

The Burger Court Opinion Writing Database

Plyler v. Doe

457 U.S. 202 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

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
THE CHIEF JUSTICE

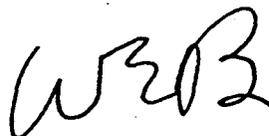
February 26, 1982

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,



To: Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: The Chief Justice

Circulated: FEB 26 1982

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1st ~~PRINTED~~ DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80-1538 AND 80-1934

JAMES PLYLER, SUPERINTENDENT OF THE TYLER
 INDEPENDENT SCHOOL DISTRICT AND ITS BOARD
 OF TRUSTEES, ET AL., APPELLANTS

80-1538

v.

J. AND R. DOE, ETC., ET AL.

TEXAS, ET AL., APPELLANTS

80-1934

v.

CERTAIN NAMED AND UNNAMED UNDOCUMENTED
 ALIEN CHILDREN, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
 FOR THE FIFTH CIRCUIT

[February —, 1982]

Memorandum of THE CHIEF JUSTICE.

Were it our business to set the Nation's social policy, I would conclude without hesitation that it is senseless for an enlightened society to deprive any children within its jurisdiction of a basic education. I fully agree that it would be folly—and wrong—to tolerate creation of even a small segment of society of illiterate persons probably with a limited or no command of our language.¹ However, the Constitution

¹ It does not follow, however, that the States should bear the costs of educating children whose illegal presence in this country results from the default of the federal government. A State has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the President. The federal government is properly chargeable with either deporting illegal aliens or incur-

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

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,

Justice Powell

To: Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **The Chief Justice**

JUN 4 1982

Circulated: _____

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80-1538 AND 80-1934

JAMES PLYLER, SUPERINTENDENT OF THE TYLER
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CERTAIN NAMED AND UNNAMED UNDOCUMENTED
 ALIEN CHILDREN, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
 FOR THE FIFTH CIRCUIT

[June —, 1982]

CHIEF JUSTICE BURGER, dissenting.

Were it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education. I fully agree that it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language.¹ However, the Con-

¹ It does not follow, however, that a State should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the federal government. A State has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive. If the federal government, properly chargeable with deporting ille-

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 10 1982

8, 12, 13

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

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80-1934

v.

CERTAIN NAMED AND UNNAMED UNDOCUMENTED
ALIEN CHILDREN, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[June —, 1982]

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE,
JUSTICE REHNQUIST, and JUSTICE O'CONNOR join,
dissenting.

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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,

Chief Justice Burger

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 25, 1982

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

Dear Thurgood,

I am taking what is for me the unusual step of circulating only to you, Harry, Lewis, 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

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 25, 1982

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

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Brennan

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Sincerely,

A handwritten signature in cursive script, appearing to read "R. C.", is written below the typed name.

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 25, 1982

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

Dear Lewis,

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Brenn 81

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Sincerely,

Paul

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 25, 1982

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

Dear John,

I am taking what is for me the unusual step of circulating only to you, Thurgood, Harry and Lewis, 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.

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Sincerely,

Bill

Circulated to TME, #A13, LFP JPS

DRAFT FOR CIRCULATION ----- January 25, 1982

PLYLER v. DOE

NO. 80-1538

TEXAS v. CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN

NO. 80-1934

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, a State may deny to children who are neither citizens of the United States nor legally admitted aliens, the free public education it offers to all other children of the State.

I

Since the late nineteenth century, the United States has restricted immigration into this country. Unsanctioned entry into the United States is a crime, 8 U.S.C. § 1325, and those who have entered unlawfully are subject to deportation. But despite the existence of these legal restrictions, a substantial number of persons have succeeded in unlawfully entering the United States, and now reside within various States, including the State of Texas.

In May 1975, the Texas legislature revised its education laws to withhold from local school districts state funds for the education of children who were not "legally admitted" into the United States. The 1975 revision also authorized local school

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

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.

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.

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

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

80-1538

80-1934 Supreme Court of the United States
Washington, D. C. 20543

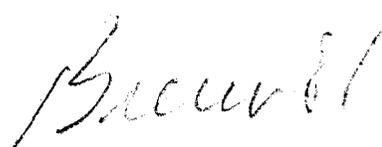
CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 8, 1982

Dear Lewis,

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

Sincerely,



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

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

To: The Chief Justice
Justice White
Justice Marshall
Justice Brennan
Justice Stevens

FILE 9 1982

Received at:

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80-1538 AND 80-1934

**JAMES PLYLER, SUPERINTENDENT OF THE TYLER
INDEPENDENT SCHOOL DISTRICT AND ITS BOARD
OF TRUSTEES, ET AL., APPELLANTS**

80-1538

v.

J. AND R. DOE, ET AL.

TEXAS, EL AL., APPELLANTS

80-1934

v.

**CERTAIN NAMED AND UNNAMED UNDOCUMENTED
ALIEN CHILDREN, ET AL.**

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[February —, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, a State may deny to children who are neither citizens of the United States nor legally admitted aliens the free public education that it offers to all other children in the State.

I

Since the late nineteenth century, the United States has restricted immigration into this country. Unsanctioned entry into the United States is a crime, 8 U. S. C. § 1325, and those who have entered unlawfully are subject to deportation, 8 U. S. C. §§ 1251-1252. But despite the existence of

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



In this related
to 4-5
WA

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P.

From: **Justice Brennan**

Circulated: _____

Recirculated: _____

Reviewed

WQB, in
my draft,
has
adapted
the
substance
of my
views in
my concurring
opinion
of 2/9/82.
Subject to
language
on pp 16-18
- and
possibly
one or two
other places
- I believe
I can
join.
4/5/82
WFB

16
17
18

2nd PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80-1538 AND 80-1934

JAMES PLYLER, SUPERINTENDENT OF THE TYLER
INDEPENDENT SCHOOL DISTRICT AND ITS BOARD
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80-1538

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TEXAS, ET AL., APPELLANTS

80-1934

v.

CERTAIN NAMED AND UNNAMED UNDOCUMENTED
ALIEN CHILDREN ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[April —, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.

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TAM The seat belt ...

pp. 13 to end



To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: **APR 7 1982**

P 13
17
20

2nd PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80-1538 AND 80-1934

**JAMES PLYLER, SUPERINTENDENT OF THE TYLER
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STYLISTIC CHANGES THROUGHOUT.

SEE PAGES: 4, 18, 19, 21, 22, 23, 24

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: **MAY 20 1982** _____

3rd PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80-1538 AND 80-1934

JAMES PLYLER, SUPERINTENDENT OF THE TYLER
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[April —, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.

I

Since the late nineteenth century, the United States has restricted immigration into this country. Unsanctioned entry into the United States is a crime, 8 U. S. C. § 1325, and those who have entered unlawfully are subject to deportation, 8 U. S. C. §§ 1251-1252. But despite the existence of

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 15, 1982

MEMORANDUM TO THE CONFERENCE:

*WJB will vote to Grant
Bill against Plyler
don't control*

Re: No. 81-857 Martinez v. Brockette

I would deny

This case was held for Nos. 80-1538, 80-1934 -- Plyler v. Doe, Etc.

Petitioner is a school-age American citizen, whose parents are Mexican citizens who are not entitled to reside in the United States, and in fact live in Mexico. Petitioner has lived with his adult sister in McAllen, Texas since 1977. Section 21.031(d) of the Texas Education Code provides that

"In order for a person under the age of 18 years to establish a residence for the purpose of attending the public free schools separate and apart from his parent ... it must be established that his presence in the school district is not for the primary purpose of attending the public free schools."

*We requested
Mrs in
Richmond*

*I think
Mrs
is
valid
a
familiar
residence
process*

In 1977, pursuant to this provision, the McAllen School District denied him admission because he was in McAllen for the primary purpose of attending school. The District Court rejected petitioner's claims that denial of education pursuant to this provision denied him the equal protection of the law, infringed on the right to travel, and denied him due process by creating an irrebuttable presumption of non-residency. The Court of Appeals affirmed. We held the case for Plyler v. Doe (Section 21.031(c) was at issue in that case).

The analysis of the District Court and the Court of Appeals was as follows: With respect to the right-to-

*I'm inclined to deny although the
question is puzzling and perhaps should be
faced*

DL

Plyler irrelevant

travel/equal protection claim, the courts below distinguished the Shapiro-Memorial Hospital line of cases by noting that this case does not involve a durational residence requirement, but concluded, in any event, that the State's interest in limiting its educational resources to bona fide residents justified whatever burden was placed on the right to travel. In this context, the court emphasized the fact that the statute applied not only to persons in petitioner's situation, but those whose parents resided in other States, or indeed, other Texas school districts. The court found the potential financial burden on local schools of accomodating transfers "primarily for the purpose of using the schools" to warrant the prohibition.

With respect to the Vlandis due process claim, the court concluded that unlike Vlandis, which held that a certain objective factor could not be taken as the sole and permanent determinant of bona fide residence, the question whether the student was in the county primarily to attend school was, in essence, a codification of the "ultimate universal test of residency, namely subjective intent."

It is clear to me that Plyler v. Doe has no direct impact on this case. Indeed, the opinion of the Court in Plyler specifically declared that a uniformly applied test of residence could have been applied to the illegal alien children in that case. Although the provision has unusually harsh consequences on the American citizen children of foreign citizen parents, it applies facially across-the-board. Thus, I would not think that a GVR in light of Plyler is appropriate.

Nevertheless, I find this case troubling in light, broadly speaking, of our continuing difficulties with unusual residency requirements. Petitioner is an American citizen, yet the effect of the decision below is to deny him an American-English education, precisely because a primary reason why he left his parents in Mexico was to get such an education. In addition, the District Court concluded that "one of the legislative purposes behind Section 21.031(d) was to inhibit the migration of persons residing in Mexico to attend schools in the United States." Finally, as was conceded by the State at oral argument in Plyler, and as is implicit in the Texas scheme, the intention to remain indefinitely, which the courts below accurately recognized as the historical test of residence, and which the court below found to be reflected in §21.031(d)'s "not primarily to attend school" requirement, is apparently not the uniform rule of resi-

yes

dence with respect to entitlement to attend school: Even children temporarily in the State, so long as they are accompanied by their parents, are entitled to attend school tuition-free.

In short, my principal difficulty with this case concerns the application of the statute to persons in petitioner's situation--children who by the Constitution are citizens, but whose parents are barred from the country. Are they a constitutionally special case requiring special rules? To be sure, the questions presented in the petition for certiorari do not focus on the unique circumstances of petitioner, but rather mount a broader gauge facial challenge to Section 21.031(d). Nevertheless, I am inclined to vote to GRANT.

Sincerely,

Bill

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

.95

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 THURGOOD MARSHALL

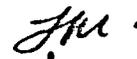
May 14, 1982

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

Dear Bill:

Please join me.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80-1538 AND 80-1934

JAMES PLYLER, SUPERINTENDENT OF THE TYLER
INDEPENDENT SCHOOL DISTRICT AND ITS BOARD
OF TRUSTEES, ET AL., APPELLANTS

80-1538

v.
J. AND R. DOE, ET AL.

TEXAS, EL AL., APPELLANTS

80-1934

v.
CERTAIN NAMED AND UNNAMED UNDOCUMENTED
ALIEN CHILDREN, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[May —, 1982]

JUSTICE MARSHALL, concurring.

While I join the Court opinion, I do so without in any way retreating from my opinion in *San Antonio School District v. Rodriguez*, 411 U. S. 1, 70-133 (MARSHALL, J., dissenting). I continue to believe that an individual's interest in education is fundamental, and that this view is amply supported "by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values." *Id.*, at 111. Furthermore, I believe that the facts of these cases demonstrate the wisdom of rejecting a rigidified approach to equal protection analysis, and of employing an approach that allows for varying levels of scrutiny depending upon "the constitutional and societal importance of the interest adversely affected and the

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

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 10, 1982

Re: No. 80-1538 - Plyler, Superintendent 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

cc: Justice Blackmun
" Powell
" Stevens

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,



Justice Brennan

cc: Justice Marshall
Justice Powell
Justice Stevens

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1538

JAMES PLYLER, SUPERINTENDENT OF THE TYLER
INDEPENDENT SCHOOL DISTRICT AND ITS BOARD
OF TRUSTEES ET AL., APPELLANTS

80-1538

v.

J. AND R. DOE, ET AL.

TEXAS ET AL., APPELLANTS

80-1934

v.

CERTAIN NAMED AND UNNAMED UNDOCUMENTED
ALIEN CHILDREN ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[May —, 1982]

JUSTICE BLACKMUN, concurring.

I join the opinion and judgment of the Court.

Like JUSTICE POWELL, I believe that the children involved in this litigation "should not be left on the streets uneducated." *Post*, at 2. I write separately, however, because in my view the nature of the interest at stake is crucial to the proper resolution of this case.

The "fundamental rights" aspect of the Court's equal protection analysis—the now-familiar concept that governmental classifications bearing on certain interests must be closely scrutinized—has been the subject of some controversy. Justice Harlan, for example, warned that "[v]irtually every state statute affects important rights. . . . [T]o extend the 'compelling interest' rule to all cases in which such rights are af

STYLISTIC CHANGES
PP. 3 & 6

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: _____ JUN 10 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80-1538 AND 80-1934

JAMES PLYLER, SUPERINTENDENT OF THE TYLER
INDEPENDENT SCHOOL DISTRICT AND ITS BOARD
OF TRUSTEES, ET AL., APPELLANTS

80-1538

v.

J. AND R. DOE, ET AL.

TEXAS, ET AL., APPELLANTS

80-1934

v.

CERTAIN NAMED AND UNNAMED UNDOCUMENTED
ALIEN CHILDREN, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE BLACKMUN, concurring.

I join the opinion and judgment of the Court.

Like JUSTICE POWELL, I believe that the children involved in this litigation "should not be left on the streets uneducated." *Post*, at 2. I write separately, however, because in my view the nature of the interest at stake is crucial to the proper resolution of this case.

The "fundamental rights" aspect of the Court's equal protection analysis—the now-familiar concept that governmental classifications bearing on certain interests must be closely scrutinized—has been the subject of some controversy. Justice Harlan, for example, warned that "[v]irtually every state statute affects important rights. . . . [T]o extend the 'compelling interest' rule to all cases in which such rights are af-

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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
Justice Blackmun
Justice Stevens

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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,

Lewis

Justice Brennan

lfp/ss

Brennan J.

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

Approved: Justice Powell

Circulated: FEB 9 1982

Received: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1538

JAMES PLYLER, SUPERINTENDENT OF THE TYLER
 INDEPENDENT SCHOOL DISTRICT AND ITS BOARD
 OF TRUSTEES, ET AL., APPELLANTS

80-1538

v.

J. AND R. DOE, ET AL.

TEXAS, ET AL., APPELLANTS

80-1934

v.

CERTAIN NAMED AND UNNAMED UNDOCUMENTED
 ALIEN CHILDREN, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
 FOR THE FIFTH CIRCUIT

[February —, 1982]

JUSTICE POWELL, concurring in part and in the judgment.

I join the judgment of the Court and Parts I and II of the opinion. But I do not join the opinion as a whole, much as I agree with portions of it. I view this case in somewhat simpler terms as a form of discrimination against children for the acts of their parents—a kind of discrimination that the Court has traditionally reviewed with some care.

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 re-

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 LEWIS F. POWELL, JR.

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 wonderful 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

Brennan
Lewis

L.F.P
4/6

of equality under law.

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.

minor

ability

should be prepared to bear consequences included in deportations

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.

¹⁹ 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. →

attached to Cr 16 4/7/82

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 8, 1982

80-1538, 80-1934 Plyler v. Doe

Dear Bill:

Please join me.

Sincerely,

A handwritten signature in cursive script that reads "Lewis".

Justice Brennan

lfp/ss

cc: The Conference

Substantial Changes Throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1538

JAMES PLYLER, SUPERINTENDENT OF THE TYLER
INDEPENDENT SCHOOL DISTRICT AND ITS BOARD
OF TRUSTEES, ET AL., APPELLANTS

80-1538

v.

J. AND R. DOE, ET AL.

TEXAS, EL AL., APPELLANTS

80-1934

v.

CERTAIN NAMED AND UNNAMED UNDOCUMENTED
ALIEN CHILDREN, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[April —, 1982]

JUSTICE POWELL, concurring.

I join the opinion of the Court, and write separately to emphasize the unique character of the case before us.

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 —, n. 17. 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

P. 4

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 7 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80-1538 AND 80-1934

JAMES PLYLER, SUPERINTENDENT OF THE TYLER
INDEPENDENT SCHOOL DISTRICT AND ITS BOARD
OF TRUSTEES, ET AL., APPELLANTS

80-1538

v.

J. AND R. DOE, ET AL.

TEXAS, EL AL., APPELLANTS

80-1934

v.

CERTAIN NAMED AND UNNAMED UNDOCUMENTED
ALIEN CHILDREN, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE POWELL, concurring.

I join the opinion of the Court, and write separately to emphasize the unique character of the case before us.

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 —, n. 17. 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

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

6/16/82

Dear Bill,

You are to be congratulated
on Plylet - especially on
the painstaking and generous
way you wrote an opinion
that accommodated out
several differing views,
and finally obtained a
Court.

Your final product is
excellent and will be in
every text and case book
on Constitutional law.

I also was proud of
your verbal summary
from the Bench Tuesday
A.M.

As ever,
Lewis

Brewer

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

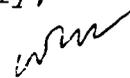
February 10, 1982

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

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 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

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,



Justice Brennan

Copies to the Conference

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,



Justice Brennan

Copies to the Conference

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 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,



The Chief Justice

Copies to the Conference