NOTE

RETHINKING *PLYLER*: PRESERVING THE RIGHT TO EDUCATION FOR UNDOCUMENTED CHILDREN

Meghan Brady-Fuchsman†

INTRODUCTION

In the summer of 1977, several families living in Tyler, Texas received a letter informing them that their children were no longer eligible to attend the public school—unless they could pay $1,000 in tuition.[1] Nine-year-old Alfredo Lopez should have been starting second grade, but his family could not afford the fee.[2] What set him apart from the other 16,000 children in Tyler who attended school for free? Alfredo and his siblings Faviola, Antonia, and Noe were undocumented.[3]

Growing up in Mexico, their parents had not been able to stay in school because they had to begin work at a young age to support their families.[4] They wanted their children to have

† J.D., Cornell Law School, 2026; B.S. in Policy Analaysis and Management, Cornell University, 2023; Executive General Editor, Cornell Law Review Vol. 111.

1 *See* JESSICA LANDER, MAKING AMERICANS: STORIES OF HISTORIC STRUGGLES, NEW IDEAS, AND INSPIRATION IN IMMIGRANT EDUCATION 241 (2022).

2 *See id.*

3 *See id.*; Lucy Hood, *Educating Immigrant Students*, CARNEGIE REP., Spring 2007, at 2, 7.

4 *See* LANDER, *supra* note 1, at 242.

different opportunities, to go to school.[5] Together with three other undocumented families, they made the risky choice to sue the Tyler Independent School District.[6] The case wound its way through the courts, ultimately reaching the Supreme Court in *Plyler v. Doe*.[7] Reasoning that school was an important public benefit and that undocumented children could very well become U.S. citizens, the Court ruled that undocumented children were entitled to free public education, the same as lawfully present children.[8] Alfredo and his siblings could go back to school.

Alfredo, Faviola, and Antonia all went on to graduate from John Tyler High School.[9] Alfredo became a shipping foreman at a grocery chain, Faviola a customer service representative for an insurance company, and Antonia found work at a bank.[10] They have families of their own and own homes.[11] And of the four formerly undocumented Lopez children, two of them have become citizens while the other two have green cards.[12]

Without an education, the lives of the Lopez children might have turned out very differently. *Plyler* has undoubtedly benefitted millions of undocumented students by giving them the opportunity to go to school. However, recent legal developments have threatened the stability of the *Plyler* decision. The Supreme Court's landmark decision in *Dobbs v. Jackson Women's Health Organization* has revived calls to overturn *Plyler*. While *Plyler* was not a substantive due process case, unlike *Dobbs*, there are concerns that the Court would decline to protect the right of undocumented children to public education because, like abortion, this right is not explicitly protected in the Constitution.[13] Accordingly, opponents of *Plyler* spoke out after the *Dobbs* decision was leaked about how they would like to see the Supreme Court overturn this longstanding precedent next.[14]

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5 *See id.*

6 *See id.* at 245; Hood, *supra* note 3, at 7.

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

8 *See id.* at 230.

9 *See* Hood, *supra* note 3, at 7.

10 *Id.*

11 *Id.*

12 *Id.*

13 *See infra* subpart I.B.

14 *See* David Martin Davies, *Texas Matters: Why Abbott Wants* Plyler v. Doe *Overturned*, TEX. PUB. RADIO (May 16, 2022), https://www.tpr.org/podcast/texas-matters/2022-05-16/texas-matters-why-abbott-wants-plyler-v-doe-overturned [https://perma.cc/QSJ7-53H7].

Overturning *Plyler* would be "catastrophic"[15] to the millions of undocumented children currently present in the United States. Public education is one of the most vital benefits the government provides. There is no guarantee that an undocumented immigrant will ever be deported,[16] and they could even one day become citizens. Therefore, from an ethical and practical perspective, *Plyler* must be sustained because it ensures equal opportunity for all children and that every child, no matter their status, can live a prosperous and productive life.

This Note demonstrates how *Plyler* can survive the post-*Dobbs* landscape and preserve undocumented children's access to public education. Part I describes the Court's holding in *Plyler v. Doe* and subsequent challenges to the decision in the following years.[17] Part II proposes multiple avenues to strengthen the Court's original reasoning—under a traditional equal protection framework, substantive due process framework, or immigration preemption principles announced thirty years after the *Plyler* decision—to better support the holding that undocumented children cannot be denied access to public education.[18]

I
BACKGROUND

In *Plyler v. Doe*, the Supreme Court ruled that a Texas law that permitted school districts to refuse to enroll undocumented children was unconstitutional, essentially recognizing a right to public education for undocumented children. However, the Court's reasoning was unstable and results-oriented, clearly tailored to achieve a desired outcome based on the facts at hand. As such, *Plyler* has been critiqued and challenged over the years, with threats mounting even more heavily after the Supreme Court's decision in *Dobbs*. This Part seeks to explain the Court's original reasoning in *Plyler* and the various challenges that the decision has faced and continues to face today.

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15 *See id.*

16 *See* Memorandum from Alejandro N. Mayorkas, Sec'y of U.S. Dep't of Homeland Sec., to Tae D. Johnson, Acting Dir. of U.S. Immigr. & Customs Enf't (Sep. 30, 2021) ("The fact [sic] an individual is a removable noncitizen . . . should not alone be the basis of an enforcement action against them."); ABIGAIL F. KOLKER & HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., R47218, UNAUTHORIZED IMMIGRANTS: FREQUENTLY ASKED QUESTIONS 5 (2022) (finding that most undocumented migrants have been living in the U.S. for over ten years).

17 *See infra* Part I.

18 *See infra* Part II.

A. *Plyler v. Doe*

In 1975, the Texas Legislature amended Section 21.031 of its state education law to (1) withhold state funds from school districts that would be used to educate children who were not "legally admitted" to the United States and (2) permit school districts to prohibit children "not 'legally admitted'" from enrolling in their schools.[19] In 1977, the Tyler Independent School District began charging undocumented children tuition in order to enroll in its schools.[20] Subsequently, a group of undocumented school-age children filed a class action suit against the superintendent and members of the Board of Trustees of the Tyler Independent School District in the Eastern District of Texas.[21]

The District Court found that Section 21.031 violated the Equal Protection Clause and the Supremacy Clause.[22] The Fifth Circuit upheld the District Court's ruling as to the Fourteenth Amendment but found that it had erred with respect to the Supremacy Clause.[23] During that same period, multiple different families across Texas filed suits challenging Section 21.031 and other school district policies.[24]

In 1981, the Supreme Court heard the consolidated case: *Plyler v. Doe*.[25] The Court considered "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."[26] In a

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

20 *Id.* at 206 n.2.

21 *Id.* at 206.

22 *Id.* at 208. The District Court ruled that undocumented migrants were entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment and that § 21.031 neither achieved the purpose of reducing unlawful migration or improving educational quality but instead severely disadvantaged undocumented children, who face a semipermanent future in the United States, by denying them the benefits of education. *Id.* at 207–08. It also found that § 21.031 was preempted because there was no federal policy of denying public education to undocumented migrants. *Id.* at 208 n.5.

23 *Id.* at 208–09, 208 n.6 (finding that the Court of Appeals had concluded that the federal government had not foreclosed all state action with respect to undocumented migrants).

24 *Id.* at 209.

25 *Id.*

26 *Id.* at 205.

5-4 decision, the Court found that Section 21.031 was unconstitutional because it violated the Equal Protection Clause.[27]

As a preliminary matter, the Court determined that noncitizens, including undocumented migrants, are "persons within the jurisdiction" for purposes of the Fourteenth Amendment.[28] Having decided that undocumented migrants were entitled to seek the protection of the Fourteenth Amendment, the Court went on to ascertain whether the Fourteenth Amendment had in fact been violated.[29] First, the Court found that undocumented migrants are not a suspect class because "undocumented status [is not] an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action,"[30] and because "their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'"[31] Next, the Court found that public education is not a right guaranteed by the Constitution.[32]

However, the Court argued that "more is involved in these cases than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right."[33] While undocumented migrants are not a suspect class, the Court acknowledged that undocumented children are "special members of this underclass" because they have little control over their immigration status, so the arguments against undocumented migrants being a suspect class "do not apply with the same force to . . . the minor children of such illegal entrants."[34] And while education is not a fundamental right, the Court acknowledged that it is more than "merely some governmental 'benefit.'"[35] The Court noted the

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27 *Id.* at 230. Because it found that the Texas law violated the Fourteenth Amendment, the Court declined to consider preemption arguments. *Id.* at 210 n.8.

28 *Id.* at 210. Appellants had argued that undocumented migrants are not "within its jurisdiction" because of their unlawful entry. *Id.* at 211. However, the Court rejected this argument, stating that this phrase was meant to include any person physically present within the territorial boundaries of a state, *id.* at 214, and to conclude otherwise would "undermine the principal purpose for which the Equal Protection Clause was incorporated," *id.* at 213.

29 *Id.* at 215.

30 *Id.* at 220.

31 *Id.* at 223.

32 *Id.* at 221 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973)).

33 *Id.* at 223.

34 *Id.* at 219–20 (emphasis omitted).

35 *Id.* at 221.

"supreme importance" of education in preserving democracy, spreading societal values, and preparing individuals to lead economically productive lives and highlighted the severe social, economic, intellectual, and psychological harms of the stigma of illiteracy.[36] Thus, the Court invoked some form of heightened scrutiny, arguing that "[i]n light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State"[37] and that "the State must demonstrate that the classification is reasonably adapted to 'the purposes for which the state desires to use it.'"[38]

Texas provided three potential justifications for its law. First, it posited an interest in mitigating the economic effects of undocumented migration, but the Court rejected this idea because there was no evidence suggesting that undocumented migrants put "any significant burden on the State's economy."[39] Next, Texas suggested that reducing the burden of educating undocumented migrant children would improve educational quality, but the Court rejected this idea, too, because it did not find that barring a small group of children from schools would result in any significant increase in funding, and, even if it did, the state could not justify why undocumented migrant children should be the particular group targeted.[40] Finally, Texas responded that undocumented migrant children are an appropriate target because their status renders them less likely to remain within the state and put their education to "productive social or political use within the [s]tate."[41] However, the Court rejected this also, pointing out that there is no assurance that any undocumented migrant will be deported and that some may become lawful residents or citizens; instead, by denying undocumented migrant children education, the state risked "promoting the creation and perpetuation of a subclass of illiterates within [its] boundaries," which would bring only greater harm to the state.[42]

Because it could not identify any substantial state interest to justify the Texas law, the Court finally ruled that denying

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36 *Id.* at 221–22.

37 *Id.* at 224.

38 *Id.* at 226 (emphasis omitted) (quoting Oyama v. California, 332 U.S. 633, 664–65 (1948) (Murphy, J., concurring)).

39 *Id.* at 228.

40 *Id.* at 229.

41 *Id.* at 229–30.

42 *Id.* at 230.

public education to undocumented migrant children violated the Equal Protection Clause.[43]

B. Post-*Plyler* Threats

In his dissent in *Plyler*, Chief Justice Burger criticized the majority, writing that "the Court's opinion rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in these particular cases."[44] His words turned out to be prescient. *Plyler* is widely considered the high-water mark of migrant rights but has also been critiqued as an example of results-oriented judicial activism.[45] Without finding that undocumented migrants are a suspect class or that education is a fundamental right, two factors that are traditionally necessary to trigger any form of heightened scrutiny,[46] the Court still employed a more exacting review of the Texas law, justifying this decision on the relative "innocence" of undocumented children and the "importance" of education.[47] Since this reasoning appears to be designed around the facts of the case to achieve the majority's desired outcome (keeping kids in school), it has not been extended in other contexts.[48] Thus, in the forty years since *Plyler* was decided, scholars have questioned the viability of the decision.[49]

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43 *Id.*

44 *Id.* at 243 (Burger, C.J., dissenting).

45 *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1734 (2010); Robert Craig, *Fundamental Rights and Private Prisons After* Dobbs*: Shifting Sands and Opportunities*, 4 LSU L.J. FOR SOC. JUST. & POL'Y 1, 15 (2024); Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections on, and Beyond,* Plyler v. Doe, 44 U. PITT. L. REV. 329, 329 (1983).

46 *See infra* text accompanying notes 62–67.

47 *See Plyler*, 457 U.S. at 221, 230.

48 *See* Motomora, *supra* note 45, at 1731.

49 *See generally* Dan Soleimani, Note, Plyler *in Peril: Why the Supreme Court's Decision in* Plyler v. Doe *is at Risk of Being Reversed—and What Congress Should Do About It*, 25 GEO. IMMIGR. L.J. 195 (2010) (arguing that *Plyler* could not survive rational basis review if reconsidered, so Congress should codify undocumented children's right to education); Udi Ofer, *Protecting* Plyler*: New Challenges to the Right of Immigrant Children to Access a Public School Education*, 1 COLUM. J. RACE & L. 187 (2012) (recommending new protections for undocumented children's right to education due to increasing restrictionist immigration policies); Camila Mojica, Note, *Nevertheless, It Persisted:* Plyler v. Doe *and a Conservative Supreme Court*, 39 IMMIGR. & NAT'Y L. REV. 809 (2018) (considering *Plyler*'s viability under a more conservative Supreme Court); Sabrina J. Rodriguez, Comment, *It's Time to Turn the Tide: The Supreme Court Must Moderate Its* Stare Decisis *Approach Before It's Too Late for Cases like* Plyler, 26 THE SCHOLAR 51 (2024) (evaluating *Plyler*'s viability under *stare decisis* principles announced in *Dobbs*).

Plyler has survived several challenges in the years since it was decided. In 1994, voters in California approved Proposition 187, which required public schools to verify the immigration status of children and their parents and report any undocumented individuals to the federal government.[50] In a judicial challenge, the District Court for the Central District of California rejected this requirement, finding that it conflicted with *Plyler*.[51] Almost two decades later, Alabama made a similar attempt to require public schools to obtain immigration documentation to enroll students, but the Eleventh Circuit found this also conflicted with *Plyler*.[52]

Most recently, the Supreme Court's decision to revoke the right to abortion in *Dobbs v. Jackson Women's Health Organization* has revived calls to overturn *Plyler*. In particular, Justice Thomas's concurrence, which criticized substantive due process as a "legal fiction" and called for the reexamination of the Court's entire substantive due process precedent,[53] raises concerns that the Court may also reconsider the right of undocumented children to public education.[54] This concern has a good basis in reality; after the *Dobbs* decision was leaked, Texas Governor Greg Abbott was asked what Supreme Court ruling he would like to see overruled. His response? *Plyler v. Doe*.[55]

Since *Dobbs*, the viability of *Plyler* has not been reevaluated on the merits. Given the threats to the decision and the generally unstable grounds upon which it rests, a reconsideration of the right of undocumented children to public education is warranted.

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50 League of United Latin Am. Citizens v. Wilson, 908 F. Supp 755, 763, 774 (C.D. Cal. 1995)).

51 *Id.* at 774.

52 United States v. Alabama, 691 F. 3d 1269, 1297 (11th Cir. 2012).

53 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022). ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.") (Thomas, J., concurring).

54 Additionally, the Court's changing attitude towards *stare decisis* raises concerns that even a longstanding precedent like *Plyler* could be discarded after four decades. For a more thorough discussion of this issue, see generally Rodriguez, *supra* note 49.

55 In his response, Governor Abbott stated, "I think we will resurrect that case and challenge this issue again, because . . . the times are different than when *Plyler v. Doe* was issued many decades ago." Davies, *supra* note 14.

II
RETHINKING THE COURT'S REASONING

In *Plyler*, the Court concluded that the Texas education law violated the Equal Protection Clause, but its analysis also contained elements of substantive due process law. However, it did not conduct a complete analysis of the law under either of these doctrines, instead relying on a confluence of three factors to justify its use of heightened scrutiny: the "innocence" of undocumented children with respect to their unlawful status, the "importance" of education as a public benefit, and practical concerns about denying education to children whose future in the United States is uncertain.[56] The Court's failure to rest its holding on traditional equal protection grounds, or any other established doctrinal grounds, has left *Plyler* vulnerable to challenges.

This Part aims to reevaluate the reasoning used by the Court in *Plyler* by proposing stronger equal protection, substantive due process, and federal preemption arguments in support of the right of undocumented children to public education. Subpart A argues that *Plyler* can be sustained on traditional equal protection grounds by finding that undocumented migrants—or in the alternative, undocumented children—are a suspect or quasi-suspect class.[57] Subpart B argues that *Plyler* can be sustained under an originalist understanding of substantive due process by finding that education is a fundamental right.[58] Finally, subpart C argues that *Plyler* can be sustained on preemption grounds by finding that denying undocumented children access to public education interferes with the federal scheme of immigration regulation.[59]

A. Equal Protection Clause

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[60] In practice, this means that states may not pass laws that discriminate against any group of people

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56 *See supra* text accompanying note 46.

57 *See infra* subpart II.A.

58 *See infra* subpart II.B.

59 *See infra* subpart II.C. Recall that the Court declined to reach a conclusion on appellant's preemption arguments. *See supra* text accompanying note 27.

60 U.S. CONST. amend. XIV, § 1.

without providing some justification for the discrimination.[61] The level of review exacted by courts and the corresponding strength of the justification varies based on the group being discriminated against.[62] The lowest level of review—rational basis review—treats legislation as valid if it is rationally related to a legitimate state interest.[63] The level of review is heightened when a statute discriminates on the basis of any of four suspect classes:[64] race, national origin, religion, and alienage.[65] Classifications on the basis of a suspect class receive strict scrutiny, the highest level of scrutiny, which treats legislation as valid if it is narrowly tailored to a compelling state interest.[66] Between these extremes, quasi-suspect classifications, such as sex, receive intermediate scrutiny, which treats legislation as valid if it is substantially related to an important government interest.[67]

While alienage is a suspect class, the Court in *Plyler* refused to treat undocumented migrants as a suspect class because "undocumented status is not irrelevant to any proper legislative goal[, n]or is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action."[68] Regardless, the Court proceeded to apply some form of heightened scrutiny, but the exact standard it used is unclear.[69] Treating undocumented migrants as a suspect class would clarify and strengthen the Court's ruling

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61 *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) ("[A]ll persons similarly situated should be treated alike.").

62 *See, e.g.*, *id.* at 440.

63 *Id.*

64 *Id.*

65 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); Graham v. Richardson, 403 U.S. 365, 372 (1971).

66 *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 217 (1982).

67 Craig v. Boren, 429 U.S. 190, 197 (1976).

68 *Plyler*, 457 U.S. at 220.

69 *See supra* subpart I.A. Scholars have widely diverged in their classification of the *Plyler* court's equal protection analysis, with some describing it as rational basis review, *see* Kristen M. Schuler, Note, *Equal Protection and the Undocumented Immigrant: California's Proposition 187*, 16 B.C. THIRD WORLD L.J. 275, 306 (1996), rational basis with bite, *see* Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2112 (2015); John Harras, Note, *Suspicious Suspect Classes—Are Nonimmigrants Entitled to Strict Scrutiny Review Under the Equal Protection Clause?: An Analysis of* Dandamudi *and* LeClerc, 88 ST. JOHN'S L. REV. 849, 863 (2014), or intermediate scrutiny, *see* Jerry Gornik, *Undocumented Children: A Sensitive Class*, 8 J. JUV. L. 87, 88 (1984); Jason H. Lee, *Unlawful Status as a "Constitutional Irrelevancy"?: The Equal Protection Rights of Illegal Immigrants*, 39 GOLDEN GATE U. L. REV. 1, 8 (2008); Ofer, *supra* note 49, at 191.

in *Plyler*. The Court should find that undocumented migrants are a suspect class because they have not articulated a sound reason for treating undocumented migrants differently than any other alienage classification. However, even if the Court is unwilling to go this far, they should at minimum find that undocumented migrants or their children are a quasi-suspect class.[70]

The idea of suspect classification originates from the famed Footnote 4 of *United States v. Carolene Products Company*, in which the Court wrote that heightened scrutiny applies to groups that constitute a "discrete and insular" minority.[71] It highlighted three groups as examples of discrete and insular minorities: religious, national, and racial minorities.[72] A little more than thirty years after *Carolene Products*, the Court announced a fourth suspect class: aliens.[73] In *Graham v. Richardson*, the Court found that state laws which condition the receipt of welfare benefits on the beneficiary's citizenship status violate the Equal Protection Clause because "[a]liens as a class are a prime example of a 'discrete and insular' minority."[74]

The *Graham* court merely cited *Takahashi v. Fish and Game Commission*, which held that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits,"[75] to support its conclusory declaration that aliens are a discrete and insular minority. In *Takahashi*, the Court reviewed a state law that prohibited the issuance of commercial fishing licenses to any people ineligible for citizenship under federal law and argued that while the federal government may discriminate on the basis of alienage, it does not necessarily follow that states have this same ability because the federal government has broad plenary power over

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70 While the Court has not announced a new suspect class since 1971, *see* Emily K. Baxter, Note, *Rationalizing Away Political Powerlessness: Equal Protection Analysis of Laws Classifying Gays and Lesbians*, 72 MO. L. REV. 891, 894 (2007), or quasi-suspect class since 1976, *see Craig*, 429 U.S. at 197 (sex); Mathew v. Lucas, 427 U.S. 495, 510 (1976) (illegitimate children), this argument does not ask the Court to create a brand new protected class but merely retract a currently-recognized exception to an already existing suspect class.

71 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

72 *See id.*

73 Graham v. Richardson, 403 U.S. 365, 372 (1971) (quoting *Carolene Prods. Co.*, 304 U.S. at 152 n.4).

74 *Id.* (quoting *Carolene Prods. Co.*, 304 U.S. at 152 n.4)

75 Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948). While the *Takahashi* court limited its holding to "lawfully admitted aliens," *id.* at 418–20, the *Graham* court made no similar specification, *see Graham*, 403 U.S. at 372.

immigration.[76] While the *Takahashi* court did not expressly apply strict scrutiny to the licensing law, it laid the groundwork for this finding in *Graham*.

After *Graham*, the Court has announced two exceptions to the alienage class. One is the exception for undocumented migrants, announced in *Plyler*.[77] This exception bars an entire group of people from the protected class. The second exception—the "governmental function" exception—applies when the state law at issue pertains to a matter that "rest[s] firmly within a State's constitutional prerogatives."[78] Instead of excepting a particular subset of "aliens" from the protected class, this exception bars a certain type of legislation from heightened review.

While the Court has held that "[i]t would be inappropriate . . . to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny,' because to do so would . . . 'depreciate the historic values of citizenship,'"[79] it is inappropriate to lower the level of scrutiny as applied to undocumented migrants because the Court has not sufficiently explained how they differ from the alien class as a whole. Undocumented migrants share with all noncitizens the same characteristics that make the latter a suspect class; likewise, the issues with treating undocumented migrants as a suspect class are shared by all noncitizens. Since the Court treats alienage as a suspect class, it should accordingly treat undocumented migrants the same.

To start, being undocumented unquestionably is a form of alienage. The Immigration and Nationality Act defines alien as "any person not a citizen or national of the United States."[80] Alienage, therefore, describes someone's character as being not a citizen or national of the United States.[81] The statutory definition does not limit its scope to only those noncitizens who are lawfully present in the United States; it simply refers to *any* individual who is not a citizen or national of the United States, regardless of their official immigration status. Accordingly, the idea of alienage is inherent in the concept of being undocumented. Therefore, on its face, the alienage-based suspect class ought to include undocumented migrants.

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76 *Takahashi*, 334 U.S. at 419-20.

77 *See supra* text accompanying notes 30–31.

78 Sugarman v. Dougall, 413 U.S. 634, 648 (1973).

79 Foley v. Connelie, 435 U.S. 291, 295 (1978) (quoting Nyquist v. Mauclet, 432 U.S. 1, 14 (1977) (Burger, C.J., dissenting)).

80 Immigration and Nationality Act (INA), § 101(a)(3); 8 U.S.C. § 1101(a)(3).

81 *See also Alienage*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("The condition or status of being an alien.").

The Court has never articulated a clear list of factors that must be satisfied to trigger heightened review.[82] However, scholars generally agree on four factors: (1) a history of discrimination, (2) political powerlessness, (3) immutability, and (4) relevancy to legitimate policymaking.[83] Courts have not applied these factors consistently nor has every factor been considered in every case where a suspect or quasi-suspect class was found.[84] Thus, it is unclear how to apply these factors and how many must be satisfied.

The first factor asks whether the group has historically faced discrimination.[85] While there is some debate over the standard against which to define a history of discrimination,[86] it is not difficult to conclude that undocumented migrants have faced a history of discrimination, extending to the present day.[87] There is a long and widespread history of state laws targeting undocumented migrants. Famously, California's Proposition 187 barred undocumented migrants' access to health care, social services, and public education.[88] Arizona's S.B. 1070[89] and Alabama's H.B. 56[90] made it a misdemeanor for an undocumented migrant to work or seek work in the state. H.B. 56 additionally made it illegal for undocumented migrants to enter into any contracts.[91] In Fremont, Nebraska[92]

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82 *See* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 147–49 (2011) ("[T]he Court itself has conceded that the formula for determining suspect status suffers from lack of specificity.").

83 *See id.* at 146. Some scholars have also suggested that "discrete and insular minority" serve as a fifth factor or be incorporated into one of the four factors. *See id.* at 148–50. However, scholars generally agree that courts typically do not look to whether a group meets the definition of "discrete and insular minority" alone. *See id.* at 150. Instead, the aforementioned four factors are more often used by courts to determine whether the group is a discrete and insular minority. *See id.* This Note adopts this second approach.

84 *See id.* at 139.

85 *See id.* at 150.

86 Strauss suggested that courts often compare a group's discriminatory history against that of African-Americans, but she critiqued this approach, arguing "the discrimination of any group in comparison to that of African-Americans will fall short of 100 years of enslavement followed by years of segregation and Jim Crow laws." *Id.* at 151–53.

87 *See* Lee, *supra* note 69, at 14–15.

88 R. Michael Alvarez & Tara L. Butterfield, *The Resurgence of Nativism in California? The Case of Proposition 187 and Illegal Immigration*, 81 SOC. SCI. Q. 167, 168 (2000). For a longer discussion of Proposition 187, see *supra* subpart I.B.

89 Arizona v. United States, 567 U.S. 387, 393–94 (2012).

90 United States v. Alabama, 691 F.3d 1269, 1277 (11th Cir. 2012).

91 *Id.* at 1278.

92 Keller v. City of Fremont, 719 F.3d 931, 938 (8th Cir. 2013).

and Hazleton, Pennsylvania,[93] local ordinances prohibited landlords from renting to undocumented migrants.

This past year, Missouri introduced a bill that prohibited undocumented migrants from enrolling in post-secondary educational institutions.[94] Alabama,[95] New Hampshire,[96] and Wyoming[97] introduced bills to invalidate out-of-state driver's licenses issued to undocumented migrants. While not every state has expressed hostility towards undocumented migrants,[98] the history of discrimination factor is not a measure of whether a group can "win every time."[99] Thus, instances of more charitable legislative actions towards undocumented migrants do not discount the plentiful discriminatory legislative actions.

Furthermore, discrimination against undocumented migrants exists outside of the legislative sphere, as evidenced by the nomenclature debate. Pro-immigrant individuals and organizations typically use the term "undocumented immigrant" to describe migrants who lack legal status.[100] However, *Black's Law Dictionary* officially uses the term "illegal alien," while acknowledging that it is often viewed as a "snarl-phrase."[101] Linguistics scholars have found that biased language plays a role in spreading anti-immigrant prejudice. Describing immigrants as "illegal" has been found to "dehumanize[] immigrants and convey[] a message of rejection and exclusion."[102] The word "alien," while the official legal term,[103] is negatively connoted with abductions, extraterrestrials, and little green men from

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93 Lozano v. City of Hazleton, 724 F.3d 297, 301 (3d Cir. 2013).

94 S.B. 1372, 102d Gen. Assemb., 2d Reg. Sess. (Mo. 2024).

95 S.B. 108, 2024 S., Reg. Sess. (Ala. 2024).

96 S.B. 358, 2024 Gen. Ct., Reg. Sess. (N.H. 2024).

97 S.B. 120, 2024 S., Budget Sess. (Wyo. 2024).

98 *See, e.g.*, S. 1747B, 2019–2020 S., Reg. Sess. (N.Y. 2019) (allowing the issuance of driver's licenses to any individual over the age of sixteen, regardless of immigration status); S. 1250, 2019–2020 S., Reg. Sess. (N.Y. 2019) (allowing undocumented students to apply for financial aid to pursue higher education).

99 *See* Strauss, *supra* note 82, at 151 (quoting Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 738 (1985)).

100 *See, e.g.*, *Defining Undocumented*, IMMIGRANTS RISING (Aug. 2023), https://immigrantsrising.org/resource/defining-undocumented/ [https://perma.cc/FM7F-4RNB].

101 *Illegal Alien*, BLACK'S LAW DICTIONARY (12th ed. 2024).

102 Kai Wei, Daniel Jacobson López, & Shiyou Wu, *The Role of Language in Anti-Immigrant Prejudice: What Can We Learn from Immigrants' Historical Experiences?*, SOC. SCIS., Mar. 11, 2019, at 1, 10, https://www.mdpi.com/2076-0760/8/3/93 [https://perma.cc/BSK9-BZW9].

103 INA, § 101(a)(3); 8 U.S.C. § 1101(a)(3).

Mars—not human beings.[104] While many organizations have stopped using the terms "illegal immigrant" or "alien" because of their negative implications,[105] this is a recent change,[106] and many anti-immigrant individuals and organizations, including President Trump,[107] continue to use the term today.[108]

Thus, given the widespread historical and present discrimination against undocumented immigrants by both lawmakers and the public, this factor leans in favor of undocumented migrants being considered a suspect class.

The next factor, political powerlessness, assesses whether a group may rely on the ordinary democratic legislative processes to protect its interests.[109] Marcy Strauss suggests four possible approaches to assess political powerlessness, which may be used separately or in combination: (1) the group's ability to vote, (2) the pure numbers of the group, (3) favorable

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104 *See* Wei, Jacobson López, & Wu, *supra* note 102, at 13.

105 *See*(Paul Colford, *'Illegal Immigrant' No More*, ASSOCIATED PRESS (Apr. 2, 2013), https://www.apstylebook.com/blog_posts/1 [https://perma.cc/W7ZM-V55P]; Christine Haughney, *The* Times *Shifts on 'Illegal Immigrant,' but Doesn't Ban the Use*, N.Y. TIMES (Apr. 23, 2013), https://www.nytimes.com/2013/04/24/business/media/the-times-shifts-on-illegal-immigrant-but-doesnt-ban-the-use.html [https://perma.cc/PS4A-JLH5] (discouraging, but not banning, reporters from using "illegal immigrant").

106 *See* Ben Winograd, *Associated Press Issues Misleading Defense of Term "Illegal Immigrant"*, AM. IMMIGR. COUNCIL (OCT. 24, 2012), https://www.americanimmigrationcouncil.org/blog/associated-press-issues-misleading-defense-of-term-illegal-immigrant [https://perma.cc/6U6R-JYY5]; Margaret Sullivan, *Readers Won't Benefit if* Times *Bans the Term 'Illegal Immigrant'*, N.Y. TIMES (Oct. 2, 2012), https://archive.nytimes.com/publiceditor.blogs.nytimes.com/2012/10/02/readers-wont-benefit-if-times-bans-the-term-illegal-immigrant/ [https://perma.cc/L39F-7EKP].

107 *Fact-checking Over 12,000 of Donald Trump's Statements About Immigration*, THE MARSHALL PROJECT (Oct. 21, 2024), https://www.themarshallproject.org/2024/10/21/fact-check-12000-trump-statements-immigrants [https://perma.cc/C8RU-THDX].

108 *See* Press Release, Off. of the Tex. Governor, Governor Abbott Issues Executive Order Requiring Texas Hospitals to Collect, Report Healthcare Costs for Illegal Immigrants (Aug. 8, 2024), https://gov.texas.gov/news/post/governor-abbott-issues-executive-order-requiring-texas-hospitals-to-collect-report-healthcare-costs-for-illegal-immigrants [https://perma.cc/RB82-Q6JD] ("Texans should not have to shoulder the burden of financially supporting medical care for illegal immigrants."); Press Release, Exec. Off. of the Governor, Governor Ron DeSantis Signs Strongest Anti-Illegal Immigration Legislation in the Country to Combat Biden's Border Crisis (May 10, 2023), https://www.flgov.com/eog/news/press/2023/governor-ron-desantis-signs-strongest-anti-illegal-immigration-legislation-country [https://perma.cc/7NKZ-WYCL] ("The legislation I signed today gives Florida the most ambitious anti-illegal immigration laws in the country."); Illegal Immigration, CTR. FOR IMMIGR. STUD., https://cis.org/Immigration-Topic/Illegal-Immigration [https://perma.cc/7HRA-CMBK] (last visited Mar. 27, 2025).

109 *See* Strauss, *supra* note 82, at 153.

legislative enactments on behalf of the group, and (4) whether members of the group have achieved positions of power.[110] Each of these factors will be considered.

To start, a group that does not have the power to vote is "a quintessential politically powerless group."[111] Undocumented migrants are unable to vote in federal or state elections.[112] While at least sixteen local jurisdictions allow noncitizen voting in certain local and municipal elections,[113] this is overall quite an insignificant number. This issue is exacerbated for undocumented migrant children in particular, who are barred from voting due to their lack of citizenship and their age.[114]

The pure numbers of the group approach asks simply if the group is a minority.[115] With an estimated eleven million undocumented migrants residing in the United States,[116] constituting approximately three-percent of the total U.S. population,[117] the undocumented population is a clear numerical minority. Undocumented migrant children comprise an

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110 *Id.* For an alternative assessment of the political powerlessness of undocumented migrant children using a slightly altered approach, see Selene C. Vázquez, Note, *The Equal Protection Clause & Suspect Classifications: Children of Undocumented Entrants*, 51 U. MIA. INTER-AM. L. REV. 63, 97–103 (2020).

111 Strauss, *supra* note 82, at 154.

112 Illegal Immigration Reform & Immigration Responsibility Act of 1996 (IIRIRA) § 611; 18 U.S.C. § 611; Kathleen Bush-Joseph, *Explainer: Noncitizen Voting in U.S. Elections*, MIGRATION POL'Y INST. (Sep. 2024), https://www.migrationpolicy.org/content/noncitizen-voting-us-elections [https://perma.cc/X82C-5XHH].

113 Bush-Joseph, *supra* note 112. Not all jurisdictions that permit noncitizen voting extend this privilege to undocumented migrants, *see* Ferry v. City of Montpelier, 296 A.3d 749, 753 (Vt. 2023) (allowing noncitizens who are "legal resident[s] of the United States" to vote in Montpelier City elections); *All Legal Resident Voting*, BURLINGTON VT., https://www.burlingtonvt.gov/164/All-Legal-Resident-Voting [https://perma.cc/KLG3-RG44] (last visited Aug. 4, 2025) (allowing noncitizens who are "legal residents" to vote in Burlington elections), although some do, *see Non-citizen Voting Rights in Local Board of Education Elections*, SF.GOV https://www.sf.gov/non-citizen-voting-rights-local-board-education-elections [https://perma.cc/CAY4-E9HZ] (last visited Mar. 27, 2025) (allowing noncitizens with children to vote in San Francisco's school board elections); D.C. Law 24-242, 2022 Council, Council Period 24 (D.C. 2022) (removing the citizenship requirement to vote in local elections in Washington, D.C.).

114 *See* U.S. CONST. amend. XXVI, § 1.

115 Strauss, *supra* note 82, at 155.

116 BRYAN BAKER & ROBERT WARREN, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2018-JANUARY 2022 1 (2024).

117 *Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/ [https://perma.cc/JER9-SHPV] (last visited Mar. 29, 2025).

even smaller minority, with an estimated 1.23-million undocumented migrants under eighteen residing in the United States as of 2022.[118]

The third approach, favorable legislative enactments, suggests that the existence of such enactments is evidence of political influence.[119] As discussed previously, there is much legislation targeting undocumented migrants in states across the country.[120] That being said, some states have also passed favorable legislation.[121] This factor has been critiqued for this precise reason: "A group can be both politically powerless and have some legislation passed on its behalf . . . Under this analysis, even African-Americans would not be considered 'politically powerless' in light of the passage of the Fourteenth Amendment itself, [and] the Civil Rights Act[s]."[122] Thus, it would be improper to conclude that, just on the basis of some favorable state legislation, undocumented migrants are not politically powerless. To do so would ignore the substantial amount of unfavorable legislation against undocumented migrants and the complete inaction of Congress to enact legislation that would provide a real solution to their biggest problem: lack of status.[123]

The final approach asks whether members of the group have reached positions of power, particularly in political office.[124] No members of the undocumented migrant class have reached positions of power because noncitizens may not run for any state or federal office.[125] For undocumented children in particular, this defect is even stronger because they are barred from running for office due to their citizenship and their

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118 BAKER & WARREN, *supra* note 116, at 7.

119 *See* Strauss, *supra* note 82, at 156.

120 *See supra* notes 87–97 and accompanying text.

121 *See supra* notes 98–100 and accompanying text.

122 Strauss, *supra* note 82, at 156–57.

123 The DREAM Act, which would provide a pathway to legal status for undocumented migrants who were brought into the country as children, has been continuously introduced in Congress for over twenty years. Despite bipartisan support for the bill, it has yet to pass. Dream Act of 2023, S. 365, 118th Cong. (2023); *see The Dream Act: An Overview*, AM. IMMIGR. COUNCIL (May 8, 2024), https://www.americanimmigrationcouncil.org/research/dream-act-overview [https://perma.cc/4TYW-EY3Q].

124 *See* Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973).

125 *See* U.S. CONST. art. I, § 2, cl. 2; *id.* § 3, cl. 3; *id.* at art. II, § 1, cl. 5; Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1460–61 (1993).

age.[126] That being said, some former members of the class have achieved positions of power. Representatives Adriano Espaillat and Ruben Kihuen, for example, became the first formerly undocumented immigrants to serve in Congress.[127] While it is reasonable to imagine that formerly undocumented individuals in public office would identify with and advocate on behalf of undocumented migrants, they are decidedly not members of this class. In fact, it was the very act of becoming documented, and ultimately U.S. citizens, that enabled them to achieve their positions. Furthermore, it would be inappropriate to equate the class of formerly undocumented migrants with the class of undocumented migrants because a law targeting undocumented migrants, like the law in *Plyler*, would not directly affect formerly undocumented migrants who were able to regularize their status. This test does not ask whether members of the class have close allies in positions of power or authority but whether members of the class have reached these positions themselves. Undocumented migrants are simply unable to achieve these positions.

Because each of these considerations, individually or in conjunction, suggests that undocumented migrants are politically powerless, this factor leans in favor of finding that undocumented migrants are a suspect class.

The next factor, immutability of the class's distinguishing characteristic, has been interpreted by courts in two distinct ways. Initially, courts interpreted an immutable trait as one "determined solely by the accident of birth."[128] Later on, some courts interpreted an immutable trait as one that is difficult to change "because it is not within a person's control . . . or because to change it would enact too great a cost to personhood."[129] Under the first interpretation, the class of undocumented immigrants is clearly not immutable, as being undocumented is not a biological trait. The second interpretation is slightly more forgiving, although it still does not lend itself perfectly to the conclusion that the class is immutable. It is arguably difficult

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126 *See* U.S. CONST. art. I, § 2, cl. 2; *id.* § 3, cl. 3; *id.* at art. II, § 1, cl. 5; *Eligibility Requirements to Run for the State Legislature*, NAT'L CONF. OF STATE LEGISLATURES (May 5, 2023), https://www.ncsl.org/elections-and-campaigns/eligibility-requirements-to-run-for-the-state-legislature [https://perma.cc/VX65-YWU9].

127 Alex Thompson, *How Two Formerly Undocumented Immigrants Got Elected to Congress*, VICE (Oct. 5, 2017), https://www.vice.com/en/article/how-two-formerly-undocumented-immigrants-got-elected-to-congress/ [https://perma.cc/8CXF-WJHF].

128 *Frontiero*, 411 U.S. at 686.

129 Strauss, *supra* note 82, at 162.

to change one's immigration status,[130] especially because undocumented immigrants are not eligible for many immigration pathways,[131] but it is not impossible. Furthermore, as the *Plyler* court points out, being undocumented is not an innate characteristic but a choice, and an unlawful choice at that.[132]

While it may be unclear whether being undocumented is an immutable trait, the situation of undocumented children is materially different. Even the *Plyler* court acknowledged that, with respect to undocumented children, their status is immutable because it is a "characteristic over which children can have little control."[133] At least one scholar has even suggested that their relative "innocence" with respect to their unlawful status is used by courts as a substitute for the immutability factor.[134] Since undocumented children, by virtue of their youth, have little ability to change their immigration status and did not choose to become undocumented in the first place,[135] this factor points in favor of finding that at least this subset of the undocumented population is a suspect class.

Finally, courts consider the relevancy of the group's distinguishing characteristic to any legitimate policy goals. Generally, "if the group characteristic is rarely relevant to a legitimate legislative objective, then strict scrutiny may be appropriate. Intermediate scrutiny is appropriate where it is sometimes relevant, and rational basis review is appropriate where the trait is often relevant."[136] The *Plyler* court held that undocumented status is not a "constitutional irrelevancy."[137] It did not thoroughly explain why, merely hinting at two possible reasons to discriminate against undocumented migrants: conservation of

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130 David J. Bier, *Why Legal Immigration Is Nearly Impossible*, CATO INST. (June 13, 2023), https://www.cato.org/policy-analysis/why-legal-immigration-nearly-impossible [https://perma.cc/D744-CAMK] (citing obstacles such as limited and narrow visa categories, extensive grounds for exclusion, immigration caps, and extreme backlogs).

131 *Why Don't Immigrants Apply for Citizenship?*, AM. IMMIGR. COUNCIL (Oct. 7, 2021), https://www.americanimmigrationcouncil.org/research/why-don%E2%80%99t-they-just-get-line [https://perma.cc/EN3M-AZCV].

132 Plyler v. Doe, 457 U.S. 202, 219–20 (1982).

133 *Id.* at 220.

134 *See* Gornik, *supra* note 69, at 91.

135 *Plyler*, 457 U.S. at 220 ("[T]he children who are plaintiffs in th[is] case[] 'can affect neither their parents' conduct nor their own status.'" (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977))).

136 Strauss, *supra* note 82, at 165.

137 *Plyler*, 457 U.S. at 223.

economic resources and deterrence of unlawful migration.[138] The Court, however, has traditionally held that conserving fiscal resources is not a valid justification for an invidious discrimination,[139] and this holding was specifically reiterated in the immigration context.[140]

On the other hand, courts have, in many contexts, found that undocumented status is irrelevant. Various courts have held that being undocumented is irrelevant for purposes of bringing civil suit, recovery under labor-protection and workers' rights statutes, and due process.[141] This raises the question, "[w]hy did the Supreme Court conclude in *Plyler* that unlawful presence, in and of itself, affects an individual's expectation of legal protections while several other courts have, in contexts outside the Equal Protection Clause, found unlawful presence completely irrelevant?"[142] Additionally, one's undocumented status, in many respects, does not "bear[] a relation to the individual's ability to participate and contribute to society."[143] Undocumented migrants participate in the economy as consumers, taxpayers, and laborers, the same as lawful migrants and U.S. citizens.[144]

Accordingly, it is unclear whether undocumented status is relevant "often," "sometimes," or "rarely."[145] On account of this uncertainty, some scholars have critiqued the relevancy factor as being too "context-specific," which begs the question, "can a group be suspect in one situation and not in others?"[146]

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138 *Id.* at 227–29. For an extensive critique of the Court's reliance on these two factors to justify its holding that undocumented migrants are not a suspect class, see generally Lee, *supra* note 69.

139 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 633 (1969) ("The saving of welfare costs cannot justify an otherwise invidious classification.").

140 Graham v. Richardson, 403 U.S. 365, 375 (1971) ("Since an alien as well as a citizen is a 'person' for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in *Shapiro*.").

141 *See* Lee, *supra* note 69, at 12–19 (discussing cases).

142 *Id.* at 20.

143 *See* Strauss, *supra* note 82, at 165 (arguing that each level of scrutiny corresponds with whether the trait is often, sometimes, or rarely relevant).

144 *See* Lee, *supra* note 69, at 34.

145 *See* Strauss, *supra* note 82, at 165.

146 *See id.* at 166–67. It seems that, in the immigration context, the courts have answered this question in the affirmative. *See supra* text accompanying notes 78–79; *see also* Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J. L. SOC'Y 1, 38 (2005) ("In the context of alienage classifications the Court has adopted a slightly different method of reconciling the fact that alienage is sometimes relevant and sometimes not. Instead of

Some have also pointed out that the Court does not apply this factor consistently: "[i]n some cases, the Court has insisted on rational basis review for traits considered relevant to a group's ability to contribute to society. Other times, however, it has awarded suspect or quasi-suspect status to groups whose characteristics are relevant to legislative goals."[147] Because of this ambiguity, it is unclear whether this factor points in favor of finding that undocumented migrants are a suspect, quasi-suspect, or nonsuspect class.

In sum, two of these factors clearly support the conclusion that undocumented migrants are a suspect class,[148] while two are more fraught.[149] The suspect class factors are not a perfect balancing test, and the Court has not "described how the factors exist in relation to each other, explained which factors are to be given priority, or clarified how much weight to assign any particular factor."[150] Some have argued that if the group meets all or most of the factors, a court will likely find that it is a suspect class, while if the group meets fewer or none of the factors, a court will likely find that it is a quasi-suspect or nonsuspect class.[151] However, sometimes courts have "disregarded some or all of [the factors] in their analysis," and "the presence of these (or most of these) factors has not necessarily resulted in the application of heightened scrutiny."[152] In light of these observations, it is not at all clear what level of scrutiny should be applied based on the divided outcome of the factors.

Regardless, undocumented migrants should still be a suspect class because "illegal immigrants share several of the same key characteristics of legal immigrants that the Court felt justified the application of strict-scrutiny review of state classifications of this latter group."[153] With respect to immutability

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applying intermediate scrutiny, the Court has applied a general rule that alienage classifications are subject to strict scrutiny, but has carved out an exception for alienage classifications related to self-government and the democratic process. Thus the Court applies strict scrutiny in situations where foreigner status is not relevant, and rational basis review in situations where foreigner status is relevant." (footnote omitted)).

147 Strauss, *supra* note 82, at 167 (footnote omitted).

148 *See supra* text accompanying notes 85–128.

149 *See supra* text accompanying notes 128–148.

150 Strauss, *supra* note 82, at 168.

151 *See* Vázquez, *supra* note 110, at 80.

152 Darren Lenard Hutchinson, *"Unexplainable on Grounds Other than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 636 (2003).

153 Lee, *supra* note 69, at 20.

and relevancy, the two factors that do not clearly point to undocumented migrants being a suspect class, many of the same arguments against undocumented status being immutable and irrelevant apply to all noncitizens. For immutability, being a noncitizen is not a biological trait nor is it impossible to change one's status or become a citizen. It is also a choice to immigrate to the United States in the first place, lawfully or unlawfully. Therefore, it cannot clearly be said that alienage, documented or undocumented, is immutable.[154] For relevancy, each of the potential justifications, with the exception of deterring unlawful migration, could be used for any alienage classification. Therefore, it cannot clearly be said that alienage, documented or undocumented, is irrelevant to any legitimate policymaking.

Since the Court has stated that alienage is a suspect class, it can be inferred that it disregarded or did not consider immutability or relevancy in its analysis. Absent some justification for why these factors should be considered when deciding whether undocumented migrants are a suspect class, but not for any other noncitizen, it would be inconsistent to consider them here. If undocumented migrants are not a suspect class because being undocumented is not an immutable or irrelevant characteristic,[155] then neither should alienage be a suspect class. Since the Court has not provided a sound reason for treating undocumented migrants differently from the class of aliens at large, it should find that undocumented migrants are a suspect class.

Considering that the law at issue in *Plyler* did not withstand the ambiguous level of scrutiny applied in the case, it would certainly not survive strict scrutiny. Hence, by finding that undocumented migrants are a suspect class, the central holding of *Plyler*—that undocumented migrant children are entitled to public education—cannot be overruled.

This same outcome can be reached on review of the factors alone. Should the Court articulate some reason to treat undocumented migrants differently from the alien class as a whole,[156] the Court should still find that undocumented migrants are a quasi-suspect class, entitled to intermediate scrutiny, or that

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154 In fact, this very point has been raised and considered by members of the Supreme Court. Justice Rehnquist believed that noncitizens should *not* be a suspect class because they are capable of changing their status. *See* Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting).

155 Plyler v. Doe, 457 U.S. 202, 223 (1982).

156 *See supra* text accompanying note 155.

undocumented migrant children are a suspect class. Since undocumented migrants meet at least two of the factors assessed in suspect class cases,[157] this should be sufficient justification to find that they are, at minimum, a quasi-suspect class.[158] The level of review applied in *Plyler* has been debated,[159] but it was no higher than intermediate scrutiny.[160] Since quasi-suspect classes receive intermediate scrutiny,[161] this finding would also ensure that the central holding of *Plyler* is preserved. Finally, undocumented migrant children meet a majority of the factors of the suspect class analysis, so the Court should find that they are a suspect, or at least quasi-suspect, class.[162] Likewise, either of these classifications invokes a level of scrutiny at least as high or higher than the one used by the *Plyler* court, so these findings, too, would preserve the central holding.

B. Due Process Clause

The Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[163] The Court has interpreted this to provide protection for substantive due process rights, including rights guaranteed by the first eight amendments of the Constitution and certain unenumerated rights contained in the "penumbras" of these first eight amendments.[164] The Court has used a variety of tests to ascertain whether an unenumerated right is fundamental,[165] but in recent decisions, the Court has expressed a clear preference for the test which asks "whether the right is 'deeply rooted in [our] history and

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157 *See supra* text accompanying notes 85–128.

158 *See* Vázquez, *supra* note 110, at 80.

159 *See supra* note 69.

160 *See supra* text accompanying notes 68–70.

161 Craig v. Boren, 429 U.S. 190, 197 (1976).

162 *See* Plyler v. Doe, 457 U.S. 202, 219–20 (1982) (recognizing the involuntariness of undocumented migrant children's entry into the United States); s*ee also supra* text accompanying notes 133–135.

163 U.S. CONST. amend. XIV, § 1.

164 Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

165 *Compare* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (finding that fundamental rights are "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty" (internal quotation marks omitted) (citation omitted) (first quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); then quoting Snyder v. Massachusets, 291 U.S. 97, 105 (1934); and then quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))), *with* Lawrence v. Texas, 539 U.S. 558, 572 (2003) (finding that an "emerging awareness" can support a fundamental right).

tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[166]

Since the Court's pre-*Plyler* precedent established that education is not a fundamental right,[167] *Plyler* was not decided as a substantive due process case.[168] Despite this, a fundamental right to education is supported by originalist legal theories, currently popular with the Supreme Court.[169] This Note will not endeavor to present this full analysis, as it has been fully explored in the literature.[170] In brief, numerous scholars have argued that there is a fundamental right to education protected by the Constitution because more than seventy-five percent of states protected a right to education at the time the Fourteenth Amendment was ratified[171] and because there is strong historical evidence that "the right to education was not mentioned in the Constitution because it was assumed to be contained within a more general constitutional guarantee."[172]

Since a right to education can be found under an original understanding of the Constitution and the Fourteenth Amendment, there is a fundamental right to education that is protected under the Due Process Clause. If *Plyler* were to be challenged, its central holding that a state may not deny public education to undocumented migrant children could be sustained by the Court recognizing this right for the first time.

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166 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022) (alteration in original) (first quoting Timbs v. Indiana, 139 S. Ct. 682, 686 (2019); then quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010); and then quoting *Glucksberg*, 521 U.S. at 721).

167 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

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

169 *See, e.g.*, *Dobbs*, 142 S. Ct. 2228; N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2131–32 (2022) (emphasizing the importance of the original meaning of statutes in evaluating their constitutionality).

170 *See, e.g.*, Susan H. Bitensky, *Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 622–30 (1992); Steven G. Calabresi & Lena M. Barsky, *An Originalist Defense of* Plyler v. Doe, 2017 BYU L. REV. 225, 297–305 (2017); *see generally* Steven G. Calabresi & Michael W. Perl, *Originalism and* Brown v. Board of Education, 2014 MICH. ST. L. REV. 429 (2014).

171 *See* Calabresi & Perl, *supra* note 170, at 437; Calabresi & Barsky, *supra* note 170, at 297–99.

172 *See* Bitensky, *supra* note 170, at 628.

C. Preemption

Federal preemption provides that federal law supersedes state law when the two come into conflict.[173] There are two general types of preemption: express and implied.[174] Implied federal preemption has been recognized in many areas of the law, including in the immigration context.[175] Courts have recognized two types of implied preemption: field preemption, which occurs where the federal government has enacted a "framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it'" or the "federal interest [is] so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,"[176] and conflict preemption, which occurs where the federal and state laws directly conflict or "the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[177]

The Supreme Court has recognized time and time again that the federal government has broad and exclusive (plenary) power over immigration.[178] While some of this nation's immigration laws contain express preemption clauses,[179] courts have struck down state actions touching on migrants on the basis of implied preemption, where express preemption was not present. In *Arizona v. United States*, the Supreme Court considered four provisions of Arizona's S.B. 1070: Section 3, which made it a state misdemeanor to fail to comply with the federal alien registration law,[180] Section 5(C), which made it a state misdemeanor for undocumented migrants to solicit or

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173 BRYAN L. ADKINS, ALEXANDER H. PEPPER, & JAY B. SYKES, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 1 (2023).

174 *Id.*

175 *See* Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on* Arizona v. United States, 9 STAN. J. C.R. & C.L. 1, 3–19 (2013) (describing the recent history of immigration preemption cases in the Supreme Court of the United States).

176 Arizona v. United States, 567 U.S. 387, 399 (2012) (first alteration in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

177 *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

178 *See* De Canas v. Bica, 424 U.S. 351, 354–55 (1976) (collecting cases).

179 *See, e.g.*, Immigration Reform and Control Act of 1986 § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").

180 *Arizona*, 567 U.S. at 400.

engage in work,[181] Section 6, which allowed police officers to execute warrantless arrests of people upon suspicion that they committed an offense that makes them removable from the United States,[182] and Section 2(B), which required police officers to verify the immigration status of any person detained upon reasonable suspicion that they are unlawfully present.[183] The Court ultimately invalidated the first three provisions on implied preemption grounds but upheld Section 2(B).[184]

The Court invalidated Section 3 on the basis of field preemption, concluding that Congress had occupied the entire field of alien registration and consequently, Arizona was not permitted to enact its own penalties in this field, even though its regulations were "complementary" or "parallel" to the federal scheme.[185] The Court invalidated Sections 5(C)[186] and 6[187] on the basis of conflict preemption because they conflicted with the federal schemes for controlling unauthorized employment and immigrant removal, respectively; it noted that Congress made deliberate choices about how to enforce its employment and removal schemes, but these provisions frustrated Congress's choices by expanding state authority in these realms.[188]

Arizona has been interpreted as providing for strong federal preemption in the immigration law context, prohibiting state enforcement of immigration laws that goes beyond the federal enforcement scheme or even that mirrors the federal scheme when Congress has occupied the entire field.[189] However, the

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181 *Id.* at 403.

182 *Id.* at 407.

183 *Id.* at 411.

184 *See id.* at 416. Section 2(B) was upheld because Congress in no way had expressed that reporting the immigration status of detainees or arrestees to the federal government would be improper. *Id.* at 412. However, the Court did note that its ruling on Section 2(B) was based solely on a facial analysis of the section and stated that it was open to future preemption challenges to the law based on its implementation, which at the time had yet to be realized. *Id.* at 416.

185 *See id.* at 401. This struck a blow to proponents of restrictionist immigration policies, who had advocated for a mirror image theory of state level immigration enforcement. *See* PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 178 (2015). Under this theory, state level immigration actions which adopted congressional standards would permissibly mirror federal regulations. *Id.*

186 *Arizona*, 567 U.S. at 407.

187 *Id.* at 410.

188 *See id.* at 406, 410.

189 *See* Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 718 (2013) ("[T]he opinion does arguably favor the federal government's arguments about its plenary occupation of the immigration field, and has firmly limited any independent state rulemaking pertaining to immigration enforcement.").

Court has long held that while states do not have authority to enact immigration laws, which "govern[] the selection, admission, and exclusion of noncitizens,"[190] they do have the authority to enact alienage laws, which "determine the rights, privileges, and obligations of noncitizens present in the United States."[191] The distinction between what constitutes alienage law versus immigration law is fuzzy, at best.[192] After all, many laws regulating the rights and privileges of noncitizens will have the incidental effect of determining the admission or exclusion of certain noncitizens.[193] More is needed, however, than a merely "speculative and indirect impact on immigration" to render a state action an improper immigration regulation.[194] To provide clarity on this issue, Stella Burch Elias suggests that, since *Arizona* holds that state actions which penalize migrants "disrupt the delicate balance that Congress has struck within the complex federal scheme," [195] then "states may not engage in anti-unauthorized-immigrant rulemaking when such action intrudes upon the federal government's plenary power to determine 'immigration' law."[196]

While this idea has not been put to the test at the Supreme Court, several lower courts have decided cases along similar lines of reasoning.[197] Notably, the Third Circuit, in *Lozano v. City of Hazleton*, ruled that a city ordinance which made it unlawful to rent to undocumented migrants, *inter alia*, was both

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190 *See id.* at 711.

191 *See id.*

192 *See* GULASEKARAM & RAMAKRISHNAN, *supra* note 185, at 174–75 ("[I]t is increasingly clear that . . . state power over alienage can seriously influence and incentivize the movement and residency of noncitizens."). This Note does not endeavor to flesh out a clear delineation between these two categories of lawmaking. Such a task could occupy an entire paper by itself.

193 *See id.* at 173 (positing that widespread restrictionist measures, implemented on a state level, could have the effect of increasing self-deportations).

194 De Canas v. Bica, 424 U.S. 351, 355–56 (1976).

195 *Id.* at 721.

196 Elias, *supra* note 189, at 718.

197 *See* United States v. Alabama, 691 F.3d 1269, 1292–97 (11th Cir. 2012) (holding that an Alabama law which denied undocumented migrants the right to contract was preempted because it was "a thinly veiled attempt to regulate immigration under the guise of contract law"); Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 528–37 (5th Cir. 2013) (en banc) (holding that a local ordinance which criminalized renting to undocumented migrants was preempted because it imposed a penalty "[b]ased on a classification . . . that does not exist . . . in federal law"); Lozano v. City of Hazleton, 724 F.3d 297, 301 (3d Cir. 2013).

field and conflict preempted by the federal removal scheme.[198] The court made several observations in support of its holding. First, while the housing provisions did not control actual physical entry or removal of migrants, housing goes to the "the core of an alien's residency,"[199] and "by prohibiting the only realistic housing option many aliens have, Hazleton is clearly trying to prohibit unauthorized aliens from living within the City."[200] Additionally, the court noted that "[l]ike the preempted provisions in *Arizona*, the housing provisions constitute an attempt to unilaterally attach *additional consequences* to a person's immigration status with no regard for the federal scheme."[201]

However, not all lower courts have read *Arizona* this way. In *Keller v. City of Fremont*, the Eighth Circuit considered a virtually identical housing ordinance but concluded that it was not preempted by the federal removal scheme because deterrence or prohibition of undocumented migrants from residing within a particular jurisdiction is not equivalent to the "remov[al of] aliens from this country (or even the City), nor . . . a parallel local process to determine an alien's removability."[202] This approach, however, should be rejected because it ignores the reality of the situation. As a practical matter, an individual who is prohibited from obtaining housing in a city (or state) on account of their immigration status will effectively be removed from that city (or state) on account of their immigration status.[203] The federal removal scheme did not anticipate "state-to-state variance" in immigration policy so prohibiting renting to undocumented immigrants "'violates the principle that the removal process is entrusted to the discretion of the Federal government' by . . . excluding them from *a part of 'the United States or the several states.*'"[204] Furthermore, as the *Lozano* court noted, "[i]f every other state enacted similar

198 *Lozano*, 724 F.3d at 315, 317. The Fifth Circuit came to the same conclusion when it considered a very similar ordinance in *Villas at Parkside Partners*, 726 F.3d at 528–37.

199 *Lozano*, 724 F.3d at 315.

200 *Id.* at 317.

201 *Id.* at 318 (emphasis added). Note the similarity to *supra* text accompanying note 197.

202 Keller v. City of Fremont, 719 F.3d 931, 942 (8th Cir. 2013).

203 *See Lozano*, 724 F.3d at 317.

204 *See* Villas at Parkside Partners, 726 F.3d at 546 (en banc) (Dennis, J., concurring) (emphasis added) (citation omitted) (first quoting Arizona v. United States, 567 U.S. 387, 409 (2012); and then quoting Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948)).

legislation . . . the immigration scheme would be turned on its head."[205]

In *Plyler*, the Court explicitly did not reach preemption claims,[206] although such issues were raised in the briefs and during oral argument.[207] The *Arizona* decision did not exist at the time *Plyler* was decided. Should *Plyler* be revisited by the Court today, it should be upheld because a state law prohibiting undocumented migrant children from attending public schools is preempted by the federal removal scheme. The Court should adopt the reasoning used by the *Lozano* court because a *Plyler*-like law would "impermissibly 'regulate immigration' in contravention of the Supreme Court's pronouncement that a state or locality may not determine 'who should or should not be admitted into the country.'"[208]

In her article discussing the new legal framework of immigration federalism post-*Arizona*, Burch Elias identified two central components of the *Arizona* holding that control whether a state "alienage" law should be preempted: (1) whether the law "detract[s] from the 'harmonious whole' of the scheme for immigrant admission and exclusion," and (2) whether the law "substitut[es] local judgment for that of the federal government."[209] A law that restricts undocumented migrant children's access to public education does both.

With respect to the first prong, education can be likened to housing as going to the "core of an alien's residency."[210] The *Lozano* decision turned on this observation, noting that

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205 *Lozano*, 724 F.3d at 318 (quoting United States v. Alabama, 691 F.3d 1269, 1295 n.21 (11th Cir. 2012)). In fact, supporters of restrictionist state policies have openly admitted that this is their goal in enacting such policies. Some scholars have argued that there is no doubt that restrictionist state policies are intended to encourage removal from the United States because

> Kris Kobach, the former law professor who drafted [many restrictionist state ordinances], [said] 'If we had a true nationwide policy of self-deportation, I believe we would see our illegal alien population cut in half' . . . . In other words if enough states were to enact restrictionist measures, unauthorized immigrants would leave in large numbers.

GULASEKARAM & RAMAKRISHNAN, *supra* note 185, at 173. Thus, the Keller court should have "speculate[d] whether other state and local governments would adopt similar measures . . . and the impact of any such trend on federal immigration policies." *See Keller*, 719 F.3d at 942.

206 Plyler v. Doe, 457 U.S. 202, 210 n.8 (1982).

207 *See* Rachel F. Moran, Essay, *Personhood, Property, and Public Education: The Case of* Plyler v. Doe, 123 COLUM. L. REV. 1271, 1294–95 (2023).

208 *Lozano*, 724 F.3d at 315 (quoting Lozano v. City of Hazleton, 620 F.3d 170, 220 (3d Cir. 2010), *vacated*, 563 U.S. 1030 (2011)).

209 *See* Elias, *supra* note 189, at 733.

210 *See Lozano*, 724 F.3d at 315.

the "housing provisions . . . [were] nothing more than a thinly veiled attempt to regulate residency," which conflicts with the federal government's comprehensive scheme.[211] In the United States, access to public education is linked to one's residency in a particular community. Since the founding of this nation, education has been controlled at the state and local level.[212] Because the federal government has never played any significant role in administering K-12 education, schools have always been conceived of as a public benefit that is created and controlled by a particular community, for members (residents) of that community.[213] Public schools receive the vast majority of their funding from state and local revenue sources, like property taxes, which from 2020 to 2021 comprised thirty-six percent of school funding nationwide.[214] Today, there are over 19,000 school districts in the United States, and the district children attend is determined by their residency.[215]

Since the "residential-based assignment system [of public education] explicitly link[s] access to . . . schools to a household's residential location decision,"[216] it is reasonable to conclude that education is a core component of residency. If states were permitted to regulate whether undocumented migrant children

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211 *Id.*

212 *See* Claudia Goldin, *A Brief History of Education in the United States* 2–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 119, 1999); NANCY KOBER & DIANE STARK RENTNER, CTR. ON EDUC. POL'Y, HISTORY AND EVOLUTION OF PUBLIC EDUCATION IN THE US 2–4 (2020), https://files.eric.ed.gov/fulltext/ED606970.pdf [https://perma.cc/4DAL-TJ4X].

213 *See* KOBER & STARK RENTNER, *supra* note 212, at 4 ("The actions of local people coming together 'to run their schools, to build schoolhouses, to hire teachers, and to collect taxes' helped forge a sense of community and made people invested in their schools.") (citation omitted)).

214 *Public School Revenue Sources*, NAT'L CTR. FOR EDUC. STAT., , U.S. DEP'T OF EDUC., https://nces.ed.gov/programs/coe/indicator/cma/public-school-revenue#fn3 [https://perma.cc/3XNW-JT8P] (May 2024). The percentage of school funding generated from property taxes reaches up to ninety–eight percent in states like Connecticut and New Hampshire. *Id.*

215 *Table 2. Number of Operating Public Schools and Districts, Student Membership, Teachers, and Pupil/Teacher Ratio, by State or Jurisdiction: School Year 2020–21*, NAT'L CTR. FOR EDUC. STAT., INST. OF EDUC. SCIS., U.S. DEP'T OF EDUC., https://nces.ed.gov/ccd/tables/202021_summary_2.asp [https://perma.cc/TR23-Z6RS] (last visited May. 9, 2025); *see* Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 505 (2010). There are limited exceptions to the residency requirement. *See* Aaron Y. Tang, Note, *Privileges and Immunities, Public Education, and the Case for Public School Choice*, 79 GEO. WASH. L. REV. 1103, 1108–21 (2011).

216 Eric J. Brunner, *School Quality, School Choice, and Residential Mobility*, *in* EDUCATION, LAND, AND LOCATION 62, 63 (Gregory K. Ingram & Daphne A. Kenyon eds., 2014).

could attend public schools, one could imagine that undocumented families with school-age children may be less likely to enter states where their children do not have the opportunity to receive an education. By effectively excluding these undocumented migrants from part of the United States,[217] such a law would interfere with the cohesiveness of the federal scheme of immigration regulation.

Courts have found that the second prong is violated where the state imposes a policy which will result in the "unnecessary harassment of some aliens . . . whom federal officials determine should not be removed."[218] The *Lozano* court found that the Hazelton ordinance unnecessarily harassed noncitizens because it imposed a "distinct, unusual and extraordinary burden[] . . . upon aliens."[219] It does not require great effort to show that denying public education to certain children on account of their undocumented status is a distinct, unusual, and extraordinary burden. No other group of children in this country is denied access to free public education.[220] Furthermore, as the *Plyler* court rightly observed, there is no promise that an undocumented child will ever be deported and they enjoy an "inchoate federal permission to remain."[221] Thus, such a policy would unnecessarily harass a group of immigrants whom the federal government had not yet decided to remove, interfering with "the federal government's discretion in deciding whether and when to initiate removal proceedings."[222]

If *Plyler* were to be challenged today, its central holding that a state may not deny public education to undocumented migrant children could be sustained because such a law would be

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217 *See* Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 546 (5th Cir. 2013) (en banc) (Dennis, J., concurring).

218 Lozano v. City of Hazleton, 724 F.3d 297, 318 (3d Cir. 2013) (alteration in original) (quoting Arizona v. United States, 567 U.S. 387, 408 (2012)).

219 *Id.* (alteration in original) (quoting Hines v. Davidowitz, 312 U.S. 52, 65–66 (1941)).

220 Every state constitution provides for the creation of a public education system, *see* EMILY PARKER, EDUC. COMM'N OF THE STATES, 50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 1 (2016), https://eric.ed.gov/?id=ED564952 [https://perma.cc/99PN-Q2ZS], and nearly every state constitution contains language that provides some semblance of a right to education, *see* MOLLY A. HUNTER, EDUC. L. CTR., STATE CONSTITUTION EDUCATION CLAUSE LANGUAGE (Jan. 2011). Also, every state has a compulsory education law that *requires* children of certain ages to attend school. *See Compulsory Education Laws: 50–State Survey*, JUSTIA, https://www.justia.com/education/compulsory-education-laws-50-state-survey/ [https://perma.cc/V5DB-PQ4D] (Oct. 2023).

221 Plyler v. Doe, 457 U.S. 202, 226 (1982).

222 *Lozano*, 724 F.3d at 317.

preempted for interfering with the federal scheme of immigration regulation by impermissibly substituting the state's judgment for that of the federal government.

Conclusion

As the Court in *Plyler* recognized, "the 'American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.'"[223] Therefore, the American people should be concerned about threats to take away education from a sizeable population of children. While *Plyler* and undocumented children's right to education is safe today, its opponents, invigorated by today's conservative Court and decisions like *Dobbs* that have called into question the protection of long-recognized rights, have come forward and expressed their desire to mount a challenge to this forty-year-old precedent. Should *Plyler* be reconsidered by the Court, it should uphold the decision.

While the *Plyler* decision rests on an unstable foundation, there are alternative arguments that support its holding that undocumented children cannot be denied equal access to public education. By recognizing that undocumented migrants, like all noncitizens, are a suspect class or that education, under an original understanding of the U.S. Constitution, is a fundamental right, the Court can justify its application of heightened scrutiny to a law that attempts to deprive undocumented children of this important right. Alternatively, the Court should find that a *Plyler*-like law is preempted because it conflicts with the federal scheme of immigration regulation by impermissibly attempting to control noncitizen residency in the United States. Public education, which plays a "fundamental role in maintaining the fabric of our society" and perpetuates "the values and skills upon which our social order rests,"[224] should not, and cannot, be denied to undocumented children. *Plyler* is a precedent that must be preserved.

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223 *Plyler*, 457 U.S. at 221 (alteration in original) (quoting Meyer v. Nebraska, 262 U.S. 390, 400 (1923)).

224 *Id.*