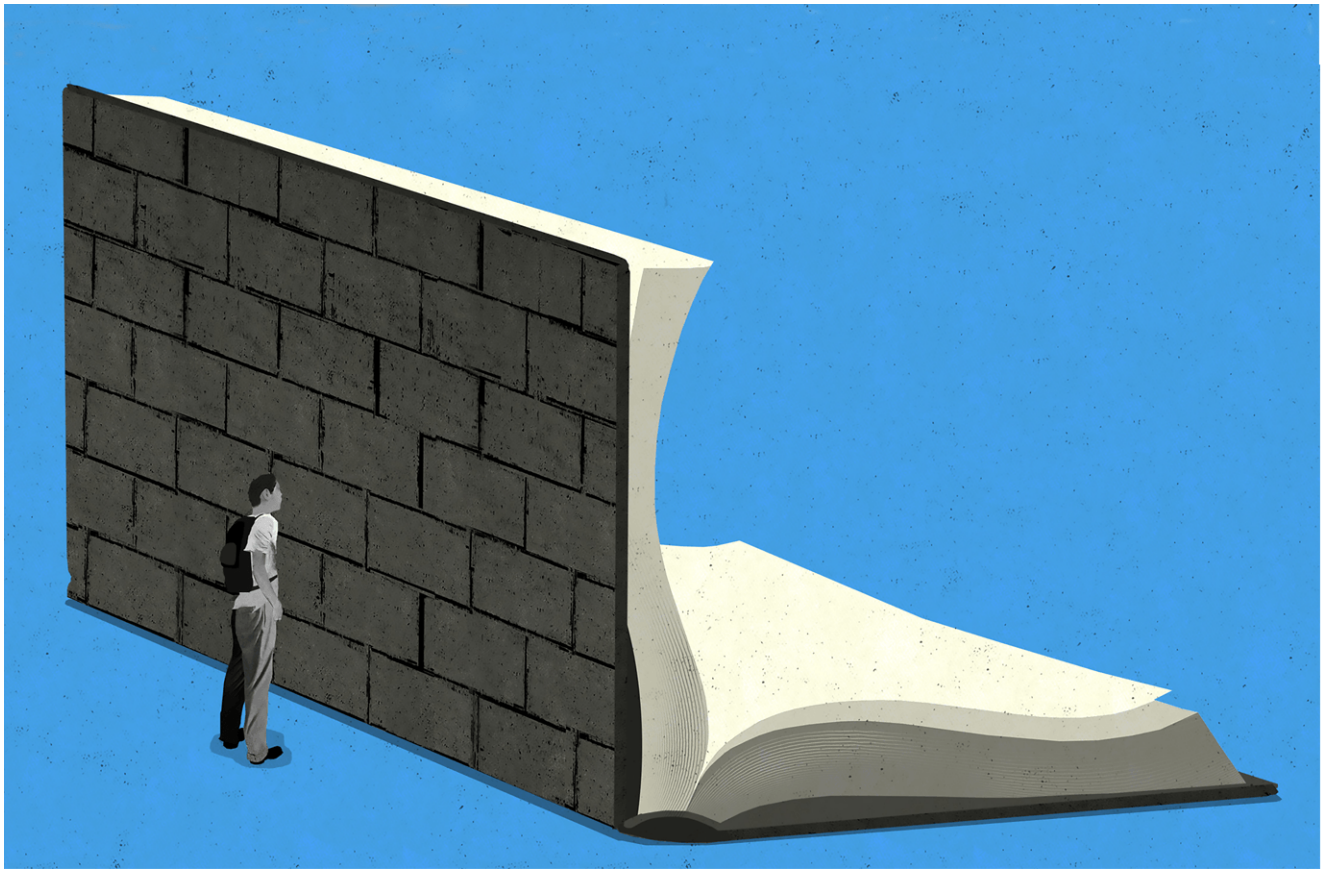
A Bad Supreme Court Decision Is Hard to Undo

As states look to challenge Plyler v. Doe *on educating children of unlawfully present parents, the court will need to confront its shaky constitutional grounds*

By Joshua Dunn



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When the Supreme Court bases a decision on policy considerations, the downstream consequences can be significant. A compelling example is 1982's *Plyler v. Doe*, when the court struck down a 1975 Texas law allowing public school districts to exclude children of foreign-born parents who were not "legally admitted" to the United States. The court's concerns were obvious. Denying access to education would harm these children, who often had no choice in the decision to come to America, which could in turn harm society.

The only problem is those concerns were not grounded in the Constitution's text or the court's own doctrine. Thus, regardless of the decision's merits as a matter of policy, it has always been difficult to defend as a matter of law. Now *Plyler* is being targeted by state legislatures, making it likely the court will have to confront the legal weaknesses of its decision four decades ago and the practical effects of overturning it.

The problems with *Plyler* begin with the court's own precedents. Nine years earlier, it had ruled in *San Antonio v. Rodriguez* that education is not a fundamental right guaranteed by the Constitution. And in *Plyler*, the court for obvious reasons refused to consider those illegally present in the United States a suspect class, a status that would require it to subject the Texas law to its most demanding level of review. With that foundation, the decision should have been straightforward. Texas's law should only have received the most lenient level of review—rational-basis review—which it could easily satisfy.

The majority in the 5–4 decision, however, refused to let constitutional text or precedent get in its way. The opinion, written by Justice William Brennan, focused on the innocence of the children in question and the burden that Texas's law would impose on them and society: "without an education, these undocumented children, 'already disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices . . . will become permanently locked into the lowest socio-economic class.'" Texas, the court said, was not justified in saying "that exclusion of undocumented children is likely to improve the overall quality of education in the State."

But the prudence of Texas's judgment should not matter. The Constitution does not prevent states from doing unwise things; it only prevents them from doing unconstitutional things. As critics, including the four dissenting justices, immediately noticed, the court had created a bespoke and textually unmoored variant of rational-basis review just to reach its desired policy outcome.

Despite the legal infirmities of the court's ruling, the policy concerns that motivated it were, and are, real. The children would be punished for the sins of the parents who decided to enter the country illegally. These children would be isolated from the rest of society and turned into permanent truants. One need not consult the oracles of social science to know that unoccupied children are a source of social disorder. And absent a coherent and enforced immigration policy, those children were likely to stay in the United States into adulthood, creating a class of uneducated and unassimilated persons.

But, despite what *Plyler's* defenders say, the policy considerations do not run only in one direction. The financial and administrative burden of educating the children of the unlawfully present are not distributed equally. Some districts—often those that are most financially and socially challenged—have disproportionate numbers of these children, who are also more likely to need English-language instruction, among other costly services. State and local governments operate under significant financial constraints. Unlike the federal government, they cannot just print money to finance programs. A dollar spent on one program means it cannot be spent on another. States, in other words, have to consider opportunity cost, which is normally considered a hallmark of rationality. Individuals who don't consider opportunity cost end up in bankruptcy.

When the federal government, including the Supreme Court, imposes mandates on state and local governments, it pretends that tough trade-offs don't exist. Absent a clear constitutional violation, decisions about spending scarce public dollars should belong to politically accountable institutions.

States, and even members of Congress, are now exploring challenges to *Plyler*. In its most recent session, the Tennessee legislature considered two such laws. One would have allowed school districts to deny enrollment or charge tuition based on immigration status, and another would have required K–12

schools and public universities to collect and report the immigration status of students to law enforcement. Neither bill passed, but they will undoubtedly resurface elsewhere if not in Tennessee. Additionally, the U.S. House Judiciary Committee held a hearing this spring on the "The Adverse Effects of *Plyler v. Doe*."

Clearly there is a growing appetite to bring a challenge to *Plyler*, and it would be foolish to believe that the court won't have to reconsider its precedent. Given the Supreme Court's current composition, it is difficult to count five votes that would find *Plyler*'s reasoning convincing, or that think policy consequences should outweigh what they see as the meaning of the Constitution. After all, they take an oath to uphold the Constitution, not precedents that they think were wrongly decided in the first instance.

But that does not mean overturning *Plyler* would lead to mass exclusion of these children from public schools. It would instead return the question to the states and potentially Congress. Some states would likely limit enrollment or charge families tuition. Many others, perhaps even most, would not do so on both policy and moral grounds. Advocates for these children would face a more difficult political landscape, since they would need to make their case in each state rather than relying on a single federal court decision.

Congress could conceivably enter the fray, but a potential federal law would face both political and constitutional hurdles. Any such action would likely not take the form of a mandate, as a majority willing to compel states to educate the children of unauthorized parents is unlikely to emerge. What's more, a mandate would have to be justified under the Commerce Clause, an argument that would also face skepticism from the Supreme Court.

Instead, Congress would need to condition a requirement to educate undocumented children on the receipt of related federal funding. One can at least imagine such a policy passing and being signed by a future president, but it would still have to be carefully drawn. The Supreme Court has said that Congress cannot make the receipt of federal funds unconstitutionally coercive. No one knows exactly where that line exists, but conditioning all federal education funding would almost certainly cross it. The funding in question would likely need to be both new and relatively small.

This returns us to the original problem with *Plyler*. Whether Texas's policy was wise or morally compelling was not a constitutional question, but the court tried to make it one. Decisions based on that kind of judicial alchemy are always at risk of being overturned. The costs that come from undoing a bad decision should be blamed not on the court that corrects it but on the court that first chose to bypass the political process. E

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