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Preschool for All: Plyler V. Doe in The Context of Early Childhood Education

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ABSTRACT

In its 1982 opinion in Plyler v. Doe, the Supreme Court held that a state could not deny undocumented children living within its borders a public and free K-12 education. This Note argues that Plyler's protections extend to publicly-funded early childhood education programs that serve children between the ages of three and five. Due to the broad support of researchers, educators, and the general public, early childhood education programs funded by local, state, and the federal governments have become an integral part of a comprehensive public education today. While these early childhood education programs are nominally open to all students who meet program-specific age, income, and geographic residency requirements, undocumented children and children of undocumented parents face a variety of indirect and direct barriers to entry that range from onerous and arbitrary identification requirements to attempted outright bans on enrollment based on immigration status. Taking a prophylactic approach, this Note details how denying access to public early childhood education programs to these young children contradicts the spirit and central holding of Plyler. In this era of judicial restraint and heightened xenophobia, the enduring precedent of Plyler offers an avenue for families, policymakers, and advocates to ensure that all children, regardless of their immigration status, can receive a comprehensive public education that includes early childhood education.

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> "The expedience of this state's policy may have been influenced by two actualities: children of illegal aliens had never been explicitly afforded any judicial protection, and little political uproar was likely to be raised in their behalf."—*Doe v. Plyler*[1]

INTRODUCTION

After the Supreme Court's 1982 ruling in *Plyler v. Doe*, undocumented students were finally permitted to attend public primary and secondary schools.[2] In the case, the Supreme Court invalidated a Texas statute that empowered school districts to deny admission to undocumented students under the Equal Protection Clause of the Fourteenth Amendment.[3] By doing so, the Supreme Court ensured that an entire cohort of children would not be deprived of basic literacy and a public school education.[4]

In consideration of the Supreme Court's ruling, this Note asserts that *Plyler's* protections also extend to publicly funded *early* childhood education programs that serve children between the ages of three and five.[5] Today, early childhood education is an integral component of a comprehensive public education, and as such, public early childhood education falls within the gambit of *Plyler's* protection.[6] The federal government as well as many states and municipalities offer their own forms of public early childhood education programs[7] that are nominally open to all students who meet the respective age, income, and geographic state residency requirements.[8] Enrolling in these programs can be incredibly beneficial for young children—social scientists have demonstrated that early childhood education has positive effects on cognitive development, school readiness,[9] and academic achievement.[10] However, not all children stand to benefit from these public programs. Undocumented children and children of undocumented parents face a variety of

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[1] Doe v. Plyler, 458 F. Supp. 569, 589 (E.D. Tex. 1978).
[2] 457 U.S. 202 (1982). This Note uses the terms "primary and secondary" to refer to kindergarten to twelfth grade. *See generally* MICHAEL OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN (2012).
[3] Doe v. Plyler, 458 F. Supp. at 569; U.S. CONST. amend. XIV, § 1.
[4] *See* Plyler v. Doe, 457 U.S. at 202.
[5] This paper uses the terms "preschool," "pre-K," and "early education programs" interchangeably, following popular parlance. While programs can vary significantly between jurisdiction, these programs are generally voluntary, free, public, and intended for students between the ages of three and four.
[6] *See infra* Part III.
[7] CHRISTINE JOHNSON-STAUB, EQUITY STARTS EARLY: ADDRESSING RACIAL INEQUITIES IN CHILD CARE AND EARLY EDUCATION POLICY 4 (Dec. 2017), https://www.clasp.org/sites/default/files/publications/2017/12/2017_EquityStartsEarly_0.pdf.
[8] State and federal programs vary on the age thresholds. *See generally State of Preschool Yearbook: 2018*, NAT'L INST. FOR EARLY EDUC. RESEARCH (2018), http://nieer.org/state-preschool-yearbooks/2018-2.
[9] The U.S. Department of Education identifies five "domains" of school readiness: language and literacy development, cognition and general knowledge, approaches to learning, physical well-being and motor development, and social and emotional development. *See Race To the Top – Early Learning Challenge Program: Definitions*, U.S. DEP'T OF EDUC., https://www.ed.gov/early-learning/elc-draft-summary/definitions. *See also* Kevin Woodson, *Why Kindergarten Is Too Late: The Need for Early Childhood Remedies in School Finance Litigation*, 70 ARK. L. REV. 87, 97 (2017).
[10] *See* Julia Isaacs, *Impacts of Early Childhood Programs*, BROOKINGS INST. 4–6 (2008), https://www.brookings.edu/wp-content/uploads/2016/06/09_early_programs_isaacs.pdf.

barriers to enrollment that keep these short- and long-term benefits of early childhood education out of their reach.[11]

Some of these public state and local programs ask parents to provide social security numbers and state-issued birth certificates when trying to enroll their, while others have attempted to prohibit undocumented children altogether on the basis of their immigration status.[12] Pervasive and deep-seeded hostility towards immigrants, the threats of adverse immigration action associated with the receipt of public benefits, reports of Immigration and Customs Enforcement (ICE) activity around preschools, and uncertainty about the scope of immigrant rights all deter undocumented parents from enrolling their children in these public early childhood education programs.[13]

The enduring precedent of *Plyler* offers important protection for the millions of undocumented families living in the United States today. It provides an important avenue for challenging these enrollment barriers that uniquely impact undocumented children and children of undocumented parents. It enables courts to protect the ability of these children to avail themselves to a comprehensive public education—an education that includes *early* education. While the Supreme Court was silent on the question of whether undocumented children would be able to attend public early childhood education programs, its silence merely reflects the relative paucity of these programs in 1982, when it issued its opinion in the *Plyler* case.[14] Moreover, *Plyler* allows the courts to circumvent the more constitutionally difficult and controversial issues of recognizing a substantive "right to education" or interfering with immigration reform efforts.

Part I of this Note outlines the growth and embrace of public early childhood education by federal, state, and local governments and describes the barriers to entry that face undocumented children today. Part II lays the foundation for the Supreme Court's ruling in *Plyler* and explains how the case remains relevant and potentially powerful in future litigation. Part III argues that denying access to public early childhood education, either directly or indirectly, to these young children contradicts the spirit and central holding of *Plyler*. Taking a prophylactic approach, Part IV describes how advocates, parents, and policymakers may use the broader interpretation of *Plyler* articulated in this Note to challenge and prevent future attempts to bar children from accessing public early education programs solely because of their immigration status.

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[11] *See* Julia Gelatt et al., *Supporting Immigrant Families' Access to Prekindergarten*, URB. INST.ITUTE, 16–17 (2014), https://www.urban.org/sites/default/files/publication/22286/413026-Supporting-Immigrant-Families-Access-to-Prekindergarten.PDF.

[12] *Id.* Christina Samuels, *Indiana's Pre-K Pilot Caught Up in Immigration Debate*, EDUC. WK. (Sept. 8, 2015), https://www.edweek.org/ew/articles/2015/09/09/indianas-pre-k-pilot-caught-up-in-immigration.html?print=1. *See also* Wendy Cervantes et al., CTR. FOR LAW. & SOC. POLICY, *Our Children's Fear: Immigration Policy's Effects on Young Children* 13 (2018), https://www.clasp.org/sites/default/files/publications/2018/03/2018_ourchildrensfears.pdf.

[13] *See* JOHN W. BORKOWSKI, NAT'L SCH. BDS. ASS'N & NAT'L EDUC. ASS'N, LEGAL ISSUES FOR SCHOOL DISTRICTS RELATED TO THE EDUCATION OF UNDOCUMENTED CHILDREN 11 (Lisa E. Soronen ed., 2009), https://cdn-files.nsba.org/s3fs-public/reports/Undocumented-Children.pdf?z7FPI9ZVydzCAmZq1GgB_mDWu9Z.jIvX.

[14] *See generally* Plyler v. Doe, 457 U.S. 202 (1982).

I. THE PROMISE OF EARLY CHILDHOOD EDUCATION

A. History of Public Early Childhood Education

Since the 1960s, educators, policymakers, and the general public have increasingly embraced and invested in public early childhood education in the United States.[15]

The federal government was first to develop public early childhood education programming in the United States when, in 1965, President Lyndon B. Johnson launched the federal Head Start Program ("Head Start") within his "War on Poverty" to "help break the cycle of poverty by providing preschool children of low-income families with a comprehensive program to meet their emotional, social, health, nutritional, and psychological needs."[16] The initial motivation for public investments in early childhood education through Head Start centered on closing racial and economic achievement gaps as well as breaking the cycle of entrenched poverty in the country.[17]

These early investments in public early childhood education were partially a result of the rising need for childcare outside the home after World War II. The war brought about a widespread entry of women into the formal labor force outside the home.[18] Before this shift in the household structure, albeit a generalization, one parent typically functioned as a wage-earner while the other provided childcare and early education inside the home.[19] As more households began to have two wage-earning parents, the need for childcare and early childhood education outside of the home grew. While some families, both then and now, rely on familial or other social networks or are able to pay for private early childhood

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[15] Between 2003 and 2015, state governments increased investments in early education programs by more than 200 percent. DEP'T OF EDUC., A MATTER OF EQUITY: PRESCHOOL IN AMERICA 5 (2015), https://www2.ed.gov/documents/early-learning/matter-equity-preschool-america.pdf. *See generally* Sonya Michel, *The History of Child Care in the U.S.*, VCU LIBR. SOC. WELFARE HIST. PROJECT, https://socialwelfare.library.vcu.edu/programs/child-care-the-american-history/.

[16] From its inception, Head Start has served three and four-year-old students. GA. DEP'T OF EARLY CARE & LEARNING, *History of Head Start*, http://www.decal.ga.gov/HeadStart/History.aspx (last visited July 10, 2019). *See also* COMPTROLLER GEN. OF THE U.S., PROJECT HEAD START: ACHIEVEMENTS AND PROBLEMS 2 (1975), https://www.gao.gov/assets/120/115310.pdf [hereinafter PROJECT HEAD START REPORT]; EDWARD ZIGLER ET AL., A VISION FOR UNIVERSAL PRESCHOOL EDUCATION 2–5 (2006)

[17] *See* BARBARA BEATTY, PRESCHOOL EDUCATION IN AMERICA: THE CULTURE OF YOUNG CHILDREN FROM THE COLONIAL ERA TO THE PRESENT 52–132 (1995).

[18] Craig T. Ramey & Sharon Landesman Ramey, *Reframing Early Childhood Education: A Means to Public Understanding and Support*, *in* THE CURRENT STATE OF SCIENTIFIC KNOWLEDGE ON PRE-KINDERGARTEN EFFECTS 93 (Deborah A. Phillips et al. eds., 2017), https://www.brookings.edu/wp-content/uploads/2017/04/duke_prekstudy_final_4-4-17_hires.pdf; James E. Ryan, *A Constitutional Right to Preschool*, 94 CALIF. L. REV. 49, 51 (2006); U.S. CENSUS BUREAU, 2012–2016 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES: TABLE S2301 (2018), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_5YR_S2301&prodType=table (last accessed Nov. 2019) (In 2018, 72.2 percent of women between the ages of 20 and 64 participated in the labor force).

[19] *See* EMILY D. CAHAN, PAST CARING: A HISTORY OF U.S. PRESCHOOL CARE AND EDUCATION FOR THE POOR, 1820–1965, 30–32 (1989), https://www.researchconnections.org/childcare/resources/2088/pdf. The percentage of women working for pay has steadily increased; in 2017, 69.6 percent of married mothers worked for pay. U.S. CENSUS BUREAU, *Table F-14. Work Experience of Husband and Wife–All Married-Couple Families, by Presence of Children Under 18 Years Old and Median and Mean Income: 1976 to 2017*, http://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-families.html (last accessed Sept. 2019).

education or childcare,[20] these options are neither practicable nor affordable for a large share of American families, and particularly for low-income families.[21] This is where Head Start fits in. In 2019, "Head Start provides grants to local public and private non-profit and for-profit agencies to provide comprehensive child development services to economically disadvantaged children and families, with a special focus on helping preschoolers develop the skills they need to be successful in school."[22] The program enrolled almost one million students in 2017[23] and provided services to approximately eight percent of children ages three to five[24] through a summer school program as well as through programming during the school year.[25] Congress added the Migrant and Seasonal Head Start program in 1969 to serve children of migrant farm workers and Early Head Start in 1994 to serve children under the age of three.[26]

Unlike in the case of K-12 education, where the impetus for publicly funded education came from state governments, the federal government drove the push for public early childhood education,[27] partially due to a consensus amongst researchers that investments in early childhood education are worthwhile.[28] Social science evidence indicates that early childhood education critically influences a student's school readiness.[29] School readiness skills, such as self-regulation, can predict longer-term academic achievement in reading and math.[30] Students who receive a high-quality education prior to entering Kindergarten are also more likely to experience tremendous gains in cognitive development, which refers to the ability to build working memories, and cognitive

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[20] U.S. DEP'T OF EDUC., A MATTER OF EQUITY: PRESCHOOL IN AMERICA 1 (Apr. 2015), https://www2.ed.gov/documents/early-learning/matter-equity-preschool-america.pdf.

[21] *See* Press Release, Rafael Medina, CTR. FOR AM. PROGRESS, New Interactive Reveals the True Cost of Quality Early Childhood in Each U.S. State (Feb. 14, 2018), https://www.americanprogress.org/press/release/2018/02/14/446590/release-new-interactive-reveals-true-cost-quality-early-childhood-education-u-s-state/ (follow interactive "Where Does Your Child Care Dollar Go?" hyperlink; then select "Illinois" for state field and select "Preschool" for child's age field) (estimating that the monthly cost of high-quality preschool in Illinois is around $822 a month in 2018).

[22] Head Start Program, 75 Fed. Reg. 57,704, 57,704 (proposed Sept. 22, 2010) (to be codified at 45 C.F.R. pt. 1307) *available at* https://www.federalregister.gov/documents/2010/09/22/2010-23583/head-start-program. *See also* Sheila B. Kamerman & Shirley Gatenio-Gabel, *Early Childhood Education and Care in the United States: An Overview of the Current Policy Picture*, 1 INT'L J. CHILD CARE & EDUC. POL'Y 23, 31 (2007), https://link.springer.com/article/10.1007/2288-6729-1-1-23.

[23] Kamerman & Gatenio-Gabel, *supra* note 22, at 31.

[24] *Id*.

[25] DEP'T HEALTH & HUMAN SERVS., *Head Start Federal Funding and Funded Enrollment History* (2017), https://eclkc.ohs.acf.hhs.gov/sites/default/files/pdf/hs-federal-funding-enrollment-history.pdf.

[26] HEAD START TIMELINE, https://eclkc.ohs.acf.hhs.gov/about-us/article/head-start-timeline (last updated Feb. 16, 2019).

[27] Kamerman & Gatenio-Gabel, *supra* note 22, at 2.

[28] PROJECT HEAD START REPORT, *supra* note 16, at *i* (there is a "consensus . . . that Head Start participants are better prepared to enter local schools than their disadvantaged, non-participating peers."). However, studies showed that the educational gains children experienced after participating in Head Start programming waned after they transitioned to elementary school, raising prospects that continued investments in early and primary education might offset such losses. *Id*. at 5 (asserting that "[the] loss of early gains may be attributable to intervening factors over which Head Start has no control").

[29] *See* Woodson, *supra* note 9, at 97 (showing that school readiness encompasses various non-academic qualities such as social and emotional development, physical well-being, and language development).

[30] *Id*. at 103.

flexibility.[31] Quality early childhood education programs can also nurture childhood development, working against any adverse childhood experiences that children may experience in their first years of life.[32] Furthermore, the research shows that at least in the short-term, high quality early childhood education closes disparities in academic performance and reduces socioeconomic and racial disparities in literacy and learning.[33]

The benefits associated with early childhood education are particularly salient for children of immigrants and English-language learners.[34] Participation in early childhood education programs eases integration for children of immigrants and can help these children gain English language skills at a critical age.[35] Finally, a copious amount of

[31] *See* Adele Diamond et al., *Preschool Program Improves Cognitive Control*, 318 SCI. 1387, 1387 (2007) (referring to a set of non-academic skills that are "more strongly associated with school readiness than are intelligence quotient (IQ) or entry-level reading or math skills."); Rhoshel K. Lenroot & Jay N. Giedd, *Brain Development in Children and Adolescents: Insights from Anatomical Magnetic Resonance Imaging*, 30 NEUROSCIENCE & BIO-BEHAVIORAL REV. 718, 720 (2006) (showing that by age five, the human brain grows to ninety percent of its adult weight). *See generally* Deborah A. Phillips et al., *The Current State of Scientific Knowledge on Pre-Kindergarten Effects*, BROOKINGS INST. 19 (2017).

[32] *See* Deborah A. Phillips et al., *Puzzling It Out: The Current State of Scientific Knowledge on Pre-Kindergarten Effects*, *in* THE CURRENT STATE OF SCIENTIFIC KNOWLEDGE ON PRE-KINDERGARTEN EFFECTS, *supra* note 31, at 25–27; *see also* DEP'T OF HEALTH & HUMAN SERVS., ASPE RESEARCH BRIEF: THE SHORT- AND LONG-TERM IMPACTS OF LARGE PUBLIC EARLY CARE AND EDUCATION PROGRAMS 1–2 (2014), https://aspe.hhs.gov/system/files/pdf/180301/rb_longTermImpact.pdf.

[33] Mark Lipsey et al., *Evaluation of the Tennessee Voluntary Prekindergarten Program: End of Pre-K Results from the Randomized Control Design (Research Report)*, VAND. U. PEABODY RES. INST. 10 (2013) (showing that students who participated in Tennessee's pre-K program scored approximately one-third of a standard deviation higher on cognitive tests than students who did not enroll). *See* Jens Ludwig & Deborah A. Phillips, *Long-term Effects of Head Start on Low-income Children*, 1136 ANN. N.Y. ACAD. SCI., 257, 268 (2008); Allison Friedman-Krauss et al., *How Much Can High-Quality Universal Pre-K Reduce Achievement Gaps?*, CTR. FOR AMER. PROGRESS (Apr. 5, 2016, 9:00 AM), https://www.americanprogress.org/issues/early-childhood/reports/2016/04/05/132750/how-much-can-high-quality-universal-pre-k-reduce-achievement-gaps/; *see also* William T. Gormley, Jr. & Ted Gayer, *Promoting School Readiness in Oklahoma: An Evaluation of Tulsa's Pre-K Program*, 40 J. HUM. RESOURCES 533 (2005) (A study on Tulsa, Oklahoma's universal prekindergarten program showed improvements in reading, writing and math skills that accrued in a matter of a few months).

[34] *See* Gellatt et al., *supra* note 11, at 8 (a quasi-experimental evaluation of Oklahoma's prekindergarten program found that gains in math skills were larger for children with parents born in Mexico and for children where Spanish is the primary language spoken at home than for children whose parents were born in the United States. Evidence from Georgia's prekindergarten program shows that children with lower English proficiency had larger increases in language, literacy, and math test scores, whether measured in Spanish or in English, and that children with lower English proficiency made greater gains in measured general knowledge than did other students. Finally, in Nebraska, English Language Learners in prekindergarten showed a larger increase in knowledge and skills between the fall and the spring than did other children).

[35] *See* Phillips et al., *supra* note 31, at 22 ("Research to date finds that pre-k enrollment can enable these children to make progress in English language proficiency and in their academic skills, each of which likely supports growth in the other. As a result, DLLs can experience especially rapid growth in early learning when exposed to supportive and rich learning opportunities in pre-k."). Findings on the longer-term benefits of early childhood education are more varied. Phillips et al. write that "the available evidence about the long-term effects of state pre-k programs offers some promising potential but is not yet sufficient to support confident overall and general conclusions about long-term effects." *Id.* at 47.

research indicates that investments in early childhood education can be valuable for long-term macroeconomic goals in addition to these other more individualized benefits.[36]

In part due to the strength of this collection of research, state and local actors began to play a larger role in funding public early childhood education programs. Currently, forty-three states offer some form of early childhood education, and numerous cities have begun to offer their own versions as well.[37] In five states and the District of Columbia, more than seventy percent of four year old children enrolled in public early childhood education programs during the 2016-2017 school year.[38] The District of Columbia enrolled eighty-eight percent of four year olds, Florida enrolled seventy-seven percent of four year olds, and Vermont enrolled seventy-five percent of four year olds during the 2016-2017 school year.[39] In 2017, as a whole, state programs served approximately five percent of three year olds and thirty-three percent of four year old children who were enrolled in public early childhood education programs.[40]

Many states and municipalities have followed the federal model and target children based on a variety of factors including income, parental education, and English as a second language.[41] State and local programs vary on whether they are open to three year olds in addition to four year olds, whether they offer full-day or part-day programming, and whether they are run directly by the government or by contracted providers.[42] Because there are no mandates dictating the quality or scope of these programs from the federal government, apart from Head Start, states and municipalities vary on how much they expend per pupil.[43] Nevertheless, some states like Oklahoma, Florida and Georgia, as well as many municipalities, have increasingly rallied around "universal" early childhood education programs that serve all children regardless of a family's income or a child's ability.[44]

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[36] Robert Lynch & Kavya Vaghul, *The Benefits and Costs of Investing in Early Childhood Education: The Fiscal, Economic, and Societal Gains of a Universal Prekindergarten Program in the United States, 2016-2050*, WASHINGTON CTR. FOR EQUITABLE GROWTH (Dec. 2015); *see generally* Byron G. Aguste et al., *The Economic Cost of the U.S. Education Gap*, MCKINSEY & CO. (June 2009), https://www.mckinsey.com/industries/social-sector/our-insights/the-economic-cost-of-the-us-education-gap.

[37] *See generally Pre-K in American Cities*, NIEER, http://nieer.org/wp-content/uploads/2019/01/Pre-K-Report-Final.pdf.

[38] Friedman-Krauss et al., *supra* note 33, at 24.

[39] *Id*.

[40] *Id.* at 14.

[41] *Id.* at 7.

[42] *See* ZIGLER ET AL., *supra* note 16, at 7.

[43] *See* Friedman-Krauss et al., *supra* note 33, at 6–12.

[44] *Id.* at 7–8. *See About Voluntary Prekindergarten*, FLA. OFF. OF EARLY LEARNING, http://www.floridaearlylearning.com/vpk/floridas-vpk-program (last visited Mar. 10, 2018) (Florida's "Voluntary Prekindergarten Education Program" serves "nearly 80 percent" of 4-year-olds in the state, with the goal of meeting all need); Kate Taylor, *New York City Will Offer Free Preschool for All 3-Year-Olds*, N.Y. TIMES (Apr. 24, 2017), https://www.nytimes.com/2017/04/24/nyregion/de-blasio-pre-k-expansion.html ("Implementing the universal prekindergarten program for 4-year-olds was the centerpiece of Mr. de Blasio's campaign for mayor four years ago and is considered to be one of the biggest accomplishments of his first term. So it is not surprising that, with his re-election effort starting, he is seeking to amplify the achievement."); *see also* John Byrne, *Emanuel Calls for Free Full-Day Public Preschool for 4-Year-Olds*, CHI. TRIB. (May 30, 2018),

This Note does recognize that early childhood education is different than primary and secondary education. Because children are not required to enroll in these programs, enrollment in public education programs will likely neither reach 100 percent nor will achieve the rate of enrollment in public K-12 schools. However, this voluntariness of enrolling in early childhood education does not affect the central question nor the thesis purported by this Note. The question driving this Note pertains to whether students can equally *access* public early childhood education programs. As programs expand and more children enroll in public early childhood education, those who are unable to enroll will be increasingly disadvantaged. The consequences of exclusion from public early childhood education on student achievement and other educational outcomes will grow more severe with time.

The following subpart identifies how undocumented children and children of undocumented parents, in particular, face a variety of barriers to access that limit their enrollment in these programs.

B. Immigration Status as a Barrier to Entry

Notwithstanding increased popular and governmental support for early childhood education,[45] at least some parents lacking legal documentation face barriers when attempting to enroll their children in public early childhood education programs—barriers that are connected solely to their immigration status.[46] The type and severity of these barriers vary state to state and program to program. Examples of barriers, both direct and indirect, are described below.

1. Direct Barriers to Enrollment: The Example of Indiana's "On My Way Pre-K" Pilot Program

In 2015, the State of Indiana attempted to bar undocumented children from enrolling in its pilot universal preschool program for four-year old kids.[47] Indiana's pilot program garnered tremendous media pushback and elicited strong reactions from advocates and policy makers. [48] In response to the proposed pilot program, Former Secretary of Education Arne Duncan stated:

> "Nothing in federal law requires state or local preschool programs to exclude any child from participation on the basis of their immigration status, and doing so just doesn't make sense." [49]

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https://www.chicagotribune.com/news/local/politics/ct-met-emanuel-education-announcement-20180529-story.html**.**

[45] *See supra* Part I(A).

[46] *See generally* Hannah Matthews et al., *Immigration Policy's Harmful Impacts on Early Care and Education*, CLASP (Mar. 2018), https://www.clasp.org/sites/default/files/publications/2018/03/2018_harmfulimpactsece.pdf.

[47] Samuels, *supra* note 12.

[48] Press Release, Arne Duncan, U.S. Sec'y of Educ., Statement from U.S. Secretary of Education Arne Duncan on Indiana Denying Preschool to Undocumented Children (Aug. 14, 2015), https://www.ed.gov/news/press-releases/statement-us-secretary-education-arne-duncan-indiana-denying-preschool-undocumented-children.

[49] *Id*.

The former Secretary's argument illustrates an important point: Indiana's attempt to restrict access to these children reflected more of an ideological choice rather than compliance with any federal or state mandate to do so. The decision was an explicit and intentional classification based on immigration status. While Indiana's pilot program exemplifies a rather rare and extreme case of exclusion, it illustrates much of the motivation for this paper and underscores the need for adequate protections for this group of children.

There is no indication that these sorts of attempts to bar children from enrolling in public early childhood education programs will disappear with time. In fact, the opposite seems to be true: given heightened xenophobia and anti-immigrant policy making at every level of government, city, state or federal policy makers may try and erect these kinds of direct barriers to access in the future.

2. Indirect Barriers to Access

Far more prevalent than policies or practices that directly bar access to enrollment are indirect barriers that can deter and discourage undocumented parents from enrolling their children in public early childhood education programs. This subpart describes a variety of indirect barriers to access, including onerous application requirements, heightened anti-immigration rhetoric, and the increased risk of adverse governmental actions aimed at undocumented families.

Important to note, however, is that Head Start does not directly limit enrollment to students lacking documentation. While Congress limited undocumented individuals' access to a variety of public benefits in the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),[50] it exempted Head Start.[51] Local agencies administering early childhood education programs relying on funding from the federal Child Care and Development Block Grant Program, which funds state programs that administer programs pursuant to federal Head Start, are similarly not allowed to deny access on the basis of immigration status.[52] Nevertheless, the indirect barriers described in this subpart are both present and applicable for parents who want to enroll their children in these federally-funded programs that are administered by state and local actors.

The first type of indirect barrier arises from difficult, onerous, and arbitrary application requirements.[53] The vast majority of state and municipal programs do not

[50] 8 U.S.C.A §§ 1621, 1622 (West 2000) (The Act created a comprehensive statutory scheme for determining aliens' eligibility for federal, state, and local benefits and services and prevents undocumented immigrants from being eligible for federal financial aid or student loans).

[51] James A. Harrell, *Clarification of Interpretation of "Federal Public Benefit" Regarding Child Care and Development Fund (CCDF) Services*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. ON CHILD., YOUTH AND FAMILIES (Nov. 25, 1998), https://www.acf.hhs.gov/sites/default/files/occ/pi9808.pdf (in a Public Instruction, the Administration for Families and Children explicitly states: "Head Start and Early Head Start have been determined not to provide 'Federal public benefits' because non-post-secondary education benefits were expressly omitted from the statutory definition in title IV of PRWORA. Therefore, Head Start providers are not required to implement PRWORA's verification requirements.").

[52] *See* Hannah Matthews, *Immigrant Eligibility for Federal Child Care and Early Education Programs*, CTR. FOR THE STUDY OF LAW & SOC. POL'Y (Apr. 2017), https://www.clasp.org/sites/default/files/public/resources-and-publications/publication-1/Immigrant-Eligibility-for-ECE-Programs.pdf.

[53] *See* Gelatt et al., *supra* note 11, at 16.

facially restrict enrollment to immigrants lacking legal immigration status. However, municipal and state funded programs tend to require forms of identification that are unavailable or difficult to obtain for undocumented parents, even if their children were born in the United States. Examples of these types of documentation requirements include the parent or guardian's government issued identification or driver's license, the child's state-issued birth certificate, and the child, parent, or guardian's social security number.[54] Undocumented parents are by definition ineligible to obtain government-issued identification, drivers licenses, or social security numbers. Moreover, undocumented parents may face difficulties in accessing their children's birth certificates either because their children were born abroad, or because undocumented parents lack the federally approved identification that are sometimes necessary for obtaining their children's birth certificates in this country.[55] Even supposedly universal early childhood education programs like the one adopted in Oklahoma request documentation in the form of state-issued birth certificates.[56] Additionally because the majority of programs today are means-tested, many programs require proof-of-income documentation that can be difficult to obtain for parents who work in domestic or in other types of nonstandard work arrangements.[57] Because many undocumented parents are employed in these sorts of work-arrangements, these requirements can have a disproportionate effect on the children of undocumented parents.

Arkansas' "Better Chance" program, open to families earning less than 200% of the poverty line, exemplifies how these implicit barriers can work. The authorizing legislation requires the program to "admit eligible students without regard to race, gender, national origin, ancestry, color, disability, creed, political affiliation, or religion."[58] Notably missing from this list is immigration status; nevertheless, the program requires parents to provide birth certificates as part of its application process.[59]

The purpose of requiring these forms of documentation is for programs to verify that children meet their programmatic age, state residency, and income requirements—not to establish immigration status. While some programs do allow parents to provide alternative identification, the mere existence of the documentation requirements can discourage parents from enrolling their children in public early childhood education programs.[60]

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[54] *Pre-K for All: Enroll Now!*, IMPACT TULSA, http://www.impacttulsa.org/pre-k-tulsa/frequently-asked-pre-k-questions/ (last visited July 29, 2019).

[55] Gelatt et al., *supra* note 11, at 16.

[56] *Pre-K for All*, *supra* note 54. Many of these programs, including the one in Oklahoma, do not provide much guidance for how parents can circumvent these requirements.

[57] Gelatt et al., *supra* note 11, at 17 (some programs have developed processes that alleviate these burdens on families including by allowing a broad range of documents to serve as proof of income or by allowing parents to self-certify their incomes through letters from employers).

[58] RULES GOVERNING THE ARK. BETTER CHANCE PROGRAM 23.04.1 (ARK. DEP'T OF EDUC. 2012).

[59] *Id*. at 4.06.

[60] *See* BORKOWSKI, *supra* note 13, at 23 n.2 ("The Mexican American Legal Defense and Education Fund (MALDEF), among other groups, has concluded that *Plyler* requires that school districts not 'engage in any practices that 'chill' or hinder the right of access to school") (quoting Letter from MALDEF to Dr. Sandra Ellis, Superintendent, North Chicago Community Unit Schools (Aug. 9, 2007)), *available at* http://lawprofessors.typepad.com/immigration/files/north_chicago_school_district.pdf.; *see also* Gelatt et al., *supra* note 11, at 16–18.

These sorts of requirements can deter some parents from enrolling their children in public programs for which their children are otherwise eligible.

A second type of indirect barrier stems from parents' legitimate fears of facing adverse immigration actions, such as deportation, if they enroll their children in these public programs. As an example, the Department of Homeland Security (DHS) issued a Notice of Proposed Rulemaking in 2017 to amend the "Inadmissibility and Deportability on Public Charge Grounds" rule, also known as the public charge rule.[61] The public charge doctrine is not new. Under the long-standing definition, "a public charge is a person who is primarily dependent on the government for subsistence. A person deemed likely to become a public charge can be denied admission to the U.S. or the ability to become a lawful permanent resident."[62] DHS's original proposed rule that was leaked to the media[63] attempted to include Head Start as a factor to determine whether a person would be a public charge.[64] Tacitly, DHS's original proposal would have treated an undocumented parent's decision to enroll their child in Head Start as an indicator for long-term dependency on the state. Neither the updated NPRM nor the final rule included Head Start as a basis to determine whether an individual was a public charge .[65] Nevertheless, DHS's attempt to include the program raises multiple concerns. First, it shows that the government was interested in limiting access to early childhood education on the basis of immigration status—that too, legal immigration status. Second, it raises the possibility of such explicit barriers to enrollment in the future.

The growth of overt anti-immigrant policies and rhetoric used by political leaders and official policies also deters parents enrolling their children in early childhood education. Candidates for public office have run campaigns centered on deporting undocumented families. For example, then-gubernatorial candidate Brian Kemp of Georgia recorded an official campaign ad during which he stated: "I got a big truck, just in case I need to round up criminal illegals and take 'em home myself. Yep, I just said that."[66] Government officials at the highest levels have also stroked fear amongst immigrant

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[61] Inadmissibility and Deportability on Public Charge Grounds, Notice For Proposed Rule [Insert main page title here] (2017), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1615-AA22

[62] *The Trump Administration's "Public Charge" Attack on Immigrant Families: Information About an Upcoming Proposed Rule*, NAT'L IMMIGR. L. CTR., https://www.nilc.org/wp-content/uploads/2018/01/Public-Charge-Fact-Sheet-2018.pdf (last updated Apr. 12, 2018).

[63] Yeganeh Torbati, *Trump Administration May Target Immigrants Who Use Food Aid, Other Benefits*, (Feb. 8, 2018, 1:19 PM), https://www.reuters.com/article/us-usa-immigration-services-exclusive/exclusive-trump-administration-may-target-immigrants-who-use-food-aid-other-benefits-idUSKBN1FS2ZK.

[64] Dara Lind, *Trump's Draft Plan to Punish Legal Immigrants for Sending US-Born Kids To Head Start*, (Feb. 8, 2018, 7:37 PM), https://www.vox.com/2018/2/8/16993172/trump-regulation-immigrants-benefits-public-charge. The leaked draft includes the following provision under "§ 212.23: Public benefits considered for purposes of public charge inadmissibility: . . . (14) [c]ertain educational benefits, including, but not limited to, benefits under the Head Start Act, as amended 42 U.S.C. 9801 et seq." The leaked document is available at: https://cdn.vox-cdn.com/uploads/chorus_asset/file/10188201/DRAFT_NPRM_public_charge.0.pdf.

[65] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212-214, 245, and 248), https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds.

[66] Ryan Bort, *These Georgia Republican Campaign Ads Are Somehow Not Fake*, ROLLING STONE (July 20, 2018, 9:00 AM), https://www.rollingstone.com/politics/politics-news/brian-kemp-ads-701456/.

families in their official capacities. For example, when asked the question of whether school officials could report children to ICE before the House Education and Workforce Committee, the Secretary of Education responded, "That's a school decision. It's a local community decision . . . we have laws and we also are compassionate."[67] This sort of interpretation of the "laws" cited by the Secretary is faulty[68] and dangerous. Since the 2016 presidential election, federal ICE agents, in their attempts to find and deport undocumented individuals, have reportedly targeted early childhood education childcare centers in their attempts to arrest undocumented individuals.[69] While ICE's policies fall beyond the scope of this paper, its practices incite fear in parents who wish to enroll their children in early childhood education programs.[70]

The goal of this Note, and primarily the next two parts, is to illustrate how our "laws" can be interpreted to protect rather than deter these children's' ability to access early childhood education programs. In particular, the case of *Plyler v. Doe*, which is the focus of the next Part, provides an avenue through which courts can challenge barriers to entry connected to immigration status. The next Part discusses the Supreme Court's decision, and Part III supports the position that early childhood education falls within *Plyler's* scope.

II. THE CASE OF *PLYLER V. DOE*

In the case of *Plyler v. Doe*, the Supreme Court faced the question of whether public schools can exclude students based on their immigration status.

Texas enacted Section 23.031 of the Texas Education Code in 1975,[71] which permitted public school districts to deny admission and charge tuition to students who were

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[67] Michael Stratford, *DeVos: Schools Should Decide Whether to Report Undocumented Kids*, POLITICO, https://www.politico.com/story/2018/05/22/undocumented-children-schools-devos-immigration-603277 (last updated May 22, 2018 6:49 PM).

[68] *See* U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., *Fact Sheet: Information on the Rights of All Children to Enroll in School*, https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201101.pdf (last revised June, 2012) ("School districts that either prohibit or discourage, or maintain policies that have the effect of prohibiting or discouraging, children from enrolling in schools because they or their parents/guardians are not U.S. citizens or are undocumented may be in violation of Federal law.").

[69] *See* Cervantes et al., *supra* note 12, at 17 (2018) (In their study on the impacts of immigration policy on young children, the authors describe the following: "In nearly all our interview sites, we heard disturbing accounts of ICE practices that undermine the best interest of children. In several sites, ICE reportedly parked outside schools and child care centers at drop-off or pick-up times and arrested parents on the way to drop children off or take them home. 'ICE can't go inside the schools, but they can be outside,' a parent in California said, demonstrating the confusion regarding the Department of Homeland Security's sensitive locations policy that restricts ICE and Customs and Border Patrol (CBP) from carrying out enforcement actions at certain locations—including schools and child care centers. 'And if they are outside, it's the same thing as being inside, so people say it's better not to take the kids to school or not go there.'")

[70] *See* Matthews et al., *supra* note 46, at 22.

[71] TEX. EDUC. CODE ANN. § 21.031 (West 1981) (repealed 1995) (current version at TEX. EDUC. CODE ANN. § 25.001) ((a) "All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year. (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission. (c) The

not "legally admitted" to the United States.[72] Pursuant to the new law, the Tyler Independent School District, located in Tyler, Texas, began charging undocumented students a $1,000 a year in tuition and began requiring students to produce birth certificates for enrollment.[73]

A group of Mexican families affected by the policy sought relief in court and "complained of [their] exclusion . . . from the public schools of the Tyler Independent School District."[74] Each of the plaintiffs' families had lived in Tyler for at least three years prior to the commencement of the case, and at least one had lived in the city for thirteen years.[75] One scholar noted that one of the plaintiff's father's "decision [to file suit] required genuine bravery because he felt that doing so substantially increased the risk of deportation for him and his family."[76]

Through their class action, the plaintiffs sought injunctive relief in the Southern District of Texas on the basis that the Immigration and Nationality Act (INA) preempted the contested Texas statute and violated the Equal Protection Clause of the Fourteenth Amendment.[77] Relying on the Supreme Court's opinion in *San Antonio Independent School District v. Rodriguez*, Judge William Wayne Justice ruled the Texas statute could not withstand a minimal rational basis review under the Equal Protection Clause.[78] The district court held that the defendants' argument that educating undocumented children would be impermissibly burdensome to the state did not constitute a rational basis for the law or policy of excluding children who lacked legal status.[79] The district court also held

board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.").

[72] Plyler v. Doe, 457 U.S. 202, 205 (1982) (The statute allowed districts to "deny enrollment in their public schools to children not 'legally admitted' to the country.").

[73] Catherine Winter, *'All They Wanted To Do Was Get An Education,'* APM REP. (May 30, 2017), https://www.apmreports.org/story/2017/05/30/all-they-wanted-to-do-was-get-an-education; Jamie Williams, *Children Versus Texas: The Legacy of Plyler v. Doe* 4 (Apr. 2011), https://www.law.berkeley.edu/files/Children_v._Texas_Williams.pdf.

[74] Plyler v. Doe, 457 U.S. at 206.

[75] Doe v. Plyler, 458 F. Supp. 569, 574 (E.D. Tex. 1978). *See* Barbara Belejack, *A Lesson in Equal Protection*, TEX. OBSERVER (July 13, 2007, 12:00 AM), https://www.texasobserver.org/2548-a-lesson-in-equal-protection-the-texas-cases-that-opened-the-schoolhouse-door-to-undocumented-immigrant-children/; Paul Feldman, *Texas Case Looms Over Prop. 187's Legal Future*, L.A. TIMES (Oct. 23, 1994), http://articles.latimes.com/1994-10-23/news/mn-53869_1_illegal- immigrants; Katherine Leal Unmuth, *Tyler Case Opened Schools to Illegal Migrants*, DALL. MORNING NEWS (June 14, 2007), http://shapleigh.org/news/1328-tyler-caseopened-schools-to-illegal-migrants; Mary Ann Zehr, *Case Touched Many Parts of Community*, EDUC. WK. (June 6, 2007), https://www.edweek.org/ew/articles/2007/06/06/39plylerside.h26.html (subscription required to access).

[76] JUSTIN DRIVER, THE SCHOOLHOUSE GATE, PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 350 (Pantheon Books eds. 2018). Because of the risk of deportation, the four families who were part of the original suit filed the case under pseudonym.

[77] OLIVAS, *supra* note 2, at 17–20.

[78] Doe v. Plyler, 458 F. Supp. at 580 (citing *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1278 (1973)) (In *Rodriguez*, the Supreme Court held that education is not a fundamental right and failed to apply strict scrutiny review in assessing the constitutionality of a Texas school-financing system under the equal protection clause).

[79] Doe v. Plyler, 458 F. Supp. at 585.

that the Fourteenth Amendment applies to all *persons*, regardless of citizenship.[80] Judge Justice worried that if the Texas statute were to stand, it would disallow the children from entering public schools and could cause them to "become permanently locked into the lowest socioeconomic class,"[81] mirroring the Supreme Court's concerns in *Brown v. Board of Education*.[82] He also held that federal law preempted the Texas statute, given the clear dominance of federal government in the field of immigration.[83] Judge Justice struck down Section 21.031 only as it pertained to Tyler's school district,[84] and the Fifth Circuit upheld the ruling in part on appeal.[85]

The district court's ruling in this original *Plyler* case inspired seventeen other challenges to the legality of Section 21.031 across the state. The Southern District of Texas consolidated these cases into *In re Alien Children Education Litigation*.[86] In this second wave of litigation, the district court similarly held that Section 21.031 violated the Equal Protection Clause and went as far as to say that "the absolute deprivation of education should trigger strict judicial scrutiny, particularly when the absolute deprivation is the result of complete inability to pay for the desired benefit."[87] As such, the court applied strict scrutiny and held that the challenged law did not substantially relate to any compelling state interest.[88] The Court of Appeals affirmed the decision, and the defendants subsequently appealed the decision.[89]

The Supreme Court granted certiorari, consolidated both appeals, and issued a final opinion on June 15, 1982.[90] Justice Brennan first held that the Equal Protection Clause of the Fourteenth Amendment reaches undocumented immigrants on the reasoning that a state's jurisdiction reaches all "persons" within its jurisdiction.[91] He carefully relied on the legislative history of the Fourteenth Amendment and wrote that "citizens or strangers, within this land, shall have equal protection in every state in this union in the rights and liberty and property."[92]

Then, the Court decided on which analytic framework under the Equal Protection Clause —rational basis review, strict scrutiny, or something in the middle—would be appropriate for the set of facts underlying this case. The level of scrutiny informs the

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[80] *Id*. at 579.
[81] Plyler v. Doe, 457 U.S. 202, 208 (1982) (citing Doe v. Plyler, 458 F. Supp. at 577).
[82] 347 U.S. 483, 493 (1954).
[83] Doe v. Plyler, 458 F. Supp. at 592.
[84] *Id.* at 593.
[85] The Fifth Circuit disagreed that Section 21.031 was preempted by federal law. Doe v. Plyler, 628 F.2d 448, 450 (5th Cir. 1980).
[86] 501 F. Supp. 544, 549 (S.D. Tex. 1980).
[87] *In re* Alien Children Ed. Litig., 501 F. Supp. 544, 582 (S.D. Tex. 1980).
[88] *Id.* at 583.
[89] Plyler v. Doe, 457 U.S. 202, 210 (1982).
[90] *See id.* at 202.
[91] *Id*. at 210, 215 (citing the Fourteenth Amendment, Justice Brennan wrote that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Court held that "within its jurisdiction … confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory. That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter.").
[92] *Id*. at 214 (citing CONG. GLOBE, 39th Cong., 1st Sess., 1033 (1866))**.**

Court's determination of whether a challenged law or policy is sufficiently tailored to a state interest and how important that interest is to the state.

In this case, the *Plyler* Court chose not to apply strict scrutiny for two reasons.

First, the Court found that "illegal aliens" do not constitute a "suspect class" because "their presence in this country in violation of federal law is not a "constitutional irrelevancy" and because their entry into the class was "a product of voluntary action."[93] However, Justice Brennan focused on the unique characteristics of the plaintiff children who were injured by Section 21.031 to extend them a "quasi-suspect" status of sorts.[94] To this end, Justice Brennan wrote:

> "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."[95]

The children lacked authority over their own circumstances, which set them apart from adults who arguably have more agency over the decision to migrate to the United States without documentation. The majority noted that penalizing children for the decisions of their parents had no rational justification and could not "comport with fundamental conceptions of justice."[96] Likewise, in his powerful concurrence, Justice Powell emphasized that children are innocent, citing *Weber* v. *Aetna Casualty & Surety Co.*, where the Supreme Court had held that penalizing children "for the misdeeds of the parents is illogical, unjust, and 'contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.'"[97]

Second, the Court relied on its previous ruling in *Rodriguez* that education does not constitute a "fundamental right," which would have triggered strict scrutiny. However, Justice Brennan acknowledged that public education is not "merely some government 'benefit' indistinguishable from other forms of social welfare legislation"[98] and wrote that "education has a fundamental role in maintaining the fabric of our society."[99] Harkening to its ruling in *Brown*, the Court stressed that the ability for children to avail themselves of a public education was too important in terms of their ability to become full participants in our society.[100] Thus, the majority appeared to treat public education as a sort of quasi-fundamental right.[101]

As a result, while the Court acted as it was applying ordinary rational basis review, it applied a heightened form of rational basis review, much akin to the intermediate scrutiny

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[93] Plyler v. Doe, 457 U.S. at 216, 219, n. 19.
[94] *Id.* at 244.
[95] Plyler v. Doe, 457 U.S. at 219–20.
[96] Plyler v. Doe, 457 U.S. at 220.
[97] 406 U.S. 164, 175 (1972) (Powell, J., concurring).
[98] Plyler v. Doe, 457 U.S. at 221.
[99] *Id.* at 244.
[100] *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").
[101] Plyler v. Doe, 457 U.S. at 221.

framework that the Court had begun to use when assessing gender-based classifications.[102] Justice Brennan wrote, "[i]f the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest."[103]

Justice Brennan struggled to identify how Section 21.031 served any such substantial state interest.[104] In its defense, the State of Texas offered several justifications for the statute. Importantly, these arguments continue to underlie the contemporary immigration debate in 2019. First, Texas argued that allowing undocumented children to attend public schools would amount to tacitly condoning illegal immigration.[105] The Court was "reluctant to impute to Congress the intention to withhold from these children … access to a basic education."[106] Second, Texas argued that undocumented children placed "special burdens" on the its ability to provide quality education to its remaining students.[107] Texas could not provide any conclusive evidence that offering education to this group of children affected incentivized further undocumented immigration nor that these children posed significant economic burdens on the state.[108] Third, Texas argued undocumented children were less likely to remain within the state after graduation because of their lawful status. The Court also rejected this argument as well on the basis that this risk was present with any child. On the whole, the majority was unconvinced that depriving children of a public education met any substantial state interest and concluded that Texas's arguments lacked sufficient supporting evidence. The Court reasoned that the costs associated with educating these children outweighed any immigration-related costs that Texas allegedly purported to be saving.[109]

Because of the majority's ruling, children lacking legal documentation have been given the opportunity to gain a public school education.[110] The legacy of *Plyler* is evident today: public school districts may not bar undocumented children from admission to elementary or secondary schools; it "stands for the abolition of castes and an affirmation of equality—two precepts which should be bedrock principles of the critical democratic

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[102] *See* U.S. v. Virginia, 518 U.S. 515, 533 (1996). *Contra* Steven G. Calabresi & Lena M. Barksy, *An Originalist Defense of Plyler v. Doe*, 2017 BYU L. REV. 225, 227–28 (2017) ("The Court essentially followed a Lochnerian approach to the Fourteenth Amendment even though it used the post-New Deal rational basis test and the concept of 'strict scrutiny.'").

[103] Plyler v. Doe, 457 U.S. at 230.

[104] *Id*. at 244**.**

[105] *Id.* at 228.

[106] *Id.* at 225.

[107] *Id.* at 229.

[108] *Id.* at 228 ("To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state.").

[109] *Id*. at 222 ("The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.").

[110] DRIVER, *supra* note 76 (While not popularly known outside the realm of the legal academy, Justin Driver writes that "Properly understood, [*Plyler*] rests among the most egalitarian, momentous, and efficacious constitutional opinions that the Supreme Court has issued throughout its entire history.").

moment in which we live."[111] Public schools may not even inquire as to these students' immigration status.[112] The following Part explains how the Court's reasoning in the case supports the position that public *early* childhood education programs fall within the realm of *Plyler's* protections.

III. *PLYLER* REACHES EARLY CHILDHOOD EDUCATION

This Part describes how the Supreme Court's language, arguments, and general spirit support the position that *Plyler's* protections extend to public *early* childhood education today.

A. Early Childhood Education is Integral to a Comprehensive Public Education

Following the Supreme Court's analytical approach in *Brown*, this Note considers the current state of public education to assess whether *Plyler* does indeed apply in context of public *early* childhood education. In *Brown*, the Court looked at the state of public education in 1954, when the case was heard, instead of at the time of the passage of the Fourteenth Amendment in reaching its ultimate conclusion that "separate educational facilities are inherently unequal."[113] Under this analytical framework, early childhood education is an integral part of a comprehensive public education today.[114]

Factors on the supply and demand sides of the equation support this position. As discussed in Part I, cities, states, and the federal government are much more significant providers of early childhood education today than in 1982.[115] A larger share of families are seeking to enroll their children in public early childhood education programs than in 1965, when President Johnson launched Head Start, or when the *Plyler* case was decided in 1982. Fewer than ten percent of students were enrolled in public early childhood education programs in 1980.[116] From 1980 to 2017, the percentage of children between the ages of three and five children enrolled in public early childhood programs quadrupled, rising to almost forty percent.[117]

As more parents are enrolling their children in public programs and as states and municipalities open additional classroom seats, early childhood education is becoming more widely recognized as a public good akin to traditional K-12 public education.

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[111] María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, SETON HALL L. REV. 1373, 1377 (2005); Catherine E. Lhamon et al., Dear Colleague Letter: School Enrollment Procedures, Plyler, U.S. DEP'T OF JUST. & U.S. DEP'T. OF EDUC. 1 (May 8, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf.

[112] Lhamon et al., *supra* note 111.

[113] *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("Even in the North, the conditions of public education did not approximate those existing today . . . [I]t is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.").

[114] *See* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1476 (2007) (Professor Michael Rebell makes the argument that early childhood education programs are a component of a right to "comprehensive educational equity."); Ryan, *supra* note 18, at 77 (arguing that "[a] strong legal case, therefore, can be made for including universal preschool in any definition of the right to an adequate education.").

[115] *See also supra* Part (I)(A).

[116] Phillips et al., *supra* note 31, at 6.

[117] *Id.*

Enrollment in early childhood education has become essential for students to achieve many of the core purposes of public education.[118] In *Brown*, the Supreme Court emphasized several characteristics of public education, including that "it is required in the performance of our most basic responsibilities … it is the foundation of good citizenship … a principal instrument in awakening the child to cultural values … in preparing him for later professional training … [and] in helping him to adjust normally to his environment."[119] The *Plyler* court itself emphasized the importance of the role of a basic education in teaching students how to read and write and becoming self-sufficient in our society.[120] These goals are not dissimilar from the goals of early childhood education programs today. Professor James Ryan, a leading expert on law and education, writes:

> "[A]s more children enroll in publicly funded pre-K programs, it may become harder for states to say that pre-K is not part of their public education systems. At a certain point, suggesting that only some students are entitled to pre-K could be akin to saying that only some students can attend Kindergarten – or third grade."[121]

Moreover, there is widespread popular support for public investments in early childhood education today.[122] A 2017 national poll of bipartisan voters revealed that eighty-nine percent of voters support "making early childhood education and child care more affordable for working families" for children from birth through age five.[123] Conservative and liberal lawmakers from both ends of the ideological spectrum have included expansions of public early childhood education programs in their policy platforms.[124] The public embrace of investing in public early childhood education is partially due to the sympathetic character of the intended beneficiaries of these investments: young children under the age of five. Educating young children remains politically and socially palatable in this era of partisanship. As such, arguments for supporting these investments mirror those made for the expansion of kindergarten a hundred years ago.[125]

B. Young Children Fall within Plyler's Scope

The population of focus in this Note, namely children between the ages of three and five lacking documentation are similar to the plaintiffs in *Plyler*. This group of children has little to no control on the immigration decisions of their parents or on their

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[118] *See supra* Part(I)(A).
[119] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
[120] Plyler v. Doe, 457 U.S. 202, 222 (1982).
[121] James E. Ryan, *A Constitutional Right to Pre-K?*, EDUC. WK. (Mar. 9, 2016, 6:52 AM), http://blogs.edweek.org/edweek/making_ the_case/2016/03/a_constitutional_right_to_pre-k.html.
[122] *See* ZIGLER ET AL., *supra* note 16, at 2.
[123] *2017 National Poll*, FIRST FIVE YEARS FUND (2018), https://www.ffyf.org/2017-poll/.
[124] *See* Alia Wong, *The Bipartisan Appeal of Pre-K*, THE ATLANTIC (Oct. 23, 2015), https://www.theatlantic.com/education/archive/2015/10/pre-k-vs-college/412048/ (citing a 2015 survey conducted by the First Five Years Fund which indicated that a plurality of parents polled supported greater investments in early education compared to higher education).
[125] Ryan, *supra* note 18, at 51, 72.

circumstances in the United States. Their realities are shaped entirely by the decisions of their parents. Therefore, a central concern of the *Plyler* majority is relevant and appropriate in this context: depriving children of early childhood education penalizes them for the decisions of their parents and does not "comport with fundamental conceptions of justice."[126]

Furthermore, early childhood education is much more similar to K-12 education than post-secondary education. The courts' refusal to extend *Plyler* to post-secondary education,[127] despite the urging of scholars in the area,[128] based of its differences from K-12 education in fact further supports the applicability of *Plyler* to *early* childhood education. In *Regents of University of California v. Superior Court of Los Angeles*, for example, the court failed to extend *Plyler's* heightened scrutiny to post-secondary education, arguing that "[t]here is, of course, a significant difference between an elementary education and a university education."[129] This difference, namely centers on the purpose of primary—and early education—to ensure that our children will be able to contribute to civic institutions and to the betterment of our nation from a fundamental sense.[130] Furthermore, "no court appears to have adopted [the] view … [that] higher education currently plays the same socioeconomic role that primary and secondary education played in the 1970s and 1980s."[131]

Moreover, numerous states have enacted laws or policies that limit access to public post-secondary education, to in-state tuition, and financial aid in various ways.[132] Congress enacted PWRORA to limit "state and local public benefits" to undocumented immigrants who are "not lawfully present in the United States" unless states pass legislation that "affirmatively provides" for their eligibility in the benefit programs.[133] As a result, undocumented students are ineligible for in-state tuition to public post-secondary institutions unless a state statute explicitly provides for such benefit.[134] Additionally,

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[126] Plyler v. Doe, 457 U.S. 202, 220 (1982). This Note cautions against interpretations of this reasoning that place judgment on the decisions of undocumented adults. Undocumented immigrants have a diversity of experiences, stories, and reasons for their arrival to the United States. A broader discussion of immigration trends and policies in the United States is beyond the scope of this Note.

[127] Regents of U. of California v. Super. Ct., 276 Cal. Rptr. 197 (Cal. App. 2d Dist. 1990); *see also* Kate M. Manuel, *Unauthorized Aliens, Higher Education, In-State Tuition, and Financial Aid: Legal Analysis*, CONGR. RES. SERV. 1, 9 (2016), https://fas.org/sgp/crs/misc/R43447.pdf ("[N]o court appears to have adopted [the] view … [that] higher education currently plays the same socioeconomic role that primary and secondary education played in the 1970s and 1980s.").

[128] *See, e.g.*, Laura A. Hernández, *Dreams Deferred: Why In-State College Tuition Rates Are Not a Benefit under the IIRIRA and How This Interpretation Violates the Spirit of Plyler*, 21 CORNELL J. L. & PUB. POL'Y 525, 536 (2012) ("Post-secondary education is as vital and important for advancement in American society today as secondary education was in 1977 and 1982.").

[129] *Regents of U. California*, 276 Cal. Rptr. at 202.

[130] *Id.*

[131] Manuel, *supra* note 127.

[132] Kristina Rogan, *Defining Residency: In-State Tuition Implications for United States Citizens Who Are Children of Undocumented Immigrant Parents*, SETON HALL LEG. J. 177, 190–91 (2017), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1112&context=shlj.

[133] 8 U.S.C. §1611(c)(1) (federal public benefits); 8 U.S.C. §1621(c)(1) (state and local public benefits).

[134] Rogan, *supra* note 132, at 184.

Congress passed the Illegal Immigration Reform and Responsibility Act (IIRIRA)[135] that effectively prohibits states from offering in-state tuition to students lacking legal immigration status.[136] There are no such federal laws barring access to early childhood education today; although, as discussed in Part I,[137] the lack of these sorts of barriers does not mean that future barriers will not be erected.

C. The Plyler's Court's Silence on Early Childhood Education

In *Plyler*, the Supreme Court did not explicitly limit the definition of public education to exclude early childhood education. Rather, it was facially agnostic to whether early childhood education can be considered "public education;" the Court only speaks about the impermissibility of denying access to "public education" in a broad sense.[138] Justice Brennan refers to "elementary education"[139] only once in passing and Justice Powell discusses only "school-age children."[140] Otherwise, the opinions only include the terms of "basic education" and "public education."[141] The plaintiffs at bar were elementary school-aged children; the question of early childhood education was not at bar in a literal sense. The common conception of public education at the time of the *Plyler* decision, as argued above, likely did not include early childhood education .[142]

Nothing in the text prevents *Plyler* from applying to preschool; to the contrary, Michael Olivas, a law professor and expert on *Plyler*, has said that if litigated, *Plyler* could offer protections to preschool aged children.[143] New York Times Supreme Court reporter Linda Greenhouse argues for a narrow interpretation of the opinion that applies only to the realm of education; she writes, "[Justice] Powell wanted the case to be about the education of children, not the equal protection of rights of immigrants, and so the decision was."[144] Part of this goes to the majority's argument regarding the "unique circumstances" surrounding a basic education, namely the characteristics and purposes of a basic

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[135] 8 U.S.C.A § 1623 (West 2000). The statute provides: "Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident."

[136] The impact of the IIRIRA on states' ability to charge in-state tuition for undocumented students has not been clear. *See, e.g.,* Martinez v. Regents of the Univ. of Cal., 241 P.3d 855, 864–65 (Cal. 2010) (finding a California law that permitted undocumented students who have attended at least three years of high school and have graduated to pay in-state tuition to public post-secondary institutions to be consistent with Section 505 of the IIRIRA).

[137] *See supra* Part (I)(B).

[138] *See* Plyler v. Doe, 457 U.S 202, 230 (1982). In *Doe v. Plyler*, 458 F. Supp. 569, 575, the court explicitly discusses that two students were previously enrolled in Head Start but it makes no further comment about the applicability of *Plyler* to such early childhood education programs.

[139] Plyler v. Doe, 457 U.S. at 226.

[140] *Id.* at 238 (Powell, J., concurring).

[141] *See generally id.*

[142] *See supra* Part III(A)-(B).

[143] Samuels, *supra* note 12**.**

[144] Jill Lepore, *Is Education a Fundamental Right?*, THE NEW YORKER (Sept. 3, 2018), https://www.newyorker.com/magazine/2018/09/10/is-education-a-fundamental-right.

education.[145] This Note's argument does not exceed even this more narrow reading of the Court's opinion.

Because early childhood education has become a core component of the modern public education system and because it closely aligns with the purposes of a basic education as contemplated in *Plyler* itself, the Supreme Court's reasoning can be interpreted to also protect children seeking to attend public early childhood education programs.

IV. USING *PLYLER* TO ENSURE ACCESS TO EARLY CHILDHOOD EDUCATION PROGRAMS

As Part III asserts, *Plyler* offers an avenue for courts to protect their ability for undocumented children and children of undocumented parents to access public early childhood education programs. This Part discusses how families, advocates, and policy makers can utilize the interpretation of *Plyler* offered in this Note to ensure that undocumented children, and children of undocumented parents, are able to enroll in public early childhood education programs—both inside and outside of the courtroom.

A. Inside the Courtroom

Undocumented children and the children of undocumented parents can utilize *Plyler* in future direct litigation challenging direct and indirect barriers to early childhood education programs on the basis of immigration status. If children and families decide to litigate the constitutionality of these barriers to access, they may be able to rely on the broad reading of *Plyler* as articulated in Part III that encompasses early childhood education. In this way, *Plyler* can be an incredibly useful precedent for claims under the Equal Protection Clause of the Fourteenth Amendment. Immigration policies and the interpretation of immigration laws have been rapidly changing over the last few years. There is no evidence that Indiana's pilot program will be the last attempt to restrict access to public early childhood programs. Cities and states may very well create their own early childhood programs that attempt to exclude students based on their immigration status in the future. Programs may also continue to have onerous identification requirements that deter parents from sending their children to early childhood education programs.[146] *Plyler* can be useful in challenging these kinds of barriers in court.

Practically, however, litigating the question of whether *Plyler* applies to early childhood education will likely be difficult. To date, there is no case that directly address this central question. If advocates and/or organizational advocates want to litigate this

[145] Plyler v. Doe, 457 U.S. at 239 (Powell, J., concurring). The Court failed to extend Plyler's application of intermediate scrutiny in a case where the plaintiffs alleged that a public school district's policy of charging a user fee for bus transportation violated the equal protection clause of the 14th Amendment. Kadrmas v. Dickinson Public School, 487 U.S. 450, 459 (1988). The Supreme Court emphasized that it has not extended Plyler's holding beyond the "unique circumstances" of primary and secondary education. *Id*. *Contra* Nat'l Law Ctr. on Homelessness & Poverty, R.I. v. New York, 224 F.R.D. 314, 321, (E.D.N.Y. 2004) (where the court argued that the children of homeless parents were not receiving an equal access to public education, and as such, the county's policy "penalize[ed] these homeless children because of the misfortunes or misdeeds of their parents;" the court applies the heightened scrutiny as established in *Plyler* based on the importance of education and held that the county's transportation policy was in violation of the 14th Amendment).

[146] *See supra* Part I(B).

issue, they will need to find a plaintiff, or class of plaintiffs, who (1) was denied access to an early childhood education program on the basis of immigration status; (2) who would be willing to undertake the burden of litigation with no real likelihood of receiving a remedy for their own child; and (3) is willing to risk potential deportation or other adverse immigration actions during the course of litigation.[147]

However, advocates and policy makers can look to executive action as an alternative means for legal change. For example, the Departments of Education and Justice issued a joint "Dear Colleague" letter in 2014 that instructed state and local educational agencies to "become aware of student enrollment practices that may chill or discourage the participation, or lead to the exclusion, of students based on their or their parents' or guardians' actual or perceived citizenship or immigration status."[148] The letter cites directly to *Plyler* and instructs schools to only inquire into parents' residency for the purpose of establishing residency in a district and not the country.[149] This letter is still in effect but only pertains to K-12 schools. *Plyler* can and should be interpreted at the agency level in a way that applies this policy statement to public early childhood education programs.[150] This form of executive directive does invoke the power of the law to directly control behavior but also makes a statement about our country's values regarding education of undocumented children.

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[147] Given these possible immigration consequences from undocumented immigrants bringing suit, it is important for these plaintiffs to discuss with legal counsel what the risks are and how to navigate those risks. As an alternative, immigrant-focused organizations may be able to assert direct organizational standing to litigate this issue, pursuant to Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), if it can establish a cognizable organization injury stemming from either (A) a diversion of organizational resources to identify or counteract the allegedly unlawful action, or (B) frustration of the organization's mission. The complexities surrounding organizational standing, however, is largely beyond the scope of this Note.

[148] Lhamon et al., *supra* note 111.

[149] *See id*. at 2.

[150] *Id*. Notwithstanding these options, states and municipalities may need to act in absence of a recognition of a fundamental right to education at the federal level. Several scholars place these arguments in their attempts to create a universal substantive right to pre-school education or education more broadly stated. *See generally* Ryan, *supra* note 18. While such a goal is admirable from a theoretical sense, such a creation of a right is impractical given the constitution of the Supreme Court today. If the Court was to create a substantive right to preschool education, there would be greater protection for undocumented children. However, waiting for the creation of the right to education, which has never been recognized by the Court, may be a futile effort. More importantly, the creation of such a right is unnecessary for the narrow purpose presented within this Note. Some states have already made preschool education a Constitutional requirement without regard to immigration status. FLA. CONST. art. IX, § 1(b) states: "Every four-year old child in Florida shall be provided by the State a high-quality pre-kindergarten learning opportunity in the form of an early childhood development and education program which shall be voluntary, high quality, free, and delivered according to professionally accepted standards. An early childhood development and education program means an organized program designed to address and enhance each child's ability to make age appropriate progress in an appropriate range of settings in the development of language and cognitive capabilities and emotional, social, regulatory and moral capacities through education in basic skills and such other skills as the Legislature may determine to be appropriate." After a state referendum in 2002, Florida adopted language in its state Constitution that requires the state to provide preschool education to all four-year old children living in Florida. The New Jersey Supreme Court came just short of creating such a "right" to preschool education; however, in *Abbott v. Burke*, the court ordered the state to provide high quality preschool education to all children living in high-poverty urban districts pursuant to their state constitutional duty to provide a "thorough and efficient education." 710 A.2d 450, 464 (1998).

B. Outside the Courtroom: Leveraging Plyler's Expressive Value

The Supreme Court's failure to foreclose the applicability of *Plyler* to the context of early childhood education can be a powerful tool for advocacy today. The existence of helpful Supreme Court precedent can be useful for facilitating social change and changes in the perceptions of undocumented families living in the United States. Prolific legal scholar, Cass Sunstein, has written on the "expressive function of law," writing that the law has a second function apart from controlling behavior to "make statements." He writes that through this function, laws can "change social norms."[151] Here, the interpretation of *Plyler* posited by this Note has the potential to send a signal to state and local governments that they should not enact or support policies that directly or indirectly deter parents from enrolling their children in public early education programs. Further, the existence of favorable case law can influence policy makers to take preventive steps that reduce the likelihood that they restrict educational opportunities for these children in the future.

Immigration reform in a way that would improve the quality of life for families lacking legal documentation in the United States seems elusive today. Federal courts are hesitant to extend new substantive rights, such as a fundamental right to education, and Congress is unlikely to legislate to statutorily extend a right to education for these children. Given this backdrop, *Plyler* provides an avenue through which families and advocates can rely on already good law to afford a critical opportunity to an entire generation of children.

CONCLUSION

Early childhood education has become a central component of American public education. Given the importance of early childhood education on students' ability to succeed in later school years and life, cities, states, and the federal government are all investing in public *early* childhood education programs that serve students between the ages of three and five. But as enrollment in these programs has grown, undocumented children are increasingly facing direct and indirect barriers that limit their ability to enroll in these public programs—and are, as a result, being deprived of a comprehensive public education.

The Supreme Court's decision in *Plyler v. Doe* offers a means through which these children, their families, and advocates can challenge direct and indirect barriers to access. As this Note makes evident, early childhood education programs that serve children under the age of five fit squarely within the *Plyler's* protection. In this era of judicial restraint, heightened xenophobia, and disagreement over the future of immigration policy, *Plyler* offers hope for advocates, families, and policymakers who want to ensure that all children can receive a truly comprehensive public education.

[151] Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996).