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## The Political Efficacy of *Plyler v. Doe*: The Danger and the Discourse

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Stinky is one ugly robot, a raggedy contraption constructed of crudely painted, cheap plastic pipes pasted together with gobs of the foul-smelling glue that gave the monstrosity its name.

Stinky's creators didn't look all that impressive, either — four teenage guys in baggy pants and sneakers, all of them illegal Mexican immigrants attending Carl Hayden High School in funky West Phoenix.

When Stinky arrived at last year's Marine Advanced Technology Remotely Operated Vehicle Competition — an underwater robotics contest sponsored by NASA and the Office of Naval Research — it was greeted with barely suppressed snickers. Nobody expected Stinky to compete with

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the robot from MIT, a handsome machine created by 12 elite engineering and computer science students and decorated with a sticker from ExxonMobil, the company that donated \$5,000 to the MIT team.

But the kids from Hayden High beat MIT and the rest of the competition — an amazing upset chronicled in an inspiring story in the April issue of *Wired* magazine. Americans love a tale of scrappy underdogs triumphing against long odds, and “La Vida Robot” by Joshua Davis is a classic. It’s got all the ingredients of a feel-good movie of the week — colorful characters, high drama, low comedy and a happy ending.

Well, a *sort* of happy ending.<sup>1</sup>

I have been actively involved in residency reform and study since 1975, when I was a doctoral student and campus recruiter at Ohio State University. As a Chicano student, I was drawn to recruit other Latinos to campus. In Ohio, the only communities with residents of Mexican origin were located in the northern part of the state, where tomatoes and other perishable crops were grown and processed. I discovered that a number of talented Mexican American and Puerto Rican farmworkers were interested in attending college. The tomato and pickle crops were being mechanized, but Latinos were not being hired in the canneries that ringed the northern border of the state. Each year these students and their families followed the crops, from Texas melons and onions up through the Midwest vegetables to tree fruits in northern Michigan. These travels meant they could not establish residency in any state, even those at either end of the migrant stream (Texas or Ohio or Michigan) where they maintained a legal domicile. In my typical graduate student way, I did not know the complexity of the interstate residency systems, and so I asked, “Why not?” I formed a ragtag group of advocates in Columbus, and we convinced the Legislature and the Higher Education Coordinating Board to enact a change in Ohio law. This change enabled agricultural workers to accumulate the residence period of twelve months over the space of three years.<sup>2</sup> Breaking up the time period seemed, in my amateur’s way at the time, a fair way to allow these farmworkers a chance at college.

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<sup>1</sup> Peter Carlson, *Stinky the Robot, Four Kids and a Brief Whiff of Success*, WASH. POST, Mar. 29, 2005, at C1 (emphasis in original).

<sup>2</sup> OHIO REV. CODE ANN. § 3333.31 (1994) (“Rules for determination of residence”); OHIO ADMIN. CODE § 3333-1-10 (1994) (“Ohio student residency for state subsidy and tuition surcharge purposes”).

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To this day, I remember our big meeting with Ohio Board of Regents officers. We even showed them the television movie “Harvest of Shame,” the classic Edward R. Murrow investigation into the plight of U.S. farmworkers. Their biggest fear was that non-farmworkers would pose as the new “protected class” in order to avail themselves of this residency benefit. That someone, not a migrant, would try and pass for one had never occurred to me: not even Cesar Chavez had ever glamorized the profession enough to make it fashionable. I earnestly whipped out a migrant student’s application I had brought in my files. I showed the administrators what a migrant academic transcript looked like: grading periods for the same seven high schools, for the same four weeks, over each of four years. Once administrators saw the transcript, once the evidence and discourse were in terms they could understand, their concerns were allayed. Moreover, once the migrant students secured admission, they were entitled to other grants and curricular benefits as well. They were also entitled, through a formal interstate compact agreement, to residency status in other reciprocal states.<sup>3</sup> These students, moreover, were U.S. citizens, not even the undocumented field hands of today, lured by the backbreaking jobs no one else wants to undertake.

This was my first professional taste of how benefits and status are accorded by place and duration and my first high-level political organizing success. (Actually, it was my second: as an undergraduate, I had convinced my college seminary officials to do away with Saturday morning classes, which had made me a hero with classmates and faculty alike.) I have since established residency as my subfield of study. I have conducted research, litigated cases, served on campus residency appeals committees, and been an expert witness in residency cases.<sup>4</sup> In an ironic twist, I was once sued for my university committee’s denial of the residency appeal by one of my law students

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<sup>3</sup> OHIO REV. CODE ANN. § 3333.18 (1994) (establishing durational requirements).

<sup>4</sup> I have chaired the University of Houston’s Residency Appeals Committee since its inception in 1987, and served as a consultant to its University of Wisconsin counterpart during my year there as a Visiting Professor of Law, 1989-90. Each institution considers hundreds of appeals each year. I have served as a witness or consultant to plaintiffs or advocates filing briefs in the Leticia “A” v. Board of Regents cases, Bradford v. Board of Regents of the University of California cases, Alarcon v. Board of Trustees of the University of Illinois case, and Martinez v. Bynum cases. I served as the state’s expert witness, defending the Kansas statute in Day v. Sebelius and Day v. Bond. As of this writing, I am a consultant to public college counsel in cases pending in 2010 in Texas and Nebraska.

and defended by another former student; I also served both as a hostile fact witness and expert in that case.<sup>5</sup> I know residency.

But others do not, or they misperceive it. These undocumented students at issue have met all admissions criteria, have met all traditional residence requirements, and displace no one on academic grounds. Except for the different fee bills they receive, they are indistinguishable from other college students. Even in California, where an estimated 40% of all undocumented residents live, undocumented college students constitute an almost invisible minority of students. Colleges in the U.S. have accustomed themselves to the undocumented students' presence, and have administered their enrollment without incident — even though federal financial aid funds are unavailable to this population.<sup>6</sup> No study has shown them to be a substantial number, even in border area colleges. Through expert testimony and research, it is evident that the lure of college is not a “pull” factor to attract illegal immigration.<sup>7</sup>

Nonetheless, immigration restrictionists and nativists seek to prevent foreigners from immigrating to the U.S. Attorney Ralph W. Kasarda, who filed briefs in *Martinez v. Regents of University of California*, exemplifies how strident the restrictionist rhetoric can appear:

In outright defiance of federal laws, politicians from states that do offer in-state tuition to illegal aliens argue with a straight face that granting eligibility for in-state tuition is not a postsecondary education benefit as contemplated by the federal statutes. . . . Since *Plyler* does not require states to provide a college education to adult illegal aliens, state taxpayers should mercifully be spared this unnecessary expense. But driven by political ideology rather than concern for their state's fiscal well-being, some state politicians have enacted legislation that forces their constituents to subsidize the post-secondary education of adult illegal aliens. . . .

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<sup>5</sup> See *Smith v. Bd. of Regents of the U. of Hous. Sys.*, 874 S.W. 2d 706 (Tex. App. 1994) (considering whether university's reclassification policy created an irrebuttable presumption of continuing nonresidency in violation of due process).

<sup>6</sup> See, e.g., Michael A. Olivas, *Undocumented College Students, Taxation, and Financial Aid: A Technical Note*, 32 REV. HIGHER EDUC. 407 (2009) (reviewing technical issues in admissions and financial aid).

<sup>7</sup> See, e.g., Transcript of record at 26-34, *Leticia A v. Board of Regents I*, No. 588982-4, (Cal. Super. Ct. 1985) (noting illegal immigrants bring their children to the U.S. without any plans for them to enroll in college); *Leticia A. v. Board of Regents II*, No. 588982-4, slip op. at 2-4 (same).

Numerous policy reasons forcefully argue against offering in-state tuition to adult illegal aliens in order to subsidize their college education, including the added burden that must be borne by taxpayers and the likelihood that offering this benefit to illegal aliens will encourage more illegal immigration. State action to encourage and condone illegal immigration is contrary to federal laws that make it a crime to immigrate to the United States illegally, stay in the country illegally, and to hire illegal aliens. The end result is the weakening of the rule of law, particularly since illegal aliens must resort to the violation of other laws to secure employment such as identity theft, and offering false documents to their employers.<sup>8</sup>

Similarly, Kris W. Kobach, perhaps the most prominent anti-immigrant litigator and commentator, has argued that states and legislators offering admission and resident tuition to illegal immigrants are engaging in “nullification,” “defiance,” and “lawbreaking.”<sup>9</sup> But these nativist objections to undocumented alienage and higher education enrollments are not rooted in careful research and analytic study, but in prejudice and political expediency. My reading of the discourse leads me to believe that those who object do not do so on meritocratic or substantive grounds: Governor Mitt Romney’s objections that the money used for serving undocumented aliens deprives lawfully resident aliens of their benefits ring hollow, even as presidential politics.<sup>10</sup>

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<sup>8</sup> Ralph W. Kasarda, *Affirmative Action Gone Haywire: Why State Laws Granting College Tuition Preferences to Illegal Aliens are Preempted by Federal Law*, 2009 BYU EDUC. & L.J., 197, 199, 202, 244 (2009) (citations omitted).

<sup>9</sup> Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 473, 517 (2006-07); Kris W. Kobach, *The Senate Immigration Bill Rewards Lawbreaking: Why the DREAM Act is a Nightmare*, THE HERITAGE FOUND., (Aug. 14, 2006), available at <http://www.heritagefoundation.org/Research/Reports/2006/08/The-Senate-Immigration-Bill-Rewards-Lawbreaking-Why-the-DREAM-Act-Is-A-Nightmare> (last visited Feb. 21, 2011); Julia Preston, *Lawyer Leads an Immigration Fight*, N.Y. TIMES, July 21, 2009, at A10 (describing Kobach admiringly as being “on a dogged campaign to fight illegal immigration at the local level, riding an insurgency by cities and states fed up with what they see as federal failures on immigration. As these local governments have taken on enforcement roles once reserved for the federal government, he is emerging as their leading legal advocate.”).

<sup>10</sup> See Michael Luo, *Romney’s Words Testify to Threat From Huckabee*, N.Y. TIMES, Dec. 2, 2007, at YT-29. By no means do I suggest that historical inquiry into the origins and meaning of the Fourteenth Amendment is inappropriate or a shibboleth. Serious scholars must follow their leads, wherever the research leads. See, e.g., PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985) (reconsidering the implications of birthright citizenship);

There is considerable resistance that extends even to permanent residents receiving benefits — so much so that there is an entire legal literature devoted to the topic of nativism and anti-immigrant sentiment.<sup>11</sup> Immigration has always been a complex transaction and dangerous sojourn, and local forces have attempted to control the process, especially as the country was forming and borders were not yet fully established.<sup>12</sup> Throughout America's history, state and local politicians have introduced and enacted hundreds of anti-alien bills.<sup>13</sup> Some legislation has even been so mean-spirited as to advocate a repealing of *Plyler v. Doe*, which would allow states to charge tuition to undocumented schoolchildren and ignore the constitutional provisions that enable native-born children to be U.S. citizens

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AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009) (same); Rogers M. Smith, *Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008*, 11 U. PA. J. CONST. L. 1329 (2009) (same).

<sup>11</sup> See, e.g., ALAN DOWTY, *CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT* (1987) (documenting public reaction and scapegoating phenomenon); KEVIN R. JOHNSON, *THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS* (2004) (same); KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (2007) (same); THOMAS MULLER, *IMMIGRANTS AND THE AMERICAN CITY* (1993) (same); RITA J. SIMON, *PUBLIC OPINION AND THE IMMIGRANT: PRINT MEDIA COVERAGE, 1880-1980* (1985) (reviewing negative media coverage of immigrants in newspapers and magazines); Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353 (2009) (analyzing the scapegoating phenomenon from the perspective of the Mercer Girls); Miriam J. Wells, *The Grassroots Reconfiguration of U.S. Immigration Policy*, 38 INT'L MIGRATION REV. 1308 (2004) (analyzing the multi-layered response to immigrant's rights at various levels of government). See generally CATHERINE DAUVERGNE, *MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW* (2008) (providing a comparative study of the scapegoating phenomenon).

<sup>12</sup> See LAURA E. GOMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE*, 141 (2007); ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 74-76 (2006); Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1 (2010); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1833 (1993) (providing excellent historical account of phenomenon).

<sup>13</sup> See, e.g., JILL ESBENSHADE, *DIVISION AND DISLOCATION: REGULATING IMMIGRATION THROUGH LOCAL HOUSING ORDINANCES* (2007) (discussing anti-immigrant housing ordinances); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008) (discussing state actions and challenging the idea that immigration is constitutionally reserved for the federal government); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2038, 2047-2069 (2008) (discussing state and local ordinances); Michael A. Olivas, *Immigration-Related State Statutes and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27 (2007).

irrespective of their parents' immigration status.<sup>14</sup> In difficult economic times, elected officials find scapegoating aliens is easy to reach, low-hanging fruit, as if these workers were the source of the sputtering economy.<sup>15</sup> For example, Alabama enacted HB 56 (the "Alabama Taxpayer and Citizen Protection Act") in 2011, regarded as the most-draconian anti-immigrant legislation to date.<sup>16</sup> HB 56's statement of purpose is emblematic of nativist and anti-immigrant politicians turning undocumented immigrants in to scapegoats during difficult economic times:

The State of Alabama finds that illegal immigration is causing economic hardship and lawlessness in this state and that illegal immigration is encouraged when public agencies within this state provide public benefits without verifying immigration status. Because the costs incurred by school districts for the public elementary and secondary education of children who are aliens not lawfully present in the United

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<sup>14</sup> See, e.g., Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 3 (2009) ("Perhaps even more importantly if the deported parents opt to take the American-citizen child with them, the child can return to this country for permanent residence at any time. The child can then, upon becoming an adult, serve as what is known in immigration law as an 'anchor child,' the basis for a claim that his or her parents be admitted and granted permanent resident status. The parents will then ordinarily be admitted without regard to quota limitations."); *Anchor Babies: Part of the Immigration-Related American Lexicon*, THE FED'N FOR AM. IMMIGRATION REFORM, (2008), available at <http://www.fairus.org> (last visited Sept. 6, 2009) (exemplifying such belief system, including use of ugly term "anchor baby" to suggest that U.S.-born children can readily convey citizenship status to parents). *But see* Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2)(A)(1) (2009) (requiring that any sponsoring citizen son or daughter must be at least twenty-one years of age to sponsor his or her parent). See generally *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down both state statute denying educational funding to undocumented children and municipal school district's attempt to charge an annual tuition fee for each undocumented student to recover lost state funding).

<sup>15</sup> See Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Administrative State*, 45 HOUS. L. REV. 11, 58-64 (2008) (describing Hurricane Katrina rebuilding politics and New Orleans mayor having "expressed fear about the future prospects of his city: 'How do I ensure that New Orleans is not overrun by Mexican workers?'").

<sup>16</sup> H.R. 56, 2011 Leg., Reg. Sess. (Ala. 2011); see *Preliminary Analysis of HB 56 "Alabama Taxpayer and Citizen Protection Act"*, ACLU, available at [https://www.aclu.org/files/assets/prelimanalysis\\_alabama\\_hb56\\_0.pdf](https://www.aclu.org/files/assets/prelimanalysis_alabama_hb56_0.pdf) (describing law's shameful treatment of immigrants); Campbell Robertson, *Alabama Law Criminalizes Samaritans, Bishops Say*, N.Y. TIMES, Aug. 14, 2011, at A13. The US Department of Justice has intervened to enjoin and overturn the Alabama laws. Julia Preston, *Alabama: Judge Delays Tough Immigration Law*, NY TIMES, August 30, 2011, A12.

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States can adversely affect the availability of public education resources to students who are United States citizens or are aliens lawfully present in the United States, the State of Alabama determines that there is a compelling need for the State Board of Education to accurately measure and assess the population of students who are aliens not lawfully present in the United States, in order to forecast and plan for any impact that the presence such population may have on publicly funded education in this state.<sup>17</sup>

All of these arguments and legislation, mixed in a cauldron amidst shrill warnings about the rights of “real Americans,” lead inevitably to a sense of divisiveness, racial superiority, and undifferentiated prejudice. Such imprecise, undifferentiated, and broad-brush swipes at “illegals” and “aliens” generally tar all the groups. Free-floating racialized animus often leads to a generalized resentment against all people of color, or “others.”<sup>18</sup> These sentiments ignore government studies showing that immigrants — however defined — are net economic contributors and will be more so after their incorporation through comprehensive immigration reform.<sup>19</sup>

Some decry the detrimental effects of immigration. They claim that criminals are not deterred from entering or remaining in the country and that aliens are stubbornly monolingual in languages other than English. They claim that immigrants take jobs and services from citizens and that they undercut or depress wages. They also assert that immigrants do not understand the American character and that their unlawful presence is itself a sign of an unwillingness to abide by rules or accept responsibility for their actions.<sup>20</sup> Of course, these traits, to

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<sup>17</sup> H.R. 56 § 2.

<sup>18</sup> See generally Kris W. Kobach, *Immigration, Amnesty, and the Rule of Law*, 36 HOFSTRA L. REV. 1323 (2008) (summarizing objections to immigration reform and legalization).

<sup>19</sup> Of all the facets of this complex issue, the economics, more properly the voodoo economics of undocumented immigration, are the most notable. For an example of the more thoughtful governmental reports, see TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, *Undocumented Immigrants in Texas: A Financial Analysis of the Impact to the State Budget and Economy* (Dec. 2006), available at <http://www.window.state.tx.us> (last visited Sept. 6, 2009). Among the more measured academic efforts, see Howard F. Chang, *The Disadvantages of Immigration Restriction as a Policy to Improve Income Distribution*, 61 S.M.U. L. REV. 23, 25 (2008).

<sup>20</sup> See SIMON, *supra* note 11 (providing an excellent analysis of this phenomenon in historical perspective); see also Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607, 625 (1993-1994); Lesley Williams Reid, Harold E. Weiss, Robert M.



the extent that they are accurate, do describe some immigrants in legal status or in undocumented status, just as they surely describe some natives. However, if there were a group that holds promise to become productive, alien college students would surely be that group. With the generally dismal schooling available to these students, that even a small percentage could meet the admission standards of the University of California or of other colleges and universities is extraordinary.<sup>21</sup> Given their status and struggle, each successful student represents a story of substantial accomplishment.

In a fascinating ethnographic study of a number of undocumented students in California who navigated the complex college admission requirements and who risked revealing themselves to immigration authorities, sociologist Leisy Abrego wrote:

The case of AB 540 in California strongly suggests that unintended constitutive functions of law may sometimes have more transformative effects on the daily lives of targeted subjects than the intended instrumental objectives of law. Instrumentally, AB 540 has been partially successful; the exemption from out-of state tuition makes community college more accessible, but fails to make a university education affordable for most undocumented students. In comparison, however, the constitutive effects of the law are considerably

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Adelman, & Charles Jaret, *The Immigration Crime Relationship: Evidence across U.S. Metro Areas*, 34 SOC. SCI. RES. 757, 761 (2005). See generally RUBÉN G. RUMBAUT & WALTER A. EWING, *THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN* (2007).

<sup>21</sup> There is a long history of the poor schooling available to Latino children. See RICHARD R. VALENCIA, *CHICANO STUDENTS IN THE COURTS: THE MEXICAN-AMERICAN LEGAL STRUGGLE FOR EDUCATIONAL EQUALITY* (2008); Carlos K. Blanton, "They Cannot Master Abstractions, But They Can Often Be Made Efficient Workers": *Race and Class in the Intelligence Testing of Mexican Americans and African Americans in Texas During the 1920s*, 81 SOC. SCI. Q. 1014, 1016 (2000); Marc S. Rodriguez, *A Movement Made of "Young Mexican Americans Seeking Change": Critical Citizenship, Migration and the Chicano Movement in Texas and Wisconsin, 1960–1975*, 34 W. HIST. Q. 275-301 (2003). Latino students show poor educational achievement at virtually every level. See Rick Fry & Felisa Gonzales, *One-in-Five and Growing Fast: A Profile of Hispanic Public School Students* (Aug. 26, 2008), available at <http://www.pewhispanic.org> (last visited Sept. 6, 2009) (providing a useful compendium of data). See generally MICHAEL A. OLIVAS ED., *LATINO COLLEGE STUDENTS* (1986); M. Beatriz Arias, *The Context of Education for Hispanic Students: An Overview*, 95 AM. J. EDUC. 26 (1986); Veronica Velez et al., *Battling for Human Rights and Social Justice: A Latina/o Critical Race Analysis of Latina/o Student Youth Activism in the Wake of 2006 Anti-immigrant Sentiment*, 35 SOC. JUST. 7 (2008); Lindsay Perez Huber et al., *Getting Beyond the "Symptom," Acknowledging the "Disease": Theorizing Racist Nativism*, 11 CONTEMP. JUST. REV. 39 (2008).

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more far reaching. Despite the narrow actionable aspects of AB 540, the law is powerfully symbolic for the students who benefit from it. To them, the law represents a statement about their earned belonging in this society; it signals support for their endeavors and affirmation of their legitimacy.

While courts and other state actors play important roles in the production of law, the constitutive approach underscores that ordinary citizens and subjects also contribute greatly to the meaning and outcomes of law. Law's constitutive power is relational and leaves room for contestation. Although marginalized groups have been known to stand against the law, the relational nature of law's constitutive power opens up the potential for innovative actions to exploit law's possibilities and invoke its power and protection. In this way, law may be invoked and utilized in ways never intended by legislators.<sup>22</sup>

Abrego's observations of these successful survivors mirror my own many interactions over the years with these communities. While I do not wish to seem or to be reductionist, or to generalize beyond recognition, it has been my experience that most of these undocumented students are high achieving strivers. They have a resilience and persistence held by few native citizens – who are born at an advantage, relative to these students. Most of these students have parents who struggled to bring them to this country and exercised considerable risk to enable their achievements. That they succeed under extraordinary circumstances is remarkable to virtually all who observe them. These students' success partially explains why so many educators and legislators have accepted *Plyler* and worked to assist them in navigating the complexities of school and college. Despite the success of anti-immigrant rhetoric in shaping a discourse and of restrictionists in fashioning resentments, reasonable legislators of both parties have attempted to address the issues these students face, notwithstanding the political blowback. This underlying support to remedy the failures of national immigration policy are better barometers of the country's generosity and acceptance of this shadow population than are even the bleatings of the Lou Dobbs of the world.

*Plyler* provides a wonderful example of private citizens' efforts to remedy the failures of national immigration policy, and its backstory

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<sup>22</sup> Leisy Abrego, *Legitimacy, Social Identity, and the Mobilization of Law: The Effects of Assembly Bill 540 on Undocumented Students in California*, 33 LAW & SOC. INQUIRY 709, 731-32 (2008) (citations omitted).

shows just how tenuous the *Plyler* decision was in the first place. A lay Catholic worker in Texas heard that, due to recent legislation, unauthorized immigrant children were not going to be able to attend local public school unless they paid tuition. If not for this worker acting against this injustice by calling a local attorney and asking them to help these students, *Plyler* would not exist. Without the generosity and persistence of this lawyer and the Mexican American Legal Defense Fund (“MALDEF”), the case would not have gone before the Supreme Court. Absent the powerful backstory of Texans precluding innocent children from attending public school, the Court would likely not have overturned the law.

Scholars who have looked carefully and thoughtfully at the case have determined it to be *sui generis*, not so much limited to its facts but as possessing weak doctrinal force and little Constitutional significance. Its gravitational pull has not affected many subsequent cases, as none has come before the Court since then on all fours. The political events since 1982 have not led to serious challenges on legislative fronts, even as *Plyler* has always been vulnerable to federal legislating on the issue of the education of undocumented children. The Gallegly proposal was the one serious attempt to preempt *Plyler*'s holding at the federal level.<sup>23</sup> Representative Elton Gallegly (R-CA) led an unsuccessful effort in 1996 to ban undocumented children from public schools, but his proposal was so polarizing it did not take root or result in legislation. Such efforts have not surfaced in a serious vein since then. Similarly, no serious state actions have threatened undocumented students' educational access in the nearly two decades since *LULAC v. Wilson* successfully challenged Proposition 187.<sup>24</sup>

Notwithstanding *Plyler*'s continued validity and cases like *Martinez* and *LULAC v. Wilson* rejecting attempts to limit undocumented students' access to schools, scholars have chronicled the many permutations that have arisen in lower federal and state courts. Immigrant advocates have had to re-litigate and shore up a number of corollary and subsidiary issues flowing from the touchstone *Plyler*. On the whole, they have beaten back most of the secondary direct and diagonal threats, such as policies affecting immigrant youth. Indeed,

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<sup>23</sup> See H.J. Res. 1377, 104th Cong. (1995).

<sup>24</sup> See *League of United Latin American Citizens v. Wilson* 131 F.3d 1297 (9th Cir. 1997); Initiative Statute, Proposition 187, 1994 Cal. Legis. Serv. (West) (codified at Cal. Educ. Code § 48215(a) (West Supp. 1995); Cal. Health & Safety Code § 130(a) (West Supp. 1995); Cal. Welf. & Inst. Code § 10001.5 (West Supp. 1995)) (attempting to overturn *Plyler* and enact restrictionist state regime to ban undocumented from virtually all California public programs).

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the record shows wide and deep accommodation to these children at individual school, district, and state levels — even as federal and state efforts to enact stricter employment legislation have increased. The record includes the broad range of postsecondary *Plyler* issues, where most of the states with larger numbers of undocumented schoolchildren, and even some with fewer such students, have facilitated their enrollment in the public colleges and universities.

Even as states have ratcheted up their efforts to apprehend undocumented parents and unauthorized workers, many other states carved out and maintained safe havens for the undocumented college children. As but one example, Utah — not thought of as a particularly hospitable climate to immigrants — retained its postsecondary residency tuition status for undocumented college students as it moved to enact significant restrictionist employment and benefit legislation. Several states have enacted harsh measures against these college students, such as South Carolina, which banned them in 2009, and others such as Virginia, Missouri, and Arizona, have not accorded them in-state residency eligibility. Most major receiver states have extended residency status to undocumented students, as have unusual venues from Nebraska to Kansas. If Florida were to move in this direction, all the major immigrant states save Arizona would allow undocumented students to enroll and receive resident tuition status. These are surely markers of how deeply the roots of *Plyler* have reached into the country's soil.

The truth is that the United States needs this talent pool. In many highly technical fields, foreign scholars enroll in high numbers and, after consuming the benefits of our educational system, return to their countries.<sup>25</sup> This is as it should be, as learning respects no borders, and recruiting internationally surely enriches U.S. institutions. However, the undocumented have every incentive to remain in the United States, to adjust their status through formal or discretionary means,

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<sup>25</sup> See generally MICHAEL G. FINN, STAY RATES OF FOREIGN DOCTORATE RECIPIENTS FROM U.S. UNIVERSITIES, 2007 (2010); Michael A. Olivas, *What the "War on Terror" Has Meant For U.S. Colleges and Universities* 249-258, in DOCTORAL EDUCATION AND THE FACULTY OF THE FUTURE (Ronald G. Ehrenberg & Charlotte V. Kuh eds., 2009); Marie-Theresa Hernandez, *The French Banlieue Riots of 2005 and Their Impact on US Immigration Policy: A Transatlantic Study*, 7 ATLANTIC STUD. 79 (2010) (providing a comparative study of the interaction between U.S and French events); Meng Lu, *Not Part of the Family: U.S. Immigration Policy and Foreign Students*, 34 T. MARSHALL L. REV. 343 (2009); Laurel S. Terry, *The Bologna Process and its Implications for U.S. Legal Education*, 57 J. LEGAL EDUC. 237 (2007); PEW HISPANIC CENTER, *Statistical Portrait of the Foreign-Born Population in the United States, 2007* (March 5, 2009), available at <http://www.pewhispanic.org> (last visited Sept. 5, 2009).

and to contribute to the U.S. economy and polity. My own experiences over the years with these students have shown them to be extremely loyal to the United States. Despite their undocumented status, most are more Americanized than are many native born students. They believe in the immigrant success story, having lived it in most instances, as did the Arizona robotics students, noted in the introduction. Why deny these students college admissions and resident tuition, when they are likely to become full-fledged members of the U.S. community, following the inevitable provisions of immigration reform?

In trying to understand the ill-advised objections to incorporating undocumented immigrants into the national community, I am reminded that in my native Santa Fe, New Mexico each year, Santa Feans ritualistically burn Zozobra, or “Old Man Gloom,” a 40-foot straw figure, to expiate the year’s accumulation of grief and indignities. After examining all the arguments immigration restrictionists raise on the issues of providing residency status to undocumented college students and the arguments those who wish to overturn *Plyler* raise, I have come to believe that they act like Santa Feans do in this scapegoating fashion. Those who raise objections to birthright citizenship and extending benefits to undocumented students, particularly those who act upon these beliefs, do so to burn Zozobra and thus to expiate their own fear and loathing of the unknown. This is not a new phenomenon. During the 19th-century, California officials banned pigtailed prisoners and oppressed them through a series of measures to keep Chinese immigrants in their place.<sup>26</sup> Today, immigration restrictionists have resorted to false stories

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<sup>26</sup> This period is widely regarded as the most overtly racist period of U.S. immigration policy. In addition to the petty harassments directed at Chinese workers, a more substantial federal legislative onus was directed at all Asians: the “Chinese Exclusion” case - *Chae Chan Ping v. United States*, 130 U.S. 581, 596 (1889). See GABRIEL J. CHIN ED., UNITED STATES COMMISSION ON CIVIL RIGHTS: REPORTS ON ASIAN PACIFIC AMERICANS xi (2005); FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 92 (2002); Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 10 (2002); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 857 (1987); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-554 (1990); Michael A. Olivas, *The Chronicles, My Grandfather’s Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425, 434-435 (1990). An additional feature from these times that has resurfaced is the questioning of birthright citizenship, which has been resolved by longstanding decisions by the U.S. Supreme Court from this period, which determined that the principle of *jus soli* confers full citizenship and nationality upon

and scapegoating in their campaign to vilify immigrants. Dean Kevin Johnson, with a long history of thoughtful immigration scholarship, labels this phenomenon of waging metaphorical wars as “The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.).”<sup>27</sup> Dean Johnson notes the rhetorical devices advanced to thwart substantive improvements in immigration laws, despite the widely-observed pressing need for change.<sup>28</sup>

Despite all the data showing negligible undocumented participation in the country’s vast higher education system, immigration opponents have told tales of massive displacement and lawlessness. Neither of these tales is true. On balance, immigrants, whether lawfully admitted or undocumented, are present and future contributors. Our society benefits tremendously by their stories and loyalties. Precluding their incorporation into the community through higher education is a foolishly short-sighted policy. Those who actively oppose the integration of long-term undocumented elementary and college students should be ashamed of themselves for their actions. Important public policy should not be premised upon unsubstantiated tales and hateful rhetoric, such as those documented by Dean Johnson and others.

When I consider the hydraulics of immigration — particularly the tug between federal and state jurisdiction and enforcement, the likely downsides of the nativist proposals, and the rise of local and state immigration-related proposals, I am convinced that no good can come from sub-federal assumption of immigration powers. Some of the inefficiencies in the current system are incontestably dysfunctional. The result of increased overlap in decentralized immigration enforcement, which would introduce new span-of-control problems and complexities of coordination would be equally, if not more,

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children born within the United State territory. *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898). This view is not universally held by scholars, but no Supreme Court has reversed or retreated from this view. *See, e.g.,* SCHUCK & SMITH, *supra* note 10. *But see* Gerald L. Neuman, *Wong Wing v. United States: The Bill of Rights Protects Illegal Aliens* 31-50, in *IMMIGRATION STORIES* (David A. Martin & Peter H. Schuck eds., 2005); Lindsay, *supra* note 12.

<sup>27</sup> Kevin R. Johnson, *It’s the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 *CHAP. L. REV.* 583, 583 (2010).

<sup>28</sup> *See id.* at 583-84; *see also* Jennifer M. Chacon, *Whose Community Shield? Examining the Removal of the “Criminal Street Gang Member,”* 2007 *U. CHI. LEGAL F.* 317, 318-21 (2007) (noting the demonization of gangs and prisoners).

dysfunctional.<sup>29</sup> Most importantly, the sub-federal assumption of immigration powers would not appreciably improve the current system, which already has coordinating provisions built-in, if not widely adopted. If state legislators think that the existing system is broken, the checkerboard of different enforcement regimes is sure to be even more complex; fifty different and inconsistent state schemes are surely no better approach than a single, improved federal scheme.

Blowback in affected communities and increased prejudice are sure to follow from sub-federal assumption of immigration powers. Local and state enforcement efforts have led to raids on workplaces and labor stations.<sup>30</sup> These efforts have required Spanish-language preachers not to proselytize in their congregants' language.<sup>31</sup> Local enforcement efforts have necessitated that landlords check the immigration status of renters.<sup>32</sup> All of these are sure signs of a racial,

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<sup>29</sup> See generally Michael A. Olivas, *Immigration-Related State Statutes and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27 (2007) (discussing inefficiencies in current federal immigration system and inefficiencies and problems created by sub-federal immigration authority).

<sup>30</sup> See, e.g., Elizabeth McCormick, *The Oklahoma Taxpayer and Citizen Protection Act: Blowing Off Steam or Setting Wildfires?*, 23 GEO. IMMIGR. L.J. 293 (2009) (reviewing employment and other immigration restrictions in Oklahoma); Leticia M. Saucedo, *National Origin, Immigrants, and the Workplace: The Employment Cases in Latinos and the Law and the Advocates' Perspective*, 12 HARV. LATINO L. REV. 53 (2009) (reviewing Latino employment law cases).

<sup>31</sup> See generally *Guevara v. City of Norcross*, 52 F. App'x 486 (11th Cir. 2002) (affirming, without opinion, N.D. Ga., No 00-00190-CV-CAP-1) (dismissing criminal charges against Spanish-language minister for posting signs in Spanish announcing religious services in violation of city ordinance restricting use of language other than English for any displayed sign serving non-residential purpose). While this was a MALDEF case, I was not on the Board at the time the action was undertaken. See generally GLOBAL CONNECTIONS AND LOCAL RECEPTIONS: NEW LATINO IMMIGRATION TO THE SOUTHEASTERN UNITED STATES (Fran Ansley & Jon Shefner eds.) (2009) [hereinafter GLOBAL CONNECTIONS]; Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579 (2009) (reviewing local and state immigration regulation in the South); Lisa R. Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135 (2009).

<sup>32</sup> See *Lozano v. City of Hazleton*, 620 F.3d 170, 222, 224 (3d. Cir. 2010); *vacated*, 2011 WL 2175213 (U.S. 2011) (vacating opinion in which Third Circuit drew upon implicit preemption grounds, and even referred to undocumented college students, who had not been specifically singled out by law at issue: "Merely because an immigrant may have a present status does not mean that this status is correct, unchangeable, or may cause the federal government to exercise its discretion to remove the immigrant. Stitched into the fabric of Hazleton's housing provisions, then, is either a lack of understanding or a refusal to recognize the complexities of federal immigration law. Hazleton would effectively remove from its City an alien college student the federal government has purposefully declined to initiate removal proceedings against. So too would Hazleton remove an alien battered spouse,

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ethnic, and national origin “tax” that will only be levied upon certain groups, certain to be Mexicans in particular, or equally likely, Mexican Americans. These more-than-petty nuisances are reminiscent of our inglorious immigration history of racial exclusion, and are pigtail ordinances in modern guise. Despite their surface attractiveness and thin veneer, we should resist them as fixes.

On occasion, the centrist view prevails, as it did in *Plyler*. Several years before the case was wending its way through courts, the Supreme Court decided *San Antonio Independent School District v. Rodriguez*.<sup>33</sup> Like *Plyler*, there were compelling circumstances in *Rodriguez*, which centered on the constitutionality of property tax-driven school funding practices that consistently led to underachievement and longstanding poverty in impoverished school districts. By validating these funding practices and holding that education is not a fundamental right, *Rodriguez*, had far-reaching implications for the education of Latino children, and indeed, poor children throughout the country. If education were not a fundamental right for citizen children, how could the undocumented children in *Plyler*, whose parents were unable to organize politically or involve themselves in school issues, hope to prevail in 1982? In short, how did our country travel the long road from *Rodriguez* to *Plyler*, and in less than a decade?

Writing in 2009, Linda Greenhouse supplies the most plausible explanation for this journey.<sup>34</sup> Justice Powell, who wrote the majority

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currently unlawfully present, but eligible for adjustment of status to lawful permanent resident under the special protections Congress has afforded to battered spouses and children.”); *Villas at Parkside Partners v. City of Farmers Branch, Texas*, 701 F. Supp. 2d 835 (N.D. Tex. 2010) (invalidating city ordinance preventing undocumented immigrants from obtaining rental housing); see also Karla Mari McKanders, *Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 3 (2007); Stephanie Sandoval, *Restraining Order Issued Against Rental Ordinance*, DALLAS MORNING NEWS, Sept. 13, 2008, at B1 (“So far, the third time is not the charm for Farmers Branch. U.S. District Judge Jane Boyle issued a temporary restraining order Friday barring the city from implementing its latest ordinance aimed at halting housing rentals to illegal immigrants.”); Dianne Solis, *Judge Rejects Rental Ban*, DALLAS MORNING NEWS, Mar. 25, 2010, at B1 (providing details about permanent injunction in *Farmers Branch*).

<sup>33</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-56 (1973) (holding school-financing system based on local property taxes did not violate Fourteenth Amendment).

<sup>34</sup> See Linda Greenhouse, *What Would Justice Powell Do?: The “Alien Children” Case and the Meaning of Equal Protection*, 25 CONST. COMMENT. 29, 32-35 (2008). See Anders Walker, *Diversity’s Strange Career: Recovering the Racial Pluralism of Lewis F. Powell, Jr.*, 50 SANTA CLARA L. REV. 647 (2010) (illustrating another useful account of Justice Powell’s jurisprudence).



opinion in *Rodriguez*, believed that the Mexican-born children on whose behalf *Plyler* had been brought “have no responsibility for being there” and they were a sympathetic class. According to Greenhouse, “[a] lifetime of experience told Powell that the Texas law was fundamentally misconceived: mean-spirited, hurtful to the individuals affected, and spectacularly counter-productive for society as a whole.” Powell thought that Texas’ interest in educating immigrant children was “strong — perhaps stronger than those advanced for not educating.” *Rodriguez* demonstrated that Powell did not view education as a fundamental right. The Equal Protection Clause, however, still protected immigrant children. According to Powell, because Texas chose to provide an education to “some children,” he did not see how it could deny the same benefit to other children.

Given the intervening quarter century since *Plyler*, it is difficult to re-imagine or recreate the time and place of pre-IRCA 1980s as the high-water mark of the liberal polity, resulting in the bipartisan Immigration Reform and Control Act of 1986 (“IRCA”).<sup>35</sup> IRCA allowed the children from *Plyler v. Doe* to become citizens, as they did.<sup>36</sup> Reading the record of the case, one missing feature is the highly-polarizing debate and interest group mobilization seen today. While the issue of undocumented children in the 1970s was hardly under the radar, it did not draw the sting of restrictionists or the attention of progressive/ethnic partisans that have arisen since. As unimaginable a breach by a congressman heckling the President of the United States about immigrant health care in a televised congressional session (“You Lie!”) was in 2009, it would have been simply unfathomable in 1982.

Despite the intermittent restrictionist impulses in the United States polity, there has been wide and deep acceptance of these children in the nation’s schools. Many, although not all of the thousands of school districts and states have accommodated their enrollment, facilitated their schooling, celebrated their achievements, and extended them college acceptance and resources. The one serious federal challenge to *Plyler*, the Gallegly Amendment, failed to gain traction. Other contemporary legislative efforts have attempted to provide additional rights to immigrant children. The Development, Relief, and Education for Alien Minors (“DREAM”) Act, unsuccessfully introduced in 2001 and recently reintroduced since then, may provide a means for

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<sup>35</sup> See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

<sup>36</sup> See *id.* § 201(a) (providing legal, temporary residence status for undocumented aliens continuously living in U.S. since 1982).

immigrant students to obtain permanent residency.<sup>37</sup> Whether through the DREAM Act or other legislation, comprehensive immigration reform of some stripe is a likely eventual development.

Paradoxically, *Plyler*'s wide scale acceptance, even in a time of increased authorized and unauthorized immigration, has occurred in the context of unprecedented nativism and restrictionism, and in the face of unmatched concerns about national security and terrorism. Unauthorized immigrant employment-related legislation and immigration enforcement are much more salient features today than they were in the 1980s. IRCA, after all, made the hiring of unauthorized workers illegal for the first time in 1986. Therefore, much of today's attention is on rooting out the core reason for the undocumented workers who come to our factories, homes, and workplaces. The fact that they have children, including U.S. citizen children, is less the dominant focus than is the original sin of the parents following the siren call of work.

*Plyler* was always a close call: the decision was surprising, inasmuch as it followed the hapless experience of *Rodriguez*. *Plyler* never commanded widespread constitutional attention or gained the weight accorded other doctrinal developments. It is widely understood to be one of a kind, perhaps high moral ground, iconic but limited in its application. Peter Schuck, among the case's most thoughtful observers, noted that "[s]ome of the manifest difficulties of devising a new constitutional order in an area of law that has long defied one are revealed in *Plyler v. Doe*, in which the Court felt obliged to turn conventional legal categories and precedents inside out in order to reach a morally appealing result."<sup>38</sup>

*Brown v. Board of Education (Brown I)* could not authoritatively cite Fourteenth Amendment framers or ratifiers as being unsympathetic to segregated public schooling.<sup>39</sup> The historical evidence of the Fourteenth Amendment either did not apply to *Brown* or more likely showed the segregated status quo to be acceptable. Similarly, the Fourteenth Amendment's ratification could not fully apprehend or accommodate a view of unauthorized aliens in the community, as

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<sup>37</sup> See The DREAM Act of 2011, S. 952 112th Cong. (2011); The DREAM Act of 2011, H.R. 1842 112th Cong. (2011); The American Dream Act of 2006, H.R. 5131, 109th Cong. (2006); The DREAM Act of 2005, S. 2075, 109th Cong. (2005). See generally Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process*, 55 WAYNE L. REV. 1757 (2009) (discussing the DREAM Act and undocumented college residency).

<sup>38</sup> Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 82-83 (1984).

<sup>39</sup> See *Brown v. Board of Education* 347 U.S. 483 (1954).

there was no such legal construct until much later in the twentieth Century. In *Brown I*, Chief Justice Warren wrote, concerning Reconstruction history, the “most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among ‘all persons born or naturalized in the United States’ ‘ while the “opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect.”<sup>40</sup> He noted, further, that “free common schools, supported by general taxation, had not yet taken hold” when the Amendment was adopted, and that white children were educated by private groups while the education of black children “was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states.”<sup>41</sup> Such was also the case with undocumented children at the time, to the extent that any such children were receiving education at all in the Southwestern United States. The extensive work of historian Mae Ngai has convincingly demonstrated that national immigration policy did not admit or envision concepts of “the undocumented,” especially along what was to become the U.S.–Mexican border, until the middle of the Twentieth Century.<sup>42</sup>

*Plyler v. Doe* continued a developing line of residency cases reaching back to *Graham v. Richardson*, prohibiting the states and Congress from legislating by using broad, unvariegated brush strokes that did not distinguish among the many categories of people in the U.S.<sup>43</sup> These cases required legislators to draw lines with more specificity and nuance than any of the legislative bodies had done.<sup>44</sup> Thus, the state

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<sup>40</sup> *Id.* at 489-90.

<sup>41</sup> *Id.*

<sup>42</sup> MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA, (2004); see also Peter Schrag, *The Unwanted: Immigration and Nativism in America*, IMMIGRATION POLICY CTR. (Sept. 13, 2010), available at <http://www.immigrationpolicy.org> (last visited Feb. 23, 2011).

<sup>43</sup> See generally *Graham v. Richardson*, 403 U.S. 365 (1971) (applying strict scrutiny to classification based on alienage and holding state interest in conserving welfare benefits for citizens would not legitimize denying welfare benefits to aliens).

<sup>44</sup> See generally *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (holding that National Labor Relations Act (NLRA) constructive discharge and back pay provisions applied to undocumented workers, as determined by National Labor Relations Board); *Elkins v. Moreno*, 435 U.S. 647 (1978) (discussing non-immigrants - G-4 treaty organization dependents who wished to gain Maryland resident tuition status); *Memorial Hospital v. Maricopa Cnty.*, 415 U.S. 250 (1974) (invalidating Arizona statute conditioning eligibility for nonemergency medical care at county's expense on one-year residence in-county); *Dep't of Revenue v. Cosio*, 858 P.2d 621, 626-27 (Alaska 1993) (rejecting equal-protection claim noting that *Plyler* was not controlling

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simply could not convince the Court that there was even a “rational basis” employed in carving out the classes for eligibility — the minimal standard for upholding any classification.

In this sense, all aliens “within” the borders of the country, no matter their legal status, are eligible for certain constitutional protection. Although *Rodriguez* held that education is not a fundamental right and *Plyer* explicitly rejected the argument that these immigrant children are a suspect class, Justice Brennan nevertheless said that the law must survive more than a rational basis review to survive. That the Texas statute at issue in *Plyler* singled out the children, innocent even if their parents had “dirty” hands, convinced the lower courts and Justice Brennan all the more that Texas could not even satisfy the most deferential level of constitutional review.<sup>45</sup>

*Plyler*, read soon after its ruling along with *Bynum* and *Toll* suggests that the Supreme Court was willing to examine more carefully the benefits or statuses to be withheld or extended by states or Congress.<sup>46</sup> Following *Plyler*, durational benefits and status distinctions would have to withstand more searching scrutiny and delineate immigration classifications more carefully and with nuance. That said, *Plyler*’s incorporation of “inchoate” federal policy and lack of efficacy failed to generate clear doctrine or guidelines. Both of these issues have surfaced in the current debates over the extent to which local or state authorities may regulate immigration by means similar to the Texas school attendance zones, such as renter laws, work authorization, policing powers, and other municipal ordinances.

As a general proposition, I would be reluctant to grant extraordinary, unreviewable deference to immigration authorities, as I would be to giving unbridled power to any governmental actors. The sad and sorry record of immigration policy reflecting prejudice rather than our better angels is manifest in virtually every footnote I have fashioned for this Project. In the collective brainstem of most Mexican Americans, we need hear no more than mention of “Operation Wetback,” the Bracero Program, or the Secure Border Initiative [sic] to flinch at increased federal authority or Congressional delegation of

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because permanent fund dividend sought was not “comparable to education”).

<sup>45</sup> *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (applying intermediate scrutiny and opining that Texas law fails even rational basis review).

<sup>46</sup> See *Martinez v. Bynum*, 461 U.S. 321, 328-31 (1983) (upholding Texas statute allowing school districts to deny tuition-free admission to its public schools for minors who lived apart from their parents if they were living in school district primarily to obtain free public schooling); *Toll v. Moreno*, 458 U.S. 1, 13-14 (1982) (overturning state university admission and fees policy denying students, whose parents had nonimmigrant alien visas in-state tuition status).

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power and authority to the executive branch. Whether the power accrues by the doctrine of enforcing sovereign external relations, or by giving extraordinary *Chevron, U.S.A.*-style deference to administrative agency decision-making, there is an underlying rationale that assumes a full and robust participation in the polity by the affected and interested parties, who then bind themselves to this process.<sup>47</sup> This electoral algebra, of course, does not apply to the undocumented whose presence is unauthorized, liminal, and contested.

The suggestion that proxies and advocates for the political stakes of the unauthorized population can carry these interests forward and assert them as others would in the traditional fashion is ludicrous. Immigration and administrative law scholar Dean Kevin R. Johnson has summarized this paradox. By his calculus, administering immigration laws and programs pose:

a fundamental problem for the democratic rationale for deference: if we entrust agencies with making and enforcing the laws because of their political accountability, what should we do if a specific agency is only accountable to part of the group of people affected, directly or indirectly, by its decisions? Both lawful and undocumented immigrants, barred from having any formal political input, namely, a vote, in the administrative state are deeply affected, and often injured, by decisions of the bureaucracy. Citizens, whose interests often diverge from those of noncitizens, are indirectly affected by the decisions of the immigration agencies, but, whatever the limitations of their input, have a full voice in the national political system about the general policy direction of the bureaucracy through election of the President . . . . [As a result,] immigrants and their advocates lack the hard political capital of the ordinary citizen constituency of an administrative agency. One would expect that the imbalance in political input between the affected communities results in agency rulings and decisions on immigration matters that fail to fully consider or appropriately weigh the interests of immigrants. This fact helps explain why the rights of immigrants have been marginalized by the immigration agencies, as well as by Congress, throughout U.S. history, but especially in times of social stress.<sup>48</sup>

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<sup>47</sup> See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

<sup>48</sup> Johnson, *supra* note 15, at 11, 20.

He was referring to the specifics of immigrants in the Hurricane Katrina debacle, but his point applies with equal force to virtually all federal immigration agency administrative decisions.

Professor Schuck is equally dubious of why judicial deference is so manifest in immigration decision making, a longstanding practice that he chalks up to the inherent nature of sovereignty:

It is worthwhile pausing to consider why this deference persisted for so long. One might suspect that judicial reluctance to challenge the power of the other branches reflected the weak political support for aliens. Yet even the Warren Court, whose case reports are filled with decisions checking governmental authorities on behalf of politically vulnerable groups, was abjectly deferential in the context of immigration law and thus firmly within the classical tradition. A lack of political influence, therefore, fails to explain why courts that eagerly picked up the cudgels to protect convicted criminals did not do so for aliens.

Other possible explanations for judicial deference seem equally dubious. The Immigration and Naturalization Service (INS), whose administrative competence and fairness have often been harshly criticized, would seem an odd repository for judicial trust. Nor has the congressional record in the immigration area been one to inspire much judicial confidence; legislative threats to constitutional values have been common. Another rationale for extraordinary judicial deference in classical immigration cases — the presence of foreign policy, national security, or other questions of an essentially nonadjudicatory nature — has explicitly been disavowed by the Court. And even if one remains skeptical of this disclaimer — even if one believes that immigration cases often present questions of legislative fact and foreign policy with which courts are and should be profoundly uncomfortable — that rationale can hardly explain the striking pattern of judicial deference in cases decided as late as the 1970's in which daunting questions of that kind were either inconsequential or wholly absent. Indeed, judicial deference cannot even be explained on the grounds that only the claims of aliens are involved: the plaintiffs in some of these decisions asserted claims-unsuccesfully, as it turned out-based primarily upon the rights of United States citizens, not of aliens. . . .

Other considerations reinforce the power of the sovereignty concept as an explanation for judicial deference. For over a century, the states have been consistently excluded from any significant role in the administration of immigration policy. Moreover, immigration policy has enjoyed a considerable consensus as among the President, Congress and the bureaucracy; one searches the immigration cases in vain for a titanic interbranch struggle like those that have occurred in other areas of public law. One measure of this consensus is that Congress has chosen to confer exceedingly broad discretion over the most farreaching immigration decisions, has delegated this discretion not merely to the executive branch but to a cabinet official who traditionally is a close political confidant of the President, and has done so not only for matters obviously requiring the weighing of many administrative considerations but also for those impinging upon fundamental civil liberties.<sup>49</sup>

I am persuaded that these loosely-woven threads of unfettered discretion and distrust of the process can be stitched solely by a robust sense and application of the preemption doctrine. Although I share the distrust aimed at lodging so much authority for immigration policy and procedure at the federal level, I am more loathe to allow it to cascade down to the state and local level. To employ another metaphor, I would not let immigration policy or more importantly, enforcement norms regress to the mean. For every state that has accorded resident tuition status to undocumented college students, there has been a South Carolina or Georgia or Arizona or Alabama to take a step backward. For every regrettable federal action, there have been several yahoo local and state ordinances, either sprouting in regional restrictionist soil or as part of a national nativist agenda to turn the clock back.

In earlier works, I reviewed the various legal strands of *Plyler*, and suggested why I thought that the preemption doctrine would have been more useful even than that of equal protection, especially in the current nativist climate, where anti-immigrant policies are spreading at the state level, and where restrictionist statutes are beginning to make their way to the U.S. Supreme Court.<sup>50</sup> In *INS v. Chadha*, a case

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<sup>49</sup> Schuck, *supra* note 38, at 16-18 (footnotes omitted).

<sup>50</sup> Some of my works on this subject would include: *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L. Q. 1019 (1995); *IIRIRA, the DREAM Act, and Undocumented College Student Residency*, 30 J.C. &

decided within a year of *Plyler*, and in many other cases, the Supreme Court has made clear “the plenary authority of Congress over aliens.”<sup>51</sup> To turn back the only Texas local anti-immigrant ordinance, in Farmer’s Branch, near Dallas, MALDEF had to secure three TRO’s, and eventually won a permanent injunction, making it the Dutch boy legal defense fund, requiring fingers in too many local and state dikes.<sup>52</sup> To undertake and finance all the litigation required of MALDEF in Arizona, the organization had to close its Atlanta office, despite the many incidents of discrimination against Latinos in the Southeastern United States.<sup>53</sup>

The Court failed to address adequately the preemption issue in *Plyler*. Six years prior, the Court explicitly rejected preemption arguments and upheld a section of the California Labor Code prohibiting the knowing employment of an illegal alien in *DeCanas v. Bica*.<sup>54</sup> By deciding *Plyler* upon the fresh equal protection grounds, and by unpersuasively distinguishing (or by finessing) *DeCanas v. Bica*’s ostensible application, the Court never squared up the question of the extent to which preemption was implicated. The Court could have held that the employment-related provisions of *DeCanas*’ California unemployment program administration were not on all fours with the Texas school statute. Justice Brennan could have persuasively revealed the extensive regulatory structure and legislative detail that had erected the mixed federal-state benefit regime upheld in *DeCanas*, contrasting it with the lack of a federal role in governing state and local elementary-secondary schooling. He could have noted the absence of a Texas legislative history that reversed the longstanding practice of not allowing “free public schooling,” but still requiring

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U.L. 435 (2004); *The Story of Plyler v. Doe, the Education of Undocumented Children, and the Polity*, in IMMIGRATION STORIES 197 (David A. Martin and Peter H. Schuck, eds., Foundation 2005); *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, U. CHI. LEGAL F. 27 (2007); *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99 (2008); *Undocumented College Students, Taxation, and Financial Aid: A Technical Note*, 32 REV. HIGHER EDUC. 407 (2009); *The Political Economy of the DREAM Act and the Legislative Process*, 55 WAYNE L. REV. 1757 (2009).

<sup>51</sup> *INS v. Chadha*, 462 U.S. 919, 940 (1983). See generally Motomura, *supra* note 26.

<sup>52</sup> Sandoval, *supra* note 32. In March, 2010, four years after the statute was first enacted, the federal judge permanently enjoined the city from implementing the ordinance, finding that it violated the supremacy clause and was preempted by federal law. *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 701 F. Supp. 2d 835, 860 (N.D. Tex. 2010); Solis, *supra* note 32 (discussing details about TROs and permanent injunction in *Farmers Branch* case).

<sup>53</sup> See, e.g., GLOBAL CONNECTIONS, *supra* note 31.

<sup>54</sup> See *De Canas v. Bica*, 424 U.S. 351, 356-357 (1976).



such attendance of the children in the state's truancy statutes, which never were reformulated to address the status of their attendance obligation. He could have noted the Hobson's choice facing the undocumented parents, whose children were required by Texas law to attend school, even as Tyler and Houston Independent School Districts were charging large fees for the obligatory attendance. That he did not attempt such an analysis has frustrated the alien benefits-question since, or at least made the conflated mix of preemption doctrine and equal protection difficult to discern, even if in practical terms, observers may not care which constitutional theory drives the decision making or jurisprudential inquiry. The transcendent, glorious meaning of *Plyler* surely is its equal protection principles, applied to innocent sojourners in the larger community, but also its place in the complex assignment equation of who apportions benefits and status, and to whom, and under what constraints. Having decided *Plyler* upon its preemption grounds would have assisted courts today who are deciding similar attempts to regulate immigration policy at the state and local level; such rulings would then shore up *Plyler's* stature as timely and relevant, reaffirming it as the robust and supple decision it has never revealed itself to be.

The communitarian seeds of *Plyler* may not have rooted in the sterile nativistic and restrictionist soil, but a "morally appealing result" is surely preferable to its antonym. And it may be difficult for immigrant activists and defenders to remain vigilant when threats do occur. These threats taking either the direct Gallegly-like or Proposition 187 form or 2011 Alabama approach, or the more oblique practices identified here, such as heightened attendance zone enforcement or drivers license and Social Security identification policies. I prefer to cast my lot with the generous impulses of communitarian traits in the American character, trusting and verifying the challenges, and recognizing the long view. However they arrived here, most of these children are our newest family members, and we ignore this at our peril. For this reason, if for no other, *Plyler v. Doe* should be celebrated and noted as the salutary event it surely is.<sup>55</sup>

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<sup>55</sup> This article was going to press as events in Alabama unfolded. The long and winding road of various challenges to the Alabama Taxpayer and Citizen Protection Act, ("H.B. 56"), has begun, and on September 28, 2011, federal Judge Sharon Lovelace Blackburn issued rulings on the several suits before her, where she determined that she would enjoin some of the act's many provisions, and would let others proceed to trial. All of these were early, preliminary, and procedural skirmishes, so there are no winners and losers yet. Even some of her more troubling and publicized rulings, such as her decision not to enjoin Section 28, which, if allowed, would require schools to determine the immigration status of certain

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schoolchildren, was predominantly an analysis of the plaintiffs' standing, not the merits. There are so many moving parts to the suits and to her findings that a comprehensive analysis would likely dwarf the long and detailed rulings. One of the pieces where she felt the state had not been persuasive and where the plaintiffs had shown an entitlement to a preliminary injunction was in Section 8 (concerning public postsecondary education in Alabama), which she held was preempted by federal immigration law. Within two weeks, the 11<sup>th</sup> Circuit enjoined Section 28, reverting back to pre-HB 56 practices for registering school children. *See* United States v. State of Alabama, No. 11 Civ. 14532, 6 (11th Cir. Oct. 14, 2011); *see also* Michael A. Olivas, Sweet Home Alabama?, InsideHigherEd.com, October 13, 2011, available at [http://www.insidehighered.com/views/2011/10/13/essay\\_on\\_the\\_alabama\\_immigration\\_law\\_and\\_higher\\_education](http://www.insidehighered.com/views/2011/10/13/essay_on_the_alabama_immigration_law_and_higher_education); Campbell Robertson, *After Ruling, Hispanics Flee an Alabama Town*, NY TIMES, Oct. 4, 2011 at A1; Campbell Robertson, *Part of Alabama Immigrant Law Blocked*, NY TIMES, Oct. 15, 2011 at A13; Jaclyn Zubrzycki, *Ala. Immigration Law Puts Squeeze on Schools*, EDUCATION WEEK, Oct. 7, 2011, available at [http://www.edweek.org/ew/articles/2011/10/07/07immigrants\\_ep.h31.html?tkn=PYUFzInKyaZ6KBG4O18PIZoga5o8WkenO%2Bas&rintc=es](http://www.edweek.org/ew/articles/2011/10/07/07immigrants_ep.h31.html?tkn=PYUFzInKyaZ6KBG4O18PIZoga5o8WkenO%2Bas&rintc=es).