded education is not a fundamental right, and six states have declined to answer the question as to whether it is a fundamental right.¹⁶⁶

The state courts that have found a fundamental right to education base that finding on their state’s education clause, the general importance of education as expressed in *Brown v. Board of Education*¹⁶⁷ (just as in *Plyler*), the nexus between political participation and education, the dissent in *Rodriguez*, and international human rights documents.¹⁶⁸ Additionally, states such as North Dakota and West Virginia have subjected education funding cases to a form of heightened

156. See, e.g., *McDuffy v. Sec’y of Executive Office of Educ.*, 615 N.E.2d 516, 519 (Mass. 1993); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997).

157. Jeffrey, *supra* note 121, at 251.

158. *Id.* at 254.

159. *Id.* at 254-57.

160. *Id.* at 257-58.

161. *Id.* at 260.

162. *Id.* at 269.

163. *Id.*

164. *Id.*

165. *Id.* at 270.

166. *Id.* at 270-71.

167. 347 U.S. 483, 493 (1954).

168. Jeffrey, *supra* note 121, at 271-74.

scrutiny.¹⁶⁹ Six states have not applied heightened scrutiny to their state's funding scheme, and all of these states except New Jersey adopted the reasoning in *Rodriguez*.¹⁷⁰ These states have upheld their states' financing schemes. State courts are divided as to whether wealth can be a suspect classification.¹⁷¹ Thus, even if state courts recognize a fundamental right to education, because of the varied results stated above, it is not clear whether application of equal protection analysis would support a greater access to education or more equity in funding.

However, the situation in *Plyler* is different than education funding cases in that the right to access education is denied completely unless parents pay for the schooling. Thus, even if state courts do not recognize education as a fundamental right and do not subject state funding schemes to heightened scrutiny, they may still be inclined to apply a heightened form of scrutiny because the complete inability to receive an education is a much harsher result than receiving an inadequate one.

This inconsistent result among states is a good reason why there should be a Federal Equal Protection right to access primary education for the undocumented. Currently there are some states that educate more undocumented children than others. If only some states recognize a right to access education and others do not, then there may be a migration of students and parents to those states that do recognize a right to access education. Hence the burden might be shared inequitably. Furthermore, with the existence of a Federal Equal Protection right to access education for undocumented students, states that tie their equal protection analysis to the federal one would follow suit.

B. Using Texas as an Example for State Constitutional Equal Protection Litigation to Protect Undocumented Children

While the possibility of inconsistent results exists, using state constitutions is one way to protect undocumented students' access to education. Specifically, using the Texas state constitutional cases concerning equal protection and education, the outcome in *Plyler* would be likely preserved. The case of *Richards v. League of United Latin American Citizens* illustrates this point.¹⁷²

In *Richards*, Mexican-American United States citizens who lived in the Mexican border area brought an equal protection challenge against

169. *Id.* at 275.

170. *Id.* at 278.

171. *See id.* at 295-96.

172. 868 S.W.2d 306 (Tex. 1993).

the Texas system of higher education.¹⁷³ The Texas Supreme Court held that the state's appropriation of fewer resources to the border area did not violate the plaintiff's equal protection rights.¹⁷⁴ The trial court had ruled that the higher education appropriation was unconstitutional via the Texas Constitution.¹⁷⁵ The trial court made the following findings:

(1) about 20% of Texans live in the border area, yet only about 10% of the State funds spent for public universities are spent on public universities in that region; (2) about 54% of the public university students in the border area are Hispanic, as compared to 7% in the rest of Texas; (3) the average public college or university student in the rest of Texas must travel 45 miles from his or her home county to the nearest public university offering a broad range of masters and doctoral programs, but the average border area student must travel 225 miles; (4) only three of the approximately 590 doctoral programs in Texas are at border area universities; (5) about 15% of the Hispanic students from the border area who attend a Texas public university are at a school with a broad range of masters and doctoral programs, as compared to 61% of public university students in the rest of Texas; (6) the physical plant value per capita and number of library volumes per capita for public universities in the border area are approximately one-half of the comparable figures for non-border universities; and (7) these disparities exist against a history of discriminatory treatment of Mexican Americans in the border area (with regard to education and otherwise), and against a present climate of economic disadvantage for border area residents.¹⁷⁶

The State of Texas claimed such disparities in funding were a result of differences in hiring salary for certain faculty, different student-faculty ratios, and different equipment needs.¹⁷⁷

In many ways, the Texas courts have analyzed their state's equal protection clause with a framework that is parallel to the federal system.¹⁷⁸ In this case, the trial court found that the state violated the

173. *Id.* at 308.

174. *Id.* at 314.

175. *Id.* at 316.

176. *Id.* at 309.

177. *Id.*

178. *See id.* at 310. The applicable Texas state constitutional provisions are as follows. Article I § 3 of the state Equal Protection Clause in the Texas Constitution provides: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." TEX. CONST. art. I § 3.

Texas Constitution when it spent fewer resources on education in this portion of the state, thus denying Mexican-Americans equal rights.¹⁷⁹ The Texas Supreme Court reversed the trial court's findings.¹⁸⁰ It did so for four reasons. First, approximately half of the Mexican-American population in the state lived outside the border area.¹⁸¹ Thus, it found that the class of people was really defined based on geography and not nationality.¹⁸² For this reason, it found "territorial uniformity is not a constitutional prerequisite."¹⁸³ Second, because the difference was only a geographical disparity, the state only needed a legitimate basis for its funding scheme, and its efficient location of such monies was one such legitimate purpose.¹⁸⁴ Third, using a disparate impact analysis, the plaintiff failed to document an intent to discriminate against Mexican-Americans.¹⁸⁵ The disproportionate impact was not enough to be "overwhelming and unequivocal" in order to show a discriminatory purpose.¹⁸⁶ Finally, higher education was not a fundamental right under the Texas Constitution.¹⁸⁷ Thus, if the Texas Supreme Court were to be presented with a case such as *Plyler v. Doe* today, it would likely reach the same result as the United States Supreme Court reached in 1982.

Unlike *Richards*, a *Plyler* type of situation, where undocumented aliens would be forced to pay out-of-district tuition, would have implications across the entire state with respect to Mexican immigrants and not just the border region. As a result, the class would be more likely to be an "easily identifiable group[] singled out for different treatment under the law and subject to prejudice in the community" and therefore less likely to be based on solely "territorial uniformity."¹⁸⁸ Further, the Texas Supreme Court noted "[the United States Supreme Court] has recognized Mexican Americans as a separate class in various equal protection contexts, and has treated discrimination against persons of Mexican ancestry as equivalent to racial discrimination."¹⁸⁹ However,

Article I, section 3a provides: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative." TEX. CONST. art. I, § 3a.

179. *Richards*, 868 S.W.2d at 310.

180. *Id.* at 317.

181. *Id.* at 311.

182. *Id.*

183. *Id.*

184. *Id.* at 312.

185. *Id.* at 314.

186. *Id.* at 313-14.

187. *Id.* at 314-17.

188. *Id.* at 311, 312 & n.6.

189. *Id.* at 312 n.6 (internal citations omitted).

Plyler states that undocumented aliens are not a suspect class.¹⁹⁰ Thus, it is unclear whether the Texas Supreme Court was referring to all persons of Mexican descent, or legal permanent residents and citizens of Mexican descent, when it used the words “Mexican Americans.”¹⁹¹ If the Texas Supreme Court found a distinction between the documented and undocumented Mexican-Americans, it would likely not apply a heightened form of scrutiny to the undocumented and thus there would be no constitutional violation.

However, unlike *Richards*, a *Plyler* situation would involve primary education and not higher education. The Texas courts have stated that primary education is a fundamental right.¹⁹² Their finding is buttressed by the Texas Constitution’s education clause that mandates the state to provide an “efficient system of public free schools.”¹⁹³ Thus, because a fundamental right exists, “the state action is subjected to strict scrutiny” and would need to “serve a compelling government interest” in order to be constitutional.¹⁹⁴ Denying education to undocumented alien children would not be a compelling state interest because such children would be more likely to be poor, commit crime, and engage in unhealthy decisions.¹⁹⁵ Further, such an action would create the very caste system that equal protection intends to abolish as found by the *Plyler* majority.¹⁹⁶ For these reasons, the inability of undocumented children to receive an education would constitute a violation of the equal protection clause of the Texas Constitution.

Finally, *Richards* is distinct from *Plyler* in that it sought to request a more equitable distribution of funds, whereas the plaintiffs in *Plyler* only sought for the same right to access education as the other children in the school district.¹⁹⁷ Thus, because the case does not involve a complicated administrative decision of allocating funds, the Texas Supreme Court may be more inclined to rule in favor of the plaintiffs.

The State of Texas may also argue that denying education to undocumented children is a compelling interest because failure to do so would be very costly to the state. However, such an argument ignores

190. *Plyler v. Doe*, 457 U.S. 202, 219 n.19.

191. *Richards*, 868 S.W.2d at 312 n.6.

192. *Id.* at 314-15 (quoting *Stout v. Grand Prairie Indep. Sch. Dist.*, 733 S.W.2d 290, 294 (Tex. Ct. App. 1987)).

193. TEX. CONST. art. VII, § 1.

194. *Richards*, 868 S.W.2d at 311.

195. *Plyler*, 457 U.S. at 238 (Powell, J., concurring) (“I agree with the Court that their children should not be left on the streets uneducated.”).

196. *Id.* at 218-19.

197. *Compare id.* at 205-06 with *Richards*, 868 S.W.2d at 308.

the benefit the residents of the state receive in the form of cheap labor of the undocumented students' parents, as well other benefits that education provides for society.¹⁹⁸

Finally, if the Texas Supreme Court were to hold that undocumented students have a right to access primary education, it would be overruling a Texas Court of Appeals decision, *Hernandez v. Houston Independent School District*.¹⁹⁹ In that 1977 case, the Texas Court of Appeals, Third District, upheld the state and federal constitutionality of a statute that denied using public funds to educate undocumented children.²⁰⁰ The court of appeals failed to find that education was a fundamental right via *Rodriguez* or that undocumented aliens were a suspect class.²⁰¹ Thus, that statute was rationally related to the improvement of education and was constitutional.²⁰² *Plyler* would have overruled the federal constitutionality issue involved in this case.²⁰³ However, the court of appeals' state equal protection conclusion has never been overruled.²⁰⁴

V. CONCLUSION

The continued vitality of *Plyler v. Doe* as a high water mark for immigrants' rights jurisprudence is a fact. Notwithstanding this fact, alternative bases for *Plyler*'s objective of securing the right to access education should be explored. While economic rights are not favored under the Federal Constitution, traditional rights, such as the right to parent and guide a child's education have been ruled on by the United States Supreme Court in the past. Such a right to parent may even be a way to allow a right to access education. The right to direct a child's education can be implemented through participation with local school boards. Undocumented parents could also be given the ability to influence this body through representation or voting.

Additionally, arguments under the education clauses and equal protection clauses of state constitutions should be explored also as

198. *Plyler*, 457 U.S. at 228-29.

199. 558 S.W.2d 121 (Tex. Ct. App. 1977).

200. *Id.* at 122-23.

201. *Id.* at 122-24.

202. *Id.* at 124-25.

203. See Phillip J. Cooper, *Plyler at the Core: Understanding the Proposition 187 Challenge*, 17 CHICANO-LATINO L. REV. 64, 70 n.25 (1995) ("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.").

204. Cf. *Kirby v. Edgewood Indep. Sch. Dist.*, 761 S.W.2d 859, 861 n.4 (Tex. App. 1988) ("The precise holding in *Hernandez*, that the state need not provide a tuition-free education to illegal alien children, was overruled by *Plyler*").

alternatives for undocumented children to attend primary school. The education clauses in many constitutions such as Texas support the proposition that the right to access primary education is a fundamental right. Therefore, any attempt to deny education should be evaluated under a heightened form of scrutiny. By using alternative arguments to preserve the objective of *Plyler*, its vitality can be preserved for future generations of undocumented students.

Plyler represented a narrow view of immigration law meeting education by focusing only on the right of children to attend school.²⁰⁵ A more expansive view would integrate the parental experience with modern notions of educating children. Rather than undocumented aliens becoming isolated from the greater American society, this view would seek their participation and personal responsibility in creating a better country. As undocumented parents become more numerous, their participation will be valuable in ensuring that the needs of all students are met. If they are participating in school board elections and PTA meetings, rather than watching from the sidelines, their neighbors would be more likely to see them as partners in achieving better educational outcomes.

205. See *Plyler v. Doe*, 457 U.S. 202 (1982).