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SEARCHING FOR EQUALITY: EQUAL PROTECTION CLAUSE CHALLENGES TO BANS ON THE ADMISSION OF UNDOCUMENTED IMMIGRANT STUDENTS TO PUBLIC UNIVERSITIES

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INTRODUCTION

In 2010, Arizona attracted the nation's attention with the passage of what the state called a comprehensive immigration reform bill.¹ Other states are enacting pieces of legislation designed as "immigration reform." One focus of current state immigration reform efforts is denying or restricting the access of undocumented students to public colleges and universities. This essay will provide an overview of those state laws and analyze a possible Equal Protection Clause challenge to these laws.

I. OVERVIEW OF HIGHER EDUCATION ADMISSIONS BANS

Most of the debate over undocumented students and higher education has centered around the question of whether undocumented students should be able to pay in-state or out-of-state tuition.² In recent years, the debate has gone beyond tuition and some states have passed legislation banning all undocumented students from applying to public colleges and universities.³

* Associate Professor of Law, University of South Carolina. This Essay grew out of a presentation that was selected for the 2011 American Association of Law Schools, Education Law Section program. Thanks to the Executive Board of the Education Law section for including this paper. Special thanks to my colleague Marcia Yablon Zug who had the original idea to combine our interests in immigration and education law into an essay on Southern states that are banning access to higher education for undocumented students. Thanks to Rose Beth Grossman for her research assistance.

1. See generally Hadia Hakim, *Development in the Legislative Branch: Support for Arizona-Style Immigration Bills Spreads During Gubernatorial Elections Despite U.S. v. Arizona Ruling*, 25 GEO. IMMIGR. L.J. 237 (2010) (detailing the background of the Arizona immigration bill).

2. See, e.g., Joshua A. Boggioni, Comment, *Unofficial American—What to Do with Undocumented Students: An Argument Against Suppressing the Mind*, 40 U. TOL. L. REV. 453, 467-75 (2009) (detailing the tuition debate); Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1769-85 (2009) (examining recent legislative developments on state residency for undocumented students).

3. See Marcia Yablon-Zug & Danielle R. Holley-Walker, *Not Very Collegial: Exploring Bans on Undocumented Immigrant Admissions to State Colleges and Universities*,

A few states, such as Alabama and North Carolina, have banned undocumented students from community colleges.⁴ The North Carolina ban even became an issue in the 2008 presidential election.⁵ In 2010, the North Carolina Community College Board reversed its decision and lifted its admissions ban on undocumented students.⁶ A bill introduced in January 2011—HB 11—in the North Carolina legislature seeks to ban undocumented students from all state colleges and universities by requiring a social security number as a prerequisite for admissions.⁷

One state, Georgia, has gone in the opposite direction and banned undocumented students from state universities with selective admissions.⁸ In 2010, the Georgia Higher Education Commission began to require that the schools determine whether each applicant is a legal resident.⁹ Any applicant without legal status is prevented from attending the five universities in Georgia, including the University of Georgia, the Georgia Institute of Technology, Georgia State University, the Medical College of Georgia, and Georgia College & State University.¹⁰ Twenty-seven undocumented students attend these five colleges, and 501 undocumented students attend the thirty-five colleges in the Georgia system.¹¹

Since 2002, the Virginia Attorney General's office has advised public universities against admitting undocumented students.¹² The memorandum stated that "the Attorney General is strongly of the view that illegal and undocumented aliens should not be admitted into our public colleges and universities."¹³ The memorandum also urged university officials to report to the Immigration and Naturalization Service any "facts and circumstances that may indicate that a student on campus is not lawfully present in the

3 CHARLESTON L. REV. 421, 423-26 (2009) (providing an overview of legislation that bans undocumented students from public colleges and universities).

4. *Id.* at 424.

5. *Id.* at 431.

6. Jennifer Gonzalez, *North Carolina Community Colleges to Resume Enrolling Illegal Immigrants*, CHRON. HIGHER EDUC., Sept. 18, 2009, <http://chronicle.com/article/article-content/48518/>.

7. Christian Diaz, *Proposed Bill HB11 Seeks to Ban Undocumented Students from State Colleges*, THE ECHO, Mar. 7, 2011, <http://warren-wilson.edu/blogs/echo/2011/03/07/proposed-bill-hb11-seeks-to-ban-undocumented-students-from-state-colleges/>.

8. Sara Hebel, *Georgia Regents Ban Illegal Immigrants from Selective Public Colleges*, CHRON. HIGHER EDUC., Oct. 13, 2010, <http://chronicle.com/article/Georgia-Regents-Ban-Illegal/124903/>.

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 591 (E.D. Va. 2004).

13. *Id.* (quoting Memorandum from Commonwealth of Virginia Attorney General, *Immigration Law Compliance Update 5* (Sept. 5, 2002)).

United States.”¹⁴ Under the Attorney General’s opinion, each Virginia public college and university crafts its own policy for the admission of undocumented students.¹⁵ In 2011, a bill was introduced to the Virginia House of Delegates that would ban undocumented students from all Virginia public colleges and universities.¹⁶

In 2008, the South Carolina legislature banned all undocumented students from being admitted to public colleges and universities.¹⁷ Legislators that supported the bill claimed that they did not want taxpayer money going to support undocumented students, even though undocumented students pay out-of-state tuition.¹⁸ Legislators also argued that undocumented students may also take the spots of legal residents.¹⁹

The reasoning given by South Carolina legislators is similar to ideology that has driven the other bans. One of the dominant reasons for these bans is the preservation of scarce resources.²⁰ Other states see these bans as part of broader immigration reform.²¹ One state legislator claimed that restricting access to higher education was a method of encouraging undocumented immigrants to “self-deport” from the state.²²

II. CONSTITUTIONAL CHALLENGES TO ADMISSION BANS

The bans on admitting undocumented students to public colleges and universities will likely face significant legal challenges. In *Equal Access Education v. Merten*, a group of plaintiffs challenged the Virginia Attorney General’s opinion that public universities should not admit undocumented students.²³ The plaintiffs were two individuals and an organization.²⁴ The plaintiff organization, Equal Access Education, included in its mission statement the goal to attain post-secondary education for all high school

14. *Id.* (quoting Memorandum from Commonwealth of Virginia Attorney General, *Immigration Law Compliance Update 5* (Sept. 5, 2002)).

15. *Id.* (quoting Memorandum from Commonwealth of Virginia Attorney General, *Immigration Law Compliance Update 5* (Sept. 5, 2002)); see also *Target of Virginia Immigrant Bills Includes Undocumented Students*, DIVERSE: ISSUES IN HIGHER EDUC. (Feb. 9, 2011), <http://diverseeducation.com/article/14738/> [hereinafter *Target*].

16. *Target*, *supra* note 15.

17. See Jill Coley, *Colleges Ban Illegal Immigrants*, THE POST & COURIER, Feb. 15, 2009, http://www.postandcourier.com/news/2009/feb/15/colleges_ban_illegal_immigrant71793/.

18. *Id.*

19. *Id.*

20. See Kerry Brian Melear, *Undocumented Immigrant Access to Public Higher Education: The Virginia Response*, 194 WEST’S EDUC. L. REP. 27, 38-39 (2005).

21. *Target*, *supra* note 15.

22. Robert Morris, *S.C. Bill May Block College for Illegal Immigrants*, MYRTLE BEACH SUN NEWS, Apr. 6, 2008, at A1 (statement of State Rep. Thad Viers).

23. 305 F. Supp. 2d 585 (E.D. Va. 2004).

24. *Id.* at 592.

students, regardless of immigration status.²⁵ The members of the organization included Virginia high school and community college students who are not United States citizens or permanent legal residents.²⁶ The two individual plaintiffs, Brian Marroquin and Freddy Vasquez, were both Virginia high school students who had applied for admission to various Virginia colleges.²⁷ Neither of the plaintiffs were United States citizens or permanent legal residents.²⁸

The plaintiffs argued that the Attorney General's memorandum violated various portions of the United States Constitution, including the Supremacy Clause, the Foreign Commerce Clause, and the Due Process Clause of the Fourteenth Amendment.²⁹ The plaintiffs argued that the admission policies at the Virginia colleges impermissibly regulate immigration, conflict with existing federal immigration law, and that immigration law is exclusively within the authority of the United States Congress.³⁰ The plaintiffs further alleged that the enforcement or threat of enforcement of the admissions policies violated the Due Process Clause by preventing the plaintiffs from applying to various colleges.³¹

The district court granted the defendants' motion to dismiss all of the plaintiffs' causes of action. The district court held that the admissions policies did not violate the Supremacy Clause.³² The Supremacy Clause of the U.S. Constitution states that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.³³

The district court examined federal immigration law, including the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), and determined that federal immigration law focuses on classifying individuals as aliens and whether aliens are eligible for public benefits such as tuition assistance.³⁴ The district court concluded that Supreme Court precedent "makes clear that the Supremacy Clause does not bar defendants from adopting and enforcing admissions

25. *Id.*

26. *Id.*

27. *Id.* at 592-93.

28. *Id.*

29. *Id.* at 594.

30. *Id.*

31. *Id.*

32. *Id.* at 608.

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

34. *Merten*, 305 F. Supp. 2d at 607-08.

policies that deny admission to illegal aliens, provided that defendants use federal immigration status standards to identify which applicants are illegal aliens.”³⁵

The district court also rejected the plaintiffs’ argument under the Foreign Commerce Clause. Article I, § 8 of the United States Constitution states that Congress has the power “to regulate commerce among the states and with foreign nations.”³⁶ The plaintiffs argued that denying them admission to college prevented them from obtaining higher incomes and remitting portions of that income back to their home nations, thus interfering with foreign commerce.³⁷ The district court found that “it is clear that defendants’ alleged admissions policies are by no stretch of the imagination a regulation of foreign commerce and furthermore do not discriminate against foreign commerce.”³⁸

The district court also dismissed the plaintiffs’ Due Process claims. The plaintiffs argued that they had a protected property interest in receiving a public education at Virginia’s community colleges and a property interest in receiving an impartial admissions decision based on constitutionally permissible criteria.³⁹ The district court found that the plaintiffs had no claim of entitlement to admission to the community colleges and no entitlement for the colleges to use admissions procedures that do not consider immigration status.⁴⁰

As *Merten* is only a district court opinion, it isn’t binding on other district courts. One of the lingering questions of *Merten* is why there was no Equal Protection claim. There is no indication in the plaintiffs’ pleadings and briefs as to why they did not challenge the Virginia admissions policies on Equal Protection grounds.⁴¹ The answer may lie in the fact that higher education is not a fundamental right and immigration status is not a protected class under the Equal Protection Clause.⁴² This means that the bans will be subject to rational basis review—does the classification at issue bear some fair relationship to a legitimate public purpose?

Despite these obstacles, I believe *Plyler v. Doe*⁴³ provides a viable avenue to meaningfully challenge state bans on admitting undocumented

35. *Id.* at 608.

36. *Id.* at 609.

37. *Id.*

38. *Id.* at 609-10.

39. *Id.* at 611.

40. *Id.* at 613-14.

41. See, e.g., Plaintiffs’ Reply to Defendants’ Opposition to Plaintiffs’ Motion for Summary Judgment, *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585 (E.D. Va. 2004) (No. 03-1113-A), 2004 WL 3756550.

42. *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (“Undocumented aliens cannot be treated as a suspect class . . . Nor is education a fundamental right.”).

43. 457 U.S. 202 (1982).

students to public colleges and universities. In *Plyler*, the Supreme Court struck down a Texas statute that banned undocumented school children from receiving public education.⁴⁴ The Court concluded that “the illegal aliens who are plaintiffs in these cases may claim the benefit of the Fourteenth Amendment’s guarantee of equal protection.”⁴⁵ Based on this finding—that the Equal Protection Clause applies to individuals who do not have legal immigration status—many constitutional law scholars consider *Plyler* to be the high-water mark for the Supreme Court’s protection of Latino rights.

Is *Plyler* applicable in seeking to overturn bans on undocumented students’ admission to public colleges? There are several important similarities between the facts and reasoning of *Plyler* and the current bans on admission to higher education. First, the reasoning given by the state of Texas in *Plyler* is similar to the reasoning given by the states that currently ban higher education admissions. In *Plyler*, the Texas legislation refused state money to reimburse local school districts for the education of any child not legally admitted to the United States.⁴⁶ The state claimed that the law was justified by the need to stop an influx of illegal immigrants into the state and to protect the state from a drain on its financial resources.⁴⁷ As detailed in Part I, states such as South Carolina have used similar reasoning to support the bans on admitting undocumented students to colleges.⁴⁸

In finding that the Texas law violated the Equal Protection Clause, Justice Brennan and the majority focused on several factors: (1) the fact that the ban applied to minor children; (2) the importance of public education; and (3) foreclosing education prevents a group that has been subject to historic discrimination from improving its group standing in society.⁴⁹ In *Plyler*, Justice Brennan emphasized that the Texas law targeted children:

Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. . . . [T]he children who are plaintiffs in these cases “can affect neither their parents’ conduct nor their own status.”⁵⁰

The students who are seeking admission to public colleges and universities are similarly situated. For example, in *Merten*, both individual plaintiffs were brought to the United States when they were minor children.⁵¹ These

44. *Id.* at 230.

45. *Id.* at 215.

46. *Id.* at 205.

47. *Id.* at 207-10.

48. *See supra* notes 17-22 and accompanying text.

49. *Plyler*, 457 U.S. at 219-22.

50. *Id.* at 219-20 (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

51. *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 592-93 (E.D. Va. 2004).

students did not have the ability to control their immigration status or entry into the United States.

In *Plyler*, Justice Brennan also explained that although education is not considered a fundamental right, providing public education is one of the most important duties performed by the government:

[Public education] is [not] merely some governmental “benefit” indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The “American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.”⁵²

Some may point out that an important distinction between *Plyler* and the bans on university admissions is that *Plyler* dealt with K-12 education. There are compulsory attendance laws for secondary and elementary education, and all fifty state constitutions have education clauses that guarantee students a basic elementary and secondary education.⁵³ In the years since *Plyler*, however, the Supreme Court has emphasized the importance of states providing college and graduate education. In one of the Michigan higher education cases involving race-conscious admissions policies, the Supreme Court explained that:

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to “sustaining our political and cultural heritage” with a fundamental role in maintaining the fabric of society. This Court has long recognized that “education . . . is the very foundation of good citizenship.” For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.⁵⁴

In *Grutter v. Bollinger*, the Supreme Court acknowledged that higher education plays a pivotal role in society and is an important government task.⁵⁵

In *Plyler*, Justice Brennan also highlighted the importance of providing public education to historically disadvantaged groups:

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an edu-

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

53. See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 166-73 (1995).

54. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (alteration in original) (citations omitted).

55. *Id.*

cation, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.⁵⁶

As to the current higher education bans, they are being targeted toward undocumented students from Latino backgrounds. As the plaintiffs argued in *Merten*, the higher education ban policies may be seen as an obstacle to the upward mobility of Latinos and their ability to advance economically in American society.⁵⁷

CONCLUSION

State legislation focused on immigration reform appears to be at just the beginning of its popularity. Restricting college admission for undocumented students will likely be a focus of many of these bills. Developing a federal Constitutional argument to protect individual rights and promote equality should be a focus of future litigation in this area.

56. *Plyler*, 457 U.S. at 221-22.

57. *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 609 (E.D. Va. 2004).