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The Equal Protection Clause-State Statutory Restrictions on the Education of Illegal Alien Children-Proposition 187

Benjamin N. Bedrick

NOTE

The Equal Protection Clause — State Statutory Restrictions on the Education of Illegal Alien Children — Proposition 187

Section 7 of California's Proposition 187 is designed to prevent illegal alien children from attending California public schools.[1] In *Plyler v. Doe*,[2] the Supreme Court held that a similar statute, denying a free public education to illegal alien children in Texas,[3]

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1. 1994 Cal. Legis. Serv. Prop. 187 (no page numbers available) (West). Section 7 of Proposition 187 concerns elementary and secondary education. It amends California law by adding a new section 48215 to the California Education Code. CAL. EDUC. CODE § 48215 (West 1995).

Subsequent references in footnotes to section 7, including subsections, will cite to section 48215. However, to conform to the district court's practice in litigation over Proposition 187 (*see infra* note 10), the text refers to portions of Proposition 187 by their section numbers in the Proposition, rather than by their section numbers in the California Code. There are no references in the text to subsections.

Section 48215(a) requires California public elementary and secondary schools to refuse admission to: children who are not citizens; aliens not lawfully admitted as permanent residents; or persons not otherwise authorized to be in the United States.

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

3. TEX. EDUC. CODE ANN. § 21.031 (West 1995). In effect, this provision establishes a class of children who are neither citizens nor legally admitted aliens, and who are not entitled to attend school in Texas free of tuition, as are other children in the state.

The Court in *Plyler* speaks of "undocumented school-age children." *Id.* at 206. This note generally uses the term "illegal alien children." The reader should be aware that the term is not intended to precisely define the class affected in the cases discussed, but is used for convenience.

violated the Equal Protection Clause of the Fourteenth Amendment.[4] This note predicts that if the Supreme Court considers the constitutionality of Proposition 187 it will rely on *Plyler* to strike down section 7 of the Proposition. However, this note also suggests that *Plyler* applied a confusing and unnecessary standard which should be abandoned.

California has been greatly affected by illegal immigration; one estimate is that nearly half the illegal aliens in the United States are living in that state.[5] Proposition 187 was proposed as a reaction to the high cost of providing public education and other social services to large numbers of illegal aliens.[6]

Section 7 of Proposition 187 deals specifically with elementary and secondary education. It requires California school districts to verify the immigration status of children who enroll in or attend public school.[7] If a school district determines, or reasonably suspects, a violation of federal immigration laws by a child, parent, or guardian, section 7 requires that the district make a report to state and federal law enforcement authorities.[8]

Proposition 187 was enacted on November 8, 1994.[9] Soon thereafter, several suits challenging the constitutionality of Proposition 187 were filed in federal district court. Ultimately, these suits were consolidated as *League of United Latin American Citizens v. Wilson*.[10]

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4. U.S. CONST. amend. XIV, § 1.

5. United States General Accounting Office, *Illegal Aliens: Assessing Estimates of Financial Burden on California*, GAO/HEHS-95-22, Nov. 28, 1994.

6. Robert L. Jackson, *New Study on Immigration Cites High Cost*, L.A. TIMES, Sept. 23, 1994, at A3.

7. CAL. EDUC. CODE § 48215(b), (c). The school district must also verify the immigration status of each child's parent or legal guardian. *Id.* § 48215(d).

8. *Id.* § 48215(e). The district must also notify the child's parent or guardian that, if the child's legal status is not established within 90 days, the child may not attend the school. *Id.* If the child is not able to establish legal status in the United States, the school district must continue to provide education for the child during the 90 days and help with the child's transition to a school in his or her country of origin. *Id.* § 48215(f).

9. Proposition 187 was added to the ballot pursuant to California's initiative procedure, which requires a measure to be submitted to the voters when supported by a petition signed by a number of voters equal to at least five percent of the votes cast for governor in the last election. CAL. CONST. art. II, § 8. California voters passed Proposition 187 by a vote of 59 percent to 41 percent. Roberto Suro, *Two California Judges Block Anti-Immigrant Measure at the Start*, WASH. POST, Nov. 10, 1994, at A39.

10. League of United Latin American Citizens v. Wilson, No. CV 94-7569 MRP, 1995 U.S. Dist. LEXIS 17720 (C.D. Cal. Nov. 20, 1995). Among the plaintiffs in the consolidated cases were a class of people who would be questioned regarding their citizenship or immigration status, or who would be ineligible for

One of the arguments put forth by the plaintiffs in *Wilson* was that the law violated the Equal Protection Clause, which prohibits states from denying Equal Protection of the law to any persons within the jurisdiction of the state.[11] The plaintiffs also argued that federal law governing immigration preempted the states' authority to enact laws with the same effect, under the Supremacy Clause.[12]

In May 1995, plaintiffs filed a motion for summary judgment.[13] The District Court for the Central District of California, in November 1995, granted the motion in *Wilson*, and enjoined the state from enforcing section 7 of Proposition 187, finding that it is unconstitutional.[14] The district court relied on a Supremacy Clause analysis,[15] rather than an Equal Protection analysis, to find that most of the provisions of Proposition 187 conflict with federal immigration law and are therefore unconstitutional.[16] However, the court struck down section 7 of Proposition 187 specifically on Equal Protection grounds,[17] relying on *Plyler*.[18]

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public services, as part of the enforcement of Proposition 187. *Id.* at *2.

11. *Id.* at *80-84. In practice, the Equal Protection Clause prohibits a state from subjecting one class of people to legal treatment different from that received by other classes without adequate justification. *See* Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121 (1989).

12. *Wilson* at *4-5, 19.

13. *Id.* at *4.

14. *Id.* at *87. Earlier, the court granted plaintiffs' motion for a preliminary injunction prohibiting the enforcement of section 7 as well as other parts of Proposition 187. *Id.* at *4. In ruling on the motion for summary judgment, the court ordered that the preliminary injunction was to remain in effect until further order. *Id.* Thus, as of this writing, the state has never been able to enforce the portions of Proposition 187 covered by the injunction.

15. U.S. CONST. art. VI, cl. 2.

16. *Wilson* at *86-87. The Supremacy Clause "requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties." DeCanas v. Bica, 424 U.S. 351, 357 n.5 (1976).

17. *Wilson* at *41, 80-84. In discussing the unconstitutionality of section 7, the court uses the term "preemption." Elsewhere in the decision, the same term is used to describe the effect of the Supremacy Clause, under which federal law preempts conflicting state law. However, it seems clear that in striking down section 7 the court is relying primarily on an Equal Protection analysis:

> [A]n analysis of section 7 under [case law dealing with the Supremacy Clause] is not necessary to sustain the Court's ruling. . . . In light of the Supreme Court's decision in Plyler v. Doe . . . in which the Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits states from excluding undocumented alien children from public schools, section 7 in its entirety conflicts with and is therefore preempted by federal law.

Id.

18. *Id.* at *80.

Because the district court relies on an Equal Protection analysis to find section 7 unconstitutional,[19] that analysis is likely to be an issue on appeal.[20] This note therefore discusses section 7 and the Equal Protection Clause.

In order to determine whether state classifications violate the Equal Protection Clause, the Supreme Court measures those actions against three different standards. The Court decides which standard to apply in a particular case based on the nature of the right that is affected and the criteria used by the state to distinguish between classes.

If the right affected by a state action is "explicitly or implicitly guaranteed by the Constitution," it is considered to be fundamental.[21] In such cases, the Court applies a strict judicial scrutiny standard. Under this standard, state action that denies or limits a fundamental right to one class of people while not subjecting other classes to the same restriction is presumed to be unconstitutional.[22] To overcome this presumption under the strict scrutiny standard, the state must demonstrate that its action was precisely tailored to serve a compelling governmental interest.[23]

The same strict scrutiny standard applies, also resulting in a presumption of unconstitutionality, if the state classifies people based on criteria such as resident alien status, nationality, or race. Such classifications are "inherently suspect"[24] because they are "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective."[25] Again, to overcome the presumption of unconstitutionality, the state must show that its action is precisely tailored to meet a compelling interest.

If the right affected is not fundamental and none of the classes created is suspect, the Court ordinarily applies the "traditional standard."[26] This "requires only that the state's system be shown

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19. *Id.* at *40-41.

20. The press has reported that the decision will be appealed to the U.S. Court of Appeals for the Ninth Circuit, and that legal analysts believe the case will ultimately go the United States Supreme Court. William Claiborne, *Judge Strikes Some California Immigration Bans*, WASH. POST, Nov. 21, 1995, at A1.

21. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1972).

22. Graham v. Richardson, 403 U.S. 365, 375-76 (1971).

23. Plyler v. Doe, 457 U.S. 202, 216-17 (1982).

24. *Graham*, 403 U.S. at 371-72.

25. *Plyler*, 457 U.S. at 216 n.14.

26. *Rodriguez*, 411 U.S. at 40. This standard has also been referred to as the "rationality" standard. Galloway, *supra* note 11, at 124. However, this note uses the term "traditional."

to bear some rational relationship to legitimate state purposes."[27] This standard is more deferential to the state's judgment than the strict scrutiny standard.[28]

The third standard (referred to as intermediate or intensified scrutiny), applies, like the traditional standard, when the right is not fundamental and the class is not suspect. However, this third standard is invoked when "the class affected has some similarities to suspect or semi-suspect classes, . . . the right affected is very important, and the disability imposed is very severe."[29] In such cases, the Court moves closer to the strict scrutiny standard than to the traditional standard: the state must show not only a rational relationship of its action to legitimate state purposes, but also that the resulting discrimination between classes "furthers a substantial goal of the State."[30]

For example, in *Plyler*, Texas law had prohibited state funding of the education of children who were not "legally admitted" into the United States.[31] The Court concluded that education is not a fundamental right.[32] Nevertheless, it held that education is so vital to our society[33] and its denial is so great a hardship to the children affected[34] that, to justify its action, Texas should be held to a stricter standard than the traditional one. Applying this standard, the Court found that Texas' denial of education to illegal alien children was unconstitutional because it was not shown to further a substantial state goal.[35]

In deciding whether section 7 of Proposition 187 is a denial of Equal Protection, the Supreme Court will likely apply the same intermediate scrutiny standard used in *Plyler*. Based on the evidence now available and using that standard, the Court will

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27. *Rodriguez*, 411 U.S. at 40.
28. Galloway, *supra* note 11, at 124.
29. *Id.* at 158.
30. *Plyler*, 457 U.S. at 224.
31. *Id.* at 205.
32. *Id.* at 221. The Court also held that illegal aliens are not a suspect class. *Id.* at 219 n.19.
33. *Id.* at 221. The Court observes that education has a "fundamental role in maintaining the fabric of our society" and that, by denying a basic education to illegal alien children, the Texas law "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status." *Id.* at 221, 223. (The children are considered by the Court not to be accountable for their status because they presumably did not choose to be in the state, but were brought there by parents or guardians. *Id.* at 220 (relying on Trimble v. Gordon, 430 U.S. 762, 770 (1977)).
34. *Plyler*, 457 U.S. at 223.
35. *Id.* at 224.

likely conclude that the denial of public education to illegal aliens does not sufficiently further a substantial interest of the state; as a result, section 7 would be found to violate the Equal Protection Clause.

In order to find in *Wilson* that section 7 does not violate the Equal Protection Clause, the Supreme Court would have to reverse its *Plyler* decision; there is no convincing basis on which to distinguish it. The situation in both cases is essentially the same: a state seeking to deny funds for public education of illegal alien children.

In particular, differences between the state laws under consideration in *Wilson* and *Plyler* do not provide a sufficient basis for reaching a different result. The two laws used different mechanisms: Texas denied state funding for education of illegal alien children, but permitted them to attend school if they paid a fee;[36] California barred the children from state schools and required that the schools report evidence of illegal aliens to federal immigration authorities.[37] However, from the perspective of Equal Protection, these differences are superficial: both laws establish a class of illegal alien children who are denied the same access to the public schools that is granted to other children in the state.

California might argue that the requirement in section 7, mandating state cooperation in the transition of an illegal alien child to a school in the child's country of origin,[38] distinguishes section 7 from the Texas law that was struck down in *Plyler*, by assuring that children will not be penalized by the state's action.[39] However, it seems likely that few, if any, children will benefit from this provision. Illegal alien children would in all likelihood not risk deportation by enrolling in California public schools, and therefore could not benefit from transition assistance. The result would be what the *Plyler* court was concerned about, an uneducated population who may ultimately become legal residents or citizens.[40]

If the Supreme Court grants certiorari and hears *Wilson*, it is unlikely that it would reject the conclusions in *Plyler*, either that

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36. *Id.* at 206 n.2.
37. CAL. EDUC. CODE § 48215 (West 1995).
38. *Id.* § 48215(f).
39. The Court in *Plyler* found it significant that the law denied a free public education to illegal alien children who were not responsible for their illegal status (because their parents or guardians presumably brought them into the United States); it regarded this as a penalty imposed on "the basis of a legal characteristic over which children can have little control." *Plyler*, 457 U.S. at 220.
40. *Id.* at 226.

undocumented aliens are not a suspect class, or that the right to education, although not a fundamental right, is important enough to justify special treatment. Both conclusions were accepted in *Plyler* by the dissenting justices[41] as well as by the majority.[42]

Finally, public discussion to date does not support a claim that section 7 furthers a substantial interest of the state. The California legislature found that the state is suffering economic hardship from the presence of illegal aliens in the state.[43] However, similar claims by Texas of economic impact did not convince the Court in *Plyler* that the Texas law furthered a substantial state interest.[44] The Court pointed out that cost alone could not justify the exclusion of illegal aliens from state schools.[45]

For these reasons, the Court in deciding *Wilson* is likely to rely on the intermediate scrutiny standard and reach the same result as it did in *Plyler*. However, as the *Plyler* opinion illustrates, that standard is vague and difficult to apply in practice. For example, Justice Brennan makes a number of arguments about the importance of education. He points out that "[t]he inability to read and write will handicap the individual deprived of a basic education each and every day of his life."[46] These statements are difficult to dispute, but there is no explanation how they distinguish education from other non-fundamental rights. As a result, the opinion offers no guidance for those who must determine whether curtailment of a non-fundamental right should be evaluated under the intermediate scrutiny standard or the traditional standard.

Thus, if the intermediate scrutiny analysis used in *Plyler* is followed, the courts must make difficult distinctions among various rights, all of which are non-fundamental. Equal Protection challenges to some non-fundamental rights will be assessed based on the traditional standard; Equal Protection challenges to other non-fundamental rights, such as public education, will require that the higher standard of intermediate scrutiny be met.

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41. *Id.* at 244 (Burger, C.J., dissenting).
42. *Id.* at 221, 223.
43. 1994 Cal. Legis. Serv. Prop. 187, § 1 (no page numbers available) (West). One study has found evidence of a net cost to the states from the presence of illegal aliens in the schools. George J. Borjas, *Know the Flow; Economics of Immigration*, NAT'L REV., Apr. 17, 1995 (no page numbers available).
44. *Plyler*, 457 U.S. at 227. The Court also expressed some skepticism about the claim that, by making more funds available, exclusion of illegal aliens would improve the overall quality of education for those legally residing in Texas. *Id.* at 229.
45. *Id.*
46. *Id.* at 222.

The intermediate scrutiny standard should be abandoned. Limiting the standards of Equal Protection review to two, traditional and strict scrutiny, would result in a bright line test. The availability of such a test would lessen uncertainty for lawmakers, the courts, and illegal aliens alike. The choice between the two standards would then depend on a relatively simple determination whether the class is suspect or not, or the right is fundamental or not, instead of the more subjective determinations called for by *Plyler* (whether the class is similar to a suspect class, the right affected is very important, although not fundamental, or the disability imposed is very severe).[47]

In *Wilson*, if intermediate scrutiny is not used, the analysis would be straightforward, resulting in a decision that Proposition 187 is constitutional. Since the class of illegal aliens is not suspect and education is not a fundamental right,[48] the traditional test — whether the state action bears a rational relationship to legitimate state purposes — would apply. One of California's purposes is to prevent economic hardship to legal residents caused by the presence of illegal aliens.[49] California could likely convince the Court that preventing economic hardship to its citizens is a legitimate state purpose; therefore a law such as section 7, which in effect eliminates the cost to the state of educating illegal aliens, bears a rational relationship to that purpose.

The foregoing discussion suggests that the intermediate scrutiny standard is difficult to administer and that the Supreme Court has not clearly articulated when it is to be applied. That raises the question why the Court applied the intermediate scrutiny standard to the Texas statute that excluded illegal alien children from state elementary and secondary schools. The decision in *Plyler* suggests that the Court was influenced by concern about the social problem that would be created, perhaps not just for the state but for the country as a whole, if states were to deny public education to illegal alien children: the state's action would promote "the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."[50]

On the other hand, the Court's concern with the burden of uneducated aliens within the United States discounts the heavy

47. Galloway, *supra* note 11, at 158.
48. *Plyler*, 457 U.S. at 219 n.19; *see supra* text accompanying notes 41-42.
49. 1994 Cal. Legis. Serv. Prop. 187, § 1 (no page numbers available) (West 1995).
50. *Plyler*, 457 U.S. at 230.

financial burdens to the states if they cannot constitutionally exclude illegal aliens from their schools.[51] The costs associated with having uneducated illegal aliens in the population to which the Court refers in *Plyler* are potential;[52] the costs of additional children in the schools are real.

This note predicts that the Supreme Court, if it hears the challenge to section 7 of Proposition 187, will strike it down as a violation of the Equal Protection Clause. However, in doing so, the Court will likely rely on a legal standard, intermediate scrutiny, that is difficult to administer because the kinds of rights to which it applies are not clearly definable. It is important to recognize, however, that in crafting the intermediate scrutiny standard, the Court was grappling with difficult social issues: should American taxpayers bear the cost of educating children who are illegal aliens (generally because of their parents' wrongdoing, not their own), or should these children, many of whom will remain in the United States for the rest of their lives, whether legally or not, be left uneducated? No matter how the Court decides *Wilson* as a matter of law, these questions of social policy will remain.

Benjamin N. Bedrick

51. *See supra* note 5 (net cost to California in its fiscal year beginning July 1, 1994, for elementary and secondary education, Medicaid, and incarceration of illegal immigrants, is estimated at $2.35 billion; of that total, approximately $1.6 billion is spent for education).

52. *Plyler*, 457 U.S. at 230.