Reflections on Educating Latino and Latina
Undocumented Children: Beyond Plyler v. Doe

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INTRODUCTION

The struggle for educational fairness and opportunity for Latino
and Latina children continues even amidst the anti-immigrant
campaigns currently raging against noncitizens\(^1\) in the United States.
Census 2000\(^2\) highlighted the reality of the increased number
of noncitizens in the country, particularly Latinos, and has precipitated

\(^{1}\) The term “noncitizen” is used in this Article instead of the term “alien,” which
is the Immigration and Naturalization Act term used to denote those who are not
commentators have noted that the term alien is a pejorative term that has
notations of otherness or lack of humanity. See Kevin Johnson, “Aliens” and the
INTER-AM. L. REV. 263, 268 (1997); Victor Romero, On Elián and Aliens: A Political
Solution to the Plenary Power Problem, 4 N.Y.U. J. LEGIS. & PUB. POL’Y 343, 343 (2000-
2001); see also Gerald Neuman, Aliens as Outlaws: Government Services, Proposition 187,
and the Structure of Equal Protection Doctrine, 42 UCLA L. REV. 1425, 1441 (1995); Peter
discussion of the anti-immigrant sentiment in the country see IMMIGRANTS OUT!: THE
NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea

\(^{2}\) See Michael E. Fix & Jeffrey S. Passel, U.S. Immigration at the Beginning of the 21st
Century, available at The Urban Institute, http://www.urban.org/Template.cfm?Section=Home&NavMenuID=75&template=/
TaggedContent/ViewPublication.cfm&PublicationID=7321(Aug. 2, 2001) (stating in
testimony before the House Judiciary Committee that Census 2000 numbers show
increased immigration levels).
a renewal of nationwide concern over an “immigration crisis.” This perceived crisis has given rise to myriad new restrictions on the participation of noncitizens in United States society.

In recent years, both the states and the federal government have placed restrictions upon the civic participation of noncitizens in virtually all areas of the United States’ societal landscape. These new restrictions on noncitizens, which have sparked a new civil rights movement—a so-called Immigrant’s Rights Movement—touch areas as varied as driver’s licensing, workplace protections, access to health care, welfare benefits, and education, among others.

From the dismantling of bilingual education through voter initiatives in California, Arizona, and Massachusetts, to the

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4 The Immigrant Workers Freedom Ride, which took place in October 2003, is an example of the linkage of the Civil Rights movement to the Immigrant Rights movement. See Steven Greenhouse, Immigrants Rally in City, Seeking Rights, N.Y. TIMES, Oct. 5, 2003 at A1 (discussing Immigrant Workers Freedom Ride campaign, in which eighteen buses carrying nine hundred immigrants from ten cities traveled over two weeks across the United States to Washington, D.C. and New York in an effort to raise consciousness for the rights of immigrants); AFL-CIO, The Struggle for Immigrant Workers’ Rights Is a Fight for Civil Rights, at http://www.aflcio.org/issuespolitics/immigration/civil_rights.cfm (last visited Apr. 18, 2005).


9 See infra Part IV.

10 Bilingual education was dismantled in California in 1998, following the passage of Proposition 227. See Kevin Johnson & George Martínez, Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education, 35 U.C. DAVIS L. REV. 1227, 1227 (2000). The proposition passed “by a sixty-one to thirty-nine percent margin.” Id.

11 Arizona voters approved Proposition 203 in 2000. See Elizabeth Becker et al.,
attempted denial of education to undocumented children perpetrated in the 1990s in California’s Proposition 187. Latino children are suffering disproportionately in the culture war in our midst. It is my contention that these children, and in particular the undocumented ones, are caught in the middle of this war against noncitizens. Undocumented children who, as the Supreme Court recognized, are blameless and present in this country through no fault of their own, have been unwillingly thrust into this unwelcome role.

This recent phenomenon in our polity has developed despite the Supreme Court’s *Plyler v. Doe* decision. Simply put, the *Plyler* Court held that undocumented children are entitled to a state-funded primary and secondary education. Yet Latino undocumented students remain hostages in the “immigration crisis” siege, notwithstanding *Plyler*’s guarantee of a free public education and the promise of educational equality rooted in two earlier Mexican-American school desegregation cases. 

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13 See *infra* Part IV.B.

14 Indeed, language-minority students, most often noncitizens and many of them undocumented, have also fared poorly in the national immigration battles. For example, the fact that in the midst of all the celebrations of the fiftieth anniversary of *Brown v. Board of Education*, 347 U.S. 483 (1954), no academic or media attention has been devoted to the fact that it is also the thirtieth anniversary of *Lau v. Nichols*, 414 U.S. 563 (1974), the Supreme Court opinion that ushered in the era of bilingual education, is very telling in this regard.


17 *Id.* at 230.

18 The earliest recorded case in the struggle for equality in education for Latino students is *Alvarez v. Owen*, No. 66625 (Cal. Sup. Ct. San Diego County filed Apr. 17, 1931), commonly known as the “Lemon Grove Incident.” See Robert R. Alvarez, Jr., *The Lemon Grove Incident: The Nation’s First Successful Desegregation Court Case*, 32 J. SAN DIEGO HIST. 116 (Spring 1986), available at http://sandiegohistory.org/journal/86spring/lemongrove.htm (last visited Apr. 18, 2005). The case took place in the 1930s in the community of Lemon Grove in San Diego County, California and was the nation’s first successful school desegregation case. *Id.* The community’s attempt to bar Mexican students from grammar school was unsuccessful, once a lower court ordered the admission of all Mexican students to the school and indicted school board members for illegal segregation. *Id.*
These vulnerable students generally still face severe challenges to their educational prospects. Thus, more than twenty years after Plyler, it is necessary to understand what has happened to the education of Latino undocumented children in the United States. What can we learn from Plyler and its aftermath? What is the future of Plyler v. Doe? Why is it that Plyler's promise of educational equality has not reached its full potential? And finally, what meaning does Plyler have in the current discussion of membership and exclusion in our society? These are largely unanswered questions that no article can completely address. In an attempt to shed some light on these murky questions, however, this Article explores the various aspects of the United States educational system and how the Latino undocumented student has fared post-Plyler.

Part I of this Article examines the current situation of Latino undocumented students in an effort to understand the challenges facing both the students and the educational systems in which they are immersed. Using census and other available data, Part I discusses the number of undocumented students currently in American schools and sets forth a picture of their educational status and attainment. Also, this section provides a review of the challenges and obstacles standing in the way of educational achievement for Latino undocumented students, painting a portrait of their daily realities.

In order to provide an understanding of the nuances of Plyler v. Doe, Part II closely examines the opinion and Part III explores its subsequent history. Next, Part IV reviews the circumstances in which Plyler has come under attack and assesses the continued vitality of Plyler. Finally, Part V offers an analysis of the two recent major affirmative action cases. The aim of Part V is to examine the Court's most recent pronouncements regarding equal protection as it pertains to education and those cases' effects on the vitality of Plyler. In particular, Part V discusses access to higher education for the undocumented, using research of pending federal legislation and also by reviewing all fifty states' laws regarding higher education for undocumented students.

This Article will show that Plyler stands for the proposition that education, although not a fundamental right, is an integral aspect of membership in our community. Thus, Plyler is still a vital opinion

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second Mexican-American desegregation case is Westminster School District v. Mendez, 161 F.2d 774, 781 (9th Cir. 1947), in which the court found that the segregation of school children of Mexican descent was a violation of the Fourteenth Amendment. In this sense, Westminster may be viewed as a precursor to the landmark decision of Brown v. Board of Education.

19 See infra notes 87–95 and accompanying text.
even in the face of the current “immigration crisis” because Plyler stands for abolition of castes and an affirmation of equality—two precepts which should still be bedrock principles of the critical democratic moment in which we live.

This Article argues, however, that these two propositions for which Plyler stands are dead letters in the face of the reality of the undocumented student. The unwelcome but inescapable reality for undocumented students is that, without the prospect of normalizing their immigration status, the education they receive is useful individually for personal growth, but is of no consequence for the betterment of the overall condition of Latinos in the United States because the undocumented remain unable to participate in our democratic society. In that sense, Plyler v. Doe may join Brown v. Board of Education\(^{20}\) as a decision embodying the interest convergence covenants in which educational opportunities for minority students exist only when the students’ interests and the nation’s interests converge.\(^{21}\) Analyzing Plyler under an interest convergence model demonstrates that the nation’s interest is the maintenance of an underclass of undocumented, low-wage earners who fuel the nation’s economy by performing work that is undesirable to many United States natives. The continued existence of this underclass must be related to the limited educational attainment of those in the group, a result perpetuated by the lackluster effect of Plyler as a catalyst for further educational gains for Latino undocumented children.\(^{22}\)

I. THE STATUS OF LATINO AND UNDOCUMENTED STUDENTS IN THE UNITED STATES

A. General Data Regarding Latino and Immigrant Students

According to the latest census data, 10.5 million students in the United States are children of immigrants, and one-fourth of these students are foreign born.\(^{23}\) More than one-third of the children of


\(^{22}\) Admittedly, this view may change over time with a greater acceptance by the United States populace of the undocumented worker. As the number of retiring Americans increases, and there is a realization that the Social Security benefits available for them would be larger, or they could retire earlier with new entrants into the Social Security system who bring the fruits of their labor into the system, acceptance of undocumented workers may grow.

immigrants\textsuperscript{24} hail from Mexico while one-fifth come from other Latin American countries.\textsuperscript{25}

The census data also show that there are over 11.4 million Latino children under the age of eighteen in the United States.\textsuperscript{26} This number represents 16\% of all the children in the United States, even though only 12\% of the overall population is Latino.\textsuperscript{27} This population increased by approximately ten million between 1990 and 2000, accounting for 38\% of the United States’ population growth during that decade.\textsuperscript{28} Finally, the Census Bureau estimates that by the year 2050, Latinos in the United States will number ninety-eight million—more than three times their current number—representing about 25\% of the total population.\textsuperscript{29}

B. Data on Undocumented Students in the United States

Because of the nature of the lives of undocumented persons as being in the “shadows” of the United States population, there is no actual data regarding the number of undocumented persons in the country; only estimates are available. It is also difficult to estimate the number of undocumented schoolchildren in the United States.\textsuperscript{30} Undocumented parents are reluctant to come forward and identify themselves to census takers or benefit providers for fear of being reported to the authorities. The latest estimates show that two out of every ten undocumented persons in the country are undocumented students.\textsuperscript{31} The federal government has recently addressed this concern. “The Census Bureau is developing a research plan aimed at

\textsuperscript{24} The term “immigrant” is not used with its strict immigration law meaning for purposes of the data compilation cited above. It instead includes the following immigration law categories: immigrants, non-immigrants, refugees, legal permanent residents and even certain naturalized citizens. Id. at 11.

\textsuperscript{25} Id. at 7.


\textsuperscript{27} Id.

\textsuperscript{28} Id.

\textsuperscript{29} Id.


eventually developing new information on the population of illegal immigrants residing in the United States.\textsuperscript{32} Thus, the information needed to more accurately determine the number of undocumented students in the country should be available in the near future.

C. Data Regarding the Educational Attainment of Latino Students

Recent data suggest that much of the increase in minority enrollment in elementary and secondary schools is attributable to Latinos. Yet, they have higher drop-out rates and lower high school completion rates than African American or White-Anglo students.\textsuperscript{33} In 2000, 39\% of public school students at the K–12 levels were minorities.\textsuperscript{34} Of these, slightly less than half, or 44\%, were Latino.\textsuperscript{35} In terms of change over time, the overall percentage of minority students in public schools increased by 17\% between 1972 and 2000.\textsuperscript{36} Slightly more than 10\% of the increase was attributable to Latinos, while the number of African American students increased by only 2\%.\textsuperscript{37} The drop-out rate for Latino students is 28\% as compared with 7\% for White-Anglo students and 13\% for African American students.\textsuperscript{38}

Even though there is a positive relationship between education and salary for all racial/ethnic groups in this country, data from a recent study suggest that incomes of Latino men are lower than those of Anglo men at most educational levels.\textsuperscript{39} Finally, aggregate national statistics document lower achievement levels for Latino immigrant students in several areas, including standardized testing.\textsuperscript{40}

\textsuperscript{32} GAO Report, supra note 30, at 18.
\textsuperscript{33} Status and Trends, supra note 26.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id. Specifically, in 2000, the median earnings of Hispanic men age twenty-five and older were $13,000 less than that of white men, while the median earnings of Hispanic women age twenty-five and older were $6500 less than that of white women. Id.
D. Data on Limited English Proficiency (“LEP”) Students in the United States

Although the following figures are not restricted to undocumented or Latino children, they are worth reviewing because it is apparent that the current influx of new immigrant groups means continuing increases in the number of students who enter United States schools with little or no English proficiency.41 Between 1990 and 2000, the overall LEP student population in the United States increased by more than half, from 14 million to 21.3 million.42

Between 1980 and 2000, the number of children in the United States speaking a language other than English at home more than doubled, from 5.1 million to 10.6 million.43 The most recent census data show that two-thirds of all non-English-speaking families speak Spanish.44 The data further show that 2.6 million students are LEP, representing 5% of all students in United States schools.45 About 1.7 million of these are United States natives.46 The Census Bureau also estimates that 1.8 million school-age children live in households in which no one age fourteen or older speaks English “very well.”47

Studies have shown that noncitizen students are at serious risk for failure in the absence of bilingual education, as they are disproportionately represented among LEP students.48 The data have also shown that it is often the case that LEP affects school achievement.49

E. Other Challenges Facing Undocumented and Latino Students

1. Fear of Deportation

Undocumented children also face challenges in terms of their mental and emotional health because of the added stress associated with the fear of deportation and separation from family members.50 This fear of deportation, in particular, can extend all the way to the school gate. For example, in Virginia, “[p]ublic employees in higher

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41 Status and Trends, supra note 26.
42 Fix & Passel, supra note 23, at 11.
43 Id. at 20.
44 Id.
45 Id. at 22.
46 Id.
47 Immigrant Children, supra note 40.
48 Id.
49 Id.
50 Id.
education are encouraged to voluntarily disclose to the Immigration and Naturalization Service and to the Office of the Attorney General in Virginia factual information indicating that a student on campus is unlawfully present in the United States, or enrolled without proper authorization.\footnote{Memorandum from Alison P. Landry, Assistant Attorney General, to Presidents, Chancellor, Rectors, Registrars, Admissions Directors, Domicile Officers and Foreign Student Advisors (INS Designated School Officials) and the Executive Director of the State Council for Higher Education in Virginia (Sept. 5, 2002), available at http://www.steinreport.com/va_colleges_11152002.htm.}

Fear of deportation also has its source in the fact that the federal government has invited local law enforcement agencies to enforce immigration laws, and the invitation has been accepted in some states and localities.\footnote{The invitation of local sheriffs, highway patrols, and police agencies to enforce immigration law raises Tenth Amendment federalism issues under \textit{New York v. United States}, 505 U.S. 144 (1992). At least one immigration scholar has concluded that the form in which the federal government has obtained the cooperation of local law enforcement, through an invitation, rather than a mandate, avoids Tenth Amendment concerns. \textit{See} Huyen Pham, \textit{The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Law Enforcement to Enforce Immigration Law Violates the Constitution}, 31 Fl. St. U. L. Rev. 965, 975–76 (2004).} For example, in Florida, state law enforcement entered into a Memorandum of Agreement with the federal government in 2002 whereby state law enforcement agents were trained by the Immigration and Naturalization Service (INS), then worked under federal supervision and were able to enforce federal immigration law.\footnote{Id. at 970–71 (citing Memorandum of Understanding Between the INS and the State of Florida (July 26, 2002), \textit{reprinted in} 79 Interpreter Releases 1138, app. II, at 1120 (2002)). For a recent example of another locality entering into an agreement with the Immigration and Customs Enforcement Bureau of the Department of Homeland Security, see Press Release No. SHB-17A-05, Los Angeles Sheriff’s Office, Homeland Security Under Secretary Asa Hutchinson Announces Memorandum of Understanding with Los Angeles County: MOU Provides for Immigration Enforcement Training for LA Sheriff’s Department’s Custody Employees (Feb. 24, 2005) (copy on file with author).} Thus, deportation for the undocumented student may only be as far away as a call to the local police for any infraction of state law.

2. Migrant Students’ Concerns

In addition, there is another segment of the Latino undocumented student population—the children of migrants—that faces severe challenges. Migrant students travel seasonally with their parents and families, following the various crop harvests that provide them seasonal employment from state to state. These students experience daunting obstacles on a routine basis. Their parents
enroll them in school, then withdraw them as soon as they have to leave in their quest for work. The students are enrolled again in their new schools once they arrive at their next destination. For example, the academic transcript of a migrant student shows “grading periods for the same 7 high schools, for the same 4 weeks over each of 4 years.”

In addition to the constant geographic displacement and the educational disadvantages that may ensue from this lifestyle, migrant students, who number nearly 800,000 in the United States, face other obstacles in their daily lives, including severe poverty, inadequate housing, and “the stigma of being a migrant.” These are severe obstacles to educational achievement, regardless of immigration status.

3. Resegregation and Inadequate Financing

Due to housing segregation patterns, the United States is currently undergoing educational resegregation. Supreme Court decisions limiting school desegregation and authorizing a return to neighborhood schools have been seen as precursors to resegregation in the United States. In particular, Latinos are disproportionately affected because of the rise of predominantly Latino neighborhood schools after busing was discontinued. In fact, data cited by the

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56 Id.; cf. Plyler v. Doe, 457 U.S. 202, 223 (1982) (remarking on the stigma of illiteracy, which the Supreme Court stated would mark the undocumented students for their lifetimes).
57 The 2000 Census data showed increasing residential segregation for Latinos in almost all parts of the country. This, along with migration, explains much of the increased segregation in schools. See Gary Orfield & Chungmei Lee, Brown at 50: King’s Dream or Plessy’s Nightmare, at http://www.civilrightsproject.harvard.edu/research/reseg04/resegregation04.php (Jan. 2004); see also Erica Frankenberg et al., A Multiracial Society with Segregated Schools: Are We Losing the Dream, at http://www.civilrightsproject.harvard.edu/research/reseg03/reseg03.php (Jan. 2003) (describing patterns of resegregation in the United States in the last twelve years).
59 See, e.g., Keyes v. Cong. of Hispanic Educators, 902 F. Supp. 1274 (D. Colo. 1995). In Colorado, for example, in 1991, only 1% of Latino students were in intensely segregated minority schools (more than 90% minority enrollment), while
Supreme Court for the year 2000–2001 show that 76.3% of Latino children attend schools where “minorities made up a majority of the student body.”60 Increased segregation of Latino students is most apparent in the western part of the country, where 80% of Latino students attend predominately minority schools—schools with 50–100% minority enrollment.61 Between 1968 and 2001, the percentage of Latino students in intensely segregated schools—schools with 90–100% minority enrollment—more than tripled from 12% to 37%.62 Thus, Latino undocumented students who live in urban areas are likely experiencing the resegregation of United States public schools and the concomitant ill effects of this phenomenon,63 including high drop-out rates, less-qualified teachers, and fewer educational opportunities.64

Another challenge for the Latino undocumented student is one that faces many urban minority students in the United States. As a result of San Antonio v. Rodriguez,65 school districts are not required to have equal financing throughout a state. In fact, after Rodriguez, school-finance equity concerns must be challenged via state constitutional provisions. If a state constitution does not specifically address educational equity in school financing, those challenging unequal school financing will probably be left without any recourse.

Furthermore, because school districts are mostly funded by property taxes, poorer areas with lower property values and lower property taxes result in school districts with inadequate finances, limiting their ability to fulfill their educational mission. In Rodriguez, the Supreme Court countenanced a school-financing scheme that relied on property taxes in the face of an equal protection challenge. Applying the rational basis standard of review,66 the Court held that such a system did provide for a basic school education, bearing a rational relationship to a legitimate state interest.67 In line with

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60 Grutter v. Bollinger, 539 U.S. 306, 345 (Ginsburg, J., concurring) (citing Frankenberg et al., supra note 57, at 28 fig. 4).
61 Frankenberg et al. supra note 57, at 80 table 37; Orfield & Lee, supra note 57, at 20 & 21 table 9.
62 Id. at 20.
64 Id.
66 The use of this standard was in part adopted based on the holding that education is not a fundamental right. See id. at 29–30, 37–38, 40, 44.
67 Id. at 54–55. This result is precisely the opposite of what had been found by the California Supreme Court in Serrano v. Priest, 487 P.2d. 1241 (Cal. 1971), a
Rodriguez, minority students disproportionately reside in poorer school districts where they generally perform below average on standardized tests and where, in fact, schools are most expensive to operate.⁶⁸ The presence of Latinos among the minorities in this group⁶⁹ is clearly apt to include undocumented students.

4. Higher Risk Factors for Latino Students in Higher Education

A recently published longitudinal study of 15,000 eighth-grade students in the United States shows that, on average, Latinos are overrepresented with respect to higher education risk factors. Such figures show how unprepared these students are for postsecondary education.⁷⁰ In particular, the study found Latinos are overrepresented in the following risk areas: having parents without a high school degree (“educational legacy”); having a low family income; having siblings who have dropped out of school; being held back in school; having a C or lower grade point average; changing schools; and having children while still in high school.⁷¹ The report concludes that:

At almost every level . . . Latino youth face an upward struggle. The impact of these forces is to suppress the educational opportunity for these youth and lead them to a future that requires more effort to keep on current standing with other students, much less than trying to climb up the ladder of opportunity.⁷²

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decision in which the California school funding system was found in violation of the state and federal equal protection clauses.


⁶⁹ Id.


⁷¹ Swail, supra note 70, at 28.

⁷² Id. at 32.
II. **Plyler v. Doe**: A CLOSER LOOK AT A LANDMARK DECISION

A. Applicability of the Equal Protection Clause to the Undocumented and the Standard of Review Applied: Highlights of the Majority Opinion

*Plyler v. Doe* is the leading case regarding the education of Latino undocumented students in the United States. It stands among a pantheon of landmark educational cases, such as *Brown v. Board of Education* and *Regents of the University of California v. Bakke*. Yet it is far from just a historical opinion. Indeed, *Plyler* is a vital opinion because of the nation’s economic interest regarding the availability of the noncitizen work force. A closer examination of the case will afford an opportunity to examine the message the Court sent regarding membership and equality, one that should resonate even to this day.

*Plyler* is a groundbreaking case in that, for the first time, the Supreme Court clearly stated that undocumented persons are protected under the Equal Protection Clause of the Fourteenth Amendment. Earlier cases had established that undocumented noncitizens are persons entitled to protection under the Due Process Clause of the Fourteenth Amendment.

The *Plyler* Court arrived at this conclusion by stating that “whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term.”

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74 347 U.S 483 (1954); see also Kevin Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twentieth Century*, 8 LA RAZA L.J. 42, 44 (discussing *Plyler* as a high-water mark for Latinos before the Supreme Court and comparing it to *Brown*).
78 See Olivas, *supra* note 77, at 443.
process of law by the Fifth and Fourteenth Amendments.\textsuperscript{80} This principle had been established in 1886 in \textit{Yick Wo v. Hopkins},\textsuperscript{81} where the Court held that the Fourteenth Amendment guarantee of equal protection of the laws was “universal in [its] application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.”\textsuperscript{82} In \textit{Plyler}, the Court reaffirmed \textit{Yick Wo} and extended the reach of the Fourteenth Amendment’s Equal Protection Clause to the undocumented.\textsuperscript{83} The Court took this step because, under the Fourteenth Amendment, it is “persons” within the state’s jurisdiction that are to be protected from the denial of equal protection. Thus, the Amendment’s protections would apply to those within a state’s borders, even if they are unlawfully present.\textsuperscript{84}

A notable aspect of the opinion with regard to the applicability of the Equal Protection Clause to the undocumented is the Court’s inquiry into the congressional debate surrounding the passage of the Fourteenth Amendment. In particular, the Court cited the following language from the debate recorded in the early legislative history of the Amendment: “‘Is it not essential to the unity of the Government and the unity of the people that all persons, \textit{whether citizens or strangers, within this land}, shall have equal protection in every State in this Union in the rights of life and liberty and property?’”\textsuperscript{85} In other words, the Court used the early legislative history of the Fourteenth Amendment to buttress its ruling that the Equal Protection Clause applied to the undocumented plaintiffs in the case.

Once the Court had determined the applicability of the Equal Protection Clause to the undocumented, its next task was to decide which level of scrutiny to apply to the governmental classification. In determining whether a statute passes constitutional muster under the Equal Protection Clause, the decision regarding which level of scrutiny to apply is paramount. Indeed, the level of scrutiny guides the Court’s analysis and determines not only how narrowly tailored to a state interest the challenged measure must be, but also how important the state interest must be in enacting the legislation.

The \textit{Plyler} Court found that strict scrutiny was inappropriate for two reasons. First, in the Court’s view, undocumented noncitizens

\textsuperscript{80} Id.
\textsuperscript{81} 118 U.S. 356 (1866).
\textsuperscript{82} Id. at 369.
\textsuperscript{83} \textit{Plyler}, 457 U.S. at 212 n.10.
\textsuperscript{84} Id. at 210.
\textsuperscript{85} Id. at 214 (quoting \textit{CONG. GLOBE}, 39th Cong., 1st Sess. 1090 (1866) (remarks of Rep. Bingham)).
are not a suspect class because their unlawful presence in the country in violation of federal law is not, in the Court’s words, a “constitutional irrelevancy.” The second reason why the Court rejected strict scrutiny was the existing precedent that education is not a fundamental right that would require a narrow tailoring of the legislation and a compelling state interest to justify its curtailment. Thus, the Plyler Court reaffirmed the holding in San Antonio Independent School District v. Rodriguez—that education is not a fundamental right—despite Justice Marshall’s plea to overrule it.

It is clear that Justice Brennan, who dissented in Rodriguez yet wrote the majority opinion in Plyler, did not have the votes to overrule Rodriguez via Plyler and hold that education is a fundamental right. In his Rodriguez dissent, Justice Brennan disagreed with the majority’s view that the only rights that may be deemed fundamental are those explicitly and implicitly guaranteed in the Constitution and instead stated that “‘fundamentality’ is . . . a function of the right’s importance in terms of the effectuation of those rights which are constitutionally guaranteed.

In fact, in his Rodriguez dissent, Justice Brennan used the following language from Justice Marshall’s dissent in the same case: “As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must

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86 Id. at 223.
87 Id. (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28–39 (1973) (holding that education is not a fundamental right and that “a State need not justify by compelling necessity every variation in the manner in which education is provided to its population”)).
be adjusted accordingly." As discussed below, Justice Brennan’s majority opinion in Plyler, a little more than a decade later, reflected this view. Indeed, the Plyler Court applied what, in effect, amounts to a heightened, almost intermediate level of scrutiny, rather than a traditional rational basis standard.

Yet, the application of this heightened level of scrutiny to the denial of an education to undocumented children would not have been Justice Brennan’s predictable position based on his previous statement in the Rodriguez dissent. There, the Justice asserted that education is “inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment.” Based on the close nexus between the constitutional guarantees of the First Amendment and the non-fundamental right to an education, Justice Brennan opined in his Rodriguez dissent that “any classification affecting education must be subjected to strict judicial scrutiny.” This turned out not to be the case in Plyler, however, where Justice Brennan did not find education to be a fundamental right and thus did not apply strict scrutiny to a state law denying education to undocumented children.

After the Court rejected the strict scrutiny standard in Plyler, it continued its equal protection analysis by applying a rational basis test to a Texas law that deprived undocumented children of a public education. Yet, though the Court purported to apply the traditional rational basis test, a close reading of the opinion reveals that the Court actually employed a more demanding standard.

Application of a heightened rational basis test in Plyler began with the recognition that education is “perhaps the most important function of state and local governments.” The Court then found that the state’s decision to deny an education to undocumented children...
students could hardly be considered rational unless it furthered some substantial state goal.\textsuperscript{98} In assessing the rationality of the state statute, the Court warned that the cost to the nation and to the innocent children involved must be taken into account.\textsuperscript{99} The Court further stated that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education”\textsuperscript{100} and noted that because the state took it upon itself to provide an education to children, it had to be made “available to all on equal terms.”\textsuperscript{101}

The fact that it would be unfair to penalize the undocumented students for their parents’ illicit act was another concern for the Court.\textsuperscript{102} The Court found that undocumented children “can affect neither their parents’ conduct nor their own status.”\textsuperscript{103} Because the Texas law was directed towards children and imposed its discriminatory burden on the basis of a characteristic for which the children had no control, the Court found that there could not be a rational justification for penalizing the children for their presence in the country.\textsuperscript{104}

Furthermore, the Court was concerned about the creation of a permanent caste of undocumented resident aliens, which, in its view, could result because of their lack of education.\textsuperscript{105} The Court stated that “[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish.”\textsuperscript{106} The Court recognized that depriving undocumented children of an education could result in the creation of a caste by imposing “a lifetime hardship on a discrete class of children not accountable for their disabling status.”\textsuperscript{107}

The Supreme Court expressed further concerns about the existence of this so-called “shadow population”—an undocumented underclass—allowed to remain in the United States by lax immigration enforcement and as a cheap labor source that need not be granted any of the benefits afforded to citizens or legally admitted

\textsuperscript{98} Id. at 224.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 223 (quoting \textit{Brown}, 347 U.S. at 493).
\textsuperscript{101} Id. (quoting \textit{Brown}, 347 U.S. at 493).
\textsuperscript{102} Id. at 220.
\textsuperscript{103} \textit{Plyler}, 457 U.S. at 220 (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)).
\textsuperscript{104} See id.
\textsuperscript{105} Id. at 219.
\textsuperscript{106} Id. at 218 n.14.
\textsuperscript{107} Id. at 223.
noncitizens.\textsuperscript{108} In the Court’s view, the existence of this undocumented underclass “presents most difficult problems for a Nation that prides itself on adherence to principles of equality under the law.”\textsuperscript{109}

The Court next addressed the state’s argument that the goal of reducing state expenditures by denying a free public education to the children of the undocumented was a legitimate one. The Court responded that there was no “evidence in the record suggesting that illegal entrants impose any significant burden on the State’s economy.”\textsuperscript{110} In fact, the district court had noted in \textit{Doe v. Plyler}\textsuperscript{111} that “families of undocumented children contribute no less to the financing of local education than do citizens or legal residents of similar means.”\textsuperscript{112}

Additionally, the state’s singling out of undocumented children for denial of a free public education because “their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State,” was similarly unpersuasive to the Court.\textsuperscript{113} Even though undocumented children would be subject to deportation, the Court found that many of them would remain in the country indefinitely, and some would even become lawful residents or United States citizens.\textsuperscript{114}

Finally, the Court concluded that “if 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.”\textsuperscript{115} This formulation, of course, is a higher form of scrutiny than the traditional rational basis test, as discussed above.\textsuperscript{116} Ultimately, because the state made no showing of a substantial state interest, the Court invalidated the Texas law.

Thus, the \textit{Plyler} Court contextualized the inequality inherent in the state’s denial of an education to undocumented children. The
Court’s equal protection analysis resulted in its use of a rational basis level of scrutiny in theory, but not in practice. Notwithstanding this contextualization and the Court’s sweeping language regarding the existence of an undocumented underclass, undocumented students have not been afforded rights without resistance, as discussed below.\textsuperscript{117}

B. Three Concurrences: Justices Marshall, Blackmun, and Powell

Three members of the Court wrote concurrences in \textit{Plyler}: Justices Marshall, Blackmun, and Powell. Justice Marshall’s concurrence reaffirmed his view that “an individual’s interest in education is fundamental”\textsuperscript{118} and rejected the rigid two-tier approach in equal protection jurisprudence, calling instead for varying levels of scrutiny “depending upon the ‘constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.’”\textsuperscript{119} Both assertions were reiterations of views that Justice Marshall had expressed in earlier dissents.\textsuperscript{120} But as discussed earlier, the \textit{Plyler} majority tacitly employed a “sliding scale” approach to the standard of constitutional review in its equal protection analysis.\textsuperscript{121}

Justice Blackmun’s concurrence emphasized his view that “the nature of the interest at stake is crucial to the proper resolution” of the case and reaffirmed that, when analyzing whether a fundamental right exists for equal protection purposes, there are meaningful distinctions among the multitude of social and political interests regulated by the states.\textsuperscript{122} In Justice Blackmun’s view, “denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage.”\textsuperscript{123} The Justice also enunciated his conviction that the classification of undocumented children was not a “monolithic” one and that many of the students would remain in this country permanently.\textsuperscript{124}

Finally, Justice Powell wrote separately “to emphasize the unique

\textsuperscript{117} See infra Parts IV & V.
\textsuperscript{118} \textit{Plyler}, 457 U.S. at 230 (Marshall, J., concurring).
\textsuperscript{119} \textit{Id.} at 231 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 (1973)).
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} See supra note 96 and text accompanying notes 115–16.
\textsuperscript{122} \textit{Plyler}, 457 U.S. at 231 (Blackmun, J., concurring).
\textsuperscript{123} \textit{Id.} at 234 (Blackmun, J., concurring).
\textsuperscript{124} \textit{Id.} at 236 (Blackmun, J., concurring).
character” of the case. In Powell’s view, the undocumented children were being severely disadvantaged by factors such as the federal government’s inability to control the border and the attractiveness of jobs in the United States, and he agreed that they were victims who should not be left on the streets uneducated. Justice Powell also opined that excluding the undocumented children “from a state-provided education is a type of punitive discrimination based on status that is impermissible under the Equal Protection Clause.

It should be noted that Justice Powell played a key role in the evolution of the majority decision in *Plyler*. In addition to drafting his concurrence, Justice Powell engaged in several written exchanges with Justice Brennan and requested that Justice Brennan share with him several versions of the draft opinion. Thus, it has been said that the ultimate result in *Plyler* became “almost nothing more than a direct reflection of [Powell’s] views of social policy.” In other words, because the Justice found the Texas statute problematic and misguided as a matter of social policy, he regarded it as unconstitutional. In fact, another effect of Justice Powell’s role in the evolution of the majority opinion is the dilution of the doctrinal arguments in the previous drafts, leaving it with “almost no generative or doctrinal significance because it invoked too many considerations.” This, of course, is one of the areas in which the dissent strongly criticized the majority opinion, as will be explored in Part II.C.

C. **Dissent: The Beginning of the Attack on ** *Plyler*?

The 5–4 decision in *Plyler* reveals a deeply divided court. Chief Justice Burger’s dissent pointed out that the majority cobbled together a custom-made standard of review by “patching together bits and pieces of what might be termed a quasi-suspect class and quasi-fundamental rights analysis, [and] . . . spin[ning] out a theory custom-tailored to the facts of these cases.” Justice Burger stated

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125 Id. at 236 (Blackmun, J., concurring).
126 Id. at 237–38 (Powell, J., concurring).
127 Id. at 240 (Powell, J., concurring).
128 Tushnet, *supra* note 90, at 1866–73.
129 Id. at 1873.
130 Id.
131 Id.
132 *Plyler*, 457 U.S. at 244 (Burger, C.J., dissenting). The *Plyler* opinion was criticized at the time as “appear[ing] to be ad hoc and divorced from other related bodies of law created by the Court.”
that if “ever a court was guilty of an unabashedly result-oriented approach, this case [would be] a prime example.” The dissent further averred that, unpalatable though it may have seemed, the choice to enact legislation was a political one, and not a function of the Court. In Chief Justice Burger’s view, it is up to Congress, not to the Court, to “assess the social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”

The dissent did not dispute that the denial of an education to this group of children would create a permanent caste of noncitizens. In fact the specter of this permanent caste was a “disturbing one;” yet it was Chief Justice Burger’s contention that this was “one segment of a larger problem” for the “political branches to solve.” Justice Burger further argued that the majority in Plyler “seeks to do Congress’ job for it,” and that it failed to allow the political process to run its course.

As with any deeply divided opinion of the Supreme Court, it is likely that such a vigorous dissent may have contributed to Plyler’s vulnerability to attack from both federal and state quarters. Also, in a sense, Chief Justice Burger’s words are prophetic in that the only recourse for undocumented children who have received an education and want to further pursue the American dream still lies in the political process. Only by means of that process may the undocumented embark upon a path to legalization, and the ability to work legally and attend postsecondary educational institutions free of the obstacles they face today.

III. SUBSEQUENT HISTORY OF PLYLER: UNDOCUMENTED TODAY, DOCUMENTED TOMORROW?

The named plaintiffs in Plyler, which was a class action lawsuit, were sixteen Mexican children who could not establish that they had

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Plyler, 457 U.S. at 244 (Burger, C.J., dissenting).

Id. at 253–54.

Id. (internal quotation marks omitted).

Id. at 254.

Id.

Id. This argument, of course, could be considered by some a convenient and politically expedient solution.

See infra Part IV.

See infra Part V.B.
been legally admitted into the United States.\textsuperscript{141} The State argued that these children should be singled out because they were less likely to remain within the State and put their education to “productive social or political use within the State.”\textsuperscript{142} As noted, the Court dismissed this argument, asserting that no State has such a guarantee.\textsuperscript{143} The Court noted that “many of the undocumented children . . . will remain in this country indefinitely, and that some will become lawful residents or citizens.”\textsuperscript{144} According to available data, this prediction proved true not only for the vast majority of the \textit{Plyler} plaintiffs, but for noncitizens in general.\textsuperscript{145}

The available citizenship data show that, of the noncitizens that arrived in the United States before 1970, 80.5\% obtained citizenship by 2002.\textsuperscript{146} Furthermore, of those who entered the country between 1970 and 1979, 66.6\% had obtained citizenship by 2002 and 45\% who entered between 1980 and 1989 had obtained citizenship.\textsuperscript{147} Finally, of those who entered in 1990 or later, 12.7\% had obtained citizenship.\textsuperscript{148}

What about the \textit{Plyler} plaintiffs? What has been their experience? More than a decade after the opinion was issued, thirteen of the sixteen children were interviewed by journalists for a leading national newspaper. The interviews disclosed that ten of them finished high school in Tyler, Texas.\textsuperscript{149} All of those interviewed are now legal residents and most of them have full-time employment.\textsuperscript{150} Although many have taken college courses, none has graduated from a four-year institution.\textsuperscript{151} They work as teacher’s aides, automobile mechanics, assembly-line workers, managers, painters, and stock clerks.\textsuperscript{152} Some work in the very school district that

\textsuperscript{141} See \textit{Plyler}, 458 F. Supp. at 571 & n.1 (“Prior to the trial of this case on the merits, the court ordered that the action be maintained as a class action on behalf of all undocumented school-aged children of Mexican origin residing within the boundaries of the Tyler Independent School District.”).

\textsuperscript{142} \textit{Plyler}, 457 U.S. at 229–30.

\textsuperscript{143} \textit{Id.} at 230; see supra text accompanying notes 113–14.

\textsuperscript{144} \textit{Plyler}, 457 U.S. at 230.


\textsuperscript{146} Schmidley, \textit{supra} note 145.

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} Feldman, \textit{supra} note 145, at A1.

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{Id.}
tried to bar them, and three are full-time housewives. Of the four families which these sixteen children comprised, only one has moved out of Tyler. Indeed, they appear to have attained the American dream by moving from undocumented to documented members of United States society.

The experience of the Plyler plaintiffs reflects the view of Professors Aleinikoff and Rumbaut, who have cited studies showing that, despite the fears of a multicultural nation underlying this “immigration crisis,” noncitizen acculturation within United States society is continuing its progress, as it has in the past. Thus, the available evidence to date show that the State’s argument in Plyler that the undocumented children would not put their education to use to benefit the state of Texas has proven to be false. This evidence comports with the economists’ view of the social benefits of an education, which recognizes that education has a value to society beyond its value to the individual student.

Among these social benefits are “a more-educated and better-informed electorate, lower rates of crime and violence, lower rates of poverty, better health and nutrition, and, generally a more smoothly functioning society.” These social benefits ensue regardless of immigration status because the undocumented person of today could indeed become the permanent resident or citizen of tomorrow.

IV. Plyler Under Attack

As time has passed and Plyler has endured as precedent, it has not been immune from attack; there have been legislative efforts to overrule the decision. In fact, the right to K–12 education for undocumented students has been under siege both at the federal and state levels as part of the current culture war against illegal immigration.

A. Federal Proposals

There were two federal proposals—in 1995 and 1996—that would have effectively overruled Plyler. These essentially identical
proposals came at the time of the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (‘‘IIRIRA’’).\textsuperscript{159} The Gallegly amendments to the IIRIRA, sponsored by California’s Congressman Elton Gallegly, would have authorized ‘‘[s]tates to deny public education benefits to certain aliens not lawfully present in the United States.’’\textsuperscript{160} The Gallegly amendments reflected the view that allowing undocumented students the opportunity to receive an education ‘‘promote[ed] violations of the immigration laws,’’\textsuperscript{161} imposed ‘‘significant burden[s] on States’ economies and deplete[ed] states’ limited educational resources.’’\textsuperscript{162} The proposed amendments also expressly permitted states to charge tuition fees to undocumented children.\textsuperscript{163} This, of course, was prohibited by Plyler as a denial of equal protection.\textsuperscript{164} The Gallegly amendments were not included in the final legislation.\textsuperscript{165} Opposition by Texas senators Kay Bailey Hutchison and Phil Gramm as well as an organized publicity campaign by a number of public interest groups contributed to the amendments’ defeat.\textsuperscript{166}

B. State Proposals: California’s Proposition 187

In California, following a very fractious and divisive campaign in which its proponents chanted ‘‘Save our State,’’ Proposition 187 passed by a close vote on November 8, 1994.\textsuperscript{167} Once the ballot initiative passed, it became effective the next day.\textsuperscript{168} One of its key provisions, Section 7, contravened the mandate of Plyler in that it

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\textsuperscript{160} & H.R. 4134.
\textsuperscript{161} & Id.
\textsuperscript{162} & Id.
\textsuperscript{163} & See supra notes 114–15 and accompanying text.
\textsuperscript{164} & Undocumented Students, supra note 158, at 7.
\textsuperscript{165} & Sidney Weintraub et al., Responses to Migration Issues, in U.S. COMM’N ON IMMIGRATION REFORM, MEXICO–U.S. BINATIONAL MIGRATION STUDY REPORT 437, 468 (1997), available at http://www.utexas.edu/lbj/uscir/binpapers/v1-5weintraub.pdf (last updated Apr. 20, 1998); see also Butler, supra note 76, at 1485 (noting that a bipartisan effort united to have Gallegly amendments defeated).
\textsuperscript{167} & LULAC, 908 F. Supp. at 763.
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denied undocumented children in the state a free public school education. This provision was judicially invalidated in League of United Latin American Citizens v. Wilson ("LULAC").

The LULAC litigation was decided in two opinions. Both the 1995 and 1997 decisions explicitly reaffirmed Plyler. In 1995, a district court in the Central District of California held that Section 7, which required the exclusion of undocumented students from public schools, was preempted by federal law under the Supremacy Clause, based on the Supreme Court’s equal protection analysis in Plyler. In addition, in 1997, the court again followed Plyler, and noted also that Section 1643 of the California law expressly deferred to Plyler in providing that “[n]othing in this chapter may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under Plyler v. Doe.”

At the time of Proposition 187’s introduction and passage, opinions as to whether the Court would overrule or affirm Plyler via the LULAC litigation varied, but most commentators believed that LULAC would reach the Supreme Court and result in an overruling of Plyler. LULAC was not brought before the Supreme Court, however, and the parties dropped their appeals following an agreement to enter into dispute resolution regarding the issues raised in the appeal.

Although the federal proposal overruling Plyler did not pass and California’s Proposition 187 was invalidated in a judicial reaffirmation of Plyler, both of these instances serve as hallmarks of the culture wars surrounding the education of Latino undocumented

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169 Id. at 774.
171 LULAC, 908 F. Supp. at 774.
172 Id.
174 See, e.g., Phillip Cooper, Plyler at the Core: Understanding the Proposition 187 Challenge, 17 CHICANO-LATINO L. REV. 64, 64–65 (1995) (stating that though Proposition 187 challenged the Supreme Court to overturn Plyler, the decision should survive); Benjamin N. Bedrick, Note, The Equal Protection Clause—State Statutory Restrictions on the Education of Illegal Alien Children—Proposition 187, 14 DICK. J. INT’L. L. 403 (1996) (arguing that the Supreme Court should rely on Plyler to invalidate section 7); Corinna Barrett Lain, Note, Outraged over Immigration: Rethinking Doctrinal Responses, 82 VA. L. REV. 987, 1009 (1996) (contending that the Supreme Court should overrule Plyler and uphold section 7); John T. Ritondo, Jr., Comment, California’s Duty to Educate the World: Proposition 187 and Mere Rationality, 26 CUMB. L. REV. 1045, 1047 (1995-1996) (arguing that Plyler should be overruled).
children. What these attacks on Plyler reveal is a deep-seeded resentment towards undocumented immigrants, mostly due to the high cost that states bear when educating their children. This was an argument, however, that the Court rejected in Plyler as an insufficiently rational basis for denying educational opportunities to undocumented children.176

V. Plyler’s Challenge to Bring About Broader Change for Undocumented Students

Much like Brown v. Board of Education, Plyler called for unprecedented reforms addressing the needs of marginalized youth and imposed duties on the states regarding their education. Although Plyler has certainly opened many doors for individual undocumented schoolchildren,177 it has not had the intense effect upon educational systems that Brown has had over the years. In fact, it may be that Plyler acts as a form of preserving the undocumented as a separate class, ensuring a primary and secondary education for their children, but nothing more within society. Does this mean that Plyler would not withstand attack if the issue of the education of the undocumented were to come before the Supreme Court again? As discussed below, the Court’s latest pronouncements of equal protection in education suggest otherwise.

A. Equal Protection: Context Matters

In the area of equal protection and education, we have seen the evolution from the school desegregation mandated in Brown, to affirmative action in higher education as a race-conscious remedy. In two companion cases, Grutter v. Bollinger178 and Gratz v. Bollinger,179 the Supreme Court recently ruled that colleges may consider race as part of a narrowly tailored, race-conscious admissions plan.180 A race-conscious admissions program that does not “unduly burden individuals who are not members of the favored racial and ethnic groups” satisfies the narrow-tailoring requirement.181 Quotas or the

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177 See supra Part III.
179 539 U.S. 244 (2003).
180 Grutter, 539 U.S. at 334.
181 Id. at 341 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 630 (1990))
automatic award of points based on race, however, are impermissible. In the Court’s view, because the Fourteenth Amendment protects persons, not groups, classifications based on race are “in most circumstances irrelevant and therefore prohibited.” The Court found that close judicial scrutiny is required to “ensure that the personal right to equal protection of the laws has not been infringed.”

In *Grutter*, the Supreme Court recognized that “context matters” in an equal protection analysis. In the Court’s view, strict scrutiny provides a structure in which to examine the “importance and the sincerity of the reasons” set forth for the classification within each context. In this contextualization of equal protection doctrine, the Court has departed from its decision in *Adarand Constructors, Inc. v. Pena*. There, the Court did not give weight to the social context behind the benign racial classification aimed at remedying past discrimination, a sentiment echoed by Justice Scalia, who stated that “[i]n the eyes of government, we are just one race here.”

The opinions in *Gratz* and *Grutter* establish that any policy that treats one racial group differently than another must employ narrowly tailored measures that further a compelling governmental interest. The Court has indicated that a narrowly tailored policy will survive strict scrutiny, thereby leaving open the idea that if a state can show a compelling governmental interest in denying education to undocumented children, and the means of denial is narrowly tailored, it would be upheld under the Equal Protection Clause of the Fourteenth Amendment. It is noteworthy, however, that the Supreme Court clarified that only an “‘exact connection between justification and classification’” will support the use of racial classifications. *Plyler* gives us a clue as to what a compelling

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(See *Gratz*, 539 U.S. at 270 (holding that automatic distribution of “20 points, or one-fifth of the points needed to guarantee admission,” virtually guaranteed admission to the underrepresented minority and in effect made race a deciding factor rather than merely a plus factor).


Id. (quoting *Adarand*, 515 U.S. at 227) (emphasis in original quoted source).

Id. at 327.

Id.

Id.

Id.

*515 U.S. 200 (1995).*

*Id. at 239 (Scalia, J., concurring).*

See *Gratz*, 539 U.S. at 270; *Grutter*, 539 U.S. at 326.

See *Gratz*, 539 U.S. at 270 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537...
governmental interest might be in the area of education. In holding that the school district’s policy was unconstitutional, the Court found that the district had failed to show that educating undocumented children imposed a substantial burden on the state, referring to almost negligible costs associated with the education of those children.

Today, however, there are approximately 1.6 million undocumented students in the United States, and the once negligible costs are now in the billions. Yet, the context of inequality and the existence of an underclass of undocumented individuals still survives. Presumably, that would be taken into account before the Court would consider overruling Plyler.

B. Access to Higher Education for Undocumented Students: Mixed Success

Another area in which Plyler has faced challenges in creating educational opportunity is in postsecondary education for the undocumented. Access to higher education is still an unattainable reality for undocumented students. For undocumented students, the obstacles to access to higher education range from the denial of admission, to an inability to obtain student loans, to being charged nonresident tuition, all because of lack of legal immigration status. The following two sections will detail the efforts being undertaken at the state and federal levels to ensure access to postsecondary education for undocumented Latino students in the United States.

1. Federal Efforts: Work in Progress

At the federal level, there have been several proposals to allow undocumented students access to higher education. Most notably,

(1980) (Stevens, J., dissenting)).

192 See supra note 31.

193 Though there are no overall figures, a few states have begun to estimate the costs of educating undocumented students. Pennsylvania estimates its cost to be between $50 million and $87.5 million, while Texas estimates its cost to be as high as $1.04 billion. See GAO REPORT, supra note 30, at 13.


the DREAM Act would amend the IIRIRA and repeal 8 U.S.C. § 1623, which denies education benefits to undocumented students if a United States national would not be eligible for the same benefits, without regard to State residence. Also, under certain circumstances, the DREAM Act would allow adjustment to legal status for undocumented students who complete a college education. Section 4 of the DREAM Act provides for the cancellation of the removal of an undocumented student who has been admitted to an institution of higher education or who has earned his or her high school diploma or GED. Under this provision, the student’s status would be adjusted to that of an alien lawfully admitted for permanent residence. The Student Adjustment Act of 2003 is the House companion bill to the Senate’s DREAM Act and also would permit states to determine residency requirements for higher education purposes. The House version also contains provisions for the adjustment of an undocumented student’s illegal status. Both bills were left pending at the end of the 108th Congress and are expected to be reintroduced in 2005.

The Supreme Court’s rationale in Plyler regarding the unfairness of penalizing undocumented children for their parents’ illegal acts, as well as the concern over the creation of a permanent caste of undocumented residents, would seem to be applicable to the undocumented student seeking access to higher education in this day and age. Commentators have similarly suggested that public policy supports the desirability of federal activity in furtherance of providing higher education opportunities for undocumented students.

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199 Id. § 5(d)(1)(D).
200 Id.
201 Id.
203 Id.
204 See supra notes 102–04 and accompanying text.
205 See supra notes 105–07 and accompanying text.
206 See Alfred, supra note 175, at 618.
2. State Efforts: Activity in the Majority of the States

Across the country, there has been action at the state level to allow access to higher education for undocumented students. A recent examination of the laws of the fifty states on this topic discloses the following results. Eight states—California, Illinois, Kansas, New York, Oklahoma, Texas, Utah, and Washington—permit undocumented students to pay resident tuition rates.\textsuperscript{207} These states grant in-state tuition based not on residency but on the basis of graduation from a high school in that state.\textsuperscript{208} Twenty-one additional states have considered legislation allowing undocumented students to pay in-state tuition rates. Most of these bills, however, never even made it to a vote or were postponed indefinitely in committees.\textsuperscript{209} The remaining twenty-one states have not considered the issue at all.\textsuperscript{210}

Undocumented students seeking a higher education, however, have been dealt severe blows in recent litigation in two states. In the first case, several undocumented students sued Virginia higher education institutions for failure to admit them under a state policy.\textsuperscript{211} In \textit{Equal Access Education v. Merten},\textsuperscript{212} the plaintiffs, several undocumented students and one association, claimed that federal

\textsuperscript{207} See Jessica Salsbury, Comment, \textit{Evading Residence: Undocumented Students, Higher Education, and the States}, 53 AM. U. L. REV. 459, 473–75 (2003). See, for example, CAL. EDUC. CODE § 68130.5 (West 2005) which exempts undocumented students from paying nonresident tuition rates if they have attended high school in California for three or more years and have graduated from a California high school or received the equivalency thereof. See also TEX. EDUC. CODE ANN. § 54.052(j) (Vernon 2004), which classifies an undocumented student as a resident if the student resides with his or her parent or guardian for three or more years while attending high school in the state and has graduated from a Texas high school or received the equivalency of a high-school diploma.

\textsuperscript{208} There are two types of laws granting undocumented students in-state tuition. One grants them in-state tuition by exempting them from paying nonresident tuition while the other type classifies an undocumented student as a resident. See the California and Texas examples, \textit{supra} note 207. See also Victor Romero, \textit{Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls}, 27 N.C. J. INT’L L. & COM. REG. 393, 404–07 (2002); Salsbury, \textit{supra} note 207, at 473.

\textsuperscript{209} The states that have considered legislation are: Alaska, Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Virginia, and Wisconsin. See, e.g., H.B. 2518, 46th Leg., 1st Reg. Sess. (Ariz. 2003); S.B. 1367, 92nd Gen. Assem. (Mo. 2004).

\textsuperscript{210} States that have not even considered the issue are Alabama, Arkansas, Connecticut, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Montana, New Hampshire, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, and Wyoming.


\textsuperscript{212} 305 F. Supp. 2d 585 (E.D. Va. 2004).
immigration law preempted the denial of admission to Virginia institutions of higher education, and that such denial violated the Commerce and Due Process Clauses of the Constitution. The plaintiffs have found themselves on the losing side of all of the rulings in the case. For instance, unlike Plyler, where the plaintiffs proceeded anonymously, the five undocumented students in Equal Access Education were not allowed to proceed anonymously. As a result, three of the individual plaintiffs were unable to continue in that role for fear of being deported. The next setback was a pretrial dismissal of a large part of the plaintiffs’ case. Finally, the undocumented students lost the case altogether when the remaining aspects of the case were dismissed after the court found that the universities were using the appropriate federal standards to identify the undocumented students. Thus, as Equal Access Education illustrates, the rights of the undocumented students in the higher education context have been left unprotected in what would appear to be the beginning of an erosion of Plyler’s promise of educational equality.

More recently, a lawsuit has been filed on behalf of two dozen United States citizen students, or parents of students, who pay non-resident tuition at Kansas universities. They are challenging the recently enacted Kansas law that offers in-state tuition to undocumented students who have graduated from and attended high school in Kansas for at least three years or have obtained their GED in Kansas.

The plaintiffs in the case allege that the Kansas law, H.B. 2145, violates § 505 of IIRIRA, which prohibits an illegal alien from receiving a benefit for which a United States citizen is ineligible. Plaintiffs also assert that H.B. 2145 contravenes federal law in that it

\[215 \text{Id. at 585.} \]
\[214 \text{See Doe v. Merten, 219 F.R.D. 387 (E.D. Va. 2004).} \]
\[215 \text{See Equal Access Educ., 305 F. Supp. 2d at 592 n.3.} \]
\[216 \text{Id. at 614.} \]
\[218 \text{Plyler, 457 U.S. at 202.} \]
\[220 \text{H.B. 2145, 80th Leg., Reg. Sess. (Kan. 2004).} \]
\[221 \text{See Hebel, supra note 219.} \]
\[222 \text{Id.} \]
creates distinct immigration classifications only operative in Kansas that are not based on federal standards used to determine who is a lawful resident in the United States.\textsuperscript{225} Plaintiffs also allege that implementation of H.B. 2145 will encourage and induce the “transport of aliens into and across the United States” in violation of federal immigration law.\textsuperscript{224} Finally, the plaintiffs allege that a law drawing a distinction on the basis of alienage must meet the requirements of the Equal Protection Clause under the heightened standard of review, and that, because these students will not be able to work once they are educated, the arguments regarding their contribution to the workforce are unpersuasive.\textsuperscript{225} This case is still pending. If the court does not contextualize the equal protection claim and instead follows the \textit{Adarand} model, there is a possibility that the plaintiffs will succeed.

\textbf{CONCLUSION: THE CONTINUED VITALITY OF \textit{Plyler}}

It is my contention that the importance of the \textit{Plyler} debate to the education of undocumented Latino children turns on whether, once educational achievements are obtained, the undocumented will be able to become productive members of United States society, an aim the Supreme Court embraced in \textit{Plyler}.\textsuperscript{226} As Professor Victor Romero stated:

\begin{quote}
\textit{[W]ithout a guarantee that an undocumented person can achieve lawful immigration status following graduation from college, such a person will always live under the double threat of being ineligible to lawfully hold a job and possible removal from the United States. And, since immigration regulation is a federal power, state legislatures could not tie academic achievement or state residency to immigration status. The power to change one’s immigration status rests solely on Congress’s shoulders.}
\end{quote}

\textsuperscript{227}

In my view, the continued vitality of \textit{Plyler} lies in the renewed call for immigration reform, so that once the undocumented student is educated in our country, he or she will have the opportunity to work legally in the United States. The spirit and message of \textit{Plyler} would have the undocumented student achieve a measure of educational parity, as education is the great equalizer. To this extent, the undocumented may appear to have entered into the confines of

\textsuperscript{225} \textit{Id.}
\textsuperscript{224} \textit{Id.}
\textsuperscript{225} \textit{Id.}
\textsuperscript{226} \textit{See supra} note 114 and accompanying text.
\textsuperscript{227} \textit{See Romero, supra} note 208, at 406–07 (footnotes omitted).
“post-national” citizenship, if not formal citizenship. Post-national citizenship could serve as a way in which the undocumented may assert their claims by virtue of their personhood, based on universal human rights, education being one of the basic human rights. Yet, the very endurance of Plyler as precedent may itself then perpetuate the “silent covenant” of the “shadow population” of the undocumented, who have the right to at least a secondary (high-school) education, but are unable to work and become full members of our society, and thus are unable to achieve a sense of belonging in this country. Because the nation’s interest in maintaining a cheap and expendable labor force has converged with the expectation of an education for undocumented children, Plyler survives to this day.

That Plyler can be viewed as an interest convergence case is further evinced by the fact that it was decided at a time when the hiring of undocumented workers had not yet been outlawed by the Immigration Reform and Control Act (IRCA), and thus, it still was considered to serve the nation’s interest to have undocumented workers and their families in the country. I contend that providing the children of undocumented workers a free public education would still be to the nation’s benefit, as in fact Justice Powell noted when he stated that education may be one of the reasons for the undocumented to come to the United States.

Viewing Plyler v. Doe in this light, and assessing the current situation of undocumented students in the United States, it is apparent that their educational advancement will occur when there is a convergence between the nation’s interest in allowing the normalization of their immigration status and the nation’s need for

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228 See Peter Schuck, The Re-Evaluation of American Citizenship, 12 GEO. IMMIGR. L.J. 1, 30 (1997) (describing “post-national citizenship” as a construct of the concept of citizenship based not on national identity but on “universal personhood”) (internal quotation marks omitted).

229 Id.

230 Professor Derrick Bell has identified silent covenants with respect to social reform, in particular with respect to school desegregation. In his view, “to settle potentially costly differences between two opposing groups of whites, a compromise is effected that depends on the involuntary sacrifice of black rights or interests.” BELL, supra note 21, at 29. In the case of undocumented students, their sacrifice of the potential for a better life can be seen as the compromise for the existence and endurance of Plyler.

231 Plyler, 457 U.S. at 218.

232 For a thorough analysis of the interest convergence theory with respect to Brown v. Board of Education, see BELL, supra note 21, at 59.


234 Plyler, 457 U.S. at 237 (Powell, J., concurring).
the work that the undocumented perform. “After almost two decades of anti-immigrant legislation, President Bush has finally announced a proposal to allow temporary guestworker status to undocumented workers under certain conditions.” If the guestworker proposal announced by the President is any indication, it may be that such interests are about to converge.

235 See Press Release, President Bush Proposes New Temporary Worker Program, supra note 76.