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Access to Higher Education for Undocumented Students

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At the dawn of the twenty-first century, immigrants were coming to the United States in near record numbers, reminiscent of the great waves that engulfed its shores at the beginning of the previous century. But, there are significant differences between these waves. Most immigrants now come from Mexico and the countries of Central America, the Caribbean, and South Asia, rather than from Europe. There are also many more undocumented immigrants than ever before, now numbering around eleven million. Most of these illegals entered the United States by crossing the Mexican border with Mexico. Others entered with stolen or fraudulent visas or simply overstayed legal visas.

Most illegal immigrants live in six states: California (26 percent of the total), Texas (12 percent), Florida (10 percent), New York (8 percent), and New Jersey (4 percent). But this demographic pattern is changing as most of the recent rapid growth of undocumented immigrants has been in the Southwest, the Rocky Mountains, the Midwest, and the Southeast. Many illegal immigrants would live in the U.S. legally, but immigrant visas granted each year are very limited by statute, and the process of applying and waiting for legal status is long and drawn out. This produces a big backlog of applicants, only some of whom eventually will be approved.

Most illegal immigrants come to the United States to get better-paying jobs. Like most Americans, they pursue the American dream of a better life than they left behind. Education is the key to fulfilling this dream. A Supreme Court decision in 1982 (*Plyler* v. *Doe*) guaranteed undocumented youngsters a free public school education. But this ruling applied only to K–12. Access to postsecondary education remained severely constrained by federal laws that prevented undocumented students from receiving financial benefits to attend college. Title IV of the Higher Education Act of 1965 forbids undocumented students from receiving federal aid for postsecondary education. And, the Personal Responsibility and Work Opportunity Reconciliation

Act (PRWORA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), both enacted in 1996 on a wave of anti-immigrant sentiment sweeping the country, aimed to exclude undocumented students from receiving state or local benefits for postsecondary education.

Neither federal nor state law forbids undocumented students from attending college, but in effect many are turned away for financial reasons. And thus, the basic arguments in the *Plyler* decision should apply to higher education. Accordingly, Congress, under its plenary power to regulate immigration into this country, should repeal the restrictive clauses of PRWORA and IIRIRA and unequivocally allow states to make undocumented students eligible for in-state tuition to public colleges and universities.

The *Plyler* case involved a May 1975 law enacted by the Texas state legislature that authored local school districts to bar undocumented children (mainly from Mexico) from enrolling in public schools if they chose to do so. The alternative, chosen by the Tyler Independent School District in Smith County, was to charge these children tuition. In 1977, defense attorneys filed a class-action suit on behalf of "certain school-age children of Mexican origin residing in Smith County, Texas, who could not establish that they had been legally admitted into the United States" against the State of Texas, the Texas Education Agency, and several Texas school districts. A federal district court ruled in both 1977 and 1980 that state law violated the Equal Protection Clause of the Fourteenth Amendment. A court injunction then barred both the state and the Tyler school board from denying free public education to undocumented children. After a federal appeals court in 1981 upheld the district court rulings, the Tyler school board and school superintendent James Plyler appealed to the U.S. Supreme Court. The key constitutional questions were whether the Equal Protection Clause applied to undocumented children, and if so, whether they should receive a free public school education.

The Supreme Court, in a 5-4 decision, upheld the basic arguments of the defense lawyers, which were supported by briefs from a wide array of civil rights and political activist groups. The majority opinion, written by Justice William J. Brennan, Jr. (with Justices Harry Blackmun, John Paul Stevens, Thurgood Marshall, and Lewis F. Powell, Jr. concurring), held that denying undocumented children access to free public education "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status, [and that] the stigma of illiteracy will mark them for the rest of their lives."

More specifically, the defense argued that the children of illegal immigrants were indeed "persons" living under the jurisdiction of the State of Texas and thus under the Fourteenth Amendment were entitled to equal

access to public education; that although the right to education did not meet the test of a "fundamental right" (citing the U.S. Supreme Court decision in 1973 of *San Antonio Independent School District* v. *Rodriguez*), it was more than an ordinary right; that although "illegal aliens" were not an inherently "suspect" class entitled to strict scrutiny protection under the Equal Protection Clause, their situation merited an intermediate level of scrutiny; that denying them free public education was not justified by any "substantial state interest;" that undocumented immigrants come to the United States mainly for jobs, not public benefits; that not educating undocumented children would mean even higher future costs (for example, in terms of jobs, welfare, health care, and crime); that undocumented children were "basically indistinguishable" from legal resident alien children as regards educational cost to the state; that these children should not be punished for decisions made by their parents; that denying free education to all children would deleteriously split some immigrant families as some children would be born in Mexico and some in the United States; and that in the future many of these undocumented children would seek legal residence and/or U.S. citizenship and thus everyone, the undocumented children as well as the State of Texas, would benefit.

The *Plyler* decision was hailed by its supporters but reviled by its opponents. Supporters considered it a major victory for civil rights, equity, and pragmatism. Opponents, however, argued that the reasoning in the majority opinion was flawed as it misconstrued the original intention of the Equal Protection Clause that they claimed was supposed to prevent discrimination against freed slaves. In addition, according to Chief Justice Warren Burger, who wrote the dissent (with Justices Sandra Day O'Connor, William H. Rehnquist, and Byron White concurring), "By definition, illegal aliens have no right whatever to be here, and the state may reasonably, and constitutionally, elect not to provide them with government services at the expense of those who are lawfully in the state."

Burger also argued that the financial burden of illegal immigration on Texas was a rational consideration for its policy response; that "the Texas law might also be justified as a means of deterring unlawful immigration;" and that the issue at hand should be decided by Congress rather than the Supreme Court. On a personal level, Burger was sympathetic to the plight of undocumented children. He agreed that "it is senseless . . . to deprive any children . . . of an elementary education" and that

> it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons. . . . However, the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.'

Although remaining controversial, the *Plyler* decision cleared the air on providing free K–12 education to undocumented children. But it left open the question whether its findings could be more broadly applied to postsecondary education. In recent years, the debate over whether undocumented students have a right to a college education has come to the fore and is conjuring up many of the same arguments as the *Plyler* case. An estimated 65,000 undocumented students graduate every year from the country's secondary schools, about 37,000 of whom are Latino. Thus, the number of students in question is substantial. The simmering controversy over equal access to a college education has been more over fairness, finances, legality, and politics than on its importance in today's world. The key issue is whether undocumented students are eligible for in-state tuition to public colleges and universities. Both supporters and opponents in this debate make impassioned and meritorious arguments for their position.

The major supporting arguments for in-state tuition reflect or extend some of the same ones the majority opinion made in the *Plyler* decision: First, undocumented students should not be punished for the unlawful actions of their parents. Second, many undocumented immigrant children drop out of high school or do not take a college preparatory program because they do not believe they can afford college. Nationally, the dropout rate is highest among Latino youth. The difference between in-state and out-of-state tuition is substantial and would make a significant difference in decisions for postsecondary education. Thus many undocumented students who otherwise would enroll in college cannot afford to do so. This is damaging psychologically and emotionally to these students, as well as a terrible waste of talent and potential.

And third, for the most part, undocumented students are in this country to stay. Therefore, it is in the public interest to allow them to reach their full potential through a college education. For many students in today's world higher education is necessary for success in their career, so denying undocumented students access to college would mean life-long punishment. The alternative, as noted in the *Plyler* decision, is to create a discrete permanent underclass continuing to live with an "enduring disability." In addition, from an economic point of view, college graduates generally pay more in taxes and cost government less in criminal justice and welfare expenses than high school dropouts. Fourth, most undocumented immigrants come to this country for jobs, not education benefits. Fifth, the enrollment of undocumented students adds important diversity to the student body. And sixth, undocumented students would not necessarily take the seats of legal immigrants or legal residents or receive preference for admission based on their immigration status. Instead, they would be part of the general in-state applicant pool.

Opponents of in-state tuition for undocumented students make these main arguments, some of which echo the minority opinion in *Plyler*: First, states should not subsidize lawbreakers. Some critics even call for the deportation of undocumented students. Also, state laws that grant in-state tuition to undocumented students violate the Supremacy Clause of the U.S. Constitution, which gives Congress plenary power over immigration. In addition, states should not have to pay benefits to undocumented students when the federal government has failed in its responsibility to keep illegal immigrants out of the country. Opponents also argue that, because of the global war on terror, undocumented students pose an unacceptable security risk to the country.

Finally, large waves of immigrants coming largely from Mexico, both legal and illegal, are adversely transforming the country. Two recent books spotlight this point. In *Who Are We? The Challenges of American Identity*, Professor Samuel P. Huntington argues that this surge of heavy Latino immigration poses a threat to America's shared values, culture, and community, which serve as the basis of liberal democracy. And in *Mexifornia: A State of Becoming*, Professor Victor Davis Hanson warns that California (the state with the largest illegal immigrant population) will continue morphing into "Mexifornia"–unless this country focuses more on assimilation and more rigorously restricts the immigration flow. Finally, the intent of Congress, indicated particularly through the enactment of PRWORA and IIRIRA, is to deny undocumented students financial assistance to attend college.

There is widespread disagreement, however, over what Congress meant by these two laws. The key dispute is over Section 505 of IIRIRA, which stipulates that "an alien who is not lawfully present in the United States shall not be eligible for in-state tuition on the basis of residence within a State (or political subdivision) for any postsecondary education benefit *unless* [my italics] a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident." Differing interpretations of this stipulation have led states to adopt a wide variety of policies on the eligibility of undocumented students for in-state tuition.

Most states, believing that their policy abides by federal law, do not allow in-state tuition for undocumented students. Their position is that Congress clearly intended to make illegal immigrants ineligible for a wide array of state and local benefits, including postsecondary education. Two states, Alaska and Mississippi, have passed laws against eligibility for in-state tuition. In November 2004, Arizona voters overwhelmingly passed Proposition 200, which forbade the granting of state benefits, including in-state tuition, to undocumented immigrants. This referendum decision is reminiscent of Proposition 187, passed by California voters in 1994 but

ruled unconstitutional several years later for having violated *Plyler* v. *Doe* and the Supremacy Clause of the Constitution. Whether the Arizona law will pass constitutional muster is highly problematic.

Other states, however, interpret Section 505 of IIRIRA differently. They look, for instance, to the arguments made by Professor Michael A. Olivas, who contends that Congress does not have the authority to regulate state benefits for postsecondary education, as decided in *Toll* v. *Moreno* in 1982 (just before *Plyler*). Moreover, according to Olivas, even if Congress does have this authority, it left a loophole in Section 505. Olivas concludes that the word "unless" allows states to enact undocumented student legislation that can circumvent official state residency laws.

In accordance with the "loophole" interpretation of IIRIRA, a growing number of states have passed laws making undocumented students eligible for in-state tuition under certain specified conditions. In June 2001, Texas became the first state to enact legislation allowing in-state tuition for undocumented students. Since then, eight other states (California, Utah, New York, Illinois, Oklahoma, Washington, Kansas, and New Mexico) have passed similar legislation. Only three of these states (Texas, Oklahoma, and New Mexico) offer state financial aid to undocumented students. State laws allowing undocumented students eligibility for in-state tuition avoid official residency requirements. Instead, with some variation, they make undocumented students eligible if they have lived in the state for a certain number of years, graduated from a high school in their state, and signed an affidavit pledging to apply for permanent residency as soon as they were eligible.

One state that allows in-state tuition for undocumented students has been taken to court for violation of federal law. On July 19, 2004 a number of students with Kansas residency sued the state for denying them in-state tuition benefits (*Day* v. *Sebelius*). Their basic charge was that the Kansas law violated PRWORA and IIRIRA as well as the Equal Protection Clause of the Fourteenth Amendment. On July 5, 2005, U.S. District Court Judge Richard Rogers ruled in favor of Governor Kathleen Sebelius. Whether this decision will be upheld on appeal remains to be seen.

The Texas law broadened the debate over the eligibility of undocumented students for public education that had begun with *Plyler*. Governments must now decide whether a college education is as necessary in today's world as basic literacy was in 1982 when *Plyler* was decided. A college education is not for everyone. But those in this country with the ability and desire for higher education should have equal access to it. Then, like Adam Smith's "invisible hand," each individual would be set free to pursue his or her self-interest. This would enhance opportunities for

individual financial success and happiness and also make the United States more competitive in the global arena.

What is the likelihood that the dreams of undocumented students for postsecondary education can be realized? After the passage of PRWORA and IIRIRA, a number of federal legislators, believing these laws were not in the best interest of the country, have sought to amend or repeal them. In July 2003, Senators Orrin Hatch (R–UT) and Richard Durbin (D–IL) reintroduced the Development and Education for Alien Minors Act (DREAM Act). At about the same time, Representatives Christopher Cannon (R–UT), Lucille Roybal-Allard (D–CA), and Howard Berman (D–CA) reintroduced the Student Adjustment Act. Similar legislation in both houses was first introduced in 2001 but had failed to pass.

The main thrust of the proposed legislation is to repeal Section 505 of IIRIRA; this would clearly allow states to make their own determination on eligibility for in-state tuition. The DREAM Act would grant conditional permanent resident status for six years to undocumented students if they came to the United States before age 16; have good moral character; have no criminal record; have lived in the U.S. continuously for at least five years at the time of the law's enactment; have graduated from high school; and have been accepted at a two- or four-year college. The Student Adjustment Act has similar provisions.

The debate over the passage of federal legislation allowing in-state tuition has been joined. Supporters include a number of civil rights, labor, and political organizations, including People for the American Way, the National Council of La Raza, the American Immigration Lawyers Association (AILA), the Mexican American Legal Defense and Education Fund (MALDEF), the AFL-CIO, and the "I Have a Dream" Foundation. Leading opponents are the Center for Immigration Studies (CIS) and the Federation for Immigration Reform (FAIR), and conservative columnists like Phyllis Schafly. Mark Krikorian, executive director of CIS, offered this reason why the DREAM Act will again not pass:

> 'Let's call this what it is: [i]t's amnesty for illegal aliens.' FAIR has made a similar charge, calling the DREAM Act 'a massive illegal amnesty program, disguised as an educational initiative.' Schafly argues that U.S. taxpayers should not reward illegal immigrants by subsidizing their college tuition, 'especially when U.S. parents are struggling to pay college expenses for their own children.'

What can we conclude from the growing national debate over the eligibility of undocumented students for in-state college tuition? Although there are strong opposing arguments, the supporting arguments are more compelling for these reasons: First, causes of undocumented status vary. Most undocumented immigrants do sneak across this country's borders

from Mexico or enter with fraudulent documents, but many others come here legally and overstay their visa. Only the technicality of their legal status, which is often in the process of litigation, is keeping many undocumented students from a college education. Second, there is widespread agreement that this country's immigration system is broken. The in-state college tuition controversy reflects this nationwide problem.

And third, state policy toward eligibility of undocumented students for in-state tuition is a mess of confusion and inconsistency, reflecting disagreement over the intent and constitutionality of federal law. Fourth, many undocumented students suffer from serious psychological and emotional distress. Generally, not only can they not afford postsecondary education, but they are reluctant to disclose their undocumented status for fear of deportation or other serious consequences. All this has kept the number of undocumented students who actually enroll in public colleges and universities very low. Finally, undocumented students who are now forced to live in the shadows of society and in legal limbo comprise a large and growing untapped resource in this country. In most states, they cannot afford to enroll in public colleges and universities because they are ineligible for in-state tuition. But even where they do qualify, they face additional and formidable barriers in pursuit of the American dream. Under federal law they remain ineligible for financial assistance and cannot work legally. Moreover, under the "Real ID" act enacted by Congress in May 2005 (set to go into effect in 2008) they will be unable to obtain a driver's license. Therefore, the issue of eligibility for in-state college tuition must be considered part of a much larger problem: the necessity for broad immigration reform.

How the debate over illegal immigration plays out most likely will provide the backdrop for whatever legislation will be enacted and policies adopted, including those dealing with the issue of in-state college tuition. Congress should take the first important step by passing the DREAM Act, which would let each state determine its own policy on in-state tuition. But this would still leave important constitutional issues such as federalism and the application of the Equal Protection Clause of the Fourteenth Amendment unresolved.

Ultimately, the Supreme Court may have to rule on the controversy over in-state tuition for undocumented students. With a new chief justice and associate justice on the bench, the newly configured Court should first look for an opportunity to reconsider the *Rodriguez* decision and declare education a right. This would be more consistent with its earlier landmark decision in *Brown* v. *Board of Education* in 1954. Next, the Court should accept a case where it could extend *Plyler* to include a college education.

More realistically the Court probably will not touch *Rodriguez* and may even reverse *Plyler*. In his nomination hearings for Chief Justice, Judge John Roberts was questioned about a memorandum he wrote on the *Plyler* case

when he was a young lawyer in the Reagan administration. In this memo, Roberts indicated that the narrowly contested decision could have gone the other way had the White House urged more judicial restraint and more vigorously supported the State of Texas. In these hearings, Roberts was very careful not to reveal his personal beliefs on this case, nor did he give any indication whether he would vote to maintain or reverse *Plyler*, let alone extend its reach to postsecondary education. Thus, the country will just have to wait and see on this matter.

Ultimately, the outcome of the whole array of issues involving illegal immigration will be decided in the court of public opinion. Those who try to improve the lot of undocumented immigrants will face tough sledding as the American public in general, although somewhat supportive of legal immigration, opposes illegal immigration. Recent public opinion polls (e.g., the National Public Radio/Kaiser Foundation/Kennedy School of Government poll, "Immigration in America," September 2004) confirms this observation. Consequently, any improvements for the undocumented probably will come only over time. In a climate where so many Americans believe that undocumented immigrants compete unfairly for jobs, depress wages, receive public benefits that they do not deserve, adversely affect the country's identity, and endanger national security, the undocumented face daunting opposition. Yet, for the most part, they are here to stay. At the end of the day, the American people will realize that undocumented immigrants are a valuable national resource that should be tapped rather than rejected—for reasons of pragmatism, equity, civil rights, and humanitarianism.

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