




10-1981

Plyler v. Doe

Lewis F. Powell Jr.

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United States Department of Justice
Immigration and Naturalization Service
Washington, D.C.

ALIENS DEPORTED AND REQUIRED TO DEPART BY DISTRICT
FISCAL YEAR 1980.

Districts	Total deported and required to depart	Deported	Required to depart
U.S. TOTAL	736474	17263	719211
EASTERN REGION	19609	2252	17357
Baltimore, Md.	1453	86	1367
Boston, Mass.	1142	26	1076
Buffalo, N.Y.	1830	147	1683
Hartford, Conn.	638	52	586
Newark, N.J.	2976	269	2707
New York, N.Y.	6121	1093	5028
Philadelphia, Pa.	1072	25	987
Portland, Me.	500	21	479
St. Albans, Vt.	867	6	861
San Juan, P.R.	1021	226	795
Washington, D.C.	1989	201	1788
SOUTHERN REGION	258451	6696	251755
Atlanta, Ga.	517	74	443
Dallas, Tx.	911	221	690
El Paso, Tx.	131999	2511	129488
Harlingen, Tx.	30555	2017	28538
Houston, Tx.	491	142	349
Miami, Fla.	1511	156	1355
New Orleans, La.	2639	153	2486
San Antonio, Tx.	89228	1422	88406
NORTHERN REGION	28498	1162	27336
Anchorage, Alaska	96	5	91
Chicago, Ill.	8233	285	7948
Cleveland, Ohio	698	37	661
Denver, Colo.	5272	128	5144
Detroit, Mich.	1199	93	1106
Helena, Mont.	2384	22	2362
Kansas City, Mo	2332	62	2270
Omaha, Neb.	897	65	832
Portland, Oreg.	1566	37	1535
St. Paul, Minn.	881	21	860
Seattle, Wash.	4940	353	4587
WESTERN REGION	429916	7153	422763
Honolulu, Hawaii	1319	15	1304
Los Angeles, Calif.	14967	716	14251
Phoenix, Ariz.	66445	57	66388
San Francisco, Calif.	3875	386	3489
SAN Diego, CALIF.	343310	5979	337331

Plylet

File

*Turned
back
at
border
in most
cases*

Court
Argued, 19...
Submitted, 19...

Voted on....., 19...
Assigned , 19...
Announced , 19...

No. 80-1538

PLYLER

vs.

DOE

Noted

[illegible]

72

68
OC
with R
QRS?

Roos

Elkins
v. Morero

One possibility
would be to
renewal to
determine when
an illegal alien
can be
deported in
Texas

mechanics? 5
no duty to educate
even if a suspect class 11

"State law" determines
domesticity status - 13

Elkins v. Morero would
allow Md. to exclude
from free College, ~~the~~
alien lawfully in U.S.
unless deported in Md. 14
16

Phil Kurland supports?
~~the~~ distinction bet
residents & non-
residents

No fundamental
right - 21

But David Thorne
Richardson requires
they be viewed as
"suspect class" - 23-26

Presumption

De Canas - Calif. ~~can~~ could make
employment illegal - if it
would have adverse effect
on lawful resident workers - 25
26
De Canas distinguished - 30

80-1538 Plyler v Doe80-1934 Texas v Children

Texas law (Act) ~~pro~~ authorizes free education to "lawfully present aliens" but not to illegal aliens. "The State's plan require 'documentation' - i.e. a decision by the State as to child's status."

The Resp. rely on E/P & Fed. Preemption.
CA 5 held Act invalid under rational basis E/P analysis. Did not reach preemption.

I Equal Protection

1. Must be domiciled (residents). This is threshold Q. If not residents, no more right than New Mex children.

Even if "suspect class" they must be domiciled - i.e. have an intention to reside permanently in Texas.

Even if "residents" in sense they have present intent to remain, it is conceded (9 Ninth) that most (DC said only 10% remain) return to Mex. Thus, Texas may have ~~rather~~ rational basis for distinction: why educate people who may never remain to work, vote, pay taxes, serve in military. (See J. Reaveley concurs in Ree v Wright (David p 18)).

Prof. Kinsland argues Act merely draws line between residents & non-residents.

E/P continued:

Elkins v Moreno (U. of Md case - W 213)
make clear that a state is not
obligated to provide benefits to people
not domiciled in state simply because
they are present. (David 12-16)

Could argue that a state must
treat illegal aliens as domiciled because
in fact ~~most~~ ^{most} probably never will be
~~deported~~ deported. But what provision
of Const. or Fed law requires this? Also,
this ^{view} would require rejection of language
in Elkins.

The major difficulty with the
Texas distinction between "residents"
& "non-residents" is that Fed Govt
determines deportation [elaborate
D/P procedure, & plus broad authority
to AG to make exceptions]. Thus,
Texas cannot know for sure who
may lawfully claim ~~as~~ a domiciliary
intent.

Answer may be that absent clear
evidence of presumption, Texas has
this right. ~~for~~ Traditionally, state
law determines ~~domicile~~ domicile.
Elkins so held & remanded for Md to decide

II Preemption

David made persuasive argument that Fed law, enacted pursuant to the Const., preempts state law in this area entirely. Field is occupied.

States have no authority to determine an individual's status under Fed immigration laws.

Absent a Fed determination, States must presume an alien is here lawfully.

But in De Canas v. Brice, we sustained Calif law making it unlawful to employ an illegal alien if this would adversely affect U.S. workers. This suggests no total preemption, as S.G. argues. [David reminds & agrees that De Canas can be limited to its facts. (David p 25) Some provisions of Fed law seem to recognize states may limit alien employment].

x x x

My concern as to preemption is that until Congress acts to contrain the States will have no control over the ~~rights~~ rights of illegal aliens

Opinion or Note

There is the Texas "education
of illegal alien children" issue
that I addressed last summer.

CA5 held E/P does apply to
such children, & invalidated Texas
statute.

PRELIMINARY MEMORANDUM

May 1, 1981 Conference
List 1, Sheet 1

No. 80-1538

PLYER (Superintendent)
ET AL

Appeal from CA5 (Dyer,
Frank Johnson and Politz)

v

DOE ET AL

Federal/Civil

Timely

SUMMARY: The appellants challenge the ruling of the two courts
below invalidating, as violative of the Equal Protection Clause, a
Texas statute which prohibits the use of state funds to educate alien
children who are not "legally admitted" to the United States.

FACTS: The appellees are a class of schoolage children who have
been denied a free public education by the appellants pursuant to a
Texas statute, § 21.031 of the Texas Education Code. They brought

Note. I've been waiting for this, For the record,

this action under 42 U.S.C. § 1983 and the Declaratory Judgment Act, challenging the constitutionality of the statute. They also attacked the tuition policy of the Tyler Independent School District (TISD), whereby the district charges a tuition of \$1,000 per year for each undocumented child as a prerequisite to enrollment in the Tyler public schools.

On September 14, 1978, the district court granted the appellees' request for permanent injunctive relief, after a trial on the merits. The district court held that § 21.031 and the TISD tuition policy violate the Equal Protection Clause and, alternatively, that the statute and the policy infringe upon an area that is pre-empted by federal law.

DECISION BELOW: CA5 affirmed the holding of the district court that the Texas statute and the TISD tuition policy violate the Equal Protection Clause. It did not agree with the alternative holding of the district court that the statute and the policy infringe upon an area pre-empted by federal law.

On the Equal Protection issue (the only challenge relevant here), CA5 noted that it is undisputed that the Fourteenth Amendment extends "due process protections to aliens, even if they are in the country illegally." Shaughnessy v United States, 345 U.S. 206. Similarly, it is clear that aliens legally residing in the United States are given the protection of the Equal Protection Clause. See, Ambach v Norwich, 441 U.S. 68. Whether aliens illegally residing in the country are entitled to such protection has never been squarely decided by the Court, however.

CA5 concluded that the Equal Protection Clause does extend to such illegal aliens. They are clearly "persons within the jurisdiction" of the state in which they reside and thus fall within its plain language. Moreover, while never holding that the Equal Protection Clause extends

to illegal aliens, the Court has indicated that the clause affords such aliens the equal protection of the laws. See Wong Wing v United States 163 U.S. 228, 238, quoting Yick Wo v Hopkins, 118 U.S. 356, 369. And, finally, logic compels the conclusion that illegal aliens come under the mantle of the Clause. To hold otherwise would be to disable courts from invalidating a state statute that established the maximum penalty for theft at 10 years if committed by a citizen or legal alien, but at 50 years if committed by an illegal alien.

CA5 proceeded to discuss the appropriate level of scrutiny. Though it felt that the statutory classification may be deserving of strict judicial scrutiny, CA5 found it unnecessary to resolve the issue. The panel concluded that the statute is ^{inform} whether tested using the mere rational basis standard or some more stringent test.

Texas clothes its statute in economic phraseology: in order to protect the education of documented children and citizens, it must decrease or avoid increasing the total cost of education; to reach this result, Texas excludes undocumented children from its free public schools. CA5 rejected this justification. In the court's view, to accept it would mean that cost, in and of itself, could justify the exclusion of any group of people from any government program that requires funding. This, clearly, is not the law.

The other justifications offered by Texas are equally unpersuasive. Texas may not argue that well-educated aliens will leave Texas, because it does not have the right to confine the long-term benefits of its public education program to its borders. The record does not support the contention that illegal aliens spread disease. And, finally, the failure of Texas to pass measures directly designed to discourage entry of illegal aliens (such as bans on employment) casts serious doubt on its claim that its motive in passing the statute was exclusionary.

CONTENTIONS: The appellants contend that aliens who enter the

country illegally are not "persons within a state's jurisdiction" for purposes of the Equal Protection Clause. The word "within" has unique meaning when illegal aliens are involved. Anyone who enters illegally cannot be legally "within" a state. According to the appellants, case after case stands for the proposition that lawful entry is a necessity if any rights other than due process rights are to apply. They cite to Blake v McClung, 172 U.S. 239 (treating citizenship of corporations).

The appellants aver that to apply the Equal Protection Clause to undocumented aliens would confer a right that would not be available were they not in this country. This would be bootstrapping of the worst sort and would encourage aliens to enter the country illegally.

The appellants close by citing Mathews v Diaz, 426 U.S. 67, 80, wherein the Court upheld the right of Congress to condition medicare on five years' residence and admission for permanent resident status.

Amici (Texas school districts) in support of the appellants say that the Texas statute in question does not contain any classification in terms of alienage or citizenship, nor any classification between legal and illegal aliens. The statute distinguishes between residents, whether citizens or aliens, and non-residents, whether citizens or aliens. The Court has made clear that a state may treat residents and non-residents differently in affording free tuition within its schools. Vlandis v Kline, 412 U.S. 441, 445, 452-53, 453-54. Thus, according to amici, the real question in the case is whether Texas is forbidden to treat illegal aliens as non-residents of a school district. Clearly, it may so treat them.

The appellees respond that, while this Court has never ruled that undocumented aliens are protected by the Equal Protection Clause, the clear language of that provision, this Court's rulings on the Due Process Clause, and simple logic command the conclusion that they are protected. The principle that basic protections adhere to all who are

physically within the jurisdiction of a state has been repeated in many rulings of the Court. See, Carlisle v United States, 16 Wall 147, 154; Johnson v Eisentrager, 339 U.S. 763; Kleindienst v Mandel, 408 U.S. 753. And, in Yick Wo v Hopkins, 118 U.S. 356, 369, the Court expressly said that the term "persons within the jurisdiction" applies to all within the territorial confines of a state.

DISCUSSION: It should be noted that the appellants' Jurisdictional Statement fails to comply with Rule 15(1)(j)(iv) because a copy of the Notice of Appeal is not appended to it.

In separate litigation, a statewide challenge to § 21.031 resulted in a ruling by a second district court that the statute violates the Equal Protection Clause. That court enjoined the State of Texas from denying free public education to any child due to the child's status as an undocumented alien. CA5 stayed the injunction without opinion, and Justice Powell vacated the stay. Certain Named and Unnamed Non Citizen Children and Their Parents v Texas, 101 S.Ct. 12. In doing so, Justice Powell noted that the case presented a difficult question of constitutional significance and that it was reasonable to assume that the Court would note probable jurisdiction.

CA5's opinion in this case seems well rooted in the decisions of this Court, and there is no conflict in the circuits. Indeed, in Bolanos v Kiley, 509 F2d 1023, CA2 expressed the view that the Equal Protection Clause does apply to illegal aliens (dicta).

Appellants' argument that it is illogical to require the states to grant educational benefits to illegal aliens when they are not bound to provide an education for aliens residing in their native countries is flawed, because it ignores a jurisdictional predicate of the Equal Protection Clause. Similarly, the appellants' argument that it is illogical to allow the federal government to deny the benefits of its social programs to illegal aliens, Diaz, supra, while disallowing the

states from similarly denying the benefits of their programs is also flawed. The same lack of symmetry exists with regard to legal aliens, Graham v Richardson, 403 U.S. 365, and it reflects no more than the fact that the federal government has plenary power to regulate immigration -- and the states do not.

Where CA5's opinion is open to challenge is in its balancing of the justifications. If, as CA5 was willing to assume arguendo, a rational basis standard is appropriate, CA5's weighing of the various state interests may be incorrect. In the more likely event that a higher standard of review is appropriate where the state completely bars (as opposed to the more limited partial bar in San Antonio School Board v Rodriguez, 411 U.S. 1) minimal education for the appellee children, however, CA5's conclusion would seem to be correct.

It is undeniable that this is an important issue. The Court could choose to affirm CA5's opinion, but it may be more desirable to afford this case plenary review.

There is a response and one amici brief.

4/22/81

Sexton

Opinion in Petition

from my study of this Q last summer,
I believe the exclusion of the children is
unconstitutional. JPB

Received 11/27 Extremely difficult case
addressed thoughtfully - Texas "illegal alien children"

df1 11/25/81

BENCH MEMORANDUM

To: Mr. Justice Powell

November 25, 1981

From: David

No. 80-1538: Plyler v. Doe

No. 80-1934: Texas v. Certain Named and Unnamed Undocumented
Alien Children

Question Presented

Whether the equal protection clause and federal
authority over immigration permit Texas school districts to
exclude illegal alien children from the benefit of a free
public education?

I. Introduction and Summary

This is an unusually difficult case without a clear answer. The Court can write a principled opinion either for or against the children, on either of the two questions--preemption or equal protection. I say, "principled," but in fact the opinion will be exceedingly difficult to write either way.

*I agree
so far!*

*I still
agree*

You will not be surprised that I argue in the memorandum for a preemption approach, but I do so with great diffidence. I will argue that because of the complexities and uncertainties of the immigration system, it is virtually impossible for the State to determine that someone is a deportable alien until there has been a finding to this effect by the INS. The Texas scheme permits--indeed forces--the school systems to make predictions about whether or not the INS will ultimately conclude that certain individuals are deportable. The State may guess wrong, and in any event it is no business of the states to determine an individual's status under the immigration laws. Certainly the federal government occupies the field to this degree. Also, there is evidence in the record that some of these children may not be deportable under federal law, indeed may be citizens, even though they are unable to obtain documentation. Because the Texas scheme is "based upon documentation", the exclusion of any such children may conflict with federal law, assuming that federal

*State
acts
require
document
-entation
that child
is
lawfully in
state*

law treats such nondeportable persons as permanent residents.

In addition, it can be argued that Congress has so occupied the field of immigration, that any state regulation based on alienage without express authorization from Congress is preempted. Although this approach was seemingly rejected by the Court in De Canas v. Bica, 424 U.S. 351 (1976), the Court may wish to limit De Canas to its particular facts.

If the Court takes a preemption approach, Congress might respond to the decision by authorizing the states to treat illegal aliens as if deportable until the INS found to the contrary. It might also authorize the states to deny such aliens any state benefits. That would remove part of the preemption problem, but a stronger form of the preemption argument would remain: The constitutional provision of power to the federal government to establish a "uniform system of naturalization" may prohibit Congress from authorizing the states to treat illegal aliens as they please and in 50 different ways. Also, were Congress to respond in this way the equal protection question would need to be faced.

In addition Texas could make the preemption argument somewhat more difficult by revising its statute. Ironically, if the statute were less generous it might be less subject to question. That is, if the statute did not extend a free education to all lawfully present aliens--thus requiring the state to decide who is and who is not lawful--but only to specific classes of aliens permitted to stay indefinitely

What
Congress
might
do

Texas
law
include
education
to all
lawfully
present
aliens. This
requires state to
assume a function
that belongs to Fed
Govt.

under federal law, the scheme might be less subject to attack. But if the argument that Congress has occupied the field is convincing, and if De Canas can be limited, then absent some explicit congressional authorization, even this scheme would be preempted. And again the Court would have to consider whether Congress could constitutionally permit the states to discriminate against aliens if they chose to do so or whether the "uniformity" clause would still prohibit such distinctions at the state level.

In short, there are three versions of the preemption argument: 1) that the Texas scheme as it is written, forces the state to determine immigration status in derogation of the exclusive authority of the INS; (2) the

field of immigration is occupied by the federal government:

the children of
aliens must be treated as citizens *residents at least for purpose of schooling* unless Congress explicitly

authorizes the states to draw distinctions; 3) the Congress'

Article I power "to establish a uniform rule of naturalization" requires that the regulation of aliens be done at the national level and Congress may not permit the states

to draw distinctions based on alienage for then the states might go their separate ways. I think that the first

preemption argument settles this particular case but that the

Court would be wise to cut back on De Canas and adopt the second of these preemption arguments. Admittedly, in the

short run, the result of adopting such a preemption argument

will be sweeping. But Congress may respond by direct

yes!

John's choice

regulation and possibly by authorizing the states to impose their own restrictions if the "uniformity" language in the naturalization clause is not a bar.

The difficulties with an equal protection approach are twofold. First, even to make the equal protection argument the Court has to make an argument very similar to that which I make under the guise of preemption. That is, a necessary threshold step to any equal protection analysis is to find that illegal aliens are "domiciliaries of the state." If the illegal alien children are not domiciliaries, Texas has no more obligation to educate them than citizens of New Mexico. Thus, the first step in an equal protection analysis is for the Court to tell the states that they must treat illegal aliens as if they are domiciled in the state. The states may reasonably reply that it is absurd to treat persons as having an intent to reside permanently who may not form such an intent as a matter of federal law. The answer is that federal law is not so clear as this. Some of these aliens will be permitted to stay on, others will never be challenged. Because the states are unable to know which of the aliens will ultimately be deported and which will be permitted to stay by default or permission, they must treat them as domiciliaries, assuming that the aliens have established a residence in the state.

Second, like the preemption approach, an equal protection approach will have sweeping implications for the

Problems
with
E/P

?

Yes

?

Second
E/P
problem

But
then
missed
in Texas?
We would
have to
so find.
But this
would be
odd in
view of
Fed
preemption
law

treatment of illegal aliens with respect to all state *sweeping implication*
benefits. Indeed, if the Court does reach the equal
 protection question, I do not see how it can avoid concluding
 that illegal aliens are every bit as much a "suspect *Suspect?*
classification" as resident aliens. The inevitable result of *But in*
Graham's holding that resident aliens are a suspect class *Graham*
 because discrete and insular is the conclusion that illegal *Richardson*
 aliens are similarly suspect. If the Court is unhappy with *they*
 that conclusion, it is because the premise is wrong. *were not*
illegal

Of course, just as in the resident alien cases, one
 would assume that a holding that illegal aliens are suspect
 would not detract from the federal government's essentially
 unfettered power over all classes of aliens. Just as with the
 preemption approach, an equal protection approach will
ultimately require Congress to legislate directly. Again the
 question will arise whether Congress may merely permit the
 states to place restrictions on aliens or whether it must
 directly do so on its own authority.

In sum, the preemption and equal protection *Two*
 approaches are strikingly similar. Both have a rather *approaches*
 "sweeping potential". Both require the Court to consider *are*
 whether the federal government may transfer some of its *similar*
 authority to regulate aliens to the states. Perhaps on the
 particular facts here a limited preemption decision is
 possible. That may be attractive in the short run.

II. Equal Protection

A. Are Illegal Aliens "Persons" Under the 14th Amendment?

By its terms the equal protection clause of the Fourteenth Amendment applies to "persons." In Wong Wing v. United States, 163 U.S. 228 (1896), the Court stated that the Fourteenth Amendment's due process and equal protection provisions "are universal in their application to all persons within the territorial jurisdiction." The Court has held that the due process component of the Amendment applies to illegal aliens, Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), and there is no apparent reason to treat the scope of the equal protection clause differently in this respect.

On the other hand, it is true that the Court has been careful in recent years not to include illegal aliens in its decisions affecting lawful resident aliens. In Mathews v. Diaz, 426 U.S. 67, 80 (1976), Justice Stevens remarked that "Neither the overnight visitor ... nor the illegal entrant can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests." In Boe v. Wright, 648 F.2d 432 (CA5 1981), Judges Reavley and Clark, through means of a lengthy concurrence, took the occasion of that case to register their disapproval of the panel's decision in Doe

v. Plyler. Judge Reavley made note of "the Supreme Court's *CA 5*
consistent and careful language indicating that the term *concur*
'person' as used in the equal protection clause of the *op.*
Fourteenth Amendment 'encompasses lawfully admitted ...
aliens...'"

Yet could it seriously be argued that a state could
exclude, for example, illegal Mexican aliens from a benefit
program but extend the program to illegal aliens from France?
If the equal protection clause has no application then such
national origin discrimination--even racial discrimination--
among illegal aliens might be permissible. In light of such a
shocking result, and given the plain language of the
Fourteenth Amendment, I conclude that aliens are included in *David*
the equal protection clause. They are "persons" within the *says*
jurisdiction of the State of Texas. *there*
are
"persons"

B. Is the Texas Scheme Rational?

1. the decision below

The CA5 found that the exclusion of illegal aliens *CA 5-*
from the public schools could not be justified under a *irrational*
rational basis standard of review. First, the CA considered *to exclude*
Texas' interest in keeping down the costs of the school *even on*
system. The CA held that such a justification could never by *rational*
itself justify an exclusion from a government benefit¹: *basis.*
Expense
to State
not a
lawful
justification

Footnote(s) 1 will appear on following pages.

Texas strongly urges that decreasing its costs is a rational justification for Section 21.031. To accept this contention would mean that cost, in and of itself, could justify the exclusion of any group of people from any government program that requires funding. This is clearly not the case. United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973). ... We think it clear that a state's desire to save money cannot be the basis of the total exclusion from public schools of a group of persons who are entitled to the equal protection of the laws of Texas and who share similar characteristics with included children."

CA5

Second, the CA considered Texas' assertion that unlike other students, illegal alien students would not return the benefit of their education to the community through their employment--the better educated an illegal alien becomes, the more likely he is to be deported. The CA held that Texas could not seek to "confine the long-term benefits of the education it provides to either its border or the national border." Such a purpose would be unconstitutional while if Texas did seek such an end "it chose a grossly underinclusive means."

Third, Texas argued that the exclusion of illegal

7. ¹The district court had held as a matter of fact that the exclusion of illegal aliens would not save the school districts any money or raise the quality of education for the other students. The CA found that the answer to this fact question was irrelevant: "Our decision today would be no different if Texas could conclusively prove that excluding undocumented children from its schools raised the quality of education available to citizens and legal aliens."

DC found
no
add. cost.
(on what
basis?)

alien children was justifiable for reasons of public health. The CA properly gave short shrift to this justification. Finally, the State argued that the exclusion of illegal alien children would tend to discourage illegal immigration into the United States and into Texas in particular. The CA found that such a goal might be constitutional, even commendable, but the CA doubted that this was in fact one of Texas' purposes. If Texas genuinely wished to deter immigration it would enact a law making it illegal to hire an illegal alien. This it had not done, casting "serious doubt on its exclusionary motive." Moreover, the district court had found that the education exclusion was not effective in discouraging immigration.²

²In a footnote the CA disposed of the State's additional arguments: (1) that the illegal children have special needs that drain the school's resources, (2) that the school districts are unable to project the number of illegal children in the future and so are unable to plan, and (3) that illegal aliens do not pay their share of taxes. The CA found that the State's inability to plan for illegals did not justify exclusion; that illegal children were no more expensive to educate than many of the legal children and that the federal government paid for the special programs anyway; and finally that no state may condition educational benefits on the amount of taxes paid by the parents.

The district court in Doe v. Plyler distinguished De Canas v. Bica in which the Court upheld California's ban on the employment of illegal aliens. Although that decision was based solely on preemption, never mentioning equal protection, one could infer that the De Canas Court implicitly believed that the California scheme was rational. Judge Justice argued that in the context of "employment" it was rational to use a classification based upon illegal alienage. Illegal aliens, because they are illegal, accept employment at substandard conditions and wages. When the state seeks to regulate these conditions and wages it is rational to ban the employment of illegal aliens because it is the fact of this status that creates the problem the state would

Footnote continued on next page.

DC
D.C. distinguished
Canas
on ground
that employment
of illegal aliens
affects adversely
state regulation
of conditions
& wages of
employment

De
Canas
not
an
E/P
case

CA5's reasoning is flawed.

1. A state may restrict benefits to domiciliaries

2. critique of the CA5

2. Even if domiciliaries, their "illegal status" distinguishes them from others

I am not at all persuaded by the CA5's reasoning for two reasons. First, a State may restrict its benefits to domiciliaries of the State. It is not at all clear that illegal aliens may under either federal or state law have an intent to reside permanently in any State. Note just how significant this point is: Even if illegal alien children are a suspect class, unless they may be said to be domiciled in the state, Texas would have no more obligation to educate them than it would a group of black Arizonans. And second, if illegal aliens may be domiciled in the state, there are rather significant difference between them and all other domiciliaries that justifies as rational the State's decision to limit its educational resources to citizens and legal residents.

yes

Texas law passes rational basis test.

a. are illegals domiciliaries?

Surely a State need not educate persons who are not domiciliaries of the State. We would not say that Texas must educate a child who lives two miles across the New Mexico

solve. But the children are not more difficult or expensive to educate because they are illegal.

illegal alien may have no intent to remain

Key Q

border but who prefers the Texas schools. If we were dealing with a State welfare program, we would not say that an unemployed citizen of Argentina could fly to Texas, request welfare, and fly home the following week. Quite simply no State has an obligation to provide its benefits to persons who are not domiciliaries of the state simply because they present themselves to the State.

I agree

The Court has recognized this principle repeatedly and in an essentially similar context. In Elkins v. Moreno, 435 U.S. 647 (1978), the Court examined whether a class of legally admitted nonimmigrant aliens were entitled to free or lower "in-state" tuition to the University of Maryland. The aliens were the children of G-IV aliens--"officers, or employees of ... international organizations" such as the United Nations. The University took the position that nonimmigrant aliens could not have "the requisite intent to reside permanently in Maryland" and therefore could not be Maryland domiciliaries.

Md. case

The Elkins Court found that under federal immigration law the children of G-IV aliens could have an intent to reside permanently even though they were nonimmigrant aliens:

"Although nonimmigrant aliens can generally be viewed as temporary visitors to the United States, the nonimmigrant classification is by no means homogeneous with respect to the terms on which a nonimmigrant enters the United States. For example, Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign

Elkins
✓
Moreno

residence or, by implication, on an intent not to seek domicile in the United States ... By including restrictions on intent in the definition of some nonimmigrant classes, Congress must have meant aliens to be barred from these classes if their real purpose in coming to the United States was to immigrate permanently. ... [I]t is also clear that Congress intended that, in the absence of an adjustment of status ..., nonimmigrants in restricted classes who sought to establish domicile would be deported.

But Congress did not restrict every nonimmigrant class. In particular, no restrictions on a nonimmigrant's intent were placed on aliens admitted under [G-IV]. ... Under present law, therefore, were a G-4 alien to develop a subjective intent to stay indefinitely in the United States, he would be able to do so without violating either the 1952 Act, the Service's regulations, or the terms of his visa."

Thus, there was no reason in federal law why the G-IV aliens could not have an intent to reside permanently. But the Court did not conclude that these aliens were therefore domiciled in the state and entitled to state benefits. Whether the aliens were then domiciliaries of Maryland, was a question of State law, and the Court certified this question to the Court of Appeals of Maryland.³ The rather clear implication of the certified question was that the State could conclude that G-4 aliens were not domiciles of the State, and

*State
law*

³The certified question was the following: "Are persons residing in Maryland who hold or are named in a visa under [G-4 of the immigration act], or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?"

could deny them the benefit of in-state tuition.

But certainly if G-IV aliens, or indeed other classes of 'legally' admitted nonimmigrant aliens, may be excluded from lower tuition because not domiciled in the state, the states must be able to treat illegal aliens as nondomiciles.⁴ Indeed, one might argue that as a matter of federal law the states may not treat illegal aliens as having an intent to reside permanently.⁵ At the least the state

clearly

⁴The Maryland court in fact did find that G-IV aliens could be domiciled but it noted that "If under federal law a particular individual must leave this country at a certain date, or cannot remain here indefinitely, then he could not become domiciled in Maryland. Any purported intent to live here indefinitely would be inconsistent with law. It would at most be an unrealistic subjective intent, which is insufficient under Maryland law to establish domicile."

Med. law

Following decision by the Maryland court, the University changed its regulation. It took the position that even if the G-4 aliens were domiciliaries the University would still not permit them to register at the lower tuition. Cert has been granted to decide whether the state may exclude such aliens. Toll v. Moreno, No. 80-2178. The first question in the cert petition is whether G-4 aliens are a suspect class.

⁵In Elkins the Court did not decide whether federal law might preempt the state from treating a class of aliens as domiciliaries: "Petitioner has argued ... that, if as a matter of federal law a nonimmigrant alien is required to maintain a permanent residence abroad or must state that he will leave the United States at a certain future date, then such an alien's subjective intent to reside permanently or indefinitely in a State would not create the sort of intent needed to acquire domicile. It is not clear whether this argument is based on an understanding of the common law of Maryland defining intent or whether it is based on an argument that federal law creates a 'legal disability,' ... which States are bound to recognize under the Supremacy Clause. ... In any case, we need not decide the effect of a federal law restricting nonimmigrant aliens postulated above, since it is clear that Congress did not require G-4 aliens to maintain a permanent residence abroad or to pledge

Footnote continued on next page.

Cert granted

should be permitted to find that as a matter of state law a person who is subject to deportation and who is in the state illegally may not form an intent to reside there permanently. Any other result would lead to the anomaly that a legally admitted but nonresident alien could only become domiciled--and thus entitled to state benefits--when he violated his visa and became an illegal alien.

On the other hand, I think one can make the argument that the state must treat illegal aliens as domiciled in the state, although the argument runs somewhat counter to the approach in Elkins. Note again that unless the argument can be made that illegal aliens must be treated as domiciliaries, the whole of the equal protection analysis-- be it low or high level scrutiny--will avail the children nothing. If the Texas scheme simply distinguishes residents from nonresidents, and is not a classification based on alienage, then it must be permissible.

The Elkins Court went to great lengths to distinguish G-IV aliens from other sorts of nonimmigrant aliens who are required to maintain a domicile elsewhere. But the Court also noted that in addition to being able to develop an intent to reside permanently, these aliens might be permitted to stay on in the country even if they lost their G-

to leave the United States at a date certain." 435 U.S. 663-664.

As long as Fed Gov't doesn't deport

Yes

But

Unless we hold that Texas must treat illegals as domiciled here, they lose on E/P analysis

IV status:

"Of course should a G-4 alien terminate his employment with an international treaty organization, both he and his family would lose their G-4 status. ... Nonetheless, such an alien would not necessarily be subject to deportation nor would he have to leave and re-enter the country in order to become an immigrant. ... Beginning with the 1952 Act, Congress created a mechanism, 'adjustment of status,' through which an alien already in the United States could apply for permanent residence status. "

Expanding upon the Elkins Court's treatment of G-IV aliens, one might say that there is a considerable likelihood *can we?* that illegal aliens will be permitted to stay by the Immigration Service although not entitled to stay. One could say that the "current reality" is that the INS permits most *Perhaps, because in fact INS deport few.* illegal aliens to stay by failing to take action against them and that the INS has the power to permit illegal aliens to stay even though they are deportable. Some substantial portion of these people live in Texas and will be permitted to continue to do so. The State has no way to predict which of them will be deported ultimately and which of them will not.⁶

⁶I will be making essentially the identical argument in the preemption setting in the next section: Because the states cannot know whether an illegal alien will be deported it must make a prediction of future immigration status--and then act on that prediction--before the federal government has acted. This the states may not do without treading upon federal power to determine immigration status.

Same as pre-emption argument

If the state could know for sure who would be deported perhaps it might treat these particular persons as nondomiciliaries. Perhaps, too, on an individual level, it may exclude those aliens who are in the state on a purely transitory basis, who have homes elsewhere, and who intend to return to these homes.

The argument that illegal aliens must be treated as domiciliaries has the virtue of recognizing the fact that many of these illegal aliens will live their lives out in Texas-- assuming that this is true. But it is ^{our view would be} a significant expansion of Elkins, and it might lead to the apparent anomaly that legal, nonimmigrant aliens who are not G-4 aliens and are not permitted to develop a domicile in this country will be treated worse than illegal aliens--at least until such time as they too become illegal aliens. But this seeming paradox may reflect the reality of the situation: illegal aliens live here and will continue to do so whereas aliens with temporary visas do not--not until they overstay. Also, temporary aliens have made a declaration that they do not intent to stay, and perhaps it is reasonable to hold them to their word.

There may be a better way to handle the domiciliary problem than occurs to me now. There was a factfinding that 10% of illegal aliens do stay permanently. But that's not a very high figure. The fundamental point is that unless the Court can explain why the State must treat these people as domiciliaries I fear equal protection analysis will be bootless: the State can always exclude nonresidents from its

DC
found
10%
do
stay

Phil Kurland

bounty. Maybe you will see a way to cut through all of this. The argument that the Texas scheme simply distinguishes residents from nonresidents is made in the brief of amici curiae school districts. Philip Kurland is on the brief.

b. it is rational to limit the state's educational efforts to persons who are likely to be employed in the state and to become members of the state's polity.

Even if the state must treat illegal aliens as domiciled in the state, to distinguish between children who may work and vote and those who never may strikes me as rational. Judge Reavley makes this argument effectively in his concurrence in Boe v. Wright in which he attacked the reasoning of Doe v. Plyler. He argued persuasively:

"I conceive that the Texas Legislature, on agreeing that education is "the very foundation of good citizenship," could reasonably have concluded that it should not dilute its limited resources by providing free public education to illegal alien children, who can never--absent some form of amnesty--become citizens, exercise the franchise, or serve in the armed forces of the United States."

Judge
Reavley's
argument
of rationality

Judge Reavley argues less persuasively, that the state law is rational because it discourages illegal migration. Even were it true that the law had this effect, I doubt that the state is entitled to assert such an interest. In De Canas v. Bica, 424 U.S. 351 (1976), the Court upheld a

California law making it a crime to hire an illegal alien. The Court began by noting that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." The Court explained that even if the California statute had "some purely speculative and indirect impact on immigration" it did not thereby "become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve." The Court upheld the law as a regulation of the employment relationship, not as an effort to stem the tide of illegal migration. It appears from De Canas that the states may not assert a purpose of affecting migration into the country. That is the business of the federal government. Even so, and even without this alleged purpose, the Texas restriction on illegal aliens is rational as an effort to limit the state's educational effort to persons who are not barred by law from becoming voting and working members of the community.

c. if the Texas scheme isn't rational what would be?

The question is rhetorical. If it is irrational for the states to discriminate against illegal aliens with respect to education, one wonders whether the state could ever deny a state benefit to an illegal alien. Presumably it would not be equally irrational for the federal government to withhold benefits. The federal government can assert an interest in

discouraging illegal migration. But if the Court finds this law irrational the states will be unable to limit their benefit programs. Indeed, it is not clear to me that Congress could even authorize the states to deny their bounty to illegal aliens if they so chose. May Congress authorize the states to violate the fourteenth amendment? Perhaps Congress could require the states not to provide benefits to illegal aliens or could make it a crime for illegal aliens to apply for benefits. That would be a federal decision supported by federal purposes. But it is not clear to me that Congress could merely grant states the leeway to decide on their own whether to share benefits with illegal aliens. In short, a decision that this scheme is irrational--although it may look less radical than a decision that illegal aliens are a suspect class--is in fact a far reaching holding with unclear consequences.

C. Are Illegal Aliens a "Suspect Class"?

The CA5 did not hold that illegal aliens were a suspect class. There was no need to do so given its conclusion that the regulation was not rational. But the CA did suggest that illegal alien children might be entitled to strict scrutiny in this context for any of three reasons.

1. The Total Denial of Education

CA5 held
Texas
rule
irrational.
Did not
ask
"suspect
class"
Q

*Q I left open
in Rodriguez*

The CA argued that an absolute denial of education might invoke strict scrutiny. Although the Court in San Antonio School District v. Rodriguez, 411 U.S. 1 (1973), indicated that the relative deprivation of educational benefits did not violate equal protection the Court noted that if "elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of 'poor' people--definable in terms of their inability to pay the prescribed sum--who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today." 411 U.S. at 25 n.60.

The CA would not take a final position on this question, but I think it would be odd to find a fundamental right of "illegal aliens" to an education. To begin with, as you explained in Rodriguez there is no apparent reason for finding a fundamental right to education and not finding a fundamental right to every other important benefit--housing, welfare, etc. 411 U.S. at 37 ("How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter."). Note that in De Canas the Court--although not addressing this question--upheld a California criminal statute prohibiting employers from employing illegal aliens. Is the right to work less fundamental than the right to an education? Moreover, the

I am inclined to agree that no "fundamental right" exists.

argument that education is somehow to be distinguished because peculiarly related to the exercise of political rights--an argument you rejected in the context of citizens--has little application to persons who are not entitled to engage in the political process.

2. Illegal Aliens are "Discrete & Insular"

Given the holding in Graham that lawful resident aliens are a suspect class because "discrete and insular," it would seem to follow that illegal aliens--indeed all aliens--are similarly suspect. The Court could create a "clean hands" exception but there is nothing in the concept of a "suspect classification" to support the exception. Perhaps this is an acceptable result. One could say that if the Court does not protect these people no one will and that they are at the mercy of the states and the community. On the other hand, the notion that special judicial solicitude should be extended to persons who find themselves without power precisely because they have broken the law, stretches the legitimacy of the suspect classification device to its limits. This may be a case where the dictates of logic should be avoided. Alternatively, the Court could reconceive the resident alien cases as based on a federal invitation to enter the country on an equality of privileges.

3. The Children Are A Suspect Class

As we have discussed, the advantage of finding the children to be a suspect class is that the decision will have some limits. Ultimately the "suspectness" of the parents may have to be faced, but not here. Yet it is not easy to simply extend the illegitimacy cases to illegal alien children. In the illegitimacy cases the states' sole purpose was to punish the parents by punishing the children. Illegitimacy was simply irrelevant to any state purpose relating to the child. Here the fact that the child is himself an illegal alien is relevant to the state's purpose, viz. limiting educational funds to those children who will become citizens and who are not under a legal disability from remaining in the community as working adults.

If we held that only the "children" are suspect class, the would be some limit. But would a state also have to provide food, health care, etc

Thus, the analogy to the illegitimacy cases is not compelling. Nor is it clear how limited such a holding would be. Presumably other state benefits that go to the care and support of children--e.g. aid to dependent children--would be affected by the holding. On the other hand, the scores of single illegal aliens would not be affected by the decision, so it does have some limiting advantages.

It would not be difficult to create a suspect classification of illegal aliens. We could build on the sorts of cases we cite to in Eddings and in your dissent to Ridgeway indicating the special place of children in the law. But this

Analogy to my illegitimacy decision is unsound (cf. Weber)

result does not follow logically from the illegitimacy cases, although there is a sense in which illegal children are being punished for the sins of their parents.

D. Conclusion

Although commonsense rebels, the conclusion that illegal aliens are a "suspect class" seems ineluctable. Yet it is a result laced with contradictions. On the one hand, in order to argue that illegal aliens must be treated as domiciliaries of the state, we argue that illegal aliens in fact are permitted to live permanently in the state and are entitled as a matter of reality to form an intent to reside there permanently. On the other hand, in order to argue that illegal aliens are "discrete and insular" we point to the fact that their illegal status disables them from exerting power in the community. Further, on the one hand, we argue that the equal protection clause forbids the states from making distinctions based on illegal alienage, but on the other hand we would presumably permit the federal government to discriminate against them without showing a compelling governmental interest. Of course in the case of resident aliens the Court will treat them as a suspect class only if it is the states that are doing the discriminating. The federal government with its plenary power over immigration must only be "not irrational" in its treatment of aliens. The Court can

It does!

*not yet
for me.*

build on this different treatment of the states and the federal government even though this difference in treatment is best suited to a preemption rather than equal protection analysis.

III. Preemption

A. De Canas v. Bica

The Court in De Canas upheld a California statute providing that "[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." 424 U.S. 352 (1976). The Court undertook a three part inquiry. First, it held that the exclusive federal power to regulate immigration under the Constitution does not prohibit all state laws that deal with aliens: "[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." Takahashi and Graham examined relevant congressional enactments of aliens to determine if there was preemption in those cases; such an inquiry would have been pointless if all state regulation of aliens is constitutionally impermissible as a regulation of immigration.

De Canas

Second, the De Canas Court found that the statute was not preempted under the Supremacy Clause because of federal occupation of the field. There is no indication that in passing the INA Congress intended to oust state authority to regulate the employment relationship--an important area of state regulation. Such a conclusion could only be justified by a "clear and manifest" congressional purpose to occupy the field. Nothing in the legislative history of the INA indicates that "Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular." 424 U.S. 358. The comprehensiveness of the federal scheme provides no basis for deriving such an intent. Moreover, there are indications in federal law that Congress approves of state regulations of the employment of illegal aliens. The Farm Labor Contractor Registration Act explicitly envisions state penalties for the employment of illegal aliens.

Finally, the Court considered whether the statute might be preempted because it conflicted with the federal scheme. The record was insufficient to make such a judgment. It was possible that the state statute might operate to keep people from working--because not entitled to lawful residence--who may have a federal permission to work here.

The Solicitor General argues that De Canas controls here, and it is certainly not difficult to make the argument. De Canas would say that the regulation of aliens in the

SG says
De Canas
controls

27.
pursuit of a proper state purpose is not a regulation of immigration. There is no evidence that the education regulation works to deter immigration; like the regulation in De Canas the statute here is an effort to deal with the problems caused by illegal immigration by using the federal classification scheme.

Schools are more traditionally local than most other govt activities
Again, the Texas statute is not preempted by federal occupation any more than the California law was. There is no indication of an intent to oust the state from an area of traditional state regulation--education. Indeed, if anything, the argument is weaker here since in De Canas there was some indication that federal law would not punish an employer for hiring an illegal alien and might not permit the states to attach criminal sanctions either.

Finally, there is no direct conflict between the federal immigration scheme and the Texas scheme: Texas does not exclude anyone who the federal government deems to be a lawful resident. *SG says*

B. Preemption Defended

De Canas is a powerful answer to a preemption argument. Yet there are indications in the Solicitor General's brief that the absence of a conflict between the Texas scheme and the immigration laws is far from clear. The SG states that the immigration laws do not preempt a state

*An alien may not
be deported until*

statute such as § 21.031 "at least to the extent that local school districts in Texas look to federal law and administrative decisions in determining whether an alien child is a 'legally admitted alien' for purposes of his entitlement to be admitted to public school without payment of tuition." But federal law will seldom be clear that a particular child is deportable until there has been a deportation order by the INS and until all appeals have been exhausted. The SG admits that "unless an alien subject to deportation departs voluntarily, he may be physically removed from the country only after he has been found to be subject to deportation in an administrative hearing, 8 U.S.C. 1252, subject to judicial review in the court of appeals, during which deportation is stayed. 8 U.S.C. 1105(a)(3)."

How will the state know that a child is deportable, indeed that a child is not a citizen, until there has been an INS finding? To administer the law Texas must, in effect, make predictions as to what the INS will do in any particular case. But the immigration laws are notoriously complex and replete with exceptions and the possible exercise of executive discretion. In short, there is no way for the state to know whether an alien child is lawfully in the country until there have been administrative proceedings. For the state to attempt to anticipate these proceedings and determine an alien's status is certainly preempted by federal occupation.

The SG does not deny that any state effort to

*D/P
in
elaborate*

*State
can't
know*

*State
can't
decide
which
children
are
lawfully
in country*

determine federal immigration status would be preempted, but he attempts to argue that the state will not have to engage in such determinations in this instance. Thus, he argues that the state may not exclude aliens who were admitted to the country legally but who have now violated the terms of their admission: "In such circumstances, from the state's perspective, the alien properly should be viewed as continuing to be lawfully present under federal law until officials of the federal government find him to be deportable." But he argues that such a determination is somehow different than deciding whether an alien was "legally admitted":

[D]eterminations by the states that an alien ... is subject to deportation would, in our view, involve a far more substantial interference with the administration of the federal immigration laws than would a state determination whether the alien had been lawfully admitted. In the former situation, the responsible state officials themselves would be required to adjudicate an alien's status under the immigration laws; in the latter, the state officials only would need to determine whether appropriate federal officials had determined that the alien could be lawfully admitted."

SG
says

SG's
curious
distinction

This distinction evaporates, however, when one considers that any individual alien may not be deported until there has been a hearing. There has been no determination by "appropriate federal officials" that an alien was not "lawfully admitted" until deportation proceedings have been held and until it is clear that the federal government will

not permit the alien to stay or adjust his status. As the SG *AG's* explains in footnote 9 the Attorney General has power to *broad* *powers* parole aliens, to waive the requirements of proper documentation, to suspend deportation, to withhold deportation, and to permit adjustment of status. Given the nature of the Texas scheme and the complexity of the federal immigration laws, I think one can argue persuasively that the *Preempted* Texas scheme is preempted. Only a scheme that excluded aliens under a deportation order could survive unless the Congress explicitly permits the states to undertake to make predictions about an alien's status under federal law.

no conflict with De Canas Placing preemption on the basis of federal occupation and of potential conflict with the federal scheme does not conflict with De Canas. The argument was not made in De Canas that state administration of its scheme would involve the state in making immigration determinations. Indeed, the possibility of conflict in that case was avoided by the peculiar nature of the federal immigration law with respect to employment. Federal law prohibits any alien from working without a certificate. Thus, the state could simply rely on the certification requirement without having to further assess an alien's particular status under the immigration laws. Moreover, the Court in De Canas sent the matter back to the state courts to determine whether any direct conflict existed between the state and federal schemes. Thus, the opinion did not preclude the finding of a conflict and of preemption.

In short, one can argue that the possibility of direct conflicts--e.g. that Texas will exclude someone who is in fact eligible for citizenship--and the involvement of Texas in determining an alien's status under the immigration laws--an area of immigration law clearly occupied by a federal scheme--requires the Court to find the ^{Texas law} scheme preempted until such time as Congress authorizes the states to employ a scheme such as the one here.

IV. CONCLUSION

*What ~~to~~ would consequences be?
Texas Act would be upheld & all
alien children would have to be treated
as legal residents. But ~~what~~ would
give alien children ~~the same~~ rights
not possessed by New Mex children*

I think that the preemption argument can be refined and strengthened. Ultimately the Court may wish to consider how wide a range of latitude the states ought to have in regulating aliens. In De Canas the state merely placed penalties on employers who hired illegal aliens. It was already clear under federal law that such aliens could not accept employment. And had the state attempted to promote the employment of illegal aliens the Court surely would have found such a law preempted. But in this case and in cases like it the possibility opens up that the states will adopt widely varying restrictions on illegal aliens. Illegal aliens may be welcomed in some states, excluded from benefits in others--assuming equal protection is not a problem. Such a varying treatment may violate the constitutional grant of power to Congress to establish a "uniform" system of naturalization.

In this case, however, I do not think that the Court needs to reach the question of uniformity. The possibility of direct conflict and the involvement of Texas in the administration of the immigration laws would seem to support a holding on preemption on the basis of direct conflict with federal law and of federal occupation of the field. De Canas can be distinguished and ought to be limited in any event.

If the Court wishes to reach equal protection the best approach might be to find the children to be a suspect class. But this is not a holding that follows from the illegitimacy cases. All illegal aliens, perhaps all aliens, may be deemed to be a suspect classification. Such a conclusion follows easily from Graham. So, too, it would follow from Graham that the aliens would not be treated as suspect vis a vis the federal government but only in relation to state regulation. That is a distinction which has been criticized, but it does exist.

On the whole I prefer preemption. A holding that illegal aliens are a "suspect class" sticks in my craw but perhaps that is a matter of prejudice on my part. Short of finding the aliens to be "suspect," I do not see how the scheme can be invalidated under a lower level of review.

I would be delighted to do more work on this if you are assigned the opinion or if you would like more analysis on any particular point before making up your mind. I wrote this rather in a rush.

Arnett (cont AB - Texas)

Local School Districts are permitted but not required to educate alien

→ | The first Districts to urge
limit were predominantly Mexican

Many children living in Mex ~~so~~
could enter

→ | Texas interest - "reduce incentive
for illegal entry of Mexican"

Texas is affected to greater
extent than any other state

Hardin

Must be some documentation
from INS

OK if they have work permit

An illegal alien cannot become
a legal resident.

→ | The clarification is bet
legal & ~~illegal~~ ^{non-} residents
~~legal~~

Schen (Resp)

Not helpful

Ross (Resp)

The Doc can children
have been in Texas ^{for many} years ~~ago~~ -
pay taxes - but are here "illegally."

DC found there is a "de facto"
amnesty or illegals (But WHR
noted that under Fed law, there
can be no ~~de facto~~ lawful amnesty.)

Only 250 INA agts for 2000 miles.

→ WJB asked whether Texas'
act is not consistent with
~~the~~ Fed law & supremacy
of it. Ross answered there
is no express Fed sanction
of Texas' law.

Arnett (cont)

Texas doesn't require "domicile"
- but ~~it~~ relies on "residency" which
is "quasi-domicile" (?). However,
→ | under Texas law an illegal alien
cannot be a resident. Their
statute makes this clear

The E/P approach (must first hold no
presumption)

1. Aliens are "persons" w/in E/P clause
2. The classification here is between
children lawfully admitted to the
U.S. & those not ~~so~~ here lawfully.

3. The standard of analysis should
be one of heightened (but not ~~strict~~ strict)
scrutiny. The class is composed
of children barred from all primary
& secondary education. (left open
in Rodriguez).

Children so barred are a "discrete"
minority w/o access to political process.

4. State interests in educating them
are strong - perhaps stronger than
~~not~~ those advanced for not educating.

5. Our opinion, if ^{written} on this theory, should
be limited to ~~the~~ alien children
(a helpless class) & to the need to educate
them. Texas may adopt reasonably
rules as to durational residence.

6. Emphasize responsibility of Fed Govt.
under Art I, 58 ("uniform rules").

U.S. should respond to Texas demand
to deport or pay for education.

De Canas v. Bica 424 U.S. 351 (Calif. 5th Cir.)
prohibiting employment of certain aliens
was decided on ground that Congress had
not preempted all state reg. Bica is not
an E/P case.

Ask Respondents

"Domiciled" (resident)

Q of State law

New Mex. child?

Even if member of
"suspect class" - what
if the New Mex child
is an Indian or black

Can one unlawfully
in a State acquire
a legal domicile?

Preemption

Consequences?

Can Fed Govt
compel Tex by doing nothing

From "lawfully present
aliens"

Not to "undocumented
aliens"

How is "documentation"
determined?

Elkins v Moreno

Ask Respondents

"Domiciled" (resident)

Q of State law

New Mex. child?

Even if member of
"suspect class" - what
if the New Mex child
is an Indian or black

Can one unlawfully
in a State acquire
a legal domicile?

Preemption

Consequences?

Can Fed Govt
compel Tex by doing nothing

The Chief Justice

Reverse

Aliens may be suspect but not illegal aliens.
Under Vladis, a state may ~~deny~~ deny admission
to of non-residents to schools.

Illegal aliens come & go.

No Court, right to welfare benefits, education,

Congress' failure to act is cause of problem.

Congress should pay for education or deport.

14th Applies as there are persons - but
illegals are not entitled to E/P

Justice Brennan

Affirm

Tax statute violates E/P.

They are persons w/in jurisdiction of state

They are suspect class as in Zen Griffith
or we could treat them as we have ~~in~~
illegal aliens in Weber

Controlling immigration is Fed problem

De Canes v Brea forecloses preemption.

Justice White

Reverse

Agree with C J. completely.

State has no obligation to illegals.

Congress should solve this problem.

Would not apply heightened scrutiny

Vast extension of E/P

Justice Marshall

Affirm

Agree wholly with W & B.

Children are not illegals.

We educate children of felons.

E/P means what it says.

No justification for Texas' treatment.

Strongest state interest is to educate

Treat children as children.

A state may regulate.

Justice Blackmun

Affirm

Statute goes off on alienage - not domicile

Could aff. ~~on~~ either on E/P or presumption.

De Canas would make ~~E/P~~ presumption different

Tex. statute is invalid because it
burden's ~~not~~ non-deportable

~~Do~~ On E/P* - then are children.

Justice Powell

Affirm

See my yellow sheet notes.

Reverse

The term "children" includes young adults - many of these are here on their own

Fed Govt may cut-off federal funding to Texas ~~as punishment~~ unless Texas educates these children.

Clampdown is rational.

Affirm

No preemption.

States justifications include discouraging flow of immigration. This is rational but does not rise to level of compelling. Cost also may be rational concern but not compelling. There are substantial benefits to State in educating these children.

Fed. Govt has right to deport - but realistically we know it ~~will~~ will not deport many.

The class is children.

Point → Standard of review ~~is~~ could be the Rogers - not strict scrutiny

Reverse (tentative).

No preemption.

E/P is closer Q. A state may restrict educational benefit for benefit of residents or domiciliaries. But this statute applies to "illegal residents".

(I'm not clear as to O'Connor's reasoning. I think she makes a domiciliary analysis - that does make sense)

De Cacer v. Mich 424 U.S. 351 (Calif. State
prohibiting employment of certain aliens)
was decided on ground that Congress had
not preempted all state reg. Since it not
an E/P case.

The E/P approach (must first hold no
presumption)

1. Aliens are "persons" w/in E/P clause
2. The classification here is between
children lawfully admitted to the
U.S. & those not ~~so~~ have lawfully.
3. The standard of analysis should
be one of heightened (but not ~~perhaps strict~~ strict)
scrutiny. The class is composed
of children barred from all primaries
& secondary education. (left open
in Rodriguez).
Children so barred are a "discrete"
minority w/o access to political process.
4. State interests in educating them
are strong - perhaps stronger than
~~not~~ those advanced for not educating.
5. Our opinion, if ^{written} on this theory, should
be limited to ~~the~~ alien children
(a helpless class) & to the need to educate
them. Texas may adopt reasonably
ruler as to durational residence.
6. Emphasize responsibility of Fed Govt.
under Art I, 58 ("uniform ruler").
U.S. should respond to Texas demand
to deport or pay for education.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 4, 1981

Plyler v. Doe - No. 80-1538

Texas v. Certain Named and Unnamed Undocumented Alien Children - No. 80-1934

Dear Chief:

I'll try my hand at the Court opinion in these cases.

Sincerely,

Bue

Chief Justice Burger

Copies to the Conference

January 25, 1982

Nos. 80-1538, 80-1934 -- Plyler v. Doe, Etc.

Dear Lewis,

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

The draft thus relies both on the nature of the classification, and on the importance of education within the framework of the Equal Protection Clause. The holding is this: A State may not except a discrete and historically demeaned group of children from the education it provides to all other children within the State. In relying on both factors, I believe the opinion is less broad than it might be if it concerned itself only with the "fundamentality" of education, or the "class" of innocent children. However, since a strong case for heightened scrutiny could be made simply on the basis of the class discriminated against, I thought it appropriate, indeed necessary, where denial of basic education was at stake, to hold strict scrutiny standards applicable. As a by-product of applying strict scrutiny, the opinion proposes to credit the state with fairly broad prerogatives in legislating with respect to illegal aliens in other contexts. Finally, it seems to me that the historical approach of this draft, although leading to strict scrutiny here, is for that very reason largely self-limiting and unlikely to force us down any uncharted paths in the future.

In my view, the Texas statute would fail under even an intermediate standard of review, with the draft cut short on page 23, and picked up again on 34, with the same ultimate result. But I do suggest that exclusive reliance on the "innocent children" rationale, would

truncate our real concern here--that whatever else the state may do with respect to illegal aliens, barring the innocent children among them from basic education is most perverse. I'd much appreciate your reaction to this analysis.

Sincerely,

Phil

lfp/ss 01/26/82

BREN SALLY-POW

80-1538, 80-1934 Plyler

*Draft -
not sent*

Dear Bill:

Thank you for affording me the opportunity to review a draft of your proposed opinion. I have read it only once, and write promptly to record a major concern.

The class alleged to be discriminated against - and the only class before us - is composed of school age children of illegal aliens. There is a good deal of language in the draft (particularly pp. 19-21) that will be read as indicating that all illegal aliens, adults as well as children, may be "disc^rete and insular minorities for which the Constitution offers a special solicitude".

The draft states, for example, that many of the reasons that have prompted us to be solicitous of "lawful resident aliens" apply "with even greater force to illegal aliens". I could not agree to this. You do recognize (p. 22) that adult aliens (in my view any alien beyond school age) who enters the United States unlawfully is guilty of a crime. Such an alien also is at deportable, subject only to due process. *H* As I indicated at Conference, and as you emphasize in other portions of the opinion, school age children of illegal aliens are in this country - at least presumptively - through no fault *oR* volition of their own. They are, as you correctly say, innocent victims who

"can affect neither their parents' conduct nor their own status". I would limit our decision narrowly to this readily identifiable class.

Although I am not entirely at rest, I would prefer not to characterize this as "suspect" entitled to the highest level of scrutiny that we accord "discrete and insular minorities". This concept has never been applied to persons unlawfully in the United States. I would think it sufficient to apply - as you suggest as an alternative - the intermediate level of scrutiny that we sometimes call "heightened". The class also can be described as unique.

I agree generally with your dual reliance on the Equal Protection Clause and the importance of education at the public school level. Indeed, the state has a substantial interest itself in assuring that this level of education be afforded all children, including those of illegal aliens in view of the finding of the DC that a high percentage of these children remain in our country.

I will take a closer look at the language of this part of the opinion. My concern when I wrote Rodriguez was not to create a chain reaction: if education is a fundamental right in a constitutional sense, then certain health and welfare - and possibly other services (e.g. utilities) - would be candidates for this status.

I venture several general observations, Bill, about the draft opinion. It is well written and even

eloquent. I suppose all of us, however, prefer shorter and more narrowly focused opinions. Your drafts sweeps rather broadly, and leaves me a little uneasy as to inferences that may be drawn from it in other connections not clearly foreseeable. As I indicated at Conference, I view this case in rather simplistic terms. The alien children are victims of a combination of circumstances. Access from Mexico into this country, across our 2,000 mile border, is readily available and could not be controlled if the entire armed forces of the United States were assigned the task. Aliens are attracted by our vastly superior employment opportunities. Congress, as you state, has been unwilling to make unlawful the employment of illegal aliens. In these circumstances, they will continue to enter the U.S., and a high percentage of them will remain here. I agree with you that in these circumstances their children should not be left on the streets uneducated. This is all that this case is about.

I will certainly join your judgment, and hope that in the drafting and redrafting process the opinion can be focused so specifically on this uniquely discrete class that I can join it also.

Sincerely,

df1 01/26/82
To: Justice Powell

From: David

Re: Justice Brennan's draft in 80-1538, 80-1934 Plyler

I give you some immediate reaction to Justice Brennan's draft. I would like to spend a day or so going back over the briefs and relevant cases.

First, I think that because of the way that the opinion is drafted it is a highly significant equal protection case. The Court has had two lines of equal protection cases that use "strict scrutiny"--the "fundamental rights" cases (voting, travel) and the "suspect classification" line of cases (blacks, resident aliens). But here Justice Brennan finds neither a "suspect classification" or a "fundamental right." Rather, he finds a quasi-suspect class--illegal alien children--and a quasi "fundamental right"--education. The sum of these parts yields the foundation for strict scrutiny. This is fairly close to the sort of sliding scale Justice Marshall advocated in Rodriguez. The problem with such an approach is that it permits judges to impose their personal values on state and federal legislators and officials. It is hard to see any limiting principle; there are so many groups of people who have moral claims upon us or who appear to be worthy of special aid and succor. There is nothing in the Constitution that gives pride of

place to children as opposed to the handicapped, the mentally ill, the aged or the widowed. There is nothing that places education before food, housing, a living wage, or spiritual fulfillment.

The rather dramatic result of concluding that a group is a "discrete and insular minority" or that a right is "fundamental" is perhaps some limit on their use. But if quasi-discreteness and "pretty important" rights suffice then judges may legislate with the impression that they merely decide the case in front of them, with its particular combination of groups and rights. I think that this is disturbing. The opinion here strikes me as result-oriented in the bad sense of the word and that is disturbing in itself. But more troubling is the prospect of other decisions putting together a like potage of half suspect groups and half fundamental rights to reach the desired result. Your letter at page 2 suggests that you agree generally with the opinion's dual reliance on equal protection and the importance of public education. So you may not share the same worry. ?

I would not impugn the values underlying the decision. They are honorable. I share them. I know that you do. But I do not know that they are constitutionally required.

Second, I think that the use of history to indicate that the framers of the fourteenth amendment considered education to be a constitutionally protected value is somewhat disingenuous and rather unnecessary. The question is not whether education is important. We know that it is. And the question is not whether education can be denied a group of people who are

entitled to it. But I do not believe that the framers of the fourteenth amendment gave any thought to whether citizens of Mexico who defy our immigration laws would be entitled to a free education. And if they had given the matter thought, one cannot doubt what their conclusion would have been. I am sure that many "rights" were considered important by the framers. They undoubtedly thought that it was essential that blacks be permitted to vote and to work. Yet we do not permit illegal aliens to do either of things and I do not suppose that Justice Brennan is suggesting otherwise.

Third, I think that the opinion may overstate the extent to which illegal aliens are permanent members of the state's communities. The district judge in 80-1934 found only that 10% of illegal aliens were here permanently.

Finally, I would not quarrel strongly with your way of looking at the case--essentially on an analogy to the illegitimacy cases. The analogy is not perfect as we have discussed. And if the record were more convincing that the presence of these children was a serious burden on the schools, I think it would be troubling for the Court to require the state to short change the education of its lawful children in order to educate illegal alien children. I guess I am still troubled by this.

On the whole, and now having seen what an equal protection opinion looks like, I am more partial to a preemption approach than before. I still think that this is the most honest

way to deal with the case. It seems more restrained and less arbitrary in the sense of imposing one value over another. But it does have its problems as well.

I would like to think more about the analogy to the illegitimacy cases. If you have any interest in pursuing a concurrence on preemption, I can think more about that too. It will be interesting to read the dissent.

January 30, 1982

80-1538, 80-1934 Plyler

Dear Bill:

Thank you for affording me the opportunity to review a draft of your proposed opinion. I submit the following reactions, some of which may be tentative.

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

Illegal Aliens as a Suspect Class

Once a class is characterized, as "suspect" the state must show a compelling interest to justify discriminatory treatment. We have never held that persons unlawfully in this country, whatever their age, are a suspect class in the full meaning of the term. I view the classification before us as a unique one. As the class is composed of innocent children, uniquely postured, I would agree that a "heightened" level of scrutiny is required. Thus, the state must establish a substantial interest to justify the discrimination. In a sense, this may be viewed as middle-tier analysis. It is, however, one we have reserved for certain situations, e.g., Craig v. Boren. As Texas has advanced no interest that I consider sufficiently substantial to justify the discrimination, I agree that there has been a violation of the Equal Protection Clause.

Having the foregoing views, I could not join Part III-A of your draft (pp. 18-23), as presently written. I

certainly could not join pp. 19-21 that come very close to saying that all illegal aliens may be "discrete and insular minorities for which the Constitution offers a special solicitude".

In sum, as to the class discriminated against, I could not agree that it is "suspect" in the sense in which we have previously used this term. I do agree that the classification depriving innocent children of an education merits heightened scrutiny, and that it doesn't meet this test.

Reliance on Education

I served for 19 years on the Richmond Public School Board and the Virginia State Board of Education. I fully share your view as to the importance of education, particularly in a democracy. We are talking, however, about what the Constitution requires and this was my concern in Rodriguez. It was my view then and now that there is no constitutional right to a state provided education any more than there is such a constitutional right to welfare, housing, health services, public works and public utilities - all of which are considered by most of us to be essential. I therefore would not characterize education as a "fundamental" right in the constitutional sense.

As your draft notes, I did make clear in Rodriguez that the situation would be different if a state had denied education altogether to a particular class. This remains my view.

Your draft appears to view the Fourteenth Amendment as creating an expectation of public education. As I am not sure where this would lead us, I need to examine your language in this respect more carefully. I have not viewed the Amendment as the source of any right to education. Thus, I would rest our holding squarely on the Equal Protection Clause - though emphasizing generally the importance of education.

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

Relatively Minor Points

1. The paragraph at page 10, at the conclusion of footnote 10, should be limited to the discussion at hand: whether illegal aliens are within the Fourteenth Amendment. Taken out of context, this paragraph says more than it ought to.

2. Footnote 15 seems to be unnecessary in its suggestion that a state tuition program, across the board, might violate equal protection.

3. At page 19, the first sentence states that "The experience of our Nation has taught us that a conscious or unconscious, but in any event constitutionally unacceptable, prejudice is likely to manifest itself in the legislature's treatment of some groups." I'm not sure how this sentence squares with the Court's requirement of a showing of intent to discriminate in Washington v. Davis.

Your draft opinion is an impressive piece of work, and I have enjoyed reading it. I suppose all of us prefer shorter and more narrowly focused opinions. As indicated above, the draft sweeps rather broadly, and leaves me a little uneasy as to inferences that may be drawn from it in other connections not clearly foreseeable.

I will join your judgment, and hope that in the drafting and redrafting process the opinion can be focused so specifically on this uniquely discrete class that I can join your opinion also.

Sincerely,

Justice Brennan

lfp/ss

cc Justice Marshall, Blackmun, Stevens

January 25, 1982

Nos. 80-1538, 80-1934 -- Plyler v. Doe, Etc.

Dear Lewis,

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

The draft thus relies both on the nature of the classification, and on the importance of education within the framework of the Equal Protection Clause. The holding is this: A State may not except a discrete and historically demeaned group of children from the education it provides to all other children within the State. In relying on both factors, I believe the opinion is less broad than it might be if it concerned itself only with the "fundamentality" of education, or the "class" of innocent children. However, since a strong case for heightened scrutiny could be made simply on the basis of the class discriminated against, I thought it appropriate, indeed necessary, where denial of basic education was at stake, to hold strict scrutiny standards applicable. As a by-product of applying strict scrutiny, the opinion proposes to credit the state with fairly broad prerogatives in legislating with respect to illegal aliens in other contexts. Finally, it seems to me that the historical approach of this draft, although leading to strict scrutiny here, is for that very reason largely self-limiting and unlikely to force us down any uncharted paths in the future.

In my view, the Texas statute would fail under even an intermediate standard of review, with the draft cut short on page 23, and picked up again on 34, with the same ultimate result. But I do suggest that exclusive reliance on the "innocent children" rationale, would

truncate our real concern here--that whatever else the state may do with respect to illegal aliens, barring the innocent children among them from basic education is most perverse. I'd much appreciate your reaction to this analysis.

Sincerely,

Bill

Sally - Copy, w/s on short 1 & 1

(But keep this draft in file.)

lfp/ss 01/26/82

BREN SALLY-POW

80-1538, 80-1934 Plyler

Dear Bill:

Thank you for affording me the opportunity to review a draft of your proposed opinion. I have read it only once, and write promptly to record a major concern.

9 The class alleged to be discriminated against - and the only class before us - is composed of school age children of illegal aliens. There is a good deal of language in the draft (particularly pp. 19-21) that will be read as indicating that all illegal aliens, adults as well as children, may be ~~considered~~ as "discete and insular minorities for which the Constitution offers a special solicitude". 9 The draft states, for example, that many of the reasons that have prompted us to be solicitous of "lawful resident aliens" applies "with even greater force to illegal aliens". I could ^{not} ~~never~~ agree to this. As ^{do} you ^{do} finally recognize on p. 22) ^{that} adult aliens (indeed in my view any alien beyond school age) who enters the United States unlawfully is guilty of a crime, ^{Such an alien also} ~~is at least~~ deportable, ^{subject only to due process} ~~and is not entitled to equal protection except~~

possibly in situations not presently relevant. Even an unlawful alien is, however, entitled to due process.

As I indicated at Conference, and as you emphasize in other portions of the opinion, school age children of illegal aliens are in this country - at least presumptively - through no fault of volition of their own. They are, as you correctly say, innocent victims who "can affect neither their parents' conduct nor their own status". *I would limit our discussion narrowly to this readily identifiable*

Although I am not entirely at rest, I am *clear* inclined not to characterize *would prefer not to characterize* this class of school age children as "suspect" entitled to the highest level of scrutiny that we accord "discrete and insular minorities".

✓ This concept has never been applied to persons unlawfully in the United States. I would think it sufficient to apply - as you suggest as an alternative - the intermediate level of scrutiny that we sometimes call "heightened". The class *also* ~~then~~ can be described as unique.

I agree *generally* with your dual *re* ~~alliance~~ on the Equal Protection Clause and the ~~fundamental~~ importance of education at the public school level. Indeed, the state

the

has a substantial interest itself in assuring that this level of education be afforded all children, including those of illegal aliens in view of the finding of the DC that ²the high percentage of these children remain in our country. ¹I will take a closer look at the language of this part of the opinion. My concern when I wrote

Rodriguez was not to create a chain reaction: if

education is a fundamental right, ^{in a Constitutional sense, then} certainly health and

^{- and possibly other services (e.g. utilities) -} welfare would be next candidates for this status. And if

²⁰education is ¹⁶so fundamental that every school district in a state must provide identical per pupil funding (if not identical curricula, teacher qualifications, etc.). If this type of equality were held necessary within a state, the equal protection component of the Fifth Amendment could - I suppose - be invoked to require equality nationwide (e.g., the rural schools of Arkansas and the elitist schools of the Westchester communities such as Scarsdale, Bronxville and the like). As ideally desirable as this would be, other considerations - that are fundamental in our federal system and with our system of local control of public education - must be weighed.

would this apply to all aspects of education?

SS

One of the strongest arguments made on behalf of petitioners (the state and county) is that durational residency requirements have been sustained by our Court with respect to state educational institutions. E.g., Vlandis. As I know from my own long experience in public education, school districts customarily charge tuition to students from other districts who may wish to attend a school geographically convenient or deemed to be superior. My guess, for example, is that Fairfax would charge tuition to a Prince William County pupil who sought the benefit of the superior Fairfax schools. I would hold open the right of the state or a county to enforce reasonable durational residency requirements with respect to the children of illegal aliens. This would be particularly important at the high school level where teenage children living near the border might enter simply for educational purposes.

venture several
I ~~make~~ a general observation, Bill, about the *well written and even*
draft opinion. It is eloquent, and ~~interesting~~. I suppose all of us, however, prefer shorter and more narrowly focused opinions. Your drafts sweeps rather broadly, and leaves

me a little uneasy as to inferences that may be drawn from it in other connections not clearly foreseeable. As I indicated at Conference, I view this case in rather simplistic terms. The alien children are victims of a combination of circumstances. Access from Mexico into this country, across our 2,000 mile border is readily available and could not be controlled if the entire armed forces of the United States were assigned the task.

Aliens are are attracted by our
~~Employment opportunities in our country are~~ vastly
employment opportunities
 superior. Congress, as you state, has been unwilling to
~~it~~ make unlawful the employment of illegal aliens. In these
 circumstances, they will continue to enter the U.S., and a
 high percentage of them will remain here.

I agree with you that in these circumstances their children should not be left in the streets uneducated. This is all that our case is about.

I will certainly join your party, and hope that in the drafting & redrafting process the opinion can be focused so specifically on this uniquely discrete class that I can join it also.

Sincerely

lfp/ss 01/26/82

BREN SALLY-POW

80-1538, 80-1934 Plyler

Dear Bill:

Thank you for affording me the opportunity to review a draft of your proposed opinion. I have read it only once, and write promptly to record a major concern.

The class alleged to be discriminated against - and the only class before us - is composed of school age children of illegal aliens. There is a good deal of language in the draft (particularly pp. 19-21) that will be read as indicating that all illegal aliens, adults as well as children, may be "discete and insular minorities for which the Constitution offers a special solicitude".

The draft states, for example, that many of the reasons that have prompted us to be solicitous of "lawful resident aliens" apply "with even greater force to illegal aliens". I could not agree to this. You do recognize (p. 22) that adult aliens (in my view any alien beyond school age) who enters the United States unlawfully is guilty of a crime. Such an alien also is at deportable, subject only to due process. As I indicated at Conference, and as you emphasize in other portions of the opinion, school age children of illegal aliens are in this country - at least presumptively - through no fault of volition of their own. They are, as you correctly say, innocent victims who

"can affect neither their parents' conduct nor their own status". I would limit our decision narrowly to this readily identifiable class.

Although I am not entirely at rest, would prefer not to characterize this as "suspect" entitled to the highest level of scrutiny that we accord "discrete and insular minorities". This concept has never been applied to persons unlawfully in the United States. I would think it sufficient to apply - as you suggest as an alternative - the intermediate level of scrutiny that we sometimes call "heightened". The class also can be described as unique.

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I will take a closer look at the language of this part of the opinion. My concern when I wrote Rodriguez was not to create a chain reaction: if education is a fundamental right in a constitutional sense, then certain health and welfare - and possibly other services (e.g. utilities) - would be candidates for this status.

I venture several general observations, Bill, about the draft opinion. It is well written and even

eloquent. I suppose all of us, however, prefer shorter and more narrowly focused opinions. Your drafts sweeps rather broadly, and leaves me a little uneasy as to inferences that may be drawn from it in other connections not clearly foreseeable. As I indicated at Conference, I view this case in rather simplistic terms. The alien children are victims of a combination of circumstances. Access from Mexico into this country, across our 2,000 mile border is readily available and could not be controlled if the entire armed forces of the United States were assigned the task. Aliens are attracted by our vastly superior employment opportunities. Congress, as you state, has been unwilling to make unlawful the employment of illegal aliens. In these circumstances, they will continue to enter the U.S., and a high percentage of them will remain here. I agree with you that in these circumstances their children should not be left on the streets uneducated. This is all that this case is about.

I will certainly join your judgment, and hope that in the drafting and redrafting process the opinion can be focused so specifically on this uniquely discrete class that I can join it also.

Sincerely,

df1 01/28/82

To: Justice Powell

From: David

Re: Justice Brennan's draft in Plyler v. Doe, Nos. 80-1538, 80-1934

Justice Brennan has constructed an argument for "strict scrutiny" that stands on three legs: these are ^{il}illegal aliens; these are children; and the right at issue--education--was particularly important to the framers of the fourteenth amendment. In theory, each one of these legs is essential to the holding.

Illegal Aliens as a Suspect Class

Part IIIA, pages 18-23 discusses whether or not illegal aliens are a "suspect class." Much of this discussion is disturbing particularly at pages 19-20. If this discussion is to be retained I think that footnote 18 ought to be moved into text. Also there is something wrong in the tone. Lax enforcement may be a problem, but the problem is overwhelming and made worse by the "suspect class" determination to enter the country. Further, the fact that persons who are here illegally hesitate to bring their "complaints" to the attention of public authorities, should not necessarily entitle them to special judicial protection. Presumably, there are some benefits to being a lawful resident or citizen.

Musil Point

I think you might request Justice Brennan to simply drop pages 18-20. That is, he might simply drop the "illegal alien" leg of his argument. I suppose it might be a bit odd to write an opinion such as this without relying on the fact that these childrens are aliens, particularly in light of the Court's holding in Graham that resident aliens are a "suspect class." But somehow I think it sits better to say that these children are entitled to an education despite the fact that they are here illegally rather than because they are here in violation of the law. ?

If Justice Brennan were agreeable to this suggestion, he could pick up the discussion with the first paragraph on page 21, discussing the illegal alien children. The discussion of illegal alien children is too short and should be fleshed out with further comparison to the illegitimacy cases and perhaps to other cases as well indicating the "special place" of children in life and in law. One could conclude this section by holding that a heightened standard of review is appropriate--something like the standard used in the illegitimacy cases. yes

Education

Part IIIB, pages 23-34 discusses the special place education occupied in the minds of the framers of the fourteenth amendment. Part IIIC contrasts this case to Rodriguez.

I am of a divided mind as to this part of the opinion. The opinion links the level of scrutiny to the importance of the children's right to education.

will
do
this

of the right without finding the right to be a so-called "fundamental" right. If you were writing the opinion, you might as well wish to emphasize the importance of education, and place this along side of the "innocent children" rationale as a reason to take a searching look at what the state is doing. And, that would be honest. We are disturbed in this case because the deprivation of education is so serious. On the other hand, for all the reasons you gave in Rodriguez it is hard for the Court to isolate certain areas of life and term them fundamental. And if the right at stake here were participation in a child abuse program I don't think you would feel that the right was any less important, although maybe you would. Justice Brennan makes a valiant effort to give education a source in the fourteenth amendment. I find this quite unconvincing.

On the whole, I tend to think that this portion of the opinion is acceptable. I think it is much too long, and that the history portion ought to be eliminated or dramatically shortened. I think it is fair to say that when a group of children are totally deprived of an education, through no fault of their own, it is reasonable to require the state to show that its interests are substantial and the scheme designed to fulfil these substantial interests. Certainly, the fourteenth amendment ought to stand as a barrier to the creation of new suspect classifications. Depriving these children of an education, will likely create a discrete and insular minority if they are not already one.

In short, I think you can join if ¹ he refocusses on the children aspect, ² alters the level of scrutiny, and ³ drops most of the illegal aliens as a suspect class discussion.

I add the following minor points:

1. The paragraph at page 10, at the conclusion of footnote 10, should be limited to the discussion at hand: whether illegal aliens are within the fourteenth amendment. Taken out of context, this paragraph says more than it ought to.

2. Footnote 15 seems to be unnecessary in its suggestion that a state tuition program, across the board, might violate equal protection.

3. At page 19, the first sentence states that "The experience of our Nation has taught us that a conscious or unconscious, but in any event constitutionally unacceptable, prejudice is likely to manifest itself in the legislature's treatment of some groups." I'm not sure how this sentence squares with the Court's requirement of a showing of intent to discriminate in Washington v. Davis.

My only question remains whether the Court ought to elevate children and education over other groups and other necessities of life. I won't keep harrying you with this point, but I find it somewhat troubling. And this is why I prefer preemption. The Court has consistently emphasized the uniquely strong nature of federal power over immigration, and the Constitution gives this

authority to the federal government in express terms. I think that DeCanas can be limited to the area of employment. Indeed, it is a great benefit to have DeCanas on the books, for a preemption approach which builds on DeCanas tells the states that they may attack the problem of illegal migration at its source--e.g. employment--but they may not accept the benefits of an illegal workforce and yet penalize that workforce with all sorts of disabilities. That seems to be a perfectly sensible policy position. I think you reported that Justice Blackmun said at conference that preemption was his preferred approach. Perhaps he will have something to say on the matter.

Another
triple space
draft 181

lfp/ss 01/29/82

PLYLER SALLY-POW

80-1538, 80-1934 Plyler

Dear Bill:

Thank you for affording me the opportunity to review a draft of your proposed opinion. I submit the following ~~reactions~~ reactions, some of which may be tentative.

As I indicated at Conference, I view this case in rather simplistic terms. The children are victims of a combination of circumstances. Access from Mexico into this country, across our 2,000 mile border, is readily available and could not be controlled if the entire armed forces of the United States were assigned the task.

Aliens are attracted by our vastly superior employment opportunities, not to mention other benefits, available

~~even to illegal aliens in our country.~~ Congress, as you

~~state,~~ has been unwilling to make unlawful the employment

of such aliens. In these circumstances, they will

continue to enter the U.S., and a certain percentage of

them will remain here. In these circumstances their

children ~~(and I am thinking of those 18 and under who come~~

~~and go with their families)~~ should not be left on the streets uneducated.

Illegal Aliens as a Suspect Class

Once a class is ~~so~~ characterized ^{as "suspect"}, the state must show a compelling interest to justify it ^{discriminatory treatment}. We have never held that persons unlawfully in this country, whatever their age, are a suspect class in the full meaning of the term. I view ~~this~~ ^{the} classification ^{before us} simply as a unique one.

~~It is discriminated against by Texas. As we are dealing~~
~~As the class is composed of~~ ^{as children of} ~~innocent children, uniquely postured,~~ I would ^{illegal} ~~agree~~ ^{status,}
~~say that the discrimination requires a "heightened" level of~~
~~agree that a "heightened" level of scrutiny is required.~~
~~of examination and in turn that~~ ^{Thus,} the state must establish a

substantial interest to justify the discrimination. In a sense, ~~perhaps~~ ⁶ this may be viewed as middle tier analysis.

It is, however, one we have reserved for certain situations, e.g., Craig v. Bowen. As Texas has advanced no interest that I consider sufficiently substantial to justify the discrimination, I agree ~~that~~ there has been a violation of the Equal Protection Clause.

Having the foregoing views, I could not join Part III-A of your draft (pp. 18-23), as presently

written. I certainly could not join pp. 19-21 that come very close to saying that all illegal aliens may be "discrete and insular minorities for which the Constitution offers a special solicitude".

In sum, as to the class discriminated against, I could not agree that it is "suspect" in the sense in which we have previously used this term. I do agree that the classification depriving innocent children of an education merits heightened scrutiny. ~~Possibly you could accept this approach.~~

Reliance on Education

As you ^{know,} ~~draft recognizes,~~ I have views about ~~education that may be perceived as being in some tension.~~

I served for 19 years on the ^{Richmond} public school board in

~~Richmond~~ and the Virginia State Board of Education. I

fully share your view as to the importance of education, particularly in a democracy. ^{, however,} ~~yet,~~ We are talking about what the Constitution requires and this was my concern in ~~Rodriguez~~ ¹. It was my view then and now that there is no constitutional right to a state provided education any more than there is such a constitutional right to welfare,

~~But these services~~
~~may not be~~

✓ housing, health services, public works and public utilities

- all of which are essential to a modern society.

As your draft notes, I did make clear

that the situation would be
~~Rodriguez would have been~~ different if a state had denied

education altogether to a particular class. This remains

my view, and all that makes this case different in this

respect is the status of respondents as unlawful aliens.

I agree with your emphasis of the importance of education,

I therefore would
but could not characterize *education* it as a "fundamental" right in

the constitutional sense. *Education* Your draft appears to view the

Fourteenth Amendment as creating an expectation of public

As I am not sure where this would lead us,
education. I need to examine your language in this

respect more carefully. *I have not ed*
I do not view the Amendment as

the source of any right to education other than not to be

discriminated against. Thus, I would rest our holding

squarely on the Equal Protection Clause. — *Though emphasizing*
the importance

In weighing the state interests, you have

mentioned - and I would emphasize even further - the

insubstantiality of *its* the asserted interest as compared with

the state's own interest in not *sub-* creating a class of

illiterate persons many of whom may remain in Texas,

adding to
~~presenting~~ the problems *and costs of* ~~of a subclass among educated~~

and
~~teenagers and adults~~ (unemployment, welfare, crime, etc.)

Relatively Minor Points

(Copy p. 4 David's memo)

Your draft opinion is an impressive piece of work, and I have enjoyed reading it. I suppose all of us

prefer shorter and more narrowly focused opinions. As

5 let indicated above, the draft sweeps rather ~~broadly~~ *more than I would*, and

leaves me a little uneasy as to inferences that may be

drawn from it in other connections not clearly

foreseeable. *2 4* Wherever you can focus it more sharply,

4 would be helpful to me.

I will join your judgment, and hope that in the drafting and redrafting process the opinion can be focused so specifically on this uniquely discrete class that I can join your opinion also.

Sincerely,

Justice Brennan

lfp/ss 01/29/82

PLYLER SALLY-POW

80-1538, 80-1934 Plyler

Dear Bill:

Thank you for affording me the opportunity to review a draft of your proposed opinion. I submit the following reactions, some of which may be tentative.

As I indicated at Conference, I view this case in rather simplistic terms. The children are victims of a combination of circumstances. Access from Mexico into this country, across our 2,000 mile border, is readily available and could not be controlled if the entire armed forces of the United States were assigned the task.

Aliens are attracted by our vastly superior employment opportunities, not to mention other benefits. Congress, has been unwilling to make unlawful the employment of such aliens. In these circumstances, they will continue to enter the U.S., and a certain percentage of them will remain here. [In these circumstances] their children should not be left on the streets uneducated.

Illegal Aliens as a Suspect Class

Once a class is characterized, as "suspect" the state must show a compelling interest to justify discriminatory treatment. We have never held that persons unlawfully in this country, whatever their age, are a suspect class in the full meaning of the term. I view the classification before us as a unique one. As the class is composed of innocent children, uniquely postured, I would agree ^h ~~t~~at a "heightened" level of scrutiny is required. Thus, the state must establish a substantial interest to justify the discrimination. In a sense, this may be viewed as middle tier analysis. It is, however, one we have reserved for certain situations, e.g., Craig v. Bowen. As Texas has advanced no interest that I consider sufficiently substantial to justify the discrimination, I agree that there has been a violation of the Equal Protection Clause.

Having the foregoing views, I could not join Part III-A of your draft (pp. 18-23), as presently written. I certainly could not join pp. 19-21 that come very close to saying that all illegal aliens may be

"discrete and insular minorities for which the Constitution offers a special solicitude".

In sum, as to the class discriminated against, I could not agree that it is "suspect" in the sense in which we have previously used this term. I do agree that the classification depriving innocent children of an education merits heightened scrutiny, *and that it does not meet this test.*

Reliance on Education

I served for 19 years on the Richmond Public School Board and the Virginia State Board of Education. I fully share your view as to the importance of education, particularly in a democracy. We are talking, however, about what the Constitution requires and this was my concern in Rodriguez. It was my view then and ^{is} now that there is no constitutional right to a state provided education any more than there is such a constitutional

✓ right to welfare, housing, health services, public works and public utilities - all of which are ^{considered by most} essential ^{of us} to a ^{to be}

~~modern society. Although I agree with your emphasis of the~~

~~importance of education, I therefore would not~~

*Sally,
no 41*

stet

characterize education as a "fundamental" right in the constitutional sense.

As your draft notes, I did make clear in Rodriguez that the situation would be different if a state had denied education altogether to a particular class. This remains my view.

Your draft appears to view the Fourteenth Amendment as creating an expectation of public education.

As I am not sure where this would lead us, I need to

examine your language in this respect more carefully. I

have not viewed the ^{Amend}~~Equal Protection Clause~~ as the source of any right ^{to education}

~~to education other than not to be discriminated against.~~

Thus, I would rest our holding squarely on the Equal

Protection Clause - though emphasizing ^{generally} the importance of

education.

In weighing the state interests, you have mentioned - and I would emphasize even further - the insubstantiality of its asserted interest as compared with the state's own interest in not creating a subclass of illiterate persons many of whom may remain in Texas,

adding to the problems and costs of unemployment, welfare, and crime.

Relatively Minor Points

(Copy p. 4 David's memo)

Your draft opinion is an impressive piece of work, and I have enjoyed reading it. I suppose all of us prefer shorter and more narrowly focused opinions. As indicated above, the draft sweeps rather broadly, and leaves me a little uneasy as to inferences that may be drawn from it in other connections not clearly foreseeable.

I will join your judgment, and hope that in the drafting and redrafting process the opinion can be focused ~~so~~ so specifically on this uniquely discrete class that I can join your opinion also.

Sincerely,

Justice Brennan

Your Edit

My first
Draft

lfp/ss 02/04/82

80-1538 Doe v. Plyler

Justice Powell, concurring in the judgment.

I join the judgment of the Court. Although I agree with a good deal of the Court's opinion, I do not join it. Perhaps understandably, the Court undertakes an extensive analytical and historical justification of its conclusion that the state's classification violates the Equal Protection Clause. Few provisions in the Constitution have prompted as much diverse writing as this clause, and perhaps no other provision presents comparable difficulties of consistent analysis or in identifying limiting principles. I therefore think it advisable to view this as the unique case that it is - one quite without precedent.

The classification in question severely disadvantages children who are the victims of a combination of circumstances. Access from Mexico into this country, across our 2,000 mile border, is readily available and virtually uncontrollable. Illegal aliens are attracted by our employment opportunities, and perhaps

by other benefits as well. This is a problem of serious national proportions, as the Attorney General recently has recognized. See, ante, at _____. Perhaps because of the intractability of the problem, Congress - vested by the Constitution with the responsibility of protecting our borders and legislating with respect to aliens - has not provided effective leadership in dealing with this problem. It therefore is certain that illegal aliens will continue to enter the United States and, as the record makes clear, an unknown percentage of them will remain here. I agree with the Court that their children should not be left on the streets uneducated.

Although the analogy is not perfect, our decision today finds support in decisions of this Court with respect to the status of illegitimates. In Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) we said: ". . . visiting . . . 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."

In this case, the state of Texas effectively denies to the school age children of illegal aliens the opportunity to attend the free public schools that the state generally makes available to all residents. They are excluded only because of a status resulting from the violation by parents or guardians of our immigration laws and the fact that they remain in our country unlawfully. The respondent children are innocent in this respect. They could "affect neither their parents' conduct nor their own status." Trimble v. Gordon, 430 U.S. 462, 770 (1977).

Certainly, our review in a case such as this is properly heightened. See Trimble v. Gordon, *supra*, 430 U.S., at 767. Cf. Craig v. Boren, 429 U.S. 190 (1976). As Justice Frankfurter said, and as the Court has so often repeated, "[c]hildren have a very special place in life which law should reflect." May v. Anderson, 345 U.S. 528, 536 (1953). Our review must not be "toothless" when the classification at issue deprives a group of children of the opportunity for education afforded all other children simply because they have been assigned a legal status due

~~ante Royster~~
↓
to a violation of law by their parents. A legislative classification that threatens the creation of an underclass of future citizens and residents strikes at one of the fundamental purposes of the Fourteenth Amendment. In these unique circumstances, the Court properly may require that the state's interests be substantial and that the means bear a "fair and substantial relation" to these interests. Cf. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

In my view, the state's denial of education to these children bears no substantial relation to any substantial state interest. Both of the district courts found that an uncertain but significant percentage of illegal alien children will remain in Texas as residents and many eventually will become citizens. The discussion by the Court, ante, at _____, of the state's purported interests demonstrates that they are poorly served by the educational exclusion. Indeed, the interests relied upon by the state seem insignificant in view of the consequences to the state itself of wholly uneducated persons living indefinitely within its borders. By

contrast, access to the public schools is made available to the children of persons lawfully in this country without regard to the temporary nature of residency in the particular Texas school district. The Court of Appeals and the District Courts that addressed this case concluded that the classification could not satisfy even the bare requirements of rationality. One need not go so far to conclude that the exclusion of respondent's class of children from state-provided education is a type of punitive discrimination that is impermissible under principles of fairness and equality before the law.

In reaching this conclusion, I am not unmindful of what must be the exasperation of responsible citizens and government authorities in Texas and other states similarly situated. Their responsibility, if any, for the influx of aliens is slight compared to that imposed by the Constitution on the federal government. So long as the ease of entry remains inviting, and the right to deport is exercised infrequently by the federal government, the additional expense of admitting these children to public schools might fairly be shared by the federal and state

governments. In any event, it hardly can be argued rationally that anyone benefits from the creation within our borders of a subclass of illiterate persons many of whom will remain in the state, adding to the problems and costs of both state and national governments attendant upon unemployment, welfare and crime.

Accordingly, I concur in the judgment.

df1 02/02/82
To: Justice Powell

80-1538 Plyler

File

From: David

Re: Justice Brennan's re-draft

(See WGB's letter
of 2/2/82 & -
my reply of 2/4)

I think that the re-draft of the pages on illegal alienage as a suspect class may satisfy your concern. The tone of this section is considerably changed; if anything, Justice Brennan may be inviting some problems from Justice Marshall and Blackmun.

It is a curious situation that Justice Brennan should be pointing out to you that your proposed method of deciding the case is likely to have more ramifications than his. I think he may be right. But I am not sure that these effects can be avoided. Thus, in his letter he suggests that if a group of children were situated geographically in a state such that the state did not provide any "accessible" education to them, the Court might not use strict scrutiny. ("So, too, a 'class' of children geographically situated in some remote corner of a state should perhaps not be able to command the state to provide a school within some accessible distance.") He expects that you would agree with the statement, and perhaps you would. But my reaction is just the reverse. If a state must provide some education to illegal aliens, then I think it must provide some education to all of its children (assuming it has undertaken to provide public education in the first place). Otherwise, children are in a sense "disabled" by the fact of their

*my note - There is a great deal to
what David says. I'm inclined to
remain with E/P but write separately.*

2.
citizenship and by the fact that their American parents have chosen to live in a remote corner of a state--rather than scramble illegally across the boarder. But surely a society has a greater obligation to its own members, than to persons, albeit children, who are here illegally and perhaps not permanently.

Again, I would think that if a state entirely deprives retarded children of an education, it would violate equal protection--assuming it violates equal protection to entirely deprive illegal alien children from an education. The problem here would be defining a deprivation. The argument would run that the normal education is in effect useless to the retarded child, and therefore no education is being provided. This is a troubling suggestion to accept but Justice Brennan's rebuttal that this mental retardation is a "functional" distinction whereas "illegal alienage" is a status distinction makes little sense to me. Illegal aliens are functionally different: they do not belong here, they have no right to vote or to work, to serve on juries or run for office. ?

In short, I am not sure that Justice Brennan is right that the Court ought to narrow its holding to illegal alien children. Certainly, that is a narrower holding than just "children" but I think it would be anomalous to favor illegal alien children over any group of legal children.

Turning to the place of education, Justice Brennan is understandably concerned that the Court not appear to be pulling education out of the air as a protected value. This explains his attachment to the historical discussion. I think that this is a problem too for you. He is concerned that under your

5.
approach, AFDC, medical care, and the whole range of social welfare services might have to be provided as well--unless you can give a constitutionally based explanation for why deprivation of education--as opposed to deprivation of heat, food, medical services, etc--should be so favored. I don't know if this troubles you. Perhaps the historical explanation is acceptable even if it is not utterly convincing.

The difficulty with the case is that any equal protection decision--except one which finds illegal aliens to be a suspect class or the right to some education to be a fundamental right--tends to have a substantive due process flavor to it. Children are favored over other groups, education over other necessities. Perhaps this is defensible, but there is some tension with your discussion in Rodriguez as to why education is not a fundamental right. One solution for you would be to rest entirely on the "innocent children" point. You could rest on the illegitimacy cases and the intermediate standard of review. The problem would be whether you would be prepared to follow the same approach in a case involving illegal alien children and some other social service. If you would be willing to treat the next case to the same standard of review then I think you can simply say here that the state cannot deprive some group of children of a social service, for reasons over which the children have no control. Of course you would limit yourself to education in this case, but the analogy to other social services would not threaten you with inconsistency.

The difficulty with resting entirely on the analogy to illegitimacy is twofold. First, illegal alien children are somewhat differently situated than illegitimates. Illegitimates are penalized for acts of their parents; illegal alien children are penalized because they are not entitled to American citizenship, to stay and work in the community, or to vote. Second, to say that when any group of children is deprived of some significant social service, the Court will use a heightened standard of review, may lead the Court down unforeseen paths in entirely different sorts of cases. But it may be perfectly reasonable to say that whenever any group of children is completely denied or relatively deprived of a significant social service, when the same services are generally provided, such that these childrens will likely be disabled from entering the mainstream of life, then the Court must look harder at the state's justifications. Of course, there is no need to say all of this in the current opinion, but I think you have to be prepared to go down this line unless you can see a principled way to limiting the case to particular combination of circumstances. I think Justice Brennan has tried to limit the case rather sharply to its particular ingredients. It is paradoxical that in the process of limiting the case, he suggests a mode of equal protection analysis that is potentially sweeping. But your approach may be subject to the same criticism.

There must be some principled way to tell a state that it cannot deprive a group of children of an education, but I am still struggling for it.

File

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

See my reply
of 2/4/82

February 2, 1982

Nos. 80-1538, 80-1934 -- Plyler v. Doe, Etc.

Dear Lewis,

Thank you very much for your thoughtful comments on the draft. I'm very encouraged that it will not be difficult to find common ground because I tend to perceive this case, and what would be the most appropriate opinion for the Court, in very nearly the terms that you do. Although the opinion was purposefully "firmed up" with as much support as possible, in order to bring to the fore all the problems at work in this somewhat sui generis case, I hoped not to wander very far afield in terms either of holding or reasoning. May I respond to your comments in turn.

Illegal Aliens as a Suspect Class

The proper level of scrutiny to be afforded state, as opposed to federal, classifications directed against "illegal aliens" is indeed a most difficult and perplexing problem. But there is no need to attempt to resolve that problem in this case for, as you observe, we are concerned here with a "uniquely postured" subclass of illegal aliens. In footnote 18, and again on p. 23, the draft describes several factors suggesting that "illegal aliens" should not be deemed a suspect class. In a similar vein, the final sentence of the crossover paragraph on page 21, clearly suggests that "need" alone, would not be enough to warrant heightened scrutiny. And in the paragraph beginning on page 21, it is said that "persuasive arguments" can be made suggesting unusual state prerogatives with respect to the treatment of illegal aliens generally.

The several sentences in the text, pp. 19-21, describing the several common elements between "illegal aliens" and those classes heretofore deemed suspect, are intended only to highlight the unique nature of the subclass of "undocumented children." For example, there might well be a difference between singling out illegal alien children as a group, and selecting out the class of retarded children. The class of retarded children would not reflect a status-based distinction, near the core of equal protection clause concern, but rather some functional differentiation. So too, a "class" of children geographically situated in some remote corner of a state should

perhaps not be able to command the state to provide a school within some accessible distance. In other words, perhaps not every subclass of children is necessarily treated the same even with respect to the denial of education. 2

As you note, the draft does not suggest that even the class of undocumented children are, in any circumstance other than the denial of education, necessarily deserving of heightened scrutiny. Although concededly the argument for "middle-level" scrutiny, across-the-board for such children is strong, isn't it best in this case to preserve what might be the somewhat divergent positions of the Court with respect to undocumented children who claim, for example, the discriminatory denial of state welfare benefits--a very difficult problem if heightened scrutiny were to be afforded to the class per se. Thus, rather than prescribe a level of scrutiny, e.g. Craig v. Boren, suitable for this class in all situations, would it not be more prudent merely to describe the nature of the "uniquely discrete class" being discriminated against here. I do think that the discrete nature of the class heightens for them the significance of education. }

In short, as the attached revised IIIA excerpt indicates, would it satisfactorily address your concerns with respect to the discussion of the discrimination, by eliminating, or dropping to footnote, most of the background discussion on the class of "illegal aliens generally"? The considerations for, and against, heightened scrutiny will then be on a more "equal footing." I am hesitant about wholly omitting all discussion of the issue since it is clearly one of the central, and most difficult, issues posed by the case. But perhaps you might suggest a way to abbreviate the discussion of this aspect of the children's unique circumstance still more. Yes

Reliance on Education

The draft was intentionally constructed simply to adopt the suggestion set forth in Rodriguez, and restated in your note, that in terms of level of scrutiny, the absolute denial of education to particular classes of children warrants strict scrutiny. Although the congressional debates lend much support for the view, reflected so frequently in our cases, that education is of special importance within the framework of equality, there is just no support in those debates, or in our cases, for the idea that a state has any affirmative obligation to establish a system of public education. That conclusion True

is stated on page 33, and again on 34, supported by the material in footnotes 23 and 28. Indeed, the legislative material tends to support your Rodriguez view that the Fourteenth Amendment was not intended to provide a mechanism for reviewing school financing arrangements, or for "finely tuning" equality in the type and quality of education provided. Please suggest any wording that you think might better state these conclusions if you feel that the slightly obscure statements presently in the text are unsatisfactory. But, I do think it important that the history also confirms our shared view that we are to look closely on the absolute denial of education to certain discrete groups of children. It is that confirmation that I wish to preserve; and then to make clear that the group of undocumented children is precisely such a discrete group.

Relatively Minor Points

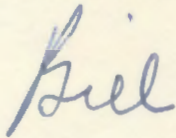
1. This point is very well taken. The concluding paragraph should be confined to the "within the jurisdiction" question.

2. The final sentence of the first paragraph of fn. 15 will be deleted.

3. I am not sure that I see the relevance of Washington v. Davis here. The draft addresses only the types of groups that have been held historically suspect; it does not purport to create any shift in the showing required when we are dealing with the impact of a facially neutral statute. I will modify this language somewhat in the next draft. Have you some wording to suggest.

I expect that we are approaching the point where I should begin preparing a printed draft for circulation to the Conference. But I would much appreciate your comments with respect to the proposed changes in the attached Part IIIA.

Sincerely,



Justice Powell

cc: Justice Marshall
Justice Blackmun
Justice Stevens

WGBS letter of
2/2/82

A

Several formulations explain our treatment of certain legislative classifications as "suspect." Some classifications are empirically more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is well recognized as incompatible with the constitutional understanding that each ^{person} ~~man~~ is to be judged individually, ~~valued~~ ^{equally}, and entitled to equal justice under the law.

Classifications treated as suspect tend also to be those that are least likely to be relevant to any proper legislative goal. See McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Hirabayashi v. United States, 320 U.S. 81, 100 (1943). Finally, certain groups, indeed largely the same groups, have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973); Graham v. Richardson, 403 U.S. 365, 372 (1971); see United States v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938). In affording rigorous scrutiny to classifications adversely affecting "discrete and insular minorities"--relatively small in number, identifiable by immutable or nearly immutable personal attributes or status, habitually victimized--we afford no judicial preference to their condition. The experience of our Nation has taught us that ~~an unacceptable~~ ^{man} prejudice ~~is likely to~~ manifest itself in the legislature's treatment of some groups. That experience is encapsulated in the Equal Protection Clause of

*Received with WGBS
letter of 2/2*

the Fourteenth Amendment. Legislation imposing special disabilities on such groups suggests precisely the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.

Lax enforcement of the law barring entry into this country, coupled with the refusal to create an effective bar to the employment of illegal aliens, has resulted in the creation of a substantial "shadow population" of illegal aliens within our national boundaries.¹ The situation has evoked the specter of a permanent caste of persons, encouraged to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.² Such

¹The Attorney General recently estimated the number of illegal aliens within this country at between 3 and 6 million. In presenting to both the Senate and House of Representatives several presidential proposals for reform of the immigration laws--including one to "legalize" many of the illegal entrants currently residing in the United States by creating for them a special status under the immigration laws--the Attorney General noted that this subclass is largely composed of persons with a permanent attachment to the nation, and that they are unlikely to be displaced from our territory:

"We have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community. By granting limited legal status to the productive and law-abiding members of this shadow population, we will recognize reality and devote our enforcement resources to deterring future illegal arrivals."

²As the District Court observed in No. 80-1538, the confluence of government policies has resulted in

"the existence of a large number of employed illegal aliens, such as the parents of plaintiffs in this case, whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous

Footnote continued on next page.

a class would appear to display many of the characteristics of those "discrete and insular" minorities for which the Equal Protection Clause has historically offered a special solicitude.³

The children who are plaintiffs in these cases are special members of this class of illegal inhabitants. Persuasive arguments suggest that state legislatures enjoy unusual prerogatives with respect to persons whose presence within the boundaries of the United States ^{is} ~~has been~~ the product of their ~~wrongful conduct~~ ^{unlawful entry}.⁴ These arguments do not apply with the same

neglect to which the state or the state's natural citizens and business organizations may wish to subject them." 458 F. Supp., at 585.

³We need not labor over historical materials before acknowledging that aliens have been "saddled with ... disabilities, ... subjected to ... a history of unequal treatment, ... and relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio School Dist., supra, 411 U.S., at 28. Many of the reasons that have prompted us to regard resident aliens as a "prime example of a discrete and insular minority ... for whom ... heightened judicial solicitude is appropriate," Graham v. Richardson, 403 U.S., at 372, apply with even greater force to illegal aliens. Lawfully resident aliens may have some access to political forums, if only in an advisory capacity, and may freely avail themselves of the judicial process. In contrast, illegal aliens are understandably reluctant to risk exposure by bringing their complaints to the attention of public agencies and law enforcement authorities, whether those complaints are a direct result of discriminatory treatment by virtue of immigration status, or arise from some less invidious source. The class may indeed be in need of protection. But need alone, without constitutional authority, cannot suffice to warrant heightened judicial scrutiny.

⁴Several factors ~~suggest~~ ^{make clear} that "illegal aliens" should not be deemed a "suspect class." Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is ~~generally~~ the product of voluntary action. Indeed, entry into the class is itself a

Footnote continued on next page.

force to classifications imposing particular disabilities on the children of such unlawful entrants. Those who choose to enter our territory by stealth and in violation of law might be asked to bear the burden of legislation designed to deter their unlawful entry.⁵ The children of those persons are hardly similarly situated. Their "parents have the ability to conform their conduct to societal norms," and indeed possess the power to remove themselves from the jurisdiction of the State of Texas,

crime. In addition, it could hardly be suggested that the status of "illegal alienage" is ~~presumptively~~ irrelevant to every legislative action. With respect to the actions of the federal government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No State may independently exercise a like power. But if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the states may, of course, follow the federal direction. Nor are the states *wholly* without power to meet legitimate demographic and economic concerns arising from a potential influx of persons from outside this country. DeCanas v. Bica, 424 U.S. 351 (1976). We have no need in this case to resolve the difficult problem that might be presented by the application of equal protection standards to state classifications based on illegal alienage generally, or with respect to other state created rights. We hold only that in the context of §21.031's absolute denial of education to this discrete class of undocumented children, strict scrutiny is the appropriate standard of review.

*must ?
pre-emption*

⁵The courts below noted the ineffectiveness of the Texas provision as a means of controlling the influx of illegal entrants into the State. See 628 F. 2d, at 460-461; Doe v. Plyler, 458 F. Supp., at 585; In re Alien Children Education Litigation, 501 F. Supp., at 578 ("the evidence demonstrates that undocumented persons do not immigrate in search for a free public education. Virtually all of the undocumented persons who come into this country seek employment opportunities and not education benefits. ... There was overwhelming evidence ... of the unimportance of public education as a stimulus for immigration.").

but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status." Trimble v. Gordon, 430 U.S. 762, 770 (1977). Whatever efficacy the State might find in attempting to reach the conduct of adults by acting against their children, legislation directing the onus of parent's misconduct on his children does not comport well with our most fundamental conceptions of justice.

"[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual--as well as unjust--way of deterring the parent." Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 175 (1972).

It surely cannot be said that undocumented status is "constitutionally irrelevant to any proper legislative goal" of the State of Texas. Further, the characteristic deemed decisive under the Texas scheme, migration status, is not absolutely immutable, since it is the product of conscious action. These considerations militate against affording illegal alienage a heightened scrutiny. Nevertheless, immigration status is a characteristic over which the undocumented children who are plaintiffs in this case have little or no control. In addition, the classification at issue in the Texas scheme adversely targets a discrete class exhibiting many of the characteristics of powerlessness and vulnerability that have evoked special solicitude. The rather unique nature of this class cautions against attempting to prescribe some standard of judicial review

This seems to be talking again about illegal aliens - not just their children

that might be applied to it in all circumstances. But it suffices for the moment to acknowledge the presence of many of the factors suggesting that legislation disabling this discrete class of "undocumented children" is in the nature of "class or caste" legislation with which the the Equal Protection Clause is most emphatically concerned. With these observations in mind, we turn our attention to the state-created right to which these children claim an equal entitlement.

February 4, 1982

80-1538, 80-1934 Plyler v. Doe

Dear Bill:

I have agonized over this case more than a little, as the answer seems so clear to me and yet writing it out creates various concerns - as we have agreed.

I am particularly grateful to you for affording multiple opportunities to suggest changes in your first draft. The revision of subpart A that accompanied your letter of February 2 is - I think - a substantial clarification.

Yet, Bill, I have concluded that it is best for me to write separately. My concern as to the "open endedness" of equal protection prompts me to be extremely cautious in this case as to the reach of the precedent we set. Although you and I often have been together on equal protection analysis (e.g., Murgia!), we also have differed as we did in Rodriguez.

This case is quite unique, and I have thought it prudent to write less exhaustively than your opinion. I recognize, of course, that your purpose also has been to circumscribe our holding narrowly, and perhaps you have done this. Nevertheless, given my concerns, I am presently inclined to join only the judgment.

I have been working all of this morning on a draft of a concurring opinion. I am saying that I agree with much of your opinion, but write to focus solely on the unique status of these children.

Although we have not heard from the three Brothers who voted as we did, there should be a Court on the basis of equal protection analysis - though my language will differ somewhat from yours.

Sincerely,

Justice Brennan

lfp/ss

Ply 1
lfp/ss 02/04/82

MEMORANDUM

TO: David DATE: Feb. 4, 1982
FROM: Lewis F. Powell, Jr.

Plyler

You must have had little sleep last night to have produced a draft opinion between 6:00 p.m., when I departed, and 8:30 a.m., when I returned. I do thank you, as it gave me an opportunity to take a look before leaving this afternoon.

As you will see from my revision, I rearranged the order of the draft and added some of my own language. I will count on you to improve it.

I have left out of the text the reference to strict scrutiny - generally the first page and a half of your draft. The substance of that should go into a footnote. With respect to strict scrutiny, despite WJB's view that it narrows the "window" of precedent for future cases, I continue to react negatively to expanding "suspect classifications". I am still open to discussion, however.

Unless you see some objection, I would like to add a note dealing with "residency". I have in mind my own experience in Virginia. No school district has any obligation to admit children who do not reside within the district. Thus - looking across the line into Virginia -

families living in King William County may not send their kids to the excellent Fairfax schools without approval and the payment of tuition. I would think Texas properly could require a de facto state of residence within the school district. Try your hand at a note to this effect.

I should have mentioned above that I certainly want to refer to Rodriguez, and I would mention that I left open the question where children were excluded altogether.

I will try to talk to Justice Brennan today, advise him that I will concur separately, and say that I should have a brief concurring opinion no later than the first of next week.

L.F.P., Jr.

ss

lfp/ss 02/04/82

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L.F.P., Jr.

lfp/ss 02/08/82

MEMORANDUM

TO: David DATE: Feb. 8, 1982
FROM: Lewis F. Powell, Jr.

80-1538 Plyler

Thank you for adding a little "scholarship" to my draft. You did not follow my plea to improve the text. Given the problem, I understand your restraint.

Comments that occur to me as I reread it this morning are as follows:

1. What do you think of the third sentence in the first paragraph in the opinion? Would it be better to omit it, and say something along the following lines:

"As our precedents afford only limited guidance, I think it advisable to rest our decision squarely on the unique facts of this case."

2. As you state, fn. 2 is troublesome. I have tried reframing a few of the sentences as follows:

"The Court in Rodriguez was not faced with the complete exclusion of a group of children from education, and it expressly reserved this question. 411 U.S., at 36-37. The rationale of the reservation was that a total denial of education might violate a fundamental right because some minimum of education may be necessary to the exercise of the franchise to vote and of First Amendment rights. As indicated above, we need not reach the question whether on this rationale illegal alien children may claim a 'fundamental' right under the Constitution."

I would like to work into the footnote at some point that there is no constitutional guarantee of a right to education any more than a guarantee that government must provide food, shelter, utilities and other now customary public services.

3. Should we not say in a note that aliens who violate immigration laws have not been held entitled to any constitutional rights other than due process in any proceedings brought against them? I would like to make this as strong as we properly can.

Although I used the term "toothless" in Trimble, I have never been enchanted by it. Can you think of a more appropriate word? If not, perhaps we should cite Trimble.

4. I note from the annual report of the Director of the Administrative Office (p. A-17), that only 113 "deportation" civil cases were filed in fiscal 1981. Is deportation a civil rather than a criminal matter? If in fact there were only 113 deportation proceedings - whether civil or criminal - filed in our entire country in 1981, this seems worthy of a footnote. It evidences the degree of inaction by the government. I must say that this number is not easy to believe, and perhaps it is prudent to ask the library to get in touch with the Administrative Office for clarification.

In note 4, the fourth sentence (beginning with "moreover" needs some amplification. Why was the state able to identify with certainty the aliens with permission to work?

Also in fn. 4, revise the final long sentence as follows:

"The Court does not address the question of preemption in this case. If, however, a state undertook to discriminate on the basis of an alien's present or future status under federal immigration laws, there would be a serious question of preemption."

I am not sure that I entirely understand the thrust of the final sentence in the footnote.

5. I have suggested changes in the language of the last sentence in the paragraph that ends on page 7. Perhaps it is best to rely solely on the Equal Protection Clause.

L.F.P., Jr.

SS

lfp/ss 02/08/82

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FROM: Lewis F. Powell, Jr.

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Called
Library
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L.F.P., Jr.

ss

df1 2/8/82

To: Justice Powell

From: David

Re: Your Concurrence in Doe v. Plyler No. 80-1538

I hardly changed your text at all. I did add the footnotes you requested as well as two other "preemption" footnotes. I was not quite sure what you wanted to do with Rodriguez. It is true that the question of an absolute deprivation of education was reserved there. If you wish to answer the question in this peculiar case then I suppose you would go the strict scrutiny route, having found the violation of a fundamental right. I did not think you wished to go so far and in footnote 2 I left the matter up in the air.

Footnotes 1 and 4 hint at the preemption problem without committing you to any particular analysis. I thought it fit rather nicely with the point you were making in text. But you need not humor me and I will ~~xxxx~~ gladly take them out if you think it best. OK

John and Dick have both read through this draft. I think it is fair to say that they are both somewhat uneasy with "middle level" review--because it tends to be so result-oriented and subjective--yet they seem to think, as we do, that this is the best way to go at this case.

David

How was your trip?

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

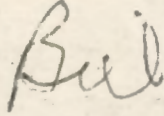
February 8, 1982

Nos. 80-1538, 80-1934, Plyler v. Doe

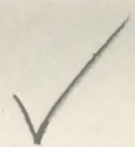
Dear Thurgood, Harry, Lewis and John,

Please note that this draft is substantially revised--
and shorter than--from the preliminary circulation of February
3. Thank you for your very helpful comments.

Sincerely,



Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens



CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 10, 1982

RE: No. 80-1538 Plyler v. Doe
No. 80-1934 Texas v. Certain Named and Unnamed Children

Dear Bill:

In due course I will undertake a dissent in this case.

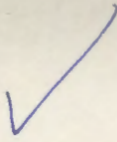
Sincerely,

Justice Brennan

cc: The Conference

CHAMBERS OF
THE CHIEF JUSTICE

February 10, 1982



Re: No. 80-1538 Plyler v. Doe
No. 80-1934 Texas v. Certain Named and Unnamed
Children

MEMORANDUM TO THE CONFERENCE:

I will be writing a dissent in this case.

Regards,

WEB/BSS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 11, 1982

No. 80-1538 Plyler v. Doe
No. 80-1934 Texas v. Certain Named and
Unnamed Children

Dear Bill,

I am doing additional work on these significant cases and will wait for the additional writing which is forthcoming before deciding what action to take.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

CHAMBERS OF
THE CHIEF JUSTICE

February 26, 1982

Re: (80-1538 - Plyer v. Doe
(
(80-1934 - Texas, etc.

MEMORANDUM TO THE CONFERENCE:

In light of the present state of these cases,
I submit the attached as a memo of my views.
In due course, something along these lines will
evolve into a dissenting opinion, reinforced by
any suggestions that may be forthcoming.

Regards,

WRB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

✓

March 8, 1982

80-1538 Plyler v. Doe
80-1934 Texas v. Certain Named and Unnamed
Undocumented Alien Children

Dear Chief,

Your memo in the referenced cases is very persuasive. I have only some minor suggestions which I will pass along. I expect to join the dissent.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 8, 1982

Dear Lewis,

in Plyler.

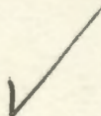
I believe my revisions^A from Part III
on, effectively preserve, and support, your
Rodriguez views.

Sincerely,

Bill

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL



March 10, 1982

Re: No. 80-1538 - Plyler, Superindendent v. Doe
No. 80-1934 - Texas v. Certain Named and
Unnamed Undocumented Alien Children

Dear Bill:

I agree with almost all of what Harry has in
his note of March 10.

Sincerely,

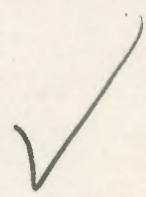
T.M.
T.M.

Justice Brennan

cc: Justice Blackmun
Justice Powell
Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



March 10, 1982

Re: 80-1538 - Plyer v. Doe
80-1934 - Texas v. Certain Named and
Unnamed Undocumented Alien Children

Dear Bill:

Harry's letter prompts me to add these comments.

In my opinion there are several different lines of legal analysis that require the result that you reach in your circulating opinion. For that reason, I am reasonably sure that any draft that is acceptable to you and to Lewis will be one that I will be able to join. I agree completely with Harry's suggestion that it is extremely important to obtain a Court opinion if that is at all possible. I could join a disposition based either on the premise that some modicum of education is "fundamental" or on the premise that the discrimination disclosed by this record violates the rational basis standard as formulated in Royster v. Guano. I agree with Harry that the reference to illegal aliens as a suspect class could well be deleted from the opinion, but I tend to disagree with his disapproval of the analogy of illegal alien children to illegitimates; it seems to me that that analogy is an effective response to some of the argument made in the Chief's draft dissenting opinion.

This is dictated rather hastily because I have not re-examined the circulations since receiving Harry's letter, but I thought I would let you know how important I think it is that we obtain a Court opinion if that can be done.

Respectfully,

Justice Brennan

cc: Justice Marshall
Justice Blackmun
Justice Powell

file

df1 03/11/82
To: Justice Powell

From: David

Re: Doe v. Plyler--No. 80-1538; 80-1934

I agree with most of this

Justice Blackmun has circulated a proposal in these cases in the hope of putting together a court. As I understand it, Justice Blackmun proposes that the opinion rest on the "fundamental rights" strand of equal protection analysis. The Court would hold that some modicum of education is fundamental "to preserve rights of expression and participation in the political process, and therefore to preserve individual rights generally." Anticipating the Chief's attack, Justice Blackmun, in line with our footnote 5, notes that some of these children will remain here permanently.

If the clerk gossip is worth anything, I gather that Justice Brennan is prepared to adopt this approach if it will attract your vote. He will rely on the historical section to demonstrate that education is special. He will rely on the illegitimacy/innocent children analogy to argue that the Court ought not to assume that Congress would support the discrimination in this case. Justice Marshall has circulated a note stating that he agrees to the proposal. Justice Stevens has said that he is in basic agreement, although he would like to keep in some analogy to the illegitimacy cases as a reason for raising the standard of review.

He believes that the illegitimate analogy ^{John} is an effective answer to some of the Chief's arguments. Otherwise ^{you} he will write a Royster v. Guano type of concurrence. Justice Blackmun also indicates that he will write a concurrence on preemption along the lines of your footnote 5 (although he does not give us a shred of credit.).

I have also looked over the Chief's dissent in more detail.

I make the following comments.

1. On re-reading your concurrence with something of a fresh eye, I find that it is still quite persuasive. As you know, I am much less comfortable with equal protection in this area than with preemption. The equal protection analysis seems "made up" to me. But if the Court is going to adopt an equal protection approach, then I think you have hit on the least damaging ^{faint} ^{praise} conception. The Justices seem to feel that an opinion for the court is important in this case, possibly because the opinion will be so heavily criticized, even resisted. But I do not think you should be quickly put off from what you have written. And it is not clear to me that an opinion for the Court is even desirable in this case.

2. Nor do I think that the Chief has damaged your position, although we may wish to make some changes in response. His sharpest attack on your position comes at page 4 and footnote 4, and footnote 5. His attack is twofold. First, he makes

the obvious point that these children are not in the precise situation of illegitimates. These children--unlike illegitimates--are different from other children. They may be deported, for example. The Chief's point is correct. We do not pretend that the analogy is perfect; indeed, we say that it is not. But I think the "rough" analogy still holds.

Second, the Chief argues that you have not distinguished Rodriguez: Why were not the children in Rodriguez penalized by their parents' decision to live in a poor county than a wealthy one? I think that there are two possible answers to this attack. One is to adopt the line Justice Blackmun suggests. If there is a fundamental right to some modicum of education, then this case is different from Rodriguez. If you adopt this line of defense, then I think you are coming so close to the Blackmun proposal that you should consider joining an opinion redrafted along the lines he suggests--perhaps retaining the analogy to the illegitimacy cases as Justice Stevens recommends.

A second line of defense--and one I prefer--is that the children in Rodriguez were not being penalized or stigmatized. There were many levels of funding across the state. No group of children was specially singled out for worse treatment. By contrast, here we have a group of children who are wholly denied a significant social service provided in full to all other children. I believe that this second approach fully answers the Chief.

The two responses to the Chief are quite different from one another, and will change the holding of your concurrence. If you say that the reason intermediate scrutiny is

justified is that these are innocent children who have been utterly denied an education, then the denial of education becomes part of the reason for elevating the level of scrutiny. You might reach a different result--and probably would--if instead of education it was free medical care. You might reach a different result, too, if the alien children were provided "some modicum" of education--e.g. morning classes.

More in line with the way the concurrence is now written, is the second approach. Here the only reason for elevating the standard of review is that a group of children are being stigmatized and penalized. Of course, it matters that is education rather than ice cream that is at stake. But you would not decide the case any differently if it were medical care or drug counselling. Perhaps it is helpful to think of the right to travel cases. In those cases the Court holds that the right may not be "penalized." A penalty is something like a denial of education or health care. But the denial of education or health care is not the source of the heightened scrutiny in those cases. Rather it is the right to travel plus some significant burden placed upon it. *yes*

In short, in the one approach you take the position that some modicum of education is a fundamental constitutional right. In the other approach, denial of education is treated like the denial of any other important benefit--it is not given special constitutional status--and the reason for raising the standard of review is that a group of children is being stigmatized and penalized by the denial of a significant benefit for the sins of their elders.

3. As I have indicated, I think your choice of responses to the Chief--and by response I am not thinking of anything more than a few sentences--is essentially the same question as whether or not you should agree to the Blackmun proposal.

My own sense is that you should not join an opinion that creates a new fundamental right. I realize that the question was left open in Rodriguez. Yet I think it would be odd to find a fundamental right to education for illegal aliens. Perhaps it is not indefensible. But it is a big step, and this would seem to be the last case in which the Court ought to take it. Only with some strain can it be argued that the state must educate all illegal alien children because some of them may eventually become citizens and take part in the political process. To find a fundamental right to some modicum of education in this case may have significant consequences in other cases. I am not sure that it is not the undoing of Rodriguez. Nor will such an opinion help with the next case in which illegal alien children complain that they are denied welfare or some other significant benefit. Finally, the one thing that Justice Brennan's history section seems to show is that the states were under no affirmative duty to provide any education. How can this be reconciled with Justice Blackmun's proposal?

In sum, although it can be argued, I would recommend against the Blackmun proposal. You do not need to create a new fundamental right to answer the Chief. It stretches common sense to argue that illegal alien children are entitled to some modicum of education because they may some day be permitted to take part in the political process.

I think you should stick to your guns.

5. I have two final comments. First note that Justice Blackmun supports a preemption approach! Second, I think that one could write an opinion holding that the Texas law was irrational under the equal protection clause. One would argue that since some significant percentage of illegal alien children are likely to stay in Texas and the country, they are no different than all the other children--citizens and legal aliens--who may or may not stay in Texas. Choosing to educate one group and not the other is like choosing to educate people on a random basis. Or, following Justice Stevens suggestion that Royster v. Guano sets the proper standard, I suppose one could point to the huge social problem the state is creating in order to save what appears to be very little money. I fear that this, too, may be too sweeping and may make it difficult for the states to discriminate against adult aliens in other areas. But I think it would be preferable to decide the case on this rational basis or rational "with bite" basis than create a new fundamental right. This could be a counter suggestion if you are at all persuaded. By using rational basis, the Court need not bother with standards of review, suspect classes, fundamental rights and the rest. But I am not sure that it works.

March 10, 1982

Re: No. 80-1538 - Plyler, Superindendent v. Doe
No. 80-1934 - Texas v. Certain Named and
Unnamed Undocumented Alien Children

Dear Bill:

I have been able now to spend some additional time on these difficult and very important cases. You have done much work in the preparation of your initial circulation of January 25 and of the revised printed draft sent around on February 8.

You will recall that at conference my expressed preference was for pre-emption rather than equal protection, but that because no one else was similarly inclined, I perhaps would have to go along with the equal protection approach. I am still inclined to favor pre-emption, primarily for the reason that any equal protection route seems to encounter analytical difficulties. Thus, even though I join an equal protection opinion, I may also write in separate concurrence a brief pre-emption paragraph or two.

I would be prepared generally to join your opinion, but I refrain from doing so at this point because I think it is desirable, if at all possible, to have a Court opinion, as well as a Court judgment. As I read Lewis' separate writing, he would not join the opinion as it is presently structured. I realize that I am presumptuous in this, but I offer the following in the faint hope that it might have some appeal for Lewis as well as for you:

Could we address the case squarely in traditional equal protection fundamental rights terms? In Rodriguez, the Court left open the question whether some modicum of education is "fundamental." I could answer that question in the affirmative, reasoning that some education is necessary to preserve rights of expression and participation in the political process, and therefore to preserve individual rights generally. The Chief and those who join him, of course, will object that illegal aliens have no individual rights to preserve. My answer to that objection possesses, I suppose, pre-emption overtones. The class of "illegal aliens" is a poorly defined one; the District Court found that a substantial percentage of the children involved in this case in fact will reside here

permanently, and that many are not presently deportable. The way in which the immigration laws are set up makes it impossible for the State ever to be sure which children will be deported or are deportable. Thus, every child has a "right" to be here until he actually is placed under a deportation order, and at every step of the immigration process a federal official still has the discretion to allow the child to remain in the United States. Many of these children, therefore, have, or will have, political and related rights, and there is no way for the State to determine which children do not have such rights. Once it is granted that some quantum of education is fundamental in a constitutional sense, the State cannot deprive the entire group of the right to attend school. If such an approach to the case is taken, one could delete the reference to illegal aliens as a suspect class and, also, the analogy of illegal alien children to illegitimates; neither of these will then be necessary. ?

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

I doubt whether the adoption of this approach would require much rewriting. Your historical analysis still could be used to indicate the importance placed on education by the Framers, as well as their judgment that education is essential to preserve other rights.

The following comments are secondary, and are offered for your consideration:

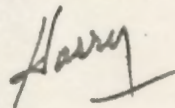
1. I am mildly concerned about citing the Arredondo case in footnote 29 on page 31. I believe that certiorari is pending in that case, and I suspect it is likely that the case will be GVRed in the light of Plyler.

2. On page 34, near the center of the page, is the statement that the record is clear "that many, if not most, of the undocumented children ... are likely to remain in this country." Does this square with the observation by the District Court in the Alien Children's case, 501 F. Supp., at 558, that the evidence "demonstrates that approximately ten percent of the undocumented persons in this country will remain here as permanent settlers"?

3. The first few words of the paragraph beginning at the bottom of page 15 jar me a little. I suppose that the Federal Government is to blame, but the problem now is almost intractable. Would it be better to say "Sheer incapability or lax enforcement" This might be a little kinder to immigration officials.

4. Would it be well to eliminate the last two sentences of footnote 17 on page 17. Lewis is uncomfortable with this. See note 2 of his opinion.

Sincerely,

A handwritten signature in dark ink, appearing to read "Harry", with a stylized flourish at the end.

Justice Brennan

cc: Justice Marshall
Justice Powell
Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 12, 1982

80-1538 Plyler

Dear Harry:

Your letter of March 10 to Bill Brennan - that I was not able to think about carefully until today - is helpful. It at least prompted me to reexamine my position.

This is a perplexing case for me because, although I am clear that our decision is correct, it is not easy to identify the controlling principle. As you say, the case does not fit neatly into prior equal protection analysis. Nor does preemption fit comfortably. I mention it in my opinion (see fn. 5, p. 6, my opinion), but concluded it would be stretching that doctrine too far.

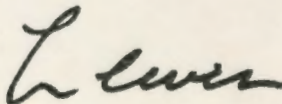
You suggest the possibility of agreeing on a "fundamental right to education" analysis. In Rodriguez, I left open the question whether a denial of all education would violate such a right. At the time the Constitution was adopted, it was not contemplated that free public school education was a fundamental right that every state had to recognize. As important as education has been in the life of my family for three generations, I would hesitate before creating another heretofore unidentified right.

I am inclined to agree with John that the preferable equal protection approach is quite simply that what Texas is doing is irrational. Texas is penalizing these children. The asserted state interest (expense of educating them) is insubstantial as compared with the eventual cost to the state of dealing with the serious problems that will result from the alien children who will remain in the state without even a grade school education. Although there is no complete analogy in our cases, I agree with John that the illegitimacy cases lend substantial support. The children there also were penalized and stigmatized.

The Chief Justice "takes out" after my opinion with some vigor. He inquires whether I would reach a different result if children in a poor county complained that they were being discriminated against because their parents were living there rather than in a wealthy county. My answer to the Chief will be that such children are not stigmatized or singled out for this "penalty". Our system since the beginning of free public education, has been to keep it in the hands of local communities, close to the homes and families of the children. In the beginning, localities bore the major financial burden of educating resident children. In recent years, however, the political process itself has tended to eliminate the locality disparity by supplemental state funding. The federal government also is now assisting in this process. This is our system.

As I have often emphasized the importance of "Court opinions", it may seem strange for me to say that at least one can argue that Court agreement on analysis in this case may not be as compelling as in some other situations. The very fact that we have not identified any prior case, or even any established principle, that controls this unique case suggests that the precedential force of a judgment alone will not be great. This will leave the Court free to meet unforeseeable situations without being bound by a decision tailored to redress a peculiar and unprecedented type of injustice. This, of course, is not to say that a Court opinion in this case would be undesirable.

Sincerely,



Justice Blackmun

lfp/ss

cc: Justice Brennan
Justice Marshall
Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 5, 1982

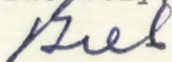
Nos. 80-1538, 80-1934 -- Plyler v. Doe, Etc.

Dear Lewis,

As you know, I am most anxious to have your join on an opinion for the Court. The first twelve pages of the present draft are essentially unchanged, with the exception of a reformulation of the question presented. Part III, on the other hand, is much revised and substantially abbreviated. The somewhat more "measured" response to the equal protection problem outlined in your draft concurrence--which I have largely incorporated--no longer required any lengthy discussion of legislative material or any complex analytic framework. But I do continue to think that it is important to explain clearly why the Texas approach is unreasonable as a matter of established constitutional principle, and not merely an idiosyncratic policy judgment on our part.

The draft is extended in one respect. I agree with you that this case cannot be resolved on preemption grounds. But I believe Harry is correct about the importance of preemption concerns in this respect: The Chief takes the view in his memorandum that undocumented status, without more, carries with it a State prerogative to deny these children an education. I think this assertion rests, at heart, on the implications of federal law; but whatever weight the predominantly federal interests at stake in the treatment of aliens may have in other contexts, it does not support the State's action here. Hence, Part IV. In addition, while I thought it inappropriate in a Court opinion to take Congress to task for its failures in this field, Part IV does offer an opportunity to emphasize Congress' pre-eminent authority--and to suggest that while at present we must muddle through these questions as a matter of Fourteenth Amendment law, we would much prefer to hear from Congress.

Sincerely,



W.J.B., Jr.

Justice Powell

March 12, 1982

80-1538 Plyler

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Sincerely,

Justice Blackmun

lfp/ss

cc: Justice Brennan
Justice Marshall
Justice Stevens

derclass presents most difficult problems for a Nation that prides itself on adherence to egalitarian principles.¹⁹

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the children of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law might be asked to bear the burden of legislation designed to deter their unlawful entry. But the children of those illegal entrants are not comparably situated. Their "parents have the ability to conform their conduct to societal norms," and presumably the wherewithal to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status." *Trimble v. Gordon*, 430 U. S. 762, 770 (1977). Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.

ernment policies has resulted in

"the existence of a large number of employed illegal aliens, such as the parents of plaintiffs in this case, whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state's natural citizens and business organizations may wish to subject them." 458 F. Supp., at 585.

"Although we need not labor over historical materials before acknowledging that aliens have been "saddled with such disabilities," "subjected to such a history of unequal treatment," and "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process," *San Antonio School District, supra*, 411 U. S., at 28, we reject the claim that "illegal aliens" are a "suspect class."

, as neither *San Antonio School District*, nor any other case in which we have defined a suspect class, was addressing the status of persons unlawfully in our country. →

of equality
under
law.

minor

ability

should be
prepared
to bear the
consequences,
including
deportation.

h.T.V.
4/6

April 7, 1982

80-1538, 80-1934 Plyler

Dear Bill:

Thank you for your letter of April 5, enclosing a copy of your second draft in this important case.

This is a fine draft, and I am grateful to you for making this substantial effort to accommodate my thinking about this case - in the commendable interest of mustering a Court.

I enclose a xerox copy of page 16, on which I have suggested minor language changes that I would appreciate your considering.

As you will note, these changes reflect my strongly held conviction that an adult illegal alien is here in willful violation of our laws, and should be so viewed. Aliens, including some perhaps who are here illegally, have become patriotic and constructive Americans. Also, I share - and applaud - your sympathy for peoples all over the world who would like nothing better than to live in our country. But this understandable desire is no justification for violating our laws. I add, parenthetically, that I wish a good many of our own citizens, who seem to make a career out of criticizing the United States, were more appreciative of the privilege of living in this wondrous land of freedom and comparative plenty.

In addition to the changes I propose in the text on page 16, I suggest a modification of fn. 19. The language that I used in Rodriguez did not embrace illegal aliens.

I appreciate, Bill, that my concerns are addressed only to a very minor portion of your well written revised opinion. Nor will these changes affect your analysis or the force of your opinion. They will, however, make me feel more comfortable about joining it.

I may retain some portions of my brief concurring opinion that will reinforce rather than detract in any way from what you have written so well.

With appreciation.

Sincerely,

Justice Brennan

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

✓

April 8, 1982

Re: 80-1538 and 80-1934 - Plyler
v. Doe

Dear Bill:

Please join me.

Respectfully,

John

Justice Brennan

Copies to the Conference

April 8, 1982

80-1538, 80-1934 Plyler v. Doe

Dear Bill:

Please join me.

Sincerely,

Justice Brennan

lfp/ss

cc: The Conference

CHAMBERS OF
THE CHIEF JUSTICE

Personal

April 9, 1982

Re: No. (80-1538 - Plyler v. Doe
(80-1934 - Texas v. Certain Named and Unnamed,
Undocumented Alien Children)

Dear Lewis:

I am profoundly troubled by the developments in this case and of course will not join it as it stands. What limiting principle can confine this massive expansion of the Fourteenth Amendment to "persons" simply on the basis of their age. If the Fourteenth Amendment covers minor children who are illegally in the country, how can this Court rationally confine the holding so that the parents will not be treated as "persons" for purposes of the whole spectrum of welfare benefits as in Thompson v. Shapiro?

I have looked for and found no case in which there can be a basis for limiting the Fourteenth Amendment on the basis of age. If anyone can point to something along this line it is possible that I could reconsider my position.

Regards,


WRB

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 14, 1982

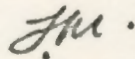


Re: Nos. 80-1538 and 80-1934 - Plyler v. Doe

Dear Bill:

Please join me.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

David - give it a try.

df1 06/03/82

To: Justice Powell
From: David
Re: The Chief's redraft of his dissent in Plyler: NO. 80-1538

The Chief makes some good points, most of which we have seen, and he keeps you in his sights.

The only attack on you that you may wish to respond to is the Chief's repeated statement that the Court has singled out education for special treatment. He says this at page 4, note 3, and again in text at pages 7-8. It would be easy enough to add a footnote or phrase to the text of your concurrence making it clear that you view education like any other important governmental benefit and that your vote would be no different if those benefits were at issue. Since the case at hand only concerns education you may not wish to do this. Yet in view of Justice Blackmun's concurrence and the prominence given to education in the opinion, it might be useful to add such a statement. Of course, that does commit you to a somewhat broader view than the opinion takes--although it cannot be doubted that the majority justices would vote the same way if the question was inoculations rather than education.

If you would like a phrase or footnote added to your concurrence, I can take care of it, as well as any other final changes.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

✓

June 4, 1982

Re: 80-1538) Plyler v. Doe
80-1934) Texas v. Certain Named and Unnamed
Undocumented Alien Children

Dear Chief,

Please join me in your dissent.

Sincerely,

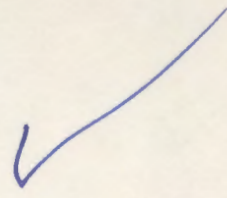
Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



June 4, 1982

Re: No. 80-1538 Plyler v. Doe
No. 80-1934 Texas v. Certain Named and Unnamed
Children

Dear Chief:

Please join me.

Sincerely,

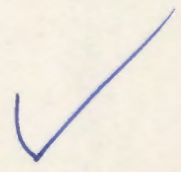
The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 7, 1982



Re: 80-1538 and 80-1934 -

Plyler v. Doe, and
Texas v. Certain Named and
Unnamed Undocumented Alien
Children

Dear Chief,

Please add my name to your dissent in
this case.

Sincerely yours,

The Chief Justice

Copies to the Conference

cpm

50C

[illegible]