

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

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INTRODUCTION

The struggle for educational fairness and opportunity for Latino and Latina children continues even amidst the anti-immigrant campaigns currently raging against noncitizens¹ in the United States. Census 2000² highlighted the reality of the increased number of noncitizens in the country, particularly Latinos, and has precipitated

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¹ The term “noncitizen” is used in this Article instead of the term “alien,” which is the Immigration and Naturalization Act term used to denote those who are not United States citizens. 8 U.S.C. § 1101(a)(3) (2004). Immigration law commentators have noted that the term alien is a pejorative term that has connotations of otherness or lack of humanity. See Kevin Johnson, “Aliens” and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 268 (1997); Victor Romero, *On Elián and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL’Y 343, 343 (2000-2001); see also Gerald Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1441 (1995); Peter Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984). For a discussion of the anti-immigrant sentiment in the country see IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997).

² See Michael E. Fix & Jeffrey S. Passel, *U.S. Immigration at the Beginning of the 21st Century*, available at The Urban Institute, <http://www.urban.org/Template.cfm?Section=Home&NavMenuID=75&template=/TaggedContent/ViewPublication.cfm&PublicationID=7321> (Aug. 2, 2001) (stating in testimony before the House Judiciary Committee that Census 2000 numbers show increased immigration levels).

a renewal of nationwide concern over an “immigration crisis.”³ This perceived crisis has given rise to myriad new restrictions on the participation of noncitizens in United States society.

In recent years, both the states and the federal government have placed restrictions upon the civic participation of noncitizens in virtually all areas of the United States’ societal landscape. These new restrictions on noncitizens, which have sparked a new civil rights movement—a so-called Immigrant’s Rights Movement⁴—touch areas as varied as driver’s licensing,⁵ workplace protections,⁶ access to health care,⁷ welfare benefits,⁸ and education,⁹ among others.

From the dismantling of bilingual education through voter initiatives in California,¹⁰ Arizona,¹¹ and Massachusetts,¹² to the

³ See Linda Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994) (describing emergent concern in the United States over a perceived immigration crisis).

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

⁵ See María Pabón López, *More Than a License to Drive: State Restrictions on the Use of Driver’s Licenses by Noncitizens*, 29 S. ILL. U. L.J. 89 (2004) (discussing efforts to restrict state driver’s license issuance to noncitizens).

⁶ See *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 149 (2002) (holding that undocumented worker not entitled to backpay, although employer engaged in unfair labor practice).

⁷ See Undocumented Alien Emergency Medical Assistance Amendments of 2004, H.R. 3722, 108th Cong. (2004). This bill, introduced by California Congressman Dana Rohrbacher on January 21, 2004, would have mandated that hospitals verify their patients’ citizenship status and turn over those who were undocumented to the Department of Homeland Security. The bill was later defeated. See National Immigration Law Center, *Bill Requiring Hospitals to Report Undocumented Persons Defeated*, 18 IMMIGRANTS’ RIGHTS UPDATE, No. 4 (June 18, 2004), at <http://www.nilc.org/immspbs/health/health028.htm>.

⁸ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, tit. IV, Pub. L. No. 104-193, 110 Stat. 2105 (codified at 8 U.S.C. §§ 1601–46 (2005)) (“Restricting Welfare and Public Benefits for Aliens”).

⁹ See *infra* Part IV.

¹⁰ Bilingual education was dismantled in California in 1998, following the passage of Proposition 227. See Kevin Johnson & George Martinez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1227 (2000). The proposition passed “by a sixty-one to thirty-nine percent margin.” *Id.*

¹¹ Arizona voters approved Proposition 203 in 2000. See Elizabeth Becker et al.,

attempted denial of education to undocumented children perpetrated in the 1990s in California's Proposition 187,¹³ Latino children are suffering disproportionately in the culture war in our midst. It is my contention that these children, and in particular the undocumented ones, are caught in the middle of this war against noncitizens.¹⁴ Undocumented children who, as the Supreme Court recognized, are blameless and present in this country through no fault of their own,¹⁵ have been unwillingly thrust into this unwelcome role.

This recent phenomenon in our polity has developed despite the Supreme Court's *Plyler v. Doe*¹⁶ decision. Simply put, the *Plyler* Court held that undocumented children are entitled to a state-funded primary and secondary education.¹⁷ Yet Latino undocumented students remain hostages in the "immigration crisis" siege, notwithstanding *Plyler's* guarantee of a free public education and the promise of educational equality rooted in two earlier Mexican-American school desegregation cases.¹⁸

The 2000 Elections: State by State; West, N.Y. TIMES, Nov. 9, 2000, at B17 (noting that Proposition 203 passed in Arizona, a state where one in every eight students is not a native speaker of English); see also William Ryan, Note, *The Unz Initiatives and the Abolition of Bilingual Education*, 43 B.C. L. REV. 487, 487 (2002). Proposition 203 is codified in title 15, sections 751–755 of the Arizona Revised Statutes.

¹² Question 2 passed in Massachusetts by a 68% to 32% margin in 2002. See Charu A. Chandrasekhar, *The Bay State Buries Bilingualism: Advocacy Lessons from Bilingual Education's Recent Defeat in Massachusetts*, 24 CHICANO-LATINO L. REV. 43, 43 (2003).

¹³ See *infra* Part IV.B.

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

¹⁵ See *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

¹⁶ 457 U.S. 202 (1982).

¹⁷ *Id.* at 230.

¹⁸ The earliest recorded case in the struggle for equality in education for Latino students is *Alvarez v. Owen*, No. 66625 (Cal. Sup. Ct. San Diego County filed Apr. 17, 1931), commonly known as the "Lemon Grove Incident." See Robert R. Alvarez, Jr., *The Lemon Grove Incident: The Nation's First Successful Desegregation Court Case*, 32 J. SAN DIEGO HIST. 116 (Spring 1986), available at <http://sandieghistory.org/journal/86spring/lemongrove.htm> (last visited Apr. 18, 2005). The case took place in the 1930s in the community of Lemon Grove in San Diego County, California and was the nation's first successful school desegregation case. *Id.* The community's attempt to bar Mexican students from grammar school was unsuccessful, once a lower court ordered the admission of all Mexican students to the school and indicted school board members for illegal segregation. *Id.* The

These vulnerable students generally still face severe challenges to their educational prospects. Thus, more than twenty years after *Plyler*, it is necessary to understand what has happened to the education of Latino undocumented children in the United States. What can we learn from *Plyler* and its aftermath? What is the future of *Plyler v. Doe*? Why is it that *Plyler*'s promise of educational equality has not reached its full potential? And finally, what meaning does *Plyler* have in the current discussion of membership and exclusion in our society? These are largely unanswered questions that no article can completely address. In an attempt to shed some light on these murky questions, however, this Article explores the various aspects of the United States educational system and how the Latino undocumented student has fared post-*Plyler*.

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

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

This Article will show that *Plyler* stands for the proposition that education, although not a fundamental right,¹⁹ is an integral aspect of membership in our community. Thus, *Plyler* is still a vital opinion

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

¹⁹ See *infra* notes 87–95 and accompanying text.

even in the face of the current “immigration crisis” because *Plyler* stands for abolition of castes and an affirmation of equality—two precepts which should still be bedrock principles of the critical democratic moment in which we live.

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

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

A. *General Data Regarding Latino and Immigrant Students*

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

²⁰ 347 U.S. 483 (1954).

²¹ See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 67 (2004).

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

²³ Michael E. Fix & Jeffrey S. Passel, *U.S. Immigration: Trends & Implications for Schools* 4, available at Educational Resources Information Center, U.S. Dep’t of Educ., <http://www.eric.ed.gov/>, document no. ED474609 (Urban Inst. Jan. 29, 2003).

immigrants²⁴ hail from Mexico while one-fifth come from other Latin American countries.²⁵

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

B. *Data on Undocumented Students in the United States*

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

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

²⁵ *Id.* at 7.

²⁶ Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., *Status and Trends in the Education of Hispanics*, available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2003008> (Apr. 15, 2003) [hereinafter *Status and Trends*].

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See generally U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES: ILLEGAL ALIEN SCHOOLCHILDREN—ISSUES IN ESTIMATING STATE-BY-STATE COSTS, available at <http://www.gao.gov/new.items/d04733.pdf> (June 2004) [hereinafter GAO REPORT].

³¹ Jeffrey S. Passel et al., *Undocumented Immigrants: Facts and Figures*, available at Urban Institute, <http://www.urban.org/url.cfm?ID=1000587> (Jan. 12, 2004) (noting that undocumented students comprise 1.6 million of the approximately 9.3 million undocumented persons in the United States).

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

C. Data Regarding the Educational Attainment of Latino Students

Recent data suggest that much of the increase in minority enrollment in elementary and secondary schools is attributable to Latinos. Yet, they have higher drop-out rates and lower high school completion rates than African American or White-Anglo students.³³ In 2000, 39% of public school students at the K–12 levels were minorities.³⁴ Of these, slightly less than half, or 44%, were Latino.³⁵ In terms of change over time, the overall percentage of minority students in public schools increased by 17% between 1972 and 2000.³⁶ Slightly more than 10% of the increase was attributable to Latinos, while the number of African American students increased by only 2%.³⁷ The drop-out rate for Latino students is 28% as compared with 7% for White-Anglo students and 13% for African American students.³⁸

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

³² GAO REPORT, *supra* note 30, at 18.

³³ *Status and Trends*, *supra* note 26.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* Specifically, in 2000, the median earnings of Hispanic men age twenty-five and older were \$13,000 less than that of white men, while the median earnings of Hispanic women age twenty-five and older were \$6500 less than that of white women.

⁴⁰ Bd. on Children & Families et al., *Immigrant Children and Their Families: Issues for Research and Policy*, 5 CRITICAL ISSUES FOR CHILDREN & YOUTHS 72 (1995), available at http://www.futureofchildren.org/information2826/information_show.htm?doc_id=71141 [hereinafter *Immigrant Children*].

D. *Data on Limited English Proficiency (“LEP”) Students in the United States*

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

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

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

E. *Other Challenges Facing Undocumented and Latino Students*

1. Fear of Deportation

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

⁴¹ *Status and Trends, supra* note 26.

⁴² Fix & Passel, *supra* note 23, at 11.

⁴³ *Id.* at 20.

⁴⁴ *Id.*

⁴⁵ *Id.* at 22.

⁴⁶ *Id.*

⁴⁷ *Immigrant Children, supra* note 40.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

education are encouraged to voluntarily disclose to the Immigration and Naturalization Service and to the Office of the Attorney General in Virginia factual information indicating that a student on campus is unlawfully present in the United States, or enrolled without proper authorization.”⁵¹

Fear of deportation also has its source in the fact that the federal government has invited local law enforcement agencies to enforce immigration laws, and the invitation has been accepted in some states and localities.⁵² For example, in Florida, state law enforcement entered into a Memorandum of Agreement with the federal government in 2002 whereby state law enforcement agents were trained by the Immigration and Naturalization Service (INS), then worked under federal supervision and were able to enforce federal immigration law.⁵³ Thus, deportation for the undocumented student may only be as far away as a call to the local police for any infraction of state law.

2. Migrant Students' Concerns

In addition, there is another segment of the Latino undocumented student population—the children of migrants—that faces severe challenges. Migrant students travel seasonally with their parents and families, following the various crop harvests that provide them seasonal employment from state to state. These students experience daunting obstacles on a routine basis. Their parents

⁵¹ Memorandum from Alison P. Landry, Assistant Attorney General, to Presidents, Chancellor, Rectors, Registrars, Admissions Directors, Domicile Officers and Foreign Student Advisors (INS Designated School Officials) and the Executive Director of the State Council for Higher Education in Virginia (Sept. 5, 2002), available at http://www.steinreport.com/va_colleges_11152002.htm.

⁵² The invitation of local sheriffs, highway patrols, and police agencies to enforce immigration law raises Tenth Amendment federalism issues under *New York v. United States*, 505 U.S. 144 (1992). At least one immigration scholar has concluded that the form in which the federal government has obtained the cooperation of local law enforcement, through an invitation, rather than a mandate, avoids Tenth Amendment concerns. See Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Law Enforcement to Enforce Immigration Law Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 975–76 (2004).

⁵³ *Id.* at 970–71 (citing Memorandum of Understanding Between the INS and the State of Florida (July 26, 2002), reprinted in 79 INTERPRETER RELEASES 1138, app. II, at 1120 (2002)). For a recent example of another locality entering into an agreement with the Immigration and Customs Enforcement Bureau of the Department of Homeland Security, see Press Release No. SHB-17A-05, Los Angeles Sheriff's Office, Homeland Security Under Secretary Asa Hutchinson Announces Memorandum of Understanding with Los Angeles County: MOU Provides for Immigration Enforcement Training for LA Sheriff's Department's Custody Employees (Feb. 24, 2005) (copy on file with author).

enroll them in school, then withdraw them as soon as they have to leave in their quest for work. The students are enrolled again in their new schools once they arrive at their next destination.⁵⁴ For example, the academic transcript of a migrant student shows “grading periods for the same 7 high schools, for the same 4 weeks over each of 4 years.”⁵⁵

In addition to the constant geographic displacement and the educational disadvantages that may ensue from this lifestyle, migrant students, who number nearly 800,000 in the United States, face other obstacles in their daily lives, including severe poverty, inadequate housing, and “the stigma of being a migrant.”⁵⁶ These are severe obstacles to educational achievement, regardless of immigration status.

3. Resegregation and Inadequate Financing

Due to housing segregation patterns, the United States is currently undergoing educational resegregation.⁵⁷ Supreme Court decisions limiting school desegregation and authorizing a return to neighborhood schools have been seen as precursors to resegregation in the United States.⁵⁸ In particular, Latinos are disproportionately affected because of the rise of predominantly Latino neighborhood schools after busing was discontinued.⁵⁹ In fact, data cited by the

⁵⁴ See Cinthia Salinas & Maria E. Franquiz, *Making Migrant Children and Migrant Education Visible*, in SCHOLARS IN THE FIELD: THE CHALLENGES OF MIGRANT EDUCATION xi (Cinthia Salinas & Maria E. Franquiz eds., 2003).

⁵⁵ Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019, 1081 (1995).

⁵⁶ *Id.*; cf. Plyler v. Doe, 457 U.S. 202, 223 (1982) (remarking on the stigma of illiteracy, which the Supreme Court stated would mark the undocumented students for their lifetimes).

⁵⁷ The 2000 Census data showed increasing residential segregation for Latinos in almost all parts of the country. This, along with migration, explains much of the increased segregation in schools. See Gary Orfield & Chungmei Lee, *Brown at 50: King's Dream or Plessy's Nightmare*, at <http://www.civilrightsproject.harvard.edu/research/reseg04/resegregation04.php> (Jan. 2004); see also Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream*, at <http://www.civilrightsproject.harvard.edu/research/reseg03/resegregation03.php> (Jan. 2003) (describing patterns of resegregation in the United States in the last twelve years).

⁵⁸ *Id.*; see also *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237 (1991). See generally Joseph R. McKinney, Commentary, *The Courts and White Flight: Is Segregation or Desegregation the Culprit?*, 110 EDUC. L. REP. 915 (1996).

⁵⁹ See, e.g., *Keyes v. Cong. of Hispanic Educators*, 902 F. Supp. 1274 (D. Colo. 1995). In Colorado, for example, in 1991, only 1% of Latino students were in intensely segregated minority schools (more than 90% minority enrollment), while

Supreme Court for the year 2000–2001 show that 76.3% of Latino children attend schools where “minorities made up a majority of the student body.”⁶⁰ Increased segregation of Latino students is most apparent in the western part of the country, where 80% of Latino students attend predominately minority schools—schools with 50–100% minority enrollment.⁶¹ Between 1968 and 2001, the percentage of Latino students in intensely segregated schools—schools with 90–100% minority enrollment—more than tripled from 12% to 37%.⁶² Thus, Latino undocumented students who live in urban areas are likely experiencing the resegregation of United States public schools and the concomitant ill effects of this phenomenon,⁶³ including high drop-out rates, less-qualified teachers, and fewer educational opportunities.⁶⁴

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

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

in 2001, 17% of Latino students were in intensely segregated minority schools. See Orfield and Lee, *supra* note 57, at 28.

⁶⁰ Grutter v. Bollinger, 539 U.S. 306, 345 (Ginsburg, J., concurring) (citing Frankenberg et al., *supra* note 57, at 28 fig. 4).

⁶¹ Frankenberg et al. *supra* note 57, at 80 table 37; Orfield & Lee, *supra* note 57, at 20 & 21 table 9.

⁶² *Id.* at 20.

⁶³ GARY ORFIELD ET AL., DISMANTLING DESEGREGATION 65–67 (1996).

⁶⁴ *Id.*

⁶⁵ 411 U.S. 1 (1973).

⁶⁶ The use of this standard was in part adopted based on the holding that education is not a fundamental right. See *id.* at 29–30, 37–38, 40, 44.

⁶⁷ *Id.* at 54–55. This result is precisely the opposite of what had been found by the California Supreme Court in *Serrano v. Priest*, 487 P.2d. 1241 (Cal. 1971), a

Rodriguez, minority students disproportionately reside in poorer school districts where they generally perform below average on standardized tests and where, in fact, schools are most expensive to operate.⁶⁸ The presence of Latinos among the minorities in this group⁶⁹ is clearly apt to include undocumented students.

4. Higher Risk Factors for Latino Students in Higher Education

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

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

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

⁶⁸ See James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 435 (1999).

⁶⁹ *Id.*

⁷⁰ Watson Scott Swail et al., *Latino Youth and the Pathway to College* vii, available at <http://www.educationalpolicy.org> (June 2004). The higher risk factors faced by Latinos in higher education were brought to the attention of the Supreme Court in *Gratz v. Bollinger*, 539 U.S. 234 (2003). See Brief of Latino Organizations as Amici Curiae in Support of Respondents, *Gratz v. Bollinger*, 539 U.S. 234 (U.S. 2003) (No. 02-516), available at 2003 WL 536740.

⁷¹ Swail, *supra* note 70, at 28.

⁷² *Id.* at 32.

II. *PLYLER V. DOE*: A CLOSER LOOK AT A LANDMARK DECISIONA. *Applicability of the Equal Protection Clause to the Undocumented and the Standard of Review Applied: Highlights of the Majority Opinion*

*Plyler v. Doe*⁷³ is the leading case regarding the education of Latino undocumented students in the United States. It stands among a pantheon of landmark educational cases, such as *Brown v. Board of Education*⁷⁴ and *Regents of the University of California v. Bakke*.⁷⁵ Yet it is far from just a historical opinion. Indeed, *Plyler* is a vital opinion because of the nation's economic interest regarding the availability of the noncitizen work force.⁷⁶ A closer examination of the case will afford an opportunity to examine the message the Court sent regarding membership and equality, one that should resonate even to this day.

Plyler is a groundbreaking case in that, for the first time, the Supreme Court clearly stated that undocumented persons are protected under the Equal Protection Clause of the Fourteenth Amendment.⁷⁷ Earlier cases had established that undocumented noncitizens are persons entitled to protection under the Due Process Clause of the Fourteenth Amendment.⁷⁸

The *Plyler* Court arrived at this conclusion by stating that “whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term.”⁷⁹ The Court did so, building upon established precedent that aliens are “guaranteed due

⁷³ 457 U.S. 202 (1982).

⁷⁴ 347 U.S. 483 (1954); see also Kevin Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twentieth Century*, 8 LA RAZA L.J. 42, 44 (discussing *Plyler* as a high-water mark for Latinos before the Supreme Court and comparing it to *Brown*).

⁷⁵ 438 U.S. 265 (1978).

⁷⁶ See, e.g., Halle Butler, Note, *Educated in the Classroom or on the Streets: The Fate of Illegal Immigrant Children in the United States*, 58 OHIO ST. L.J. 1473, 1490–91 (1997) (discussing data regarding the contributions of noncitizens to the United States economy). Even President Bush has recognized “a basic fact of life and economics: some of the jobs being generated in America’s growing economy are jobs American citizens are not filling.” Press Release, President Bush Proposes New Temporary Worker Program (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>.

⁷⁷ *Plyler*, 457 U.S. at 213; see also Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 443 (2004) (discussing how “[p]rior to *Plyler*, the Supreme Court had never taken up the question of whether undocumented aliens could seek Fourteenth Amendment equal protections”).

⁷⁸ See Olivas, *supra* note 77, at 443.

⁷⁹ *Plyler*, 457 U.S. at 210.

process of law by the Fifth and Fourteenth Amendments.”⁸⁰ This principle had been established in 1886 in *Yick Wo v. Hopkins*,⁸¹ where the Court held that the Fourteenth Amendment guarantee of equal protection of the laws was “universal in [its] application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.”⁸² In *Plyler*, the Court reaffirmed *Yick Wo* and extended the reach of the Fourteenth Amendment’s Equal Protection Clause to the undocumented.⁸³ The Court took this step because, under the Fourteenth Amendment, it is “persons” within the state’s jurisdiction that are to be protected from the denial of equal protection. Thus, the Amendment’s protections would apply to those within a state’s borders, even if they are unlawfully present.⁸⁴

A notable aspect of the opinion with regard to the applicability of the Equal Protection Clause to the undocumented is the Court’s inquiry into the congressional debate surrounding the passage of the Fourteenth Amendment. In particular, the Court cited the following language from the debate recorded in the early legislative history of the Amendment: “Is it not essential to the unity of the Government and the unity of the people that all persons, *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?”⁸⁵ In other words, the Court used the early legislative history of the Fourteenth Amendment to buttress its ruling that the Equal Protection Clause applied to the undocumented plaintiffs in the case.

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

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

⁸⁰ *Id.*

⁸¹ 118 U.S. 356 (1866).

⁸² *Id.* at 369.

⁸³ *Plyler*, 457 U.S. at 212 n.10.

⁸⁴ *Id.* at 210.

⁸⁵ *Id.* at 214 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866) (remarks of Rep. Bingham)).

are not a suspect class because their unlawful presence in the country in violation of federal law is not, in the Court's words, a "constitutional irrelevancy."⁸⁶ The second reason why the Court rejected strict scrutiny was the existing precedent that education is not a fundamental right that would require a narrow tailoring of the legislation and a compelling state interest to justify its curtailment.⁸⁷ Thus, the *Plyler* Court reaffirmed the holding in *San Antonio Independent School District v. Rodriguez*⁸⁸—that education is not a fundamental right—despite Justice Marshall's plea to overrule it.⁸⁹

It is clear that Justice Brennan, who dissented in *Rodriguez* yet wrote the majority opinion in *Plyler*, did not have the votes to overrule *Rodriguez* via *Plyler* and hold that education is a fundamental right.⁹⁰ In his *Rodriguez* dissent, Justice Brennan disagreed with the majority's view that the only rights that may be deemed fundamental are those explicitly and implicitly guaranteed in the Constitution and instead stated that "'fundamentality' is . . . a function of the right's importance in terms of the effectuation of those rights which are constitutionally guaranteed."⁹¹

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

⁸⁶ *Id.* at 223.

⁸⁷ *Id.* (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–39 (1973) (holding that education is not a fundamental right and that "a State need not justify by compelling necessity every variation in the manner in which education is provided to its population")).

⁸⁸ 411 U.S. 1 (1973).

⁸⁹ See *Plyler*, 457 U.S. at 230–31. Article 28 of the Convention on the Rights of the Child states that "Parties recognize the right of the child to an education." Convention on the Rights of the Child, Nov. 20, 1989, art. 28, 28 I.L.M. 1448, 1467, available at Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/english/law/crc.htm> (last visited Apr. 18, 2005). Subsection (a) of that article requires Parties to the Convention "make primary education compulsory and available free to all." *Id.* art. 28(a), 28 I.L.M. at 1467; see also Charter of Fundamental Rights of the European Union, Dec. 7, 2000, art. 14, 2000 O.J. (C 364) 1, available at University of Minnesota Human Rights Library, <http://www1.umn.edu/humanrts/instree/europeancharter2.html> (stating that everyone has a right to education including the possibility of receiving a free compulsory education) (last visited Apr. 18, 2005).

⁹⁰ See generally Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1862–74 (1995) (discussing the deliberations that took place during the drafting of the *Plyler* decision).

⁹¹ *Rodriguez*, 411 U.S. at 62 (Brennan, J., dissenting).

be adjusted accordingly.”⁹² As discussed below, Justice Brennan’s majority opinion in *Plyler*, a little more than a decade later, reflected this view. Indeed, the *Plyler* Court applied what, in effect, amounts to a heightened, almost intermediate level of scrutiny, rather than a traditional rational basis standard.⁹³

Yet, the application of this heightened level of scrutiny to the denial of an education to undocumented children would not have been Justice Brennan’s predictable position based on his previous statement in the *Rodriguez* dissent. There, the Justice asserted that education is “inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment.”⁹⁴ Based on the close nexus between the constitutional guarantees of the First Amendment and the non-fundamental right to an education, Justice Brennan opined in his *Rodriguez* dissent that “any classification affecting education must be subjected to strict judicial scrutiny.”⁹⁵ This turned out not to be the case in *Plyler*, however, where Justice Brennan did not find education to be a fundamental right and thus did not apply strict scrutiny to a state law denying education to undocumented children.

After the Court rejected the strict scrutiny standard in *Plyler*, it continued its equal protection analysis by applying a rational basis test to a Texas law that deprived undocumented children of a public education. Yet, though the Court purported to apply the traditional rational basis test, a close reading of the opinion reveals that the Court actually employed a more demanding standard.⁹⁶

Application of a heightened rational basis test in *Plyler* began with the recognition that education is “perhaps the most important function of state and local governments.”⁹⁷ The Court then found that the state’s decision to deny an education to undocumented

⁹² *Id.* at 62–63 (Brennan, J., dissenting) (quoting *Rodriguez*, 411 U.S. at 102–03 (Marshall, J., dissenting)).

⁹³ See *infra* notes 96–104 and accompanying text.

⁹⁴ *Rodriguez*, 411 U.S. at 63 (Brennan, J., dissenting).

⁹⁵ *Id.* (Brennan, J., dissenting).

⁹⁶ This application of heightened scrutiny under the rational basis standard of review seems stronger than traditional rational basis because under traditional rational basis the classification only needs to be rationally related to a legitimate government interest. See Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 382 (1999); see also Rachel F. Moran, *Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA L.J. 1, 14 (1995) (discussing Supreme Court’s application of “rationality with a bite” standard).

⁹⁷ *Plyler*, 457 U.S. at 222 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

students could hardly be considered rational unless it furthered some substantial state goal.⁹⁸ In assessing the rationality of the state statute, the Court warned that the cost to the nation and to the innocent children involved must be taken into account.⁹⁹ The Court further stated that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education”¹⁰⁰ and noted that because the state took it upon itself to provide an education to children, it had to be made “available to all on equal terms.”¹⁰¹

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

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

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

⁹⁸ *Id.* at 224.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 223 (quoting *Brown*, 347 U.S. at 493).

¹⁰¹ *Id.* (quoting *Brown*, 347 U.S. at 493).

¹⁰² *Id.* at 220.

¹⁰³ *Plyler*, 457 U.S. at 220 (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

¹⁰⁴ *See id.*

¹⁰⁵ *Id.* at 219.

¹⁰⁶ *Id.* at 218 n.14.

¹⁰⁷ *Id.* at 223.

noncitizens.¹⁰⁸ In the Court's view, the existence of this undocumented underclass "presents most difficult problems for a Nation that prides itself on adherence to principles of equality under the law."¹⁰⁹

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

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

Finally, the Court concluded that "if the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest."¹¹⁵ This formulation, of course, is a higher form of scrutiny than the traditional rational basis test, as discussed above.¹¹⁶ Ultimately, because the state made no showing of a substantial state interest, the Court invalidated the Texas law.

Thus, the *Plyler* Court contextualized the inequality inherent in the state's denial of an education to undocumented children. The

¹⁰⁸ *Id.* at 219.

¹⁰⁹ *Plyler*, 457 U.S. at 218–19.

¹¹⁰ *Id.* at 228.

¹¹¹ 458 F. Supp. 569 (E.D. Tex. 1978).

¹¹² Elizabeth Hull, *Undocumented Aliens and the Equal Protection Clause: An Analysis of Doe v. Plyler*, 48 BROOK. L. REV. 43, 59 (1981); see also *Plyler*, 458 F. Supp. at 588–89.

¹¹³ *Plyler*, 457 U.S. at 229–30.

¹¹⁴ *Id.* at 230.

¹¹⁵ *Id.*

¹¹⁶ See *supra* notes 96–104 and accompanying text.

Court's equal protection analysis resulted in its use of a rational basis level of scrutiny in theory, but not in practice. Notwithstanding this contextualization and the Court's sweeping language regarding the existence of an undocumented underclass, undocumented students have not been afforded rights without resistance, as discussed below.¹¹⁷

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

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

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

Finally, Justice Powell wrote separately "to emphasize the unique

¹¹⁷ See *infra* Parts IV & V.

¹¹⁸ *Plyler*, 457 U.S. at 230 (Marshall, J., concurring).

¹¹⁹ *Id.* at 231 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973)).

¹²⁰ *Id.*

¹²¹ See *supra* note 96 and text accompanying notes 115–16.

¹²² *Plyler*, 457 U.S. at 231 (Blackmun, J., concurring).

¹²³ *Id.* at 234 (Blackmun, J., concurring).

¹²⁴ *Id.* at 236 (Blackmun, J., concurring).

character” of the case.¹²⁵ In Powell’s view, the undocumented children were being severely disadvantaged by factors such as the federal government’s inability to control the border and the attractiveness of jobs in the United States, and he agreed that they were victims who should not be left on the streets uneducated.¹²⁶ Justice Powell also opined that excluding the undocumented children “from a state-provided education is a type of punitive discrimination based on status that is impermissible under the Equal Protection Clause.”¹²⁷

It should be noted that Justice Powell played a key role in the evolution of the majority decision in *Plyler*. In addition to drafting his concurrence, Justice Powell engaged in several written exchanges with Justice Brennan and requested that Justice Brennan share with him several versions of the draft opinion.¹²⁸ Thus, it has been said that the ultimate result in *Plyler* became “almost nothing more than a direct reflection of [Powell’s] views of social policy.”¹²⁹ In other words, because the Justice found the Texas statute problematic and misguided as a matter of social policy, he regarded it as unconstitutional.¹³⁰ In fact, another effect of Justice Powell’s role in the evolution of the majority opinion is the dilution of the doctrinal arguments in the previous drafts, leaving it with “almost no generative or doctrinal significance because it invoked too many considerations.”¹³¹ This, of course, is one of the areas in which the dissent strongly criticized the majority opinion, as will be explored in Part II.C.

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

The 5–4 decision in *Plyler* reveals a deeply divided court. Chief Justice Burger’s dissent pointed out that the majority cobbled together a custom-made standard of review by “patching together bits and pieces of what might be termed a quasi-suspect class and quasi-fundamental rights analysis, [and] . . . spin[ning] out a theory custom-tailored to the facts of these cases.”¹³² Justice Burger stated

¹²⁵ *Id.* at 236 (Blackmun, J., concurring).

¹²⁶ *Id.* at 237–38 (Powell, J., concurring).

¹²⁷ *Id.* at 240 (Powell, J., concurring).

¹²⁸ Tushnet, *supra* note 90, at 1866–73.

¹²⁹ *Id.* at 1873.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Plyler*, 457 U.S. at 244 (Burger, C.J., dissenting). The *Plyler* opinion was criticized at the time as “appear[ing] to be ad hoc and divorced from other related bodies of law created by the Court.” Phillip B. Kurland & Dennis J. Hutchinson, *The*

that if “ever a court was guilty of an unabashedly result-oriented approach, this case [would be] a prime example.”¹³³ The dissent further averred that, unpalatable though it may have seemed, the choice to enact legislation was a political one, and not a function of the Court.¹³⁴ In Chief Justice Burger’s view, it is up to Congress, not to the Court, to “assess the social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”¹³⁵

The dissent did not dispute that the denial of an education to this group of children would create a permanent caste of noncitizens. In fact the specter of this permanent caste was a “disturbing one;” yet it was Chief Justice Burger’s contention that this was “one segment of a larger problem” for the “political branches to solve.”¹³⁶ Justice Burger further argued that the majority in *Plyler* “seeks to do Congress’ job for it,”¹³⁷ and that it failed to allow the political process to run its course.¹³⁸

As with any deeply divided opinion of the Supreme Court, it is likely that such a vigorous dissent may have contributed to *Plyler*’s vulnerability to attack from both federal and state quarters.¹³⁹ Also, in a sense, Chief Justice Burger’s words are prophetic in that the only recourse for undocumented children who have received an education and want to further pursue the American dream still lies in the political process. Only by means of that process may the undocumented embark upon a path to legalization, and the ability to work legally and attend postsecondary educational institutions free of the obstacles they face today.¹⁴⁰

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

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

Business of the Supreme Court, O.T. 1982, 50 U. CHI. L. REV. 628, 650 (1983). Prof. Dennis J. Hutchinson has further asserted that “*Plyler* cut a remarkably messy path through other areas of the Court’s jurisprudence.” Dennis J. Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167, 184.

¹³³ *Plyler*, 457 U.S. at 244 (Burger, C.J., dissenting).

¹³⁴ *Id.* at 253–54.

¹³⁵ *Id.* (internal quotation marks omitted).

¹³⁶ *Id.* at 254.

¹³⁷ *Id.*

¹³⁸ *Id.* This argument, of course, could be considered by some a convenient and politically expedient solution.

¹³⁹ See *infra* Part IV.

¹⁴⁰ See *infra* Part V.B.

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

The available citizenship data show that, of the noncitizens that arrived in the United States before 1970, 80.5% obtained citizenship by 2002.¹⁴⁶ Furthermore, of those who entered the country between 1970 and 1979, 66.6% had obtained citizenship by 2002 and 45% who entered between 1980 and 1989 had obtained citizenship.¹⁴⁷ Finally, of those who entered in 1990 or later, 12.7% had obtained citizenship.¹⁴⁸

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

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

¹⁴² *Plyler*, 457 U.S. at 229–30.

¹⁴³ *Id.* at 230; see *supra* text accompanying notes 113–14.

¹⁴⁴ *Plyler*, 457 U.S. at 230.

¹⁴⁵ See Paul Feldman, *Texas Case Looms Over Prop. 187’s Legal Future*, L.A. TIMES, Oct. 23, 1994, at A1; Dianne Schmidley, *The Foreign-Born Population in the United States: March 2002* (Feb. 2003), available at U.S. Census Bureau, <http://www.census.gov/prod/2003pubs/p20-539.pdf> (Feb. 2003).

¹⁴⁶ Schmidley, *supra* note 145.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Feldman, *supra* note 145, at A1.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

tried to bar them, and three are full-time housewives.¹⁵³ Of the four families which these sixteen children comprised, only one has moved out of Tyler.¹⁵⁴ Indeed, they appear to have attained the American dream by moving from undocumented to documented members of United States society.

The experience of the *Plyler* plaintiffs reflects the view of Professors Aleinikoff and Rumbaut, who have cited studies showing that, despite the fears of a multicultural nation underlying this “immigration crisis,” noncitizen acculturation within United States society is continuing its progress, as it has in the past.¹⁵⁵ Thus, the available evidence to date show that the State’s argument in *Plyler* that the undocumented children would not put their education to use to benefit the state of Texas has proven to be false. This evidence comports with the economists’ view of the social benefits of an education, which recognizes that education has a value to society beyond its value to the individual student.¹⁵⁶

Among these social benefits are “a more-educated and better-informed electorate, lower rates of crime and violence, lower rates of poverty, better health and nutrition, and, generally a more smoothly functioning society.”¹⁵⁷ These social benefits ensue regardless of immigration status because the undocumented person of today could indeed become the permanent resident or citizen of tomorrow.

IV. PLYLER UNDER ATTACK

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

A. Federal Proposals

There were two federal proposals—in 1995 and 1996—that would have effectively overruled *Plyler*.¹⁵⁸ These essentially identical

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ T. Alexander Aleinikoff & Ruben G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, 13 GEO. IMMIGR. L.J. 1, 10 (1998).

¹⁵⁶ Rebecca A. Maynard & Daniel J. McGrath, *Family Structure, Fertility, and Child Welfare*, in THE SOCIAL BENEFITS OF EDUCATION 125 (Jere R. Behrman & Nevzer Stacey eds., 1997).

¹⁵⁷ *Id.*

¹⁵⁸ H.R. 4134, 104th Cong. (1996); H.R. 1377, 104th Cong. (1995); *see also* Nat’l

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

B. State Proposals: California’s Proposition 187

In California, following a very fractious and divisive campaign in which its proponents chanted “Save our State,” Proposition 187 passed by a close vote on November 8, 1994.¹⁶⁷ Once the ballot initiative passed, it became effective the next day.¹⁶⁸ One of its key provisions, Section 7, contravened the mandate of *Plyler* in that it

Ass’n for College Admission Counseling, *Issue Focus: Considering Undocumented Students in American Schools*, NACAC BULL., Feb. 2001, at 1, 7, available at <http://www.nacac.com/fe2001.pdf> [hereinafter *Undocumented Students*].

¹⁵⁹ Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified in scattered sections of U.S.C.).

¹⁶⁰ H.R. 4134.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See *supra* notes 114–15 and accompanying text.

¹⁶⁵ *Undocumented Students*, *supra* note 158, at 7.

¹⁶⁶ Sidney Weintraub et al., *Responses to Migration Issues*, in U.S. COMM’N ON IMMIGRATION REFORM, MEXICO–U.S. BINATIONAL MIGRATION STUDY REPORT 437, 468 (1997), available at <http://www.utexas.edu/lbj/uscir/binpapers/v1-5weintraub.pdf> (last updated Apr. 20, 1998); see also Butler, *supra* note 76, at 1485 (noting that a bipartisan effort united to have Gallegly amendments defeated).

¹⁶⁷ League of United Am. Citizens v. Wilson, 908 F. Supp. 755, 763 (C.D. Cal. 1995) [hereinafter *LULAC*]. For an excellent in-depth discussion of Proposition 187, its main provisions and their constitutionality, see Lolita K. Buckner Inness, *California’s Proposition 187—Does It Mean What It Says? Does It Say What It Means? A Textual and Constitutional Analysis*, 10 GEO. IMMIGR. L.J. 577 (1996).

¹⁶⁸ *LULAC*, 908 F. Supp. at 763.

denied undocumented children in the state a free public school education.¹⁶⁹ This provision was judicially invalidated in *League of United Latin American Citizens v. Wilson* (“LULAC”).¹⁷⁰

The LULAC litigation was decided in two opinions. Both the 1995 and 1997 decisions explicitly reaffirmed *Plyler*. In 1995, a district court in the Central District of California held that Section 7, which required the exclusion of undocumented students from public schools, was preempted by federal law under the Supremacy Clause,¹⁷¹ based on the Supreme Court’s equal protection analysis in *Plyler*.¹⁷² In addition, in 1997, the court again followed *Plyler*, and noted also that Section 1643 of the California law expressly deferred to *Plyler* in providing that “[n]othing in this chapter may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under *Plyler v. Doe*.”¹⁷³

At the time of Proposition 187’s introduction and passage, opinions as to whether the Court would overrule or affirm *Plyler* via the LULAC litigation varied, but most commentators believed that LULAC would reach the Supreme Court and result in an overruling of *Plyler*.¹⁷⁴ LULAC was not brought before the Supreme Court, however, and the parties dropped their appeals following an agreement to enter into dispute resolution regarding the issues raised in the appeal.¹⁷⁵

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

¹⁶⁹ *Id.* at 774.

¹⁷⁰ 997 F. Supp. 1244 (C.D. Cal. 1997); 908 F. Supp. 755 (C.D. Cal. 1995).

¹⁷¹ LULAC, 908 F. Supp. at 774.

¹⁷² *Id.*

¹⁷³ LULAC, 997 F. Supp. 1244, 1255 (C.D. Cal. 1997) (citation omitted).

¹⁷⁴ See, e.g., Phillip Cooper, *Plyler at the Core: Understanding the Proposition 187 Challenge*, 17 CHICANO-LATINO L. REV. 64, 64–65 (1995) (stating that though Proposition 187 challenged the Supreme Court to overturn *Plyler*, the decision should survive); Benjamin N. Bedrick, Note, *The Equal Protection Clause—State Statutory Restrictions on the Education of Illegal Alien Children—Proposition 187*, 14 DICK. J. INT’L. L. 403 (1996) (arguing that the Supreme Court should rely on *Plyler* to invalidate section 7); Corinna Barrett Lain, Note, *Outraged over Immigration: Rethinking Doctrinal Responses*, 82 VA. L. REV. 987, 1009 (1996) (contending that the Supreme Court should overrule *Plyler* and uphold section 7); John T. Ritondo, Jr., Comment, *California’s Duty to Educate the World: Proposition 187 and Mere Rationality*, 26 CUMB. L. REV. 1045, 1047 (1995-1996) (arguing that *Plyler* should be overruled).

¹⁷⁵ Janice Alfred, Note, *Denial of the American Dream: The Plight of Undocumented High School Students Within the U.S. Educational System*, 19 N.Y.L. SCH. J. HUM. RTS. 615, 626 & n.62 (2003).

children. What these attacks on *Plyler* reveal is a deep-seeded resentment towards undocumented immigrants, mostly due to the high cost that states bear when educating their children. This was an argument, however, that the Court rejected in *Plyler* as an insufficiently rational basis for denying educational opportunities to undocumented children.¹⁷⁶

V. *PLYLER'S* CHALLENGE TO BRING ABOUT BROADER CHANGE FOR UNDOCUMENTED STUDENTS

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

A. *Equal Protection: Context Matters*

In the area of equal protection and education, we have seen the evolution from the school desegregation mandated in *Brown*, to affirmative action in higher education as a race-conscious remedy. In two companion cases, *Grutter v. Bollinger*¹⁷⁸ and *Gratz v. Bollinger*,¹⁷⁹ the Supreme Court recently ruled that colleges may consider race as part of a narrowly tailored, race-conscious admissions plan.¹⁸⁰ A race-conscious admissions program that does not “unduly burden individuals who are not members of the favored racial and ethnic groups” satisfies the narrow-tailoring requirement.¹⁸¹ Quotas or the

¹⁷⁶ *Plyler*, 457 U.S. at 229. A recent legislative proposal in Arizona would require school officials to verify the immigration status of parents of students before allowing them to enroll their children, in direct contravention of *Plyler*. See Associated Press, *Arizona to Clamp Down Even Harder on Illegals*, March 4, 2005, available at <http://www.newsmax.com/archives/articles/2005/3/4/112027.shtml>.

¹⁷⁷ See *supra* Part III.

¹⁷⁸ 539 U.S. 306 (2003).

¹⁷⁹ 539 U.S. 244 (2003).

¹⁸⁰ *Grutter*, 539 U.S. at 334.

¹⁸¹ *Id.* at 341 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990)).

automatic award of points based on race, however, are impermissible.¹⁸² In the Court's view, because the Fourteenth Amendment protects persons, not groups, classifications based on race are "in most circumstances irrelevant and therefore prohibited."¹⁸³ The Court found that close judicial scrutiny is required to "ensure that the *personal* right to equal protection of the laws has not been infringed."¹⁸⁴

In *Grutter*, the Supreme Court recognized that "context matters" in an equal protection analysis.¹⁸⁵ In the Court's view, strict scrutiny provides a structure in which to examine the "importance and the sincerity of the reasons"¹⁸⁶ set forth for the classification within each context.¹⁸⁷ In this contextualization of equal protection doctrine, the Court has departed from its decision in *Adarand Constructors, Inc. v. Pena*.¹⁸⁸ There, the Court did not give weight to the social context behind the benign racial classification aimed at remedying past discrimination, a sentiment echoed by Justice Scalia, who stated that "[i]n the eyes of government, we are just one race here."¹⁸⁹

The opinions in *Gratz* and *Grutter* establish that any policy that treats one racial group differently than another must employ narrowly tailored measures that further a compelling governmental interest.¹⁹⁰ The Court has indicated that a narrowly tailored policy will survive strict scrutiny, thereby leaving open the idea that if a state can show a compelling governmental interest in denying education to undocumented children, and the means of denial is narrowly tailored, it would be upheld under the Equal Protection Clause of the Fourteenth Amendment. It is noteworthy, however, that the Supreme Court clarified that only an "exact connection between justification and classification" will support the use of racial classifications.¹⁹¹ *Plyler* gives us a clue as to what a compelling

(O'Connor, J., dissenting)).

¹⁸² See *Gratz*, 539 U.S. at 270 (holding that automatic distribution of "20 points, or one-fifth of the points needed to guarantee admission," virtually guaranteed admission to the underrepresented minority and in effect made race a deciding factor rather than merely a plus factor).

¹⁸³ See *Grutter*, 539 U.S. at 326 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)).

¹⁸⁴ *Id.* (quoting *Adarand*, 515 U.S. at 227) (emphasis in original quoted source).

¹⁸⁵ *Id.* at 327.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ 515 U.S. 200 (1995).

¹⁸⁹ *Id.* at 239 (Scalia, J., concurring).

¹⁹⁰ See *Gratz*, 539 U.S. at 270; *Grutter*, 539 U.S. at 326.

¹⁹¹ See *Gratz*, 539 U.S. at 270 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537

governmental interest might be in the area of education. In holding that the school district's policy was unconstitutional, the Court found that the district had failed to show that educating undocumented children imposed a substantial burden on the state, referring to almost negligible costs associated with the education of those children.

Today, however, there are approximately 1.6 million undocumented students in the United States,¹⁹² and the once negligible costs are now in the billions.¹⁹³ Yet, the context of inequality and the existence of an underclass of undocumented individuals still survives. Presumably, that would be taken into account before the Court would consider overruling *Plyler*.

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

Another area in which *Plyler* has faced challenges in creating educational opportunity is in postsecondary education for the undocumented. Access to higher education is still an unattainable reality for undocumented students. For undocumented students, the obstacles to access to higher education range from the denial of admission,¹⁹⁴ to an inability to obtain student loans,¹⁹⁵ to being charged nonresident tuition,¹⁹⁶ all because of lack of legal immigration status. The following two sections will detail the efforts being undertaken at the state and federal levels to ensure access to postsecondary education for undocumented Latino students in the United States.

1. Federal Efforts: Work in Progress

At the federal level, there have been several proposals to allow undocumented students access to higher education.¹⁹⁷ Most notably,

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

¹⁹² See *supra* note 31.

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

¹⁹⁴ Equal Access Educ. v. Merten, 305 F. Supp. 2d 585 (E.D. Va. 2004).

¹⁹⁵ See 8 U.S.C. § 1611 (2000). See, e.g., Margaret Fosmoe, *Undocumented Teen Dreams of College Despite Obstacles: Youth Looks Beyond His Lack of Documents in Planning Future*, S. BEND TRIB., Apr. 26, 2004, at A2 (recounting the story of Carlos, an Indiana high-school student who hopes to go to college but is ineligible for Federal or State aid because of his undocumented status).

¹⁹⁶ 8 U.S.C. § 1623(a) (2000).

¹⁹⁷ See Earned Legalization and Family Unification Act of 2003, H.R. 1830, 108th

the DREAM Act would amend the IIRIRA and repeal 8 U.S.C. § 1623, which denies education benefits to undocumented students if a United States national would not be eligible for the same benefits, without regard to State residence.¹⁹⁸ Also, under certain circumstances, the DREAM Act would allow adjustment to legal status for undocumented students who complete a college education.¹⁹⁹ Section 4 of the DREAM Act provides for the cancellation of the removal of an undocumented student who has been admitted to an institution of higher education or who has earned his or her high school diploma or GED.²⁰⁰ Under this provision, the student's status would be adjusted to that of an alien lawfully admitted for permanent residence.²⁰¹ The Student Adjustment Act of 2003 is the House companion bill to the Senate's DREAM Act and also would permit states to determine residency requirements for higher education purposes.²⁰² The House version also contains provisions for the adjustment of an undocumented student's illegal status.²⁰³ Both bills were left pending at the end of the 108th Congress and are expected to be reintroduced in 2005.

The Supreme Court's rationale in *Plyler* regarding the unfairness of penalizing undocumented children for their parents' illegal acts,²⁰⁴ as well as the concern over the creation of a permanent caste of undocumented residents,²⁰⁵ would seem to be applicable to the undocumented student seeking access to higher education in this day and age. Commentators have similarly suggested that public policy supports the desirability of federal activity in furtherance of providing higher education opportunities for undocumented students.²⁰⁶

Cong. (2003); Worker Amnesty and Opportunity Act of 2003, H.R. 604, 108th Cong. (2003); Preserving Educational Opportunities for Immigrant Children Act of 2003, H.R. 84, 108th Cong. (2003); Educational Excellence for All Learners Act of 2003, S. 8, 108th Cong. (2003); Earned Legalization and Family Unification Act of 2002, H.R. 3271, 107th Cong. (2002).

¹⁹⁸ Development, Relief, and Education for Alien Minors Act of 2003, S. 1545, 108th Cong. § 3 (2003).

¹⁹⁹ *Id.* § 5(d)(1)(D).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² H.R. 1684, 108th Cong. (2003).

²⁰³ *Id.*

²⁰⁴ See *supra* notes 102–04 and accompanying text.

²⁰⁵ See *supra* notes 105–07 and accompanying text.

²⁰⁶ See Alfred, *supra* note 175, at 618.

2. State Efforts: Activity in the Majority of the States

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

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

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

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

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

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

²¹¹ *Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 585 (E.D. Va. 2004).

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

immigration law preempted the denial of admission to Virginia institutions of higher education, and that such denial violated the Commerce and Due Process Clauses of the Constitution.²¹³ The plaintiffs have found themselves on the losing side of all of the rulings in the case. For instance, unlike *Plyler*, where the plaintiffs proceeded anonymously, the five undocumented students in *Equal Access Education* were not allowed to proceed anonymously.²¹⁴ As a result, three of the individual plaintiffs were unable to continue in that role for fear of being deported.²¹⁵ The next setback was a pretrial dismissal of a large part of the plaintiffs' case.²¹⁶ Finally, the undocumented students lost the case altogether when the remaining aspects of the case were dismissed after the court found that the universities were using the appropriate federal standards to identify the undocumented students.²¹⁷ Thus, as *Equal Access Education* illustrates, the rights of the undocumented students in the higher education context have been left unprotected in what would appear to be the beginning of an erosion of *Plyler's* promise of educational equality.²¹⁸

More recently, a lawsuit has been filed on behalf of two dozen United States citizen students, or parents of students, who pay non-resident tuition at Kansas universities.²¹⁹ They are challenging the recently enacted Kansas law²²⁰ that offers in-state tuition to undocumented students who have graduated from and attended high school in Kansas for at least three years or have obtained their GED in Kansas.²²¹

The plaintiffs in the case allege that the Kansas law, H.B. 2145, violates § 505 of IIRIRA, which prohibits an illegal alien from receiving a benefit for which a United States citizen is ineligible.²²² Plaintiffs also assert that H.B. 2145 contravenes federal law in that it

²¹³ *Id.* at 585.

²¹⁴ See *Doe v. Merten*, 219 F.R.D. 387 (E.D. Va. 2004).

²¹⁵ See *Equal Access Educ.*, 305 F. Supp. 2d at 592 n.3.

²¹⁶ *Id.* at 614.

²¹⁷ *Equal Access Educ. v. Merten*, 325 F. Supp. 2d 655 (E.D. Va. 2004); see also Kendra Nichols, *Federal Judge Dismisses Illegal Immigrants' Lawsuit Against Virginia's Public Colleges*, CHRON. OF HIGHER EDUC., Aug. 6, 2004, at A24.

²¹⁸ *Plyler*, 457 U.S. at 202.

²¹⁹ *Day v. Sebelius*, No. 04-4085 (D. Kan. filed July 19, 2004); see also Sara Hebel, *Opponents of Lower Tuition for Illegal Immigrants Seek to Strike Down Kansas Law*, CHRON. DAILY REP. (Chronicle of Higher Educ., Wash., D.C.), July 21, 2004, at <http://chronicle.com/daily/2004/07/2004072103n.htm> (copy on file with author).

²²⁰ H.B. 2145, 80th Leg., Reg. Sess. (Kan. 2004).

²²¹ See Hebel, *supra* note 219.

²²² *Id.*

creates distinct immigration classifications only operative in Kansas that are not based on federal standards used to determine who is a lawful resident in the United States.²²³ Plaintiffs also allege that implementation of H.B. 2145 will encourage and induce the “transport of aliens into and across the United States” in violation of federal immigration law.²²⁴ Finally, the plaintiffs allege that a law drawing a distinction on the basis of alienage must meet the requirements of the Equal Protection Clause under the heightened standard of review, and that, because these students will not be able to work once they are educated, the arguments regarding their contribution to the workforce are unpersuasive.²²⁵ This case is still pending. If the court does not contextualize the equal protection claim and instead follows the *Adarand* model, there is a possibility that the plaintiffs will succeed.

CONCLUSION: THE CONTINUED VITALITY OF *PLYLER*

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

[W]ithout a guarantee that an undocumented person can achieve lawful immigration status following graduation from college, such a person will always live under the double threat of being ineligible to lawfully hold a job and possible removal from the United States. And, since immigration regulation is a federal power, state legislatures could not tie academic achievement or state residency to immigration status. The power to change one’s immigration status rests solely on Congress’s shoulders.²²⁷

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

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See *supra* note 114 and accompanying text.

²²⁷ See Romero, *supra* note 208, at 406–07 (footnotes omitted).

“post-national” citizenship, if not formal citizenship.²²⁸ Post-national citizenship could serve as a way in which the undocumented may assert their claims by virtue of their personhood, based on universal human rights, education being one of the basic human rights.²²⁹ Yet, the very endurance of *Plyler* as precedent may itself then perpetuate the “silent covenant”²³⁰ of the “shadow population”²³¹ of the undocumented, who have the right to at least a secondary (high-school) education, but are unable to work and become full members of our society, and thus are unable to achieve a sense of belonging in this country. Because the nation’s interest in maintaining a cheap and expendable labor force has converged²³² with the expectation of an education for undocumented children, *Plyler* survives to this day.

That *Plyler* can be viewed as an interest convergence case is further evinced by the fact that it was decided at a time when the hiring of undocumented workers had not yet been outlawed by the Immigration Reform and Control Act (IRCA),²³³ and thus, it still was considered to serve the nation’s interest to have undocumented workers and their families in the country. I contend that providing the children of undocumented workers a free public education would still be to the nation’s benefit, as in fact Justice Powell noted when he stated that education may be one of the reasons for the undocumented to come to the United States.²³⁴

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

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

²²⁹ *Id.*

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

²³¹ *Plyler*, 457 U.S. at 218.

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

²³³ Immigration Reform and Control Act, § 274A, Pub. L. No. 99-603, 100 Stat. 3359, 3360–74 (1986) (codified at 8 U.S.C.A. § 1324a (West 1999 & Supp. 2004)).

²³⁴ *Plyler*, 457 U.S. at 237 (Powell, J., concurring).

the work that the undocumented perform. “After almost two decades of anti-immigrant legislation, President Bush has finally announced a proposal to allow temporary guestworker status to undocumented workers under certain conditions.”²³⁵ If the guestworker proposal announced by the President is any indication, it may be that such interests are about to converge.

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