Children Versus Texas: The Legacy of Plyler v. Doe

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> "The *American [D]ream*, that dream of a land in which life should be better and richer and fuller for everyone, with opportunity for each according to ability or achievement. . . . It is not a dream of motor cars and high wages merely, but a dream of social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position."
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> - JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* (1931).

I. INTRODUCTION

During a press conference on December 22, 2010, President Obama declared that his greatest disappointment of the lame-duck 111th Congress was "the failure of lawmakers to pass the DREAM Act for children of illegal immigrants."[1] The aptly titled DREAM Act[2] would provide undocumented students with a route to citizenship and eliminate a federal provision that discourages states from providing in-state tuition to undocumented students.[3] For undocumented students, the Act is the opportunity to get an education, to get a job, and to become more active and accepted members of U.S. society. As one undocumented student testified to Congress, "'Without the DREAM Act, I have no prospect of overcoming my immigration status limbo. I'll forever be a perpetual foreigner in a country I've always considered my home.'"[4]

December 2010 was the closest the DREAM Act has come to passage in the ten years since it was first introduced. Since 2001, the Act has been reintroduced in various forms, sometimes as a stand-alone bill and sometimes as an amendment to a comprehensive

[1] Michael D. Shear, '*We Are Not Doomed to Endless Gridlock,'* THE CAUCUS, Dec. 22, 2010, 5:12 PM, http://thecaucus.blogs.nytimes.com/2010/12/22/we-are-not-doomed-to-endless-gridlock/?hp (last viewed April 27, 2011).
[2] DREAM Act is the popular shorthand for Development, Relief, and Education for Alien Minors Act.
[3] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (codified at 8 U.S.C. § 1623) (federal prohibition against providing instate college tuition to undocumented youth).
[4] UCLA Center for Labor Research and Education, *Undocumented Students, Unfulfilled Dreams* (2007) (available at http://www.labor.ucla.edu/publications/reports/Undocumented-Students.pdf).

immigration reform bill.[5] Ten years later and the Act remains an unfulfilled dream for the roughly 2.5 million undocumented youth living in the United States.[6]

One could begin the long and ongoing story of the DREAM Act in August 2001, when Senator Orrin G. Hatch first introduced the bill before the U.S. Senate.[7] However, perhaps a more apt beginning is the story *Plyler v. Doe*,[8] a 1983 Supreme Court decision said to stand "at the apex of immigrants' rights in the United States."[9] *Plyler v. Doe*—touted by some as the *Brown v. Board of Education* for undocumented children—held that undocumented children are entitled to state-funded primary and secondary education. Since the Court's decision in 1983, hundreds of thousands of undocumented children have gone to school who otherwise would have been barred.

Through granting undocumented individuals an inchoate permission to participate in the U.S. political and cultural life,[10] *Plyler* lies at the foundation of the DREAM Act and the fight to secure access to higher education for undocumented students—the fight to secure access to the American Dream. While *Plyler* was only a first step in what has proven to be a long battle to ensure that undocumented students have the ability to participate meaningfully in society, it was an important first step—one that has shaped the lives of many through inspiring undocumented students to dream of obtaining a college education, of breaking out of their circumstances of birth, and of actively making their lives better, richer, and fuller, the words of Pulitzer Prize-winning American historian James Truslow Adams. *Plyler* made the DREAM Act possible, for "if there were no *Plyler*, there could be no undocumented college students."[11] And this the *Plyler* plaintiffs likely never anticipated.

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[5] *See* THOMAS (Library of Congress), Search Bill Text for Multiple Congresses, http://thomas.loc.gov/home/multicongress/multicongress.html (search "DREAM Act") (last visited May 3, 2011).
[6] UCLA Center for Labor Research and Education, *supra* note 4 (indicating that approximately 65,000 undocumented students graduate from high school in the United States each year).
[7] DREAM Act, S.1291, 107th Cong. (2001); *see also* Bill and Summary Status, 107th Congress (2001-2002): S. 1291, Thomas.com, *http://rs9.loc.gov/cgi-bin/bdquery/z?d107:SN01291:@@@L&summ2=m&* (last viewed May 3, 2011).
[8] Plyler v. Doe, 457 U.S. 202, 230 (1983).
[9] Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L. Q. 1019, 1039 (1995) (hereinafter "*Storytelling"*).
[10] *See* Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 S.M.U. L. REV. 99, 101 (2008) (hereinafter "*Lawmakers Gone Wild*").
[11] *Id.*

II. BACKGROUND

A. *The Robles and Alvarez Families and Tyler, Texas*

In 1972, Jose and Rosario Robles packed up their children and what they could carry and left Mexico for Texas. Jose wanted a better life for his family. Jose and Rosario found themselves in Tyler, Texas—a quiet city in East Texas. Jose found a job as a pipe factory worker, and Rosario enrolled their young child in the Tyler public school system. She began a tradition of walking her children to school each day.

Two years later, in 1974, Humberto Alvarez left his wife and children in Mártires de Río Blanco, a working class neighborhood in the Mexico City's northernmost borough, to seek work to support his growing family.[12] He, too, found himself in Tyler, Texas. A jack-of-all trades, Humberto found a job at a meatpacking plant in Tyler—99 miles southeast of Dallas, 465 miles from the U.S.-Mexico border, and over 1220 miles from home.

The sleepy East Texas city, proclaimed the "Rose City of America," was drastically different than the crowded, crime- and poverty-ridden streets of Mexico City, one of the most populous cities in the world. With a population of about 70,000 people,[13] Tyler was about 0.6 percent the size of Mexico City, home to 11.2 million people in 1975. Tyler boasted of charming brick-lined streets and of being home to America's largest rose garden.[14] Around the state, those from Tyler can be identified by their distinct traditional accent—one that is conjures up images of Vivien Leigh in "Gone With the Wind."[15] It was recently listed as one of the top ten places to

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[12] The following articles and books were used to develop the background section for this story, including information about the plaintiff's families, the attorneys and other parties involved, as well as the history of the relevant section of Texas's Education Code: Paul Feldman, *Texas Case Looms Over Prop. 187's Legal Future*, LOS ANGELES TIMES, (October 23, 1994) (available at http://articles.latimes.com/1994-10-23/news/mn-53869_1_illegal-immigrants); Barbara Belejack, *A Lesson in Equal Protection*, TEXAS OBSERVER (July 12, 2007) (available at http://www.texasobserver.org/archives/item/15148-2548-a-lesson-in-equal-protection-the-texas-cases-that-opened-the-schoolhouse-door-to-undocumented-immigrant-children); Mary Ann Zehr, *Case Touched Many Parts of Community*, 26(39) EDUCATION WEEK 13 (June 6, 2007) (available at http://www.edweek.org/ew/articles/2007/06/06/39plylerside.h26.html) (subscription required to access); Katherine Leal Unmuth, *Tyler case opened schools to illegal migrants*, DALLAS MORNING NEWS (June 14, 2007), (available at http://shapleigh.org/news/1328-tyler-case-opened-schools-to-illegal-migrants) ; Michael A. Olivas, *The Story of Plyler v. Doe, The Education of Undocumented Children, and The Polity*, in IMMIGRATION STORIES 197-222 (David Martin and Peter Schuck, eds., 2005).

[13] U.S. Department of Commerce, 1980 Census of Population: Texas, Volume 1, Characteristics of Population, Chapter C, General Social and Economic Characteristics, Table 59 (July 1983) (available at http://www2.census.gov/prod2/decennial/documents/1980a_txCs1-01.pdf).

[14] *See, e.g.,* Tyler Convention and Visitors Website, http://www.visittyler.com (last visited March 30, 2011).

[15] Interview with Danielle Ogden and Jason Sergio Jacobs (March 5, 2011).

retire in the country.[16] Tyler was about 71 percent white, 26 percent black, 4.5 percent Hispanic, 0.3 percent Asian and Pacific Islander, and 0.1 percent Native American. About 97 percent of those who lived in Tyler were born in the United States and 76.5 percent were born in the State of Texas. Only about 5.4 percent spoke a language other than English at home.[17]

In 1975, about a year after Mr. Alvarez immigrated to Tyler, his wife Jackeline and their children followed. The children began learning English and enrolled in the Tyler Public School District. Their daughter, Laura, enrolled in the same grade as Alfredo Lopez, another undocumented child whose parents, Jose and Lidia Lopez, had moved him and his sibling to Texas in the hope that they would receive a better education than they would in Mexico.

In 1977, as Laura was eagerly preparing to enter the third grade, she and her siblings were told they could no longer attend. Laura, only eight at the time, did not understand why. She was not told that on July 21, 1977, the trustees of the Tyler Independent School District voted to charge undocumented immigrant children $1,000 a year in tuition—a fee that the Alvarez family could not afford for each of their five children with Humberto's meatpacking plant wages. Adjusting for inflation, this would be $3,634.04 per child in 2011. For most of the 30 to 60 undocumented students enrolled in Tyler's public schools, this fee was tantamount to expulsion. Most of their parents worked in agriculture or at Tyler factories or restaurants, earning only about $4,000 each year, if that.[18] Thus, as a practical matter, the decision constituted a denial of minimal access to education for undocumented youth.

On the first day of school in September 1977, children were turned away at schoolhouse doors across the Tyler School District if they could not produce birth certificates. That morning, as in years past, Rosario had walked her five children to school. The Robles had lived in Tyler for five years. They owned their house and paid school taxes. However, after she could not produce documentation for her children, the principal piled her and her children into his car and drove them home.

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[16] *Best Places to Retire Top 10,* http://www.greatplacestoretire.com/best-places-to-retire.php (last visited March 30, 2011).

[17] U.S. Department of Commerce, 1980 Census of Population: Texas, Volume 1, Characteristics of Population, Chapter C, General Social and Economic Characteristics, Table 59 (July 1983) (available at http://www2.census.gov/prod2/decennial/documents/1980a_txCs1-01.pdf). The Hispanic population in Tyler rose to 15.8 percent in 2001 and 21.2 percent in 2010.

[18] *See* Feldman, *supra* note 12.

B. *History of Education Code section 21.031*

On September 1, 1975, about two years before the Tyler School District's change in policy, the Texas Legislature revised the state education code to authorize its public school districts to either charge undocumented children tuition fees or exclude them entirely.[19] The Legislature did not hold a hearing on the provision, Education Code section 21.031, and did not publish a record explaining its origin or purpose. Legislators in office at the time suggest that the provision was inserted into a routine education bill at the request of border-area superintendents who had mentioned the issue to their representatives. Many don't remember even reading it.

Section 21.031 was passed in an era of apprehension in regard to illegal immigration. Particularly concerned were the Border States—Texas, New Mexico, Arizona, and California. During the 1960s, illegal immigration from Mexico had begun to rise considerably. Then, during the 1970s, the United States was hit with a gas crisis and the worst economic downturn in decades, one with both high inflation and high unemployment rates. With the convergence of the economic recession and the increasing immigrant population, concerns about masses of immigrants flooding the U.S.-Mexico border erupted in the national consciousness.[20]

Although section 21.031 enabled public school districts to charge tuition, not all school districts chose to do so. The Tyler School District had ignored the law for two years, but other schools across Texas had begun to change their policies. By 1977, the School District trustees feared that if they did not take action, Tyler would soon become a "haven" for undocumented families seeking access to a free public education.[21] Only between thirty and sixty undocumented school-aged children lived in the Tyler School District, but the trustees feared

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[19] *See* Tex. Educ. Code Ann § 21.031 (Vernon Supp. 1981). The pertinent part of section 21.031 reads:

> (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 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.

[20] SOLTERO, CARLOS. LATINOS AND AMERICAN LAW: LANDMARK SUPREME COURT CASES 118 (2006); *see also* CFR TASK FORCE ON IMMIGRATION, U.S. IMMIGRATION POLICY (July 2009) (cited by Aimee Rawlins, *Immigration and the Midterm Elections*, CRF.ORG, October 27, 2010, http://www.cfr.org/congress/immigration-midterm-elections/p23225?cid=rss-fullfeed-immigration_and_the_midterm_el-102710).

[21] Doe v. Plyler, 458 F. Supp. 569, 572 (D.C. Tex. 1978).

more would come—more than the School District could handle. At the time, Superintendent James Plyler described the undocumented students as a burden. Interviewed later, he claimed that due to the influx of Hispanic families to Tyler, the District "'didn't have a choice'" but to begin charging tuition.[22] In deciding how much to charge in tuition, the District divided its annual operating budget of $18.5 million by the total number of students enrolled, 16,000. The District arrived at the quotient of $1,156.25—the proportional cost of educating one child in the district.[23] The District then rounded this figure down to a clean $1,000.

Although some schools districts, like Tyler, were slow to the uptake, section 21.031 eventually had the practical effect of excluding undocumented children from Texas's public schools. By 1980, the majority of Texas's over-1,047 public school districts had decided to either charge tuition or outright reject undocumented students.[24] A 1980 stratified random sample of Texas school districts, surveying 60 randomly selected districts, indicated that while some school districts had not yet decided how they would respond to section 21.031, 72.9 percent of districts had established policies either excluding all undocumented children or charging them tuition.[25] Thus, although some school districts chose to ignore the statute and to continue admitting undocumented students free of charge, as they had in the past, this approach was quickly becoming the minority position.

The *New York Times* editorialized in regard to section 21.031, it is "intolerable that a state so wealthy and so willing to wink at undocumented workers should evade the duty—and ignore the need—to educate all its children."[26] With the State balking its duty, teachers, church workers, and graduate students across Texas set up makeshift schools to educate the undocumented children who had been shut out by the public school districts. In Fort Worth, schoolteachers gave up their evenings to lead night schools for these children. In Dallas, a group of religious and business leaders created a network of schools in churches. Some private Catholic schools also took in undocumented students free of charge.

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[22] *See* Zehr, *supra* note 12.

[23] Accounting for inflation, $1,156.25 per student in 1976 amounts to $3,499.23 per student in 2000 and $4,497.16 per student in 2011. However, education spending in Texas is rising at a rate faster that inflation. In 2000, Texas spent $5,857 per student on public education, and in 2010, more than $11,000 per student. National Center for Policy Analysis: Daily Policy Digest, *Texas School Spending Tops $11K Per Pupil*, May 20, 2010, http://www.ncpa.org/sub/dpd/index.php?Article_ID=19360 (last visited March 30, 2011).

[24] In re Alien Children Education Litigation, 501 F. Supp 544, 555 (1980); *see also* Tyler Economic Development Counsil, Inc., *Tyler, TX – Education,* http://www.tedc.org/profile/pro_education.php (last visited March 30, 2011) (indicating that there are over 1,047 Independent School Districts (ISDs) in Texas).

[25] *In re Alien Children Education Litigation*, 501 F. Supp. at 555, n.17.

[26] Editorial, *Teaching Alien Children Is a Duty*, N.Y. TIMES, June 16, 1982, at A30 (cited in Belejack, *supra* note 12).

C. *From Schoolhouse to Court House*

Until 1977, there had been only local resistance to section 21.031. Then, after a series of events in 1977, section 21.031 broke the national radar. Like many other families, Jose and Rosario Robles were furious after the School District denied their children access to school. They had moved to Texas to secure a better life for their family, not to have their children be turned away at the schoolhouse doors. They turned to outreach worker Michael McAndrew, who worked with Hispanic families at a local Roman Catholic Church. Unsure how to respond, McAndrew contacted local civil rights and labor law attorney Larry Daves, who in turn contacted the Mexican American Legal and Educational Fund (MALDEF). The director of MALDEF's San Antonio office, also unsure what to do, called up MALDEF's headquarters in San Francisco, where the issue landed on the desk of Peter Roos, MALDEF's Director for Education Litigation.

Peter Roos immediately saw *Plyler* as the *Brown v. Board of Education*[27] for Mexican Americans—MALDEF's "vehicle for consolidating the various strands of social exclusions that kept Mexican-origin persons in subordinate status."[28] Since the early 1970s, MALDEF had taken on almost 100 education lawsuits throughout the Southwest, most on the issue of desegregation.[29] However, there cases had predominately been small state court cases, and Roos had for some time been seeking out the right federal case to bring home a more far-reaching remedy. Two days after receiving the call from Texas, Roos was on a plane from San Francisco to Tyler. He and Larry Daves worked through Labor Day weekend and filed a lawsuit in federal court against Superintendent James Plyler and the Tyler School Board on Tuesday, September 6, 1977, alleging that section 21.031, as implemented by the Tyler School District, (a) violated the Equal Protection Clause and equal protection of the laws and (b) was preempt by the federal Immigration and Nationality Act (INA).

III. LITIGATION

A. Plyler v. Doe: *District Court Case No. 1*

Roos filed the suit against the Tyler School District on behalf of four willing families—Jose and Rosario Robles, Humberto and Jackeline Alvarez, Jose and Lidia Lopez, and Felix

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[27] *Brown v. Board of Education*, 347 U.S. 483 (1954).
[28] Olivas, *supra* note 12, at 201.
[29] Through 1970-1981, MALDEF undertook 93 federal and state cases, 71 cases (or 76.3 percent) in the area of desegregation. *See id.* at 202 (citing GUADALUPE SAN MIQUEL, LET ALL OF THEM TAKE HEED, MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981 (1987)).

Hernandez. The families had lived in Tyler for between three and thirteen years, and the parents had local jobs in meatpacking, foundries, and agriculture, including Tyler's famous rose industry. Some had income tax statements, all had rent receipts and car titles, and all had at least one child who had been born in the United States.[30]

The decision to become engaged in the lawsuit was a perilous one. All four families risked deportation by joining the lawsuit in the name of their children's education. Indeed, a year later in a similar but separate lawsuit involving the Port Arthur Independent School District, U.S. District Judge Joseph J. Fisher ordered the District to send the names of the undocumented parents to immigration officials.[31] Roos and Daves were terrified that the families were going to get deported. Fearing disclosure of their identities to immigration authorities, they filed the complaint under pseudonyms. The Robles, Alvarez, Lopez, and Hernandez families became the Doe, Loe, Roe, and Boe families, respectively. Despite this precaution, the parents were still well aware of the risk they faced. To be sure, U.S. District Judge William Wayne Justice reminded them that he had no right to withhold their names from the U.S. Department of Justice.[32]

In an attempt to intimidate the families into dropping the suit, the U.S. Attorney authorized the director of Dallas's Immigration and Naturalization Service (INS) office to conduct "immigration sweeps" in Tyler and the surrounding area. Fearing the effect of any planned immigration raids, Roos wrote to the INS Commissioner in Washington. Fortunately for the plaintiffs, the Commissioner at the time was Leonel Castillo, a Texas-native, a progressive Mexican American politician, a former Peace Corps volunteer, the husband of an immigrant, and the first Hispanic appointed to the head of the INS.[33] Castillo was also the first INS Commissioner to issue a policy directive instructing all INS staff to refer to those who had formerly been called "illegal aliens" as "undocumented workers,"[34] a linguistic battle that

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[30] The school-aged children who were citizens, presumably, were not turned away, only their undocumented siblings.

[31] Judge Fisher was appointed by President Eisenhower to the Eastern District of Texas in 1959.

[32] *See* Doe v. Plyler 458 F. Supp. at 572 ("Fearing disclosure of their identities, plaintiffs had filed their complaint under pseudonyms, and at the hearing moved for a protective order limiting the circumstances under which, and the persons to whom, plaintiffs' true names might be revealed. The motion was granted and the order issued; however, the court advised the Department of Justice representatives that the order did not bind any officer of the United States who might desire to take action against plaintiffs and their parents for violations of the federal immigration laws.").

[33] Castillo was appointed by Jimmy Carter and served as INS Commissioner from May 13, 1977, to October 1, 1979. ENCYCLOPEDIA OF MINORITIES IN AMERICAN POLITICS, VOLUME 2: HISPANIC AMERICANS AND NATIVE AMERICANS 429 (Jeffrey D. Schultz et al., eds, 2000).

[34] David North, *Blog Update: Fuzzy Words Foul Up the Immigration Policy Debate*, CENTER FOR IMMIGRATION STUDIES, October 7, 2009, http://www.cis.org/north/terminology (last visited April 29, 2011).

continues to this day.[35] Castillo effectively halted any planned immigration raids in and around Tyler.[36]

Judge Justice scheduled a preliminary hearing for 6:00 a.m. on Friday, September 9, 1977, just three days after the suit was filed. He hoped that a pre-dawn hearing would limit the publicity draw and protect the families from being recognized and deported. On the morning of the hearing, Jose and Lidia Lopez packed everything they owned into their Dodge Monaco—prepared for immediate arrest and deportation. Only eight years old at the time, Alfredo remembers his family's car, packed unusually full on the ride to the courthouse. He knew his family might have to leave Tyler, though he did not fully understand why. Laura, also eight years old, also remembers the morning of September 9 and the bumpy, pre-dawn ride to the courthouse in her family's station wagon, and of being shuffled inside through the side-door. Like Alfredo, she did not fully understand what was going on. Her parents had taught her that children should stay out of "adult issues."

With outreach worker Michael McAndrew translating, the initial hearing began. The plaintiffs' parents sat in the courtroom nervously anticipating their fate, unaware that the U.S. Department of Justice—more interested in letting the case proceed than deporting a few families in Tyler, Texas—had already decided not to take action against the families.

Two days after the hearing, on a Sunday, Judge Justice issued a preliminary injunction and ordered Tyler schools to re-open their doors to undocumented students. The children were back in the classroom the very next day—just one week after they had been barred. Alfredo and Laura went back to school, not understanding until many years later why they had been taken out of school for a week.

After winning the preliminary injunction, Roos began to prepare for the trial, set for December 1977. In addition to the traditional trial preparation, Roos and other MALDEF attorneys launched a campaign to build political support for undocumented children. They enlisted public opinion leaders from across the country to "support the schoolchildren." They set up meetings with leaders of other Latino organizations, elicited legal organizations to file amicus

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[35] A current campaign targeting media and pubic servants, "Drop the I-Word," charges that "illegal" is "a damaging word that **divides** and **dehumanizes** communities and is used to **discriminate** against immigrants and people of color. Colorlines *Drop the I-Word*, http://colorlines.com/droptheiword/#about (last visited April 29, 2011) (emphasis in original).

[36] *See Olivas, supra* note 12, at 204*; see also* ENCYCLOPEDIA OF MINORITIES IN AMERICAN POLITICS, VOLUME 2: HISPANIC AMERICANS AND NATIVE AMERICANS 429 (Jeffrey D. Schultz et al, eds 2000).

briefs on behalf of the plaintiffs, and encouraged people to write editorials and host fundraisers to raise awareness and solicit resources.

During the two-day trial in December 1977, Roos argued that the Tyler School District's implementation of section 21.031 denied undocumented students equal protection of the law, in violation of the United States Constitution. He offered into evidence the record of September's early morning hearing and offered the testimony of four expert witnesses. These expert witnesses testified to the historical framework of illegal immigration across the U.S.-Mexico Border, the general characteristics of illegal immigrants, the state of school financing in Texas, and the educational needs of Mexican children.

In defense of the Tyler School District's application of section 21.031, the State presented testimony from the Superintendent Plyler and the business manager of the School District. The State asserted that (a) undocumented migrants were not entitled to equal protection of the law under the Fourteenth Amendment, and (b) even if they were, their decision to spend public monies to provide higher education to lawful residents "instead of sharing it with people who have no right to be in the state at all," easily satisfied rational basis review.[37]

Ultimately, in September 1978, about nine months after the trial, Judge Justice issued a permanent injunction against the Tyler School District, ordering the District to keep its doors open to undocumented students. He ruled that section 12.031, as applied by the Tyler School District, violated the Equal Protection Clause of the Fourteenth Amendment. He found, for the first time, that undocumented immigrants were entitled to Equal Protection under the Fourteenth Amendment, and that the discrimination embodied in section 12.031 was unconstitutional because it was not supported by a rational basis.[38] Since the statute did not even pass rational basis review, Judge Justice declined to rule on whether undocumented individuals constituted a suspect classification meriting a strict scrutiny inquiry.

Judge Justice's opinion included factual findings that would play a critical role at the Supreme Court. First, Judge Justice found that while the exclusion of undocumented students would "eventually" result in some savings to the state, "the connection between the 'economy

[37] The State also argued that the statute and the School District's policy were "merely 'state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights,' thereby requiring only relaxed judicial scrutiny." *Doe v. Plyler*, 458 F. Supp. at 579.
[38] *Doe v. Plyler*, 458 F. Supp. at 590-92. Judge Justice also ruled that section 12.031 violated the Supremacy Clause, but the Fifth Circuit rejected this proposition and the Supreme Court did not address the preemption issue. *See Plyler v. Doe*, 457 U.S. at 208.

measure' of excluding undocumented children from the benefits of the Available School Fund and increasing educational quality for the remaining students was shown to be unreliable."[39] He also found that any savings to the state would be unpredictable in amount and distribution. He further noted that although the State might save money, the amount of funding allocated to a given school would likely decrease, since state and federal funding is allocated to schools based primarily on the number of children enrolled. Such a decrease in funding could result in a school district being forced to cut programming, he reasoned. He concluded, "Although the state will have saved money, it will not necessarily have improved the quality of education."[40]

Judge Justice also found that statute would predominantly affect only a small subclass of undocumented individuals: "entire families who have migrated illegally and – for all practical purposes – permanently to the United States."[41] This finding directly refuted the State's argument that the "illegal" immigrants would not put their Texas education to use in the state. Citing the statistic that fifty to sixty percent of then-currently legal immigrant workers were once illegal, Judge Justice noted, "the illegal alien of today may well be the legal alien of tomorrow."[42] Although legalization rates have since slowed given the rise in immigration and the corresponding increased difficulty of obtaining a green card,[43] the finding that the great majority of undocumented students remain in the United States remains true today.

Finally, Judge Justice found that section 12.031 would result in a sub-class of uneducated individuals within the United States. He stated that undocumented children were already disadvantaged by poverty, an inability to speak English, and racial prejudice, and that without an education, they "will become permanently locked into the lowest socio-economic class."[44] He chided that state for attempting to deal with the long-standing challenges caused by local financing, especially problematic in schools across the border, in a way that targeted such a marginalized population. He wrote, "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."[45]

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[39] *Doe v. Plyler,* 458 F. Supp. at 576-577.
[40] *Id.* While the exact amount of money the state actually would have saved is open to debate, Judge Justice's finding that the measure was not narrowly tailored to improve the quality of education in Texas schools played an important role later in the Supreme Court's decision.
[41] *Id.* at 578.
[42] *Id.* at 577.
[43] *See* Vikas Bajaj, *Green Card, Red Tape: Visa program under fire for labor drain*, THE DALLAS MORNING NEWS, August 6, 2000, http://dallasnews.com/business/134348_immigration_06.html (indicating that the INS had a backlog of more than 1 million applications in 2000) (last visited March 29, 2011).
[44] *Doe v. Plyler,* 458 F. Supp. at. at 577.
[45] *Id.* at 589.

Despite the immediate success, Roos anticipated that the State would appeal to the Fifth Circuit. He therefore continued his efforts to garner support on behalf of the undocumented children plaintiffs. In March 1979, Roos urged Drew Days, the Assistant Attorney General for Civil Rights, to join the litigation. He then asked the Secretary of Health, Education, and Welfare, Joseph Califano, to persuade the Solicitor General to enter on the side of the children. As a result of these efforts, after the State ultimately filed their appeal to the Fifth Circuit, the Carter administration filed an amicus brief on the side of the children.[46] In October 1980, the Fifth Circuit affirmed Judge Justice's holding, agreeing that the statute was "constitutionally infirm" regardless of the level of scrutiny applied.[47]

B. *In re Alien Children Education Litigation: District Court Case No. 2*

Judge Justice's decision was limited to the Tyler Independent School District and its policy of charging undocumented students $1,000 in tuition. Section 21.031 remained open for challenge in school districts across Texas. Soon, inspired by Judge Justice's ruling in *Plyler*, seventeen lawsuits against section 21.031 and various local implementations of the law were filed across the state. Unlike *Plyler*, these cases did not only name a particular school district as defendant. They also named the State of Texas, the governor, the Texas Education Agency, and the Education Agency Commissioner.

In May 1979, before the Fifth Circuit affirmed Judge Justice's holding, Isaias Torres, local counsel for the undocumented students in Houston, had asked Peter Roos if he would consolidate *Plyler* with the various other challenges across the state. Torres wanted to step-back, re-group, and join forces as a single statewide effort to oppose section 21.031. He believed that consolidating the efforts of the various advocates across the state, including MALDEF, would be in the best interest of all. Most significantly, he feared that without such consolidation, the relief granted in *Plyler* by Judge Justice would not be extended to other school districts throughout Texas.

Roos, who still thought of *Plyler* as his *Brown v. Board*, was reluctant to consolidate. He had good reason to be reluctant. First, *Plyler* was far less complex than the cases it had spawned. *Plyler* challenged only the Tyler School District's application of the Texas law, not the law itself.

[46] Joseph Califano was appointed as Secretary of Health, Education, and Welfare by President Carter in January 1977 and served until August 1979.
[47] Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980) (affirming 458 F. Supp. 569 (E.D. Tex. 1978)).

Also, *Plyler* named as defendants only parties affiliated with the Tyler School District, not the State of Texas, the governor, the Texas Education Agency, or the Education Agency Commissioner.

Second, the State had underestimated the *Plyler* plaintiff's case and had therefore not put together their strongest case to oppose it. For instance, the attorney representing the State did not even produce any independent witnesses.[48] Judge Justice had denied the States' motion to re-open the record, so the *Plyler* plaintiffs were insulated from any attempt to correct this mistake of underestimating the case. However, consolidation would give the State a chance to correct their mistake and mount a more aggressive strategy. Roos did not want to give the State that opportunity.

Third, Roos thought that his opposing counsel was, quite simply, an ineffective attorney. He predicted that defense counsel in Houston would be far more experienced and specialized in the area of education law. Thus, while Roos understood Torres' core motivation for making the request—a fear that the relief granted in *Plyler* would not be applied to other Texas school districts—he declined to consolidate.

The State, too, wanted the cases consolidated. The State brought a motion to consolidate. On November 1979, the motion was granted, and the seventeen cases—excluding *Plyler,* up for appeal at the Fifth Circuit—were merged into a single case to be heard in Houston: *In re Alien Children Education Litigation*.[49] Peter Schey, a civil rights attorney and South African immigrant who was working with an immigrant rights project in Los Angeles, was chosen to represent the undocumented student plaintiffs in Houston before Judge Woodrow Seals of the Southern District of Texas in early 1980. At trial, Schey not only challenged the constitutionality of section 21.031, but also raised larger issues about federal immigration law, immigration history, school finance, federal education programs, and Texas's historical influence on labor and migration patterns. He brought in sociologist Gilbert Cardenas to discuss the "longstanding practice" of offering temporarily employment opportunities to Mexican workers and then sending them home "whenever it was convenient." He brought in Leonel Castillo, whose term as INS Commissioner had ended about two months before, to discuss how INS staffing deficiencies created a "de facto amnesty," so children who would be kicked out of school under section 21.031 would likely never be deported. Over the course of the 24-day trial spanning nearly six weeks, Judge Seals let virtually everything into evidence.

[48] He did, at least, question several of the Plaintiffs witnesses. *See Doe v. Plyler*, 458 F. Supp. at 573.
[49] In Re Alien Children Education Litigation, 501 F. Supp 544 (S.D. Tex. 1980).

Despite Torres' concerns, on July 21, 1980, Judge Seals issued an 87-page opinion striking section 21.031 as unconstitutional and ordering the state to stop enforcing the law and all school districts to admit students regardless of immigration status.[50] Unlike Judge Justice, Judge Seals applied strict scrutiny on the grounds that the statute had resulted in "the absolute deprivation of education."[51] He found that the State's concern for "fiscal integrity" was not a compelling state interest, that the State had failed to show that excluding undocumented children would improve the quality of education in Texas, and that the educational needs of undocumented children were no different than those of documented children.[52] Like Judge Justice, Judge Seals concluded that the statute was not narrowly tailored "to advance the asserted state interest in an acceptable manner."[53]

Immediately after Judge Seals' issued his opinion, his office was flooded with angry phone calls and letters. One letter proclaimed, "'It is people like you who will cause the ultimate breakdown of the system of law under which we live and the subsequent return to the law of the jungle.'" His office learned to ignore the sound of the phone. Judge Seals did reply to some of the few supportive letters he did receive. In one, he expressed concern for the upcoming election: "'I hate to think what will happen to my decision if Governor Reagan wins the election and appoints four new justices to the Supreme Court. I do not think those children would have much of a chance.'"[54]

In February 1981, only seven months after Judge Seals issued his opinion, the Fifth Circuit summarily affirmed his holding.[55] Apparently, its decision in *Plyler v. Doe* of only a few months before was strong enough and similar enough that the Fifth Circuit felt further argument was unwarranted.

C. *Consolidation and Oral Argument at the United States Supreme Court*

The State appealed both *Plyler* and *In Re Alien Children Education.* On May 4, 1981, the Supreme Court noted probable jurisdiction and combined the State's appeals into a single case for briefing and oral argument, despite Roos' desires to keep the cases separate.[56] Roos,

[50] *Id.* at 597.
[51] *Id.* at 582.
[52] *Id.* at 583.
[53] *Id.* at 583-883.
[54] Belejack, *supra* note 12 (quoting letter written by Judge Seals).
[55] *Plyler v. Doe*, 457 U.S. at 210 (1983).
[56] Plyler v. Doe, 452 U.S. 937 (1981) (noting probable jurisdiction).

naturally, was unhappy with the ordered consolidation. He and Peter Schey "worked out a stiff and formal truce, dividing the oral arguments down the middle."[57] Roos again not only on trial prep but also continued his efforts to generate political support for undocumented children. In January 1981, after the Reagan administration took office, Roos wrote to the Under Secretary of the newly created Department of Education, William Clohan, and urged him to continue to support the children, as the Carter Administration had. Though the Reagan administration declined to formally enter its amicus curiae brief on the side of the children, it also declined to seek to overturn the lower court decision. The new Justice Department told the Court that "while it believed the equal protection clause applied to illegal aliens, the Federal Government had no legal 'interest'' in the constitutionality of the Texas law and would therefore take no position."[58]

By the time the Supreme Court heard the case in December 1981, Laura and Alfredo was in seventh grade and Judge Seals' fear had come true: Ronald Regan had replaced Jimmy Carter as president.[59] Luckily, when the Court heard *Plyler*, President Regan had only had the opportunity to appoint one justice: Justice Sandra Day O'Connor, to replace Justice Potter Stewart.[60] And surprisingly, at oral argument on December 1, 1981, as she peppered Texas Assistant Attorney Richard Arnett with questions, it seemed to some in the room that Justice O'Connor might actually come out on the side of the undocumented children.

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[57] Olivas, *supra* note 12, at 207.

[58] Linda Greenhouse, *Justices Rule States Must Pay To Educate Illegal Alien Pupils*, NY TIMES, June 16, 1982, at A1.

[59] Feldman, *supra* note 12.

[60] It is unclear how Justice Stewart would have voted in *Plyler v. Doe*. He was the swing vote in *San Antonio v. Rodriquez,* concurring with the majority opinion and giving the victory in that case to the school district. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring). While Justice Stewart stated that Texas's method of school financing had "resulted in a system of public education that can fairly be described as chaotic and unjust," he found that finding the system to be unconstitutional would be "an extraordinary departure from principled adjudication under the Equal Protection Clause of the Fourteenth Amendment." *Id.* Justice Stewart may have been convinced to side with the children in *Plyler* based on the lower court findings that the school district's measure were not narrowly tailored to achieve improved educational quality. *See id.* at 62. However, his opinion in *San Antonio* suggests that he preferred to leave expansion of the Equal Protection Clause to the political process. *See id.; see also* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 255 (1979) (claiming that Justice Stewart—who concurred without opinion in the judgment of *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973)—balked at joining the plurality opinion in part because he was " certain the Equal Rights Amendment would be ratified," thereby leaving the decision to expand the scope of the Equal Protection Clause to Congress) (cited in David A. Sklansky, *Proposition 187 and the Ghost of James Bradley Thayer*, 17 CHICANO-LATINO L. REV. 24, 44 & n.113 (1995)).

That said, it may have been hard to predict where many of the justices might have landed on this issue. Justice White, for instance issued a dissent in both *San Antonio v. Rodriquez* and *Plyler*. In *Rodriquez,* he found that the Texas' public school finance law was constitutionally infirm because it yielded irrationally disparate spending per-pupil among various districts. *See Rodriguez*, 411 U.S. at 63-70. However, in *Plyler*, Justice White joined Justice Burger's dissenting opinion, asserting that the School District's decision to exclude undocumented students all together was constitutional. *See Plyler*, 457 U.S. at 202 (Burger, J., dissenting).

After Justice O'Connor, President Regan went on to appoint Justice Scalia to replace Chief Justice Burger in 1986 and Justice Kennedy to replace Justice Powell in 1988.

Justice Brennan describes the December 1 oral argument as "unusually lively."[61] Justice Thurgood Marshall asked Tyler School Attendant John Hardy if Texas could constitutionally deny fire protection to undocumented migrants. Hardy asked for clarification, and Justice Marshal proceeded to spell out "F-I-R-E." After Hardy responded, saying that Texas likely could not pass such a law, Marshall asked, "'Somebody's house is more important than his child?'"[62] Marshall would surely side with the children.

The private conference discussions between the judges also proved uncommonly charged, as recounted by Justice Brennan's case memos. Brennan wrote, "The Chief began the discussion by arguing that aliens should not be entitled to receive welfare (as if that was the issue),[63] but I was pleased when he concluded that aliens were 'persons' within the meaning of the Equal Protection Clause," though not persons entitled to welfare or an education. While Roos' efforts to define the case as narrowly as possible to mollify those who feared *Plyler* would result in a "host of rights" for undocumented people had resonated with Justice Brennan, they had not placated Justice Rehnquist. Later in discussions, Rehnquist referred to the undocumented children as "wetbacks," sharply offending Justice Marshall, the only minority on the Court at the time. Justice Rehnquist tried to defend his use of the term, explaining that it was a term that "still had currency in his part of the country."[64] Marshall countered that this was the same reasoning once used to justify calling him a "nigger."[65]

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[61] Slate.com, *Justice Brennan's Notes*, http://www.slate.com/id/2156940/slideshow/2157023/entry/2157022/ (last viewed April 27, 2011).

[62] Belejack, supra note 12 (quoting *Plyler v. Doe,* Supreme Court Oral Argument, December 1, 1981, available at *http://www.oyez.org/cases/1980-1989/1981/1981_80_1538/argument*).

[63] The Supreme Court had ruled in *Graham v. Department of Pub. Welfare*, 403 U.S. 365, 375 (1971), that Arizona could not justify an alienage classicization used in allocating state welfare benefits where the only justification was preservation of fiscal resources. However, the Court's holding had also turned on its finding that the Arizona statute had unconstitutionally interfered with national immigration and naturalization policies—matters of federal control according to the U.S. Constitution. The decision dealt with the allocation of welfare benefits by the state and did not preclude the federal government from limiting welfare distribution based on legal status. *See, e.g.,* Amanda Levinson, *Immigrants and Welfare Use*, MIGRATION INFORMATION SOURCE (August 2002) (available at http://www.migrationinformation.org/usfocus/display.cfm?ID=45) (discussing the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, which cut the benefits of approximately 935,000 noncitizens. Under the Act, "nonimmigrants" and undocumented immigrants are barred from receiving benefits and are eligible only for "public health, emergency services, and programs identified by the attorney general as necessary for the protection of life and safety."). The term "nonimmigrants" is used to describe a foreign national seeking to enter the United States temporarily and for a specific purpose.

[64] Justice Rehnquist grew up in Shorewood, Wisconsin, a small town in southeastern Wisconsin. His grandparents immigrated to the United States from Sweden.

[65] Slate.com, *Justice Brennan's Notes*, http://www.slate.com/id/2156940/slideshow/2157023/fs/0//entry/2157035/ (last visited March 30, 2011).

D. *The Majority Opinion*

Ultimately, on June 15, 1982, the Supreme Court issued an opinion striking down the statute by a narrow 5-4 vote, with three concurring opinions.[66] Despite Torres's hope that O'Connor would be the swing vote, it was Justice Powell who ultimately tilted the scale in favor of the children. As part of Brennan's effort to court the swing Justice, Brennan had shared several versions of the draft opinion with Powell and had made changes at Powell's request.[67] Yet, Powell's decision was a close one. Had the U.S. Solicitor General Rex E. Lee filed a brief on the side of Texas, as he was chastised for his failure to do so on the day the opinion was issued, Powell would likely have sided with Texas and given Texas a victory.

1. *Undocumented Immigrants Are Entitled to Equal Protection of the Law.*

In his majority opinion, Justice Brennan extended the constitutional guarantee of equal protection of the law to undocumented immigrants—a first in Supreme Court precedent. While the Supreme Court had long held that undocumented persons were entitled to Due Process under the Fifth and Fourteenth Amendments,[68] the Court had not yet before addressed the question of whether undocumented persons were entitled to Equal Protection of the law. The State claimed that undocumented immigrants were not "persons within the jurisdiction of the United States" for the purposes of the Equal Protection Clause, and therefore, had no right to the equal protection of Texas Law. Justice Brennan held that a state could not enact a discriminatory classification "merely by defining a disfavored group as a nonresident."[69] He rejected the State's suggestion that due process is "somehow of greater stature" than equal protection and extended the Equal Protection Clause to undocumented immigrants.[70] In doing so, he quoted from an 1866 legislative debate from the drafting of the Fourteenth Amendment:

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[66] Justice Brenan wrote the majority opinion, joined by Justice Stevens, Justice Marshall, Justice Blackmun, and Justice Powell. Chief Justice Burger wrote the dissent, joined by Justice Rehnquist, Justice White, and Justice O'Connor.

[67] María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children*: *Beyond* Plyler v. Doe, 35 SETON HALL L. REV. 1373, 1400 (2005). As epitomized in his concurring opinion, Justice Powell found the Texas statute egregious as a matter of social policy—a form of "punitive discrimination" that victimized children who had been severely disadvantaged by the United States' inability to control its borders and the enticing job opportunities available in the United States. *Plyler*, 475 U.S. at 240 (Powell, J., concurring). While sympathetic with Powell's views on the statute, critics of the opinion assert that his additions rendered the opinion "almost nothing more than a direct reflection of [his] views of social policy." *See* López, supra note 67, at 1377 (internal citations omitted). They assert that because of the opinion's weak doctrinal force and diminutive constitutional significant, *Plyler* has had only a "lackluster effect" as a vehicle for further education gains for undocumented children. *See id.*

[68] Shaughnessv v. Mezei, 345 U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[69] *Plyler*, 475 U.S. at 227.

[70] *Id.* at 214.

"Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential to the unity of the Government and the unity of the people that all persons, *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?" [71]

2. *Education Code section 21.031 Violates the Equal Protection Clause*.

After deciding that undocumented immigrants were entitled to protection under the Equal Protection Clause, the Court then moved to the more difficult question: whether the Equal Protection Clause had been violated. The Court acknowledged that undocumented individuals were not a suspect class, that education was not a fundamental right per *San Antonio Independent School Dist. v. Rodriguez*,[72] and that strict scrutiny review was therefore not merited.[73] However, he did not apply the customary rational basis review, either—which requires only "a rational relationship to a legitimate state purpose." Rather, after citing the importance of education as fundamental "in maintaining the fabric of our society,"[74] the unfairness that would result from punishing children for the illegal conduct of their parents,[75] and the government's own role in creating a substantial "'shadow population' of illegal migrants,"[76] Brennan employed a test that would later be described as intermediate scrutiny.[77] In doing so, he tacitly employed a "sliding scale"—the approach Justice Marshall advocated for in his *Plyler* concurrence and *Rodriquez* dissent, which called for varying levels of scrutiny "depending on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[78] Judge Brennan explained that education is "a most vital civic institution for the preservation of our democratic system of government," and that it "provides the basic tools by which individuals might lead economically

[71] *Id.* (emphasis in case).
[72] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).
[73] *Plyler*, 475 U.S at 223.
[74] *Id*. at 221.
[75] *Id.* at 220 ("Even if the State found it expedient to control the conduct of adults by acting against their children, the legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.").
[76] *Id.* at 218 (noting that "sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens," played a part in creating the existence of a significant population of undocumented immigrants within U.S. borders).
[77] For another example of the Supreme Court's application of intermediate scrutiny, see *Craig v. Boren*, 429 US 190 (1976).
[78] *Plyler*, 475 U.S. at 231 (J. Marshall, concurring); *Rodriguez*, 411 U.S. at 99 (J. Marshall, dissenting).

productive lives to the benefit of us all."[79] He held, given the significant social costs of the statute, that it could "hardly be considered rational unless it futures some substantial goal of the state."[80] In reaching his decision he stated:

> The inestimable toll of that deprivation on the social, economic, intellectual, and psychological wellbeing 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.[81]

The subtle and nuanced phrasing of his test differed only slightly, but significantly, from the traditional rational basis review test.[82] Justice Brennan had dissented in *Rodriquez*, recording his "disagreement with the Court's rather distressing assertion that a right may be deemed 'fundamental' for the purposes of equal protection analysis only if it is 'explicitly or implicitly guaranteed by the Constitution.'"[83] He argued that "fundamentality" protected rights were those rights who were important in terms of the effectuation of explicitly guaranteed constitutional rights.[84] Education, he asserted, 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," and therefore is unquestionably a fundamental right.[85] "This being so," he concluded, "any classification affecting education must be subjected to strict judicial scrutiny."[86] His opinion in *Plyler*—through his musings on education's critical role in society and his application of more searching standard of review—reflects this dissenting opinion in *Rodriquez.*[87] The holding also echoes an "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."[88]

Brennan's failure to apply strict scrutiny in *Plyler* has been criticized as illogical for failing "to provide an internally consistent reason for not holding that these children were members of a suspect class."[89] But had he had the votes, Brennan likely would have overruled

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[79] *Plyler*, 475 U.S. at 221.
[80] *Id.* at 224.
[81] *Id.* at 222.
[82] *See* Olivas*, supra* note 12*,* at 209-210.
[83] *Rodriguez*, 411 U.S. at 62 (Brennan, J., dissenting).
[84] *Id.*
[85] *Id.* at 63.
[86] *Id.*
[87] *Id.* at 62-63 (Brennan, J., dissenting).
[88] López, *supra* note 67, at 1400.
[89] *Storytelling*, *supra* note 9, at 1046.

Rodriquez, held that education was a fundamental right, and applied strict scrutiny review. In his *Plyler* case memo, he wrote, "I pressed a willingness to go along with a strict scrutiny" analysis.[90] However, he simply did not have the votes.[91] Instead, he redrafted the opinion multiple times "to emphasize the innocence of children and the importance of education."[92] Although the decision is criticized for failing to proclaim education a fundamental right, it makes clear that education is an integral aspect of membership in the national community and that undocumented persons have a right to participate, at some level, in that community.

Texas offered three arguments to support its claim that the undocumented status of students established a sufficient rational basis for denying them access to public education under section 21.031. An unimpressed Justice Brennan found that none passed his "substantial state interest" test. He promptly rejected each argument, and with highly critical tone. First, Texas argued that the classification was necessary to preserve its limited resources for educating lawful residents of the State.[93] However, Judge Justice had previously made the factual finding that exclusion of undocumented students would result in only incremental savings to the state and that the saving would not necessarily lead to an increase in the quality of education in Texas schools.[94] Even if the statute would have saved the State a significant sum of money, a 1971 Supreme Court case blocked such a fiscal rationale.[95] In that case, *Graham v. Department of Public Welfare*, the Court held that concern for preservation of fiscal resources alone could not justify a classification used in the allocation of those resources.[96]

Texas next maintained that the statute was a protective measure, designed to deter an influx of undocumented individuals. Brennan found that section 21.031 was not tailored to meet such an objective. Reiterating the words of Judge Justice, he wrote, "it is clear that '[c]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration.'"[97] Furthermore, he stated, "Even if the State found it expedient to control

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[90] Slate.com, *Justice Brennan's Notes*, http://www.slate.com/id/2156940/slideshow/2157023/entry/2157022/ (last viewed April 27, 2011).
[91] *See* López, *supra* note 67, at 1380.
[92] Belejack, *supra* note 12.
[93] *Plyler*, 475 U.S. at 227.
[94] *Doe v. Plyler*, 458 F. Supp. at 576-577.
[95] *Plyler*, 475 U.S. at 227.
[96] Graham v. Department of Pub. Welfare, 403 U.S. 365, 375 (1971) (holding that Arizona could not justify an alienage classicization used in allocating state welfare benefits where the only justification was preservation of fiscal resources); *see also S*hapiro v. Thompson, 394 U.S. 618, 633 (1969*)* ("We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens.").
[97] *Plyler*, 475 U.S. at 229 (citing *Doe v. Plyler,* 458 F. Supp at 585).

the conduct of adults by acting against their children, the legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[98]

In its final argument, Texas argued that it was rational to single out undocumented children "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."[99] Brennan did not buy this argument, "even assuming that such an interest was a legitimate one." Moreover, the record reflected the fact that undocumented children in the United States are here with the intent to remain indefinitely, and that some will eventually become lawful residents or U.S. citizens.[100] Brennan wrote, "It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."[101] Brennan concluded, "It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation."[102]

E. *Chief Justice Burger's Dissent*

In Chief Justice Burger's dissent, he criticized Brennan for "patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis" to spin out "a theory custom-tailored to the facts of the case."[103] Further criticizing Brennan's failure to apply a more traditional rational basis review, "If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example."[104] Burger also made clear that he felt Brennan was overstepping the judicial bounds and legislating from the bench. He conceded that there were sound policy arguments against the decision to deny undocumented children a free public education, and that if he were a legislature, he would not have voted in support of section 21.031.[105] However, he opined, the decision of whether to "take advantage of whatever savings will accrue from limiting access to the tuition-free public schools to its own

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[98] *Id*. at 220.
[99] *Plyler*, 475 U.S. at 229-30.
[100] As distinguished from a sub-class of undocumented adult individuals who might cross the border temporarily to find work, with plans of returning home after saving up some money.
[101] *Plyler*, 475 U.S. at 230.
[102] *Id.* at 230.
[103] *Id.* at 244 (Burger, J., dissenting).
[104] *Id.*
[105] *Id.* at 252-53.

lawful residents" was one to be left to state political processes.[106] The fact that the Texas legislation might seem ill advised did not make it unconstitutional, he wrote.[107]

F. *Post*-Plyler

Since the 1975 version of section 21.031 was stuck down in *Plyler*, the distinction between "citizens of the United States" and "legally admitted aliens" no longer appear in the section of Texas's Education Code governing attendance qualifications.[108] Moreover, hundreds of thousands of undocumented children across the United States have had access to a free K-12 public education. Today, each year an estimated 65,000 undocumented students either graduate from high school or earn an equivalent degree. Moreover, school officials "may not ask students for Social Security numbers or otherwise question them or their parents in ways that have a 'chilling effect' and discourage school attendance."[109]

As the Supreme Court predicted, all of the 16 plaintiffs from *Tyler* eventually became legal residents or U.S. citizens—most through an amnesty program created as part of the 1986 Immigration Reform and Control Act that led to the legalization of about 3 million undocumented immigrants. Only one of four families moved out of Tyler. Ten of the 16 graduated from high school in Tyler. Most have full-time jobs, and three are housewives. Both Alfredo Lopez and Laura Alvarez graduated from John Tyler High School in 1987. Lauren then worked for some time as a teacher's aide for the Tyler School District. As of 1995, Alfredo Lopez was working was an auto mechanic at Sears and as a warehouse worker. He credits the automobile mechanic course he took at Tyler high for getting him the job at Sears. Alfredo's sister, Faviola Tiscareño, expresses a similar sentiment for the typing skills and grasp of the English language that she acquired through the Tyler school system. She thanks her education for her ability to find a job that paid $10 per hour.

IV. EFFORTS TO OVERTURN *PLYLER*

A. *Mid-1990s Resentment: Direct Efforts to Overturn* Plyler

Since *Plyler* was decided in 1982, there have been various attempts to overturn its holding. Many of these efforts came in the mid-1990s, an era that has been referred to as the

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[106] *Id.* at 252.
[107] *Id.* at 253.
[108] The former section 21.031 was deleted by the 1995 reenactment and revision of Titles 1 and 2 of the Education Code. Section 25.001 now governs attendance qualifications. Tex. Educ. Code Ann. § 25.001.
[109] Belejack, *supra* note 12.

"Superbowl of immigration reform,"[110] when a perceived "immigration crisis" swept the nation.[111]

In November 1994, a proposition similar to the 1975 Texas statute appeared on California ballots. Proposition 187—sold as the "Save Our Sate" or "SOS" initiative as part of Governor Pete Wilson's re-election campaign—required state employees to screen for immigration status and deny undocumented persons social services, health care, and education.[112] It also required that undocumented persons be reported to state and federal officials. Proponents hoped to deter immigration through prohibiting social services and benefits to undocumented residents. In Governor Pete Wilson's words, it was intended to induce undocumented migrants to "self-deport."[113] Wilson stressed the cost-saving nature of the measure, which was apparently well-received by the majority of Californians—who, concerned with the effects of the recession of the early 1990s, were experiencing a "growing sense of alarm over the state's changing demographics."[114] The proposition passed by 54 percent margin.[115]

Supporters of Proposition 187 claimed that California was different than Texas was back in the mid-1970s.[116] They argued that the magnitude of the undocumented population was much greater in California, with an estimated 1.3 million undocumented people in the State and 300,000 undocumented students in its public schools—three to thirty times the number estimated in Texas around the time *Plyler* was decided.[117] Supporters hoped that legal challenges against

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[110] Halle I. Butler, Note: *Educated in the Classroom of on the Streets: The Fate of Illegal Immigrant Children in the United States*, 58 OHIO STATE L. J. 1473, 1494 & n. 142 (1997). During the 1990s, Congress passed various immigration reform measures—measures that reduced the number of immigrants admitted to the United States annually, cut social programs and welfare benefits for immigrants, and proscribed mandatory deportation for all legal permanent residents sentenced to a year or more in prison for aggravated felonies, crimes of moral turpitude, or controlled substances violations. For a brief history of immigration reform in the United States, from the First Naturalization Rule in 1790 through 2008, as well as information about an interesting documentary on U.S. Immigration Policy, visit Golden Venture: A documentary about the US immigration crisis*,* Immigration Reform, http://www.goldenventuremovie.com/Immigration_Reform.html (last visited April 27, 2011).

[111] *See* López, *supra* note 67, at 1374 & n.3.

[112] League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 763 (C.D. Cal. 1995); *see also* Belejack, *supra* note 12.

[113] Janet Boss & Carol Kasel, *Proposition 187 Feedback and Fallout*, ROCKY MOUNTAIN NEWS (DENVER), Nov. 21, 1994, at 3N (reporting that according to Governor Wilson, "Proposition 187 would effectively lead people to 'self deport'").

[114] Belejack, *supra* note 12.

[115] *League of United Latin American Citizens*, 908 F. Supp. at 763.

[116] Like Texas's law, under California's Proposition 187, undocumented children would no longer qualify for a free public education. In addition, Prop. 187 required school officials to report suspected illegal immigrant students and their parents to federal authorities. It provided no clear provisions for deportation, and unlike Texas's law, it did not give undocumented students the option to remain in California's public schools through paying tuition.

[117] Feldman, *supra* note 12; *see also* Jeffrey R. Margolis, *Closing the Doors to the Land of Opportunity: The Constitutional Controversy Surrounding Proposition 187*, 26 U. OF MIAMI INTER-AMERICAN L. REV. 368 (1994)

Prop. 187 would bring a reversal of *Plyler* at the Supreme Court,[118] but the proposition was ruled unconstitutional in the Southern District of California in 1995 and never went into effect.[119]

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), establishing a national policy of restricting undocumented persons' access to public benefits, including postsecondary education.[120] Congress shortly thereafter passed IIRIRA section § 1623, which prohibited states from providing undocumented students with in-state tuition unless the state provided the same discount to all U.S. citizens regardless of residency.[121]

That same year, California Representative Elton Gallegly introduced an amendment to the 1996 spending bill that would override *Plyler* and allow states to enact legislation denying free K-12 public education to undocumented children, like California's Prop. 187 and Texas's Education Code section 21.031.[122] Again, supports claimed its purpose was to deter the influx of undocumented migrants and to curtail social costs of illegal immigration. Again, they argued that *Plyler* was no longer good law due to the consequences of the ever-growing undocumented immigrant population—consequences that had been unforeseeable in 1982 when *Plyler* was decided.[123] The amendment—known as the Gallegy Amendment—passed through the House with a 257 to 163 margin. However, the Amendment drew much negative attention and President Clinton indicated that he would veto the entire spending bill if it was included.[124] In an effort to save the entire bill, the controversial Amendment was withdrawn.[125]

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[118] Feldman, *supra* note 12.

[119] *League of United Latin American Citizens*, 908 F. Supp. at 763.

[120] Laura Yates, Plyler v. Doe *and the Rights of Undocumented Immigrants to Higher Education: Should Undocumented Students Be Eligible For In-State College Tuition Rates?*, 82 WASH. L. R. 585, 595 (2004); *see also* PRWORA, 8 U.S.C. § 1611 (2000), which reads in the pertinent part:

> an alien who is not a qualified alien . . . is not eligible for any Federal public benefits . . . [including] any postsecondary education . . . or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States of by appropriated funds of the United States.

[121] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (codified at 8 U.S.C. § 1623). The statute reads:

> "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 political subdivision for any postsecondary education benefits 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."

[122] *Lawmakers Gone Wild*, *supra* note 10.

[123] Butler, *supra* note 110, at 1496.

[124] Michael A. Olivas, Plyler v. Doe: *Still Guaranteeing Unauthorized Immigrant Children's Right to Attend US Public Schools,* MIGRATION INFORMATION SOURCE, Sept 22, 2010, http://www.migrationinformation.org/Feature/display.cfm?ID=795 (last visited May 3, 2011) (hereinafter "Migration Information Source").

[125] Butler, *supra* note 110, at 1496.

Resentment of *Plyler* and presence of undocumented youth in K-12 public schools did not pass with the '90s. Most recently, on February 23, 2011, the Arizona Senate Appropriations Committee passed Senate Bill 1611, an omnibus immigration bill that included a provision that would require proof of legal status to enroll a student in any public or private K-12 school. It would have also required teachers and school officials to report any undocumented students to law enforcement and the Arizona Department of Education. If passed, the bill would have pushed undocumented students out of schools for fear that their families would be deported—a chilling effect that would directly contravene *Plyler*.[126] The bill's sponsor, republican Senate President Russell Pearce, stated that *Plyler* is not *really* governing law: "It's not the law of the land when a Supreme Court issues a bad decision."[127] He and other supporters of the bill pitched it as a money-saving measure to close Arizona's budge gap, pressing $1.15 billion in the 2012 fiscal year.[128] Pearch said, "This is about protection of the taxpayer."[129] On March 9, 2011, hundreds of Arizona students marched at the state's Capitol in protest of the bill.[130] The next week, 60 chief executives from Arizona sent a letter to lawmakers urging them to stop the bill because it would hurt business.[131] The bill was voted down on March 17, an emotional St. Patrick's day in the Arizona Senate.[132]

B. *The Real Pushback: Indirect and on the Ground*

Since the unsuccessful efforts to overturn *Plyler* of the mid-1990s, the real pushback has been on the ground, in everyday life in public schools.[133] School districts across the country have employed various tactics to restrict undocumented students' access to a public education.

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[126] Belejack, *supra* note 12.
[127] Alia Beard Rau, Dan Nowicki and Ken Alltucker, *Arizona bills a test of federal government authority*, THE ARIZONA REPUBLIC, Feb. 24, 2011, http://www.azcentral.com/news/election/azelections/articles/2011/02/24/20110224arizona-bills-test-federal-government-authority.html (last viewed May 3, 2011).
[128] *Id.*
[129] Alia Beard Rau, *Arizona immigration bills aim for bigger crackdown*, THE ARIZONA REPUBLIC, Feb. 23, 2011, http://www.azcentral.com/arizonarepublic/news/articles/2011/02/23/20110223arizona-immigration-bills-controversy.html#ixzz1GDca8cfl (last viewed May 3, 2011); *Students Walk Out of School to Protest SB 1611*, Mar. 4, 2011, http://www.myfoxphoenix.com/dpp/news/immigration/students-walk-out-of-school-to-protest-sb-1611-03042011 (last viewed May 3, 2011); Senate Research, Arizona State Senate, Fact Sheet for S.B. 1611: Immigration Omnibus, Feb. 22, 2011, http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/50leg/1r/summary/s.1611approp.doc.htm (last viewed May 3, 2011).
[130] *Students Walk Out of School to Protest SB 1611*, Mar. 4, 2011, http://www.myfoxphoenix.com/dpp/news/immigration/students-walk-out-of-school-to-protest-sb-1611-03042011 (last viewed May 3, 2011)
[131] Alia Beard Rau, *Arizona Senate rejects 5 major immigration bills*, AZCENTRAL.COM, Mar. 18, 2011, http://www.azcentral.com/news/election/azelections/articles/2011/03/17/20110317arizona-birthright-citizenship-bills-rejected.html#ixzz1I1CBeeC8 (last viewed May 3, 2011).
[132] *Id.*
[133] Migration Information Source, *supra* note 124.

MALDEF has had to remain on the defensive, vigilantly enforcing *Plyler* against attempts to require social security numbers for enrollment, requests for parents' drivers licenses or additional "registration" requirements for undocumented children only, and efforts to create separate schools for undocumented children—all "designed to identify immigration status or single-out undocumented children."[134]

Other indirect efforts to restrict undocumented students access to public education include dismantling bilingual education programs in public schools[135] and cutting funding for programs for English language learners.[136] "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 [Limited English Proficiency] students."[137] The overall population of LEP students is increasing at a tremendous rate, growing from 14 million to 21.3 million between 1990 and 2000.[138] Cutting funding and doing away with programming to help these students will leave them unable to understand what is going on in the classroom. Thus, like the statute at issue in *Plyler*, these efforts are in essence disguised attempts to deny undocumented youth access to education.

The resentment of Hispanic presence in public schools, and in the United States more generally, also rears its head in more petty ways. In 2006, an Illinois public school administrator required Latino students to pledge not to speak Spanish in schools under the pretext that doing so would violate the school's anti-bullying policy.[139] In 2007, a Dallas pizza chain received hate mail after announcing that it planned to accept Mexican pesos in its stores, a plan to increase business with its Hispanic customers.[140]

V. THE PARADOX OF PLYLER V. DOE AND THE DREAM SOLUTION

Despite the continuing resentment of *Plyler*, the case remains good law. However, many say *Plyler* is not good enough. Despite the achievements of the *Plyler* plaintiffs, not one

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[134] *Lawmakers Gone Wild*, *supra* note 10, at 110.
[135] *See* López, *supra* note 67, at 1400 & n.10-12 (noting the "dismantling of bilingual education through voter initiatives" in California, Arizona, and Massachusetts).
[136] *See, e.g.,* Horne v. Flores, 129 S.Ct. 2579 (2009).
[137] López, *supra* note 67, at 1380.
[138] *Id.*
[139] MALDEF led the effort to rescind the policy. *See* Jeff Long, *'Bully' Contract Leads to Apology; District 26 Denies Spanish Speakers Were Targeted*, CHI. TRIB., Dec. 13, 2006, at Metro-1.
[140] *Pizza chain sparks debate by accepting pesos: Hate mail follows promotion — management says it's serving customers*, MSMBC.COM, Jan. 12, 2007, http://www.msnbc.msn.com/id/16581765/ (last visited May 3, 2011).

graduated from a four-year college. And they are not alone. Less than twenty years after *Plyler*, a steady trickle of stories began appearing in the media about undocumented students graduating at the top of their class or winning national awards but who could not attend college because of their legal status.[141] For undocumented individuals, *Plyler* resulted in a substantial disconnect between childhood—when they are guaranteed a free K-12 education regardless of their immigration status—and the "illegal" adult world—where their status stands in the way of finding employment, obtaining a college education, and participating fully in American society.[142] The protection of *Plyler* does not extend into this illegal adult world, as conceded by Roos during oral argument, when children transform into adults and the innocence factor abruptly disappears.[143] Often, undocumented students don't even learn of their undocumented status until they are old enough to apply for a driver's license or attend college.[144] This disconnect has been criticized for creating a class of "well-educated farm workers."[145] And it is this disconnect that the DREAM Act aims to fix.

A. *The "Illegal" Adult World*

"Carmen, mija, focus on school and things will get better."

- Carmen's parents, advice to their undocumented daughter.[146]

Undocumented high school seniors appear virtually indistinguishable from their documented peers. They express the same excitement when discussing school and extracurricular activities, such as student government, school clubs, and service groups. However, "the similarities being to dissolve when you sit across the table from them and talk

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[141] *See Lawmakers Gone Wild, supra* note 10, at 111-112 & n.47 (citing headlines regarding an undocumented salutatorian heading to Oxford and four undocumented youths beating MIT in a robotics competition); Belejack, *supra* note 12.

[142] *See* Andrew Stevenson, *Dreaming of an Equal Future for Immigrant Children: Federal and State Initiatives to Improve Undocumented Students' Access to Postsecondary Education*, 46 ARIZONA L. R. 551, 553 (2004); *see also* Immigration and Nationality Act § 212(a)(6)(A)(i), 8 U.S.C.A. § 1182(a)(6)(A)(i) (West 2004) (rendering mere presence within the United States a violation of federal law for undocumented individuals).

[143] In response to questioning by an unidentified justice regarding whether Texas would be required to grant undocumented students resident tuition to all its state universities and graduate schools, Roos replied, "You would be dealing with people above the age of majority so the innocent factor that was referred to earlier, certainly, the argument for compelling interest is not the same, and indeed the analysis under a rational basis would be somewhat different." *Plyler v. Doe,* Supreme Court Oral Argument December 1, 1981, available at *http://www.oyez.org/cases/1980-1989/1981/1981_80_1538/argument*).

[144] Julie Preston, *Students Spared Amid an Increase in Deportations,* NEW YORK TIMES (New York Edition), August 9, 2010, A1 (available at http://www.nytimes.com/2010/08/09/us/09students.html).

[145] Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promise and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393, 396 (2002) (citing Carmen Medina, Executive Director of the Adams County Delinquency Prevention Program).

[146] UCLA Center for Labor Research and Education, *Undocumented Students, Unfulfilled Dreams* (2007) (available at http://www.labor.ucla.edu/publications/reports/Undocumented-Students.pdf).

candidly about their outlook on the future and their possibilities after high school." As graduation day approaches and undocumented students begin to think about what comes next, they awaken to a harsh reality. Finding a job outside of the agricultural sector is difficult if not impossible for undocumented youth, and for the average undocumented high school student, the prospect of obtaining a postsecondary education is dim.[147] When interviews with undocumented students shift from their current extracurricular activities to their post-graduation plans, the previously eager and talkative students become ashamed and physically drained, "hunching their shoulders and speaking softly, eyes focused downward."[148]

As María Pabón López, immigration law expert and professor at Indiana University School of Law, says, "Access to high education is still an unattainable reality for undocumented students."[149] Undocumented students face various impediments to obtaining a higher education. These obstacles range from flat denials of admission to an inability to obtain student loans and being charged nonresistant tuition.[150] Financial obstacles include the 1996 federal mandate explicitly prohibiting any state from providing undocumented students with in-state tuition unless the state provides the same discount to all U.S. citizens regardless of residency.[151] The statute made it economically impossible for postsecondary institutions to legally offer in-state tuition to undocumented students, because to do so would mean extending the same offer to all students across the country. In combination with the fact that undocumented students are not eligible for federal student loans or grants, the denial of in-state tuition precludes many undocumented students from continuing their education after high school.[152]

In addition to the financial barriers, students also face mental health concerns connected to the stress associated with the fear of being deported and separated from their families.[153] While the deportation of 19-year old Harvard biology major Eric Balderas was indefinitely deferred last summer after classmates, Harvard officials, and Senator Dick Durbin campaigned

[147] *See* Stevenson, *supra* note 142, at 553, 557, 569-571.
[148] Stevenson, *supra* note 142, at 553. Stevenson conducted various case studies with students, teachers, counselors, and immigration attorneys throughout Eastern Washington and Southern Texas.
[149] López, *supra* note 67, at 1400.
[150] Stevenson, *supra* note 142, at 569 (explaining that undocumented students are ineligible for all federal financial aid programs, including grants, loans and work study programs, as well as most state loan programs and tuition subsidies based on in-state residency); López, *supra* note 67, at 1400.
[151] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), 8 U.S.C. § 1623; Pub. L. No. 104-208, 110 Stat. 3009 (1996).
[152] Yates, *supra* note 120, at 596-97.
[153] López, *supra* note 67, at 1380.

on his behalf,[154] not all students will be so lucky. Some states, including Virginia, encourage its public employees of higher education to voluntarily alert the INS and the state Attorney General when a student is unlawfully present or enrolled without proper authorization.[155]

Further, many students are unmotivated to invest in a higher education knowing that their undocumented status will make ineligible for jobs that would use a college degree. Even with a college education, their status will lock undocumented students into jobs cleaning houses or doing construction.[156] As Dallas superintendent Michael Hinojosa says, "It's very frustrating. We inspired them to go to college, and the irony is that now they cannot work legally."[157] Indeed, without any guarantee of normalizing their federal immigration status, the high school education undocumented students receive thanks to *Plyler* is only useful for their personal growth but does not improve the overall condition of Latinos in the United States.[158] Thus, the role of the court in the battle to secure meaningful participation in U.S. society is limited. Comprehensive federal reform from Congress is needed—a.k.a. the DREAM Act—as without the prospect of normalizing their legal status at the federal level, a college degree won't help undocumented students become eligible for employment. Until the passage of the DREAM Act, the advice of Carmen's parents—"Carmen, mija, focus on school . . . "—won't suffice for undocumented students. Carmen, who hopes to someday become a lawyer, has focused on school, but not all things have gotten better. Focusing on school cannot guarantee a clear path to legalization. Carmen gave her own advice to Congress in 2007: "[F]ocus on the DREAM Act and comprehensive immigration reform, and things will get better."[159]

B. *Politics and Public Policy*

The DREAM Act's ongoing struggle to get through Congress is perhaps unsurprising considering the backdrop of pervasive animosity against Hispanics and the national preoccupation with the costs of undocumented immigrants. Although *Plyler* stands in the way of denying undocumented students access to free primary and secondary education, many states

[154] Julie Preston, *Students Spared Amid an Increase in Deportations,* NEW YORK TIMES (NEW YORK EDITION), August 9, 2010, A1 (indicating that Balderas was arrested in San Antonio in June 2010 as he was about to fly back to Cambridge. He had been visiting his mother.).
[155] López, *supra* note 67, at 1380.
[156] Unmuth, *supra* note 12.
[157] *Id.*
[158] López, *supra* note 67, at 1400.
[159] UCLA Center for Labor Research and Education, *Undocumented Students, Unfulfilled Dreams* (2007) (available at http://www.labor.ucla.edu/publications/reports/Undocumented-Students.pdf).

have enacted statutes denying other public benefits, such as health care.[160] And given the continued resentment of *Plyler* and of the presence of undocumented youth in K-12 pubic schools, it may be more surprising that the Act has come so close to passage. As *Plyler* attorney Larry Daves recalls, "The atmosphere [thirty years ago] was very similar to what we have now. There was a hysteria about undocumented workers."[161]

Immigration and Mexican politics Professor Wayne A. Cornelius suggests that surges of anti-Mexican nativism are a cyclical phenomenon.[162] Concerns about immigration and its costs to our nation inevitably flare up when the economy faces a recession or when the immigrant population sees sharp increases.[163] As in the early-to-mid-1990s, the United States has recently faced both,[164] making a certain class of constituents all the more receptive to political appeals to nativism—appeals "cloaked in an aura of protecting our basic values as a society, the hard won living standards or the middle class, or even the national security."[165] Cornelius argues that the true (and not-so-noble) attitudes, perceptions, fears, and prejudices underlying the appeals to nativism are every-present, just dormant in more economically prosperous times, "waiting to be manipulated by politicians who have no reservations about appealing to the baser instincts of their constituents."[166] This baser instinct is captured in a statement of Elton Corbitt, a white businessman worried about the future of small town life in Atkinson County, Georgia, where his family has lived since the 1800s: "[I]mmigration threaten[s] everything that matters—the quality of schools, health facilities, neighborhoods, even the serene rhythms of small-town life."[167]

But do undocumented immigrants really deserve to be the scapegoat for the economic woes of the United States? Probably not, as the question of whether undocumented immigrants are actually a burden on our economy is one open to debate. In fact, a wide spectrum of people and organizations—including not only teachers and social workers, but also the typically

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[160] *See, e.g.*, GA. CODE ANN. § 50-36-1 (2006); VA CODE ANN. § 63.2-503.1 (2006); COLO. REV. STAT. § 24-76.5-103 (2006); IDAHO CODE ANN. § 67-7901 (2007); OKLA. STAT. Tit., 56, § 71 (2007); S.C. CODE ANN. § 8-29-10 (2008); MISS. CODE ANN. § 71-11-1 (2008); UTAH CODE ANN. § 63G-11-104 (2008).
[161] Belejack, *supra* note 12.
[162] Wayne A. Cornelius, *American in the Era of Limits: Migrants, or Nativists, and the Future of U.S.-Mexico Relations*, in MEXICAN-U.S. RELATIONS, CONFLICT, AND CONSEQUENCE 1373-74 (Vasquez and Garcia y Griego, eds. 1983).
[163] CFR TASK FORCE ON IMMIGRATION, U.S. IMMIGRATION POLICY (July 2009) (cited by Aimee Rawlins, *Immigration and the Midterm Elections*, CRF.ORG, October 27, 2010, http://www.cfr.org/congress/immigration-midterm-elections/p23225?cid=rss-fullfeed-immigration_and_the_midterm_el-102710).
[164] *See* Sabrina Tavernise, *Immigration to U.S., After Dip, Is Back Up*, December 16, 2010, http://www.nytimes.com/2010/12/16/us/16immig.html (last visited March 30, 2011).
[165] Cornelius, *supra* note 162.
[166] *Id.*
[167] Rachel L. Swarns, *In Georgia, Immigrants Unsettle Old Sense of Place*, N.Y. TIMES, Aug. 4, 2006, at A1.

conservative *Wall Street Journal*, unions, medical associates, and Hollywood—have argued that undocumented immigrants are a blessing.[168] Immigrants-rights activists argue that undocumented immigrants are an economic asset, filling jobs that native-born Americans would not take and paying roughly $12,000 to $20,000 more to the U.S. government in taxes over their lifetimes than they exhaust in public services.[169]

While the presence of undocumented workers who will fill low-wage, low-skill jobs may very well be in the nation's economic interest, so too is allowing undocumented students to attend college. The push to keep undocumented students out of higher education often focuses on the economic consequences of doing so, but preventing undocumented students from attending higher education generates systemic social and economic consequences that far outweigh the cost saved by failing to provide tuition subsidies. Impediments to receiving an education permanently lock undocumented immigrants into the lowest socioeconomic class—encouraging and perpetuating poverty and the societal ills that go hand in hand. Thus, impediments to higher education do more than exacerbate the concerns aired by *Plyler*—creation of a permanent class of undocumented residents and unfairly penalizing undocumented children for their parents' illegal action. Denying undocumented children access to higher education also creates a class of unmotivated high school students and leads to increased high school drop out rates—thereby aggravating juvenile delinquency, teen pregnancy, and reliance on public assistance programs, and increasing tax spending on the criminal justice system, drug rehabilitation, health and medical emergency services, and social welfare.[170]

Denying undocumented students access to higher education also hurts the national tax revenue by restricting citizens capable of becoming successful, skilled professionals—and thus significant taxpayers—to low-skill, low-wage employment.[171] Thus, the denial of access to higher education is not only bad public policy, but it also stands in the way of a tenet of *Plyler*—that undocumented citizens have a right to participate meaningfully in society.

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[168] Butler, *supra* note 110, at 1486.
[169] *Id.* at 1490-91 & note 116 (citing 136 CONG. REC. H8712, H8718 (daily ed. Oct. 3, 1990) (statement of Rep. Miller); *see also Immigrants Are Plus to California, Study Says Legal or Illegal, They Return More in Taxes Over Lifetime,* SAN DIEGO UNION TRIBUNE, June 11, 1996, at A3.
[170] Butler, *supra* note 110, at 1492; Yates, *supra* note 120, at 607.
[171] Janice Alred, Note, *Denial of the American Dream: The Plight of Undocumented High School Students Within the U.S. Education System*, 19 N.Y.L. SCH. J. HUM. RTS. 615, 628 (2003); *but see* Butler, *supra* note 110, at 1490-91 (discussing the national economic interest in maintaining a noncitizen workforce).

C. *State Efforts*

Some states, at least, seem to have acknowledged that denying undocumented students access to higher education is bad public policy. Perhaps surprisingly, Texas was the first to offer undocumented students in-state tuition, despite that fact that it was also the first state to try to exclude undocumented students from its public schools.[172] Ten states now allow students to attend public universities at in-state rates: Texas, California, Utah, New York, Washington, Oklahoma, Illinois, Kansas, New Mexico, and Nebraska.[173] Each of these ten states enacted legislation that either exempts undocumented students from nonresident tuition or classifies them as residents for tuition purposes.

These ten states bucked the general trend of compliance with the 1996 Congressional mandate prohibiting any state from providing undocumented students in-state tuition unless the state provides the same discount to all U.S. citizens regardless of residency.[174] Opponents argue that that these "recalcitrant" states are in blatant disregard for federal law and demand that they be brought into compliance through threatening to take away federal funding.[175] They argue that illegal behavior should not be rewarded and that providing in-state tuition benefits for

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[172] Belejack, *supra* note 12.

[173] Michael A. Olivas, *Undocumented College Students, Taxation, and Financial Aid: A Technical* Note, 32 The Review of High Education 407, 409 (2009) (listed in order of adoption of policy, from Texas in 2001 to Nebraska in 2006, the later which was enacted over veto); *see also* Lopez, *supra* note 67, at 1402.

California is the only one of these states who's in-state tuition law includes a clause that makes student information obtained through the citizenship affidavits confidential. *See* California, Assembly Bill 540, Chapter 814 (2001). California has applied the exemption, codified at Ed. Code § 68130.5, to both the UC system and community colleges. *See* Memo from Steven Bruckman, Interim General Counsel, California Community Colleges Chancellor's Office, to Linda Michalowski, Vice Chancellor for Student Services, *Charging a Capital Outlay Fee to Students Exempt from Nonresident Tuition Pursuant to Education Code Section 68130.5 - Legal Opinion O 04-15* (September 27, 2004) (available at http://www.cccco.edu/Portals/4/Legal/opinions/attachments/04-15.pdf).

California's statute was upheld in November 2010 by the California Supreme Court in *Martinez v. Regents of University of California*, 241 P.3d 855 (Cal. 2010).

Kansas, on the other hand, is on its way to repealing the 2004 law that granted undocumented students in-state tuition. On February 22, 2011, the Kansas House of Representatives voted 69 to 49 to approve House Bill 2006, which denies in-state tuition rates to those living in Kansas without legal documentation. *See* http://blogs.kansas.com/gov/2011/02/21/house-passes-bill-to-repeal-in-state-tuition-for-undocumented-students/.

Oklahoma, too, seems to be rethinking its policy of granting undocumented students instate tuition. In 2010, Oklahoma's House of Representatives, passed a bill that required school districts to report to the state the number of undocumented students enrolled and how much it cost to educate them, Michael McNutt, *Bill seeks detail on non-U.S. students' in Oklahoma schools*, NEWSOK.COM, Feb. 25, 2010, http://newsok.com/bill-seeks-details-on-non-u.s.-students-in-oklahoma-schools/article/3442072 (last visited March 31, 2011).

[174] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), 8 U.S.C. § 1623; Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[175] *See, e.g.,* Kris V. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U.J. LEGIS. & PUB. POL'Y 473 (2006-2007).

undocumented students encourages illegal immigration.[176] The ten states counter that 8 U.S.C. § 1621(d) allows them to enact such legislation.[177] Either way, the federal statute does not specify the sanctions or consequences of noncompliance, and it does not give individuals standing to sue to enforce its mandate. This leaves the matter solely in the hands of the Department of Justice, which has refrained from taking action.[178]

D. *Remaining Hopeful*

While states cannot offer a path to citizenship and legal employment, these efforts represent a step in the right direction for immigrant rights advocates. If anything, they represent some sense of growing political support for the DREAM Act. The latest Senate version of the DREAM Act (S. 3992) was introduced on November 30, 2010 by Richard Durbin (D-IL). On December 9, 2010, Senate majority leader Harry Reid forced a vote in an attempt to avoid a Republican filibuster against its passage. Senators voted 59-40 to table the legislation.[179] A week later, on December 18, 2010, the bill was ultimately defeated. Though 55 to 41 senators had voted in support of the bill, cloture and passage requires 60 votes.[180] Meanwhile, in the House, the latest version (H. 6497) was introduced on December 7, 2010, by Rep. Howard Berman (D-CA) and Rep. Lincoln Diaz-Balart (R-FL), as an amendment to the Removal Clarification Act of 2010.[181] The amendment appears to have died in the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, where it was referred on December 20, 2010.[182] Yet, as 2010 was the closest the DREAM Act had come to passage, advocates remain hopeful. With Obama on their side, the story will continue on into the next session of Congress.

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[176] *See, e.g.,* Kris V. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U.J. LEGIS. & PUB. POL'Y 473 (2006-2007).

[177] 8 U.S.C § 1621(d) provides, in the pertinent part:

> A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local benefit for which such alien would be otherwise ineligible . . . only though the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

[178] Yates, *supra* note 120, at 597.

[179] Carl Hulse, *Senate Democrats Put 'Dream Act' on Hold*, THE CAUCUS, December 9, 2010, 12:31 PM, http://thecaucus.blogs.nytimes.com/2010/12/09/senate-democrats-put-dream-act-on-hold/ (last viewed May 6, 2011).

[180] Michael Winerip, *Dream Act Advocate Turns Failure Into Hope*, N.Y. TIMES, February 21, 2011, A10 (available at http://www.nytimes.com/2011/02/21/education/21winerip.html).

[181] National Immigration Law Center, *DREAM ACT: Summary* (December 2010) (available at http://www.nilc.org/immlawpolicy/dream/dream-bills-summary-2010-09-20.pdf).

[182] DREAM Act of 2010, H.R. 6497, 111th Congress (2010).

VI. CONCLUSION

Directly after *Plyler* came out, the *New York Times* stated that the decision was too close and the legal holding too narrow to be a true landmark case.[183] Critics assert that because of the opinion's weak doctrinal force and limited constitutional significant, *Plyler* has had only a "lackluster effect" as a vehicle for further education gains for undocumented children.[184] These critics likely wished to see undocumented people deemed a suspect class, or education deemed a fundamental right—something that could be directly used to grant undocumented students access to higher education, block attempts to restrict access to health care, and truly transform undocumented persons from an illegal subclass into an integrated and accepted part of United States society. True, the concerns aired by *Plyler*—the creation of a permanent class of undocumented residents and unfairly penalizing undocumented children for their parents' illegal actions—cannot be fully addressed without granting undocumented students access to higher education. And without access to higher education, undocumented persons will remain systematically blocked from achieving the American Dream—this despite James Truslow Adams' declaration that, in the United State, this was a dream accessible to everyone, regardless of their circumstances of birth.[185]

But *Plyler* was the beginning, not the end, of the fight for undocumented students' access to education. Through establishing that undocumented individuals are entitled to some level of involvement in U.S. political and cultural life, *Plyler* set the stage for the passage of the DREAM Act.

VII. EPILOGUE: WHERE ARE THEY NOW?

The plaintiffs are now in their forties. Three of the four families still live in Tyler, Texas.[186] *Jose Lopez*, who risked deportation to keep his children in school, proudly displays photographs from his children's high school graduation in his living room. His grandchildren attend school in Tyler and dream of becoming a pediatrician and a music producer.[187]

James "Jim" Plyler is long retired from his position as superintendent of the Tyler Independent School District. Although he once referred to undocumented children as a "burden"

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[183] Editorial, Teaching Alien Children Is a Duty, N.Y. Times, June 16, 1982, at A30 (cited in Belejack, *supra* note 12).
[184] *See* López, *supra* note 67, at 1377; Migration Information Source, *supra* note 124.
[185] JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* (1931).
[186] Zehr, *supra* note 12.
[187] Unmuth, *supra* note 12.

on the school districts, he now agrees with the Supreme Court.[188] He says, "'If we don't provide education, children will be a greater burden and cost more in the long run.'"[189] His son married a woman of Mexican descent, and Jim proudly displays photographs of his Hispanic grandchildren in his home.[190]

Peter Roos stepped down from his position as Director of Educational Litigation for MALDEF in 1982, soon after *Plyler* was decided.[191] He took a position at Multicultural Education, Training and Advocacy (META), Inc., a San Francisco-based public interest organization, where he continued to work on education litigation involving bilingual and immigrant rights.[192] He has been involved in litigation to extend *Plyler* to post-secondary education in the State of California. Recently, he filed an amicus brief on behalf of Californians Together in defense of the California statute granting undocumented students eligibility for in-state tuition.[193]

Peter Schey served as the President and Executive Director of the Center for Human Rights and Constitutional Law Foundation (CHRCL) from 1980 until present. Peter Schey went on to litigate *League of United Latin American Citizens v. Wilson*, the case that struck down California's Proposition 187.[194]

U.S. District Judge William Wayne Justice served on the bench of the Eastern District of Texas until his death on October 13, 2009. In 2007, he said that of all the cases he heard in his nearly four decades on the federal bench, he hoped to be remembered for *Plyler*.[195] After his death, former Lieutenant Governor William Hobby said, "Judge Justice dragged Texas into the 20th century. God bless him. He was very unpopular, but he was doing the right thing."[196]

U.S. District Judge Woodrow Seals remained on the bench until his death on October 27, 1990. Before becoming a judge, he was a United States Attorney in Houston, Texas, where he

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[188] Tawnell D. Hobbs, Gary Jacobson, and Katherine Leal Unmuth, *An Educated Guess on Texas Students in the U.S. Illegally,* DALLAS MORNING NEWS, Dec. 5, 2010, http://www.dallasnews.com/news/community-news/dallas/headlines/20101205-an-educated-guess-on-texas-students-in-the-u.s.-illegally.ece (last visited May 3, 2011).
[189] Feldman, *supra* note 12.
[190] Zehr, *supra* note 12.
[191] Theresa Mesa Casey, Stanford University Libraries, *Research Guide to the records of the Mexican American Legal Defense and Education Fund: 1968-1983*, http://www-sul.stanford.edu/depts/spc/guides/m673.html (last viewed May 3, 2011).
[192] Olivas, *supra* note 12, at 211.
[193] Martinez v. The Regents of the University of California, 50 Cal. 4th 1277 (2010).
[194] League of United Latin American Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995).
[195] Belejack, *supra* note 12.
[196] *Texas Federal Judge, 89, Dies*, LAREDO MORNING TIMES, October 15, 2009, 11A.

hired the first African-American Assistant U.S. Attorney. He also served as John F. Kennedy's campaign manager in 1960. In the mid-1960's, he founded the Society of St. Stephen in Houston, a now-national organization to help the needy. Like Judge Justice, Judge Seals was known for his courageous rulings on school desegregation and students' rights. He likely was pleasantly surprised on May 16, 1984, when President Ronald Reagan released $30 million in aid to help educate undocumented migrants in border school districts in Texas.[197]

[197] Texas Archival Resources Online, Judge Woodrow Seals: An Inventory of His Papers at the Houston Metropolitan Research Center, http://www.lib.utexas.edu/taro/houpub/00036/hpub-00036p1.html (last visited May 6, 2011).