
Bias in the Legal System? An Essay on the Eligibility of Undocumented Immigrants to Practice Law

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The American justice system, as it has evolved, has struggled to slowly remove impermissible bias from social life. To that laudable end, the judicial landmark of *Brown v. Board of Education*¹ contributed significantly to the end of de jure segregation of the public schools and

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The late Professor Keith Aoki’s academic career — and life — was devoted to the subject of “bias in the legal system,” the topic of the AALS panel for which this essay was prepared. See Symposium, *Super Aoki — A Tribute to Keith Aoki*, 45 UC DAVIS L. REV. 1585 (2012). This Essay is dedicated to the memory of my good friend.

¹ 347 U.S. 485 (1954).

accommodations, which Jim Crow had embedded in the nation's social fabric for generations.² More recently, the Supreme Court in a more focused way prohibited the use of peremptory challenges to strike minorities and women from juries.³ Today, race-conscious affirmative action pursued by some universities offers the hope of redressing the legacy of racial discrimination in American social life.⁴

The title of this 2013 Association of American Law Schools annual meeting program asks the panelists to “re-examine bias in the legal system” and “search” for “new approaches,” a most ambitious charge. This Essay considers one aspect of what some observers might characterize as bias in the legal profession — the restriction of undocumented immigrants — from the practice of law.⁵ In contrast, others might consider the alleged “bias” as a permissible regulation of the admission of lawyers to practice law.

Like laws affecting immigrants indirectly, such as street vendor regulations,⁶ or directly, as in efforts by state and local governments at immigration enforcement,⁷ restricting access to the legal profession

² See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (commemorative ed. 2002) (analyzing history of Jim Crow in the United States).

³ See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994) (holding that party could not exercise peremptory challenges based on gender to strike women from juries); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (extending *Batson v. Kentucky* to civil actions as well as criminal prosecutions); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (prohibiting the use of peremptory challenges to exclude racial minorities from the jury pool in criminal cases). See generally Symposium, *Batson at Twenty-Five: Perspectives on the Landmark, Reflections on Its Legacy*, 97 IOWA L. REV. 1393 (2012) (collecting articles analyzing the legacy of *Batson v. Kentucky*).

⁴ See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). As this Essay goes to press, the Supreme Court is reconsidering race-conscious affirmative action at public colleges and universities. See *Fisher v. Univ. of Texas*, 631 F.3d 213, 247 (5th Cir. 2011) (upholding race-conscious University of Texas undergraduate admissions scheme), *cert. granted*, 132 S. Ct. 1536 (2012).

⁵ See *infra* Part II.

⁶ See Ernesto Hernández-López, *LA's Taco Truck War: How Law Cooks Food Culture Contests*, 43 U. MIAMI INTER-AM. L. REV. 233, 245 (2011).

⁷ See Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 617 (2012); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 31 (2007); Michael Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 528-57 (2001); see, e.g., *Arizona v. United States*, 132 S. Ct. 2492 (2012) (striking down several core provisions of Arizona's immigration enforcement law known as S.B. 1070); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (upholding Arizona immigration enforcement law); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012) (addressing Alabama's law); Georgia Latino Alliance for

based on immigration status under contemporary conditions will unquestionably have disparate impacts on communities of color.⁸ Specifically, the vast majority of today's immigrants are from Mexico and Central America, as well as Asia,⁹ and the reliance on undocumented immigrant status to screen access to the bar will directly impact those communities.

Heated debates have raged in the United States in recent years over “illegal” immigrants, immigration, and immigration reform.¹⁰ Despite ongoing public dialogue for more than a decade, Congress has been unable to pass comprehensive immigration reform.¹¹ Ostensibly seeking to fill a perceived void in immigration enforcement as well as to respond to the failure of reform at the national level, several states in the last several years have enacted controversial immigration enforcement laws.¹² This Essay considers a small but important ancillary issue involving state treatment of undocumented immigrants — restrictions on undocumented immigrants to practice law.

The question of licensing undocumented immigrants as attorneys is part of the larger question of the integration of undocumented immigrants into American social life.¹³ Like it or not, millions of undocumented immigrants live in this country.¹⁴ Many come to the

Human Rights v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012) (same for Georgia); *United States v. South Carolina*, 2012 U.S. Dist. LEXIS 170752 (D.S.C. Nov. 15, 2012) (same for South Carolina).

⁸ See generally Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1 (2009) (analyzing intersection of race and class in U.S. immigration law and its enforcement).

⁹ See OFFICE OF IMMIGRATION STATISTICS, 2011 YEARBOOK OF IMMIGRATION STATISTICS 6-19 (2012).

¹⁰ See MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 4 (2012) (observing “a coarsening of the public discourse [in the United States], especially the rise of nativist hate speech and organized racial violence, enabled and spread by restrictionist demagoguery, the Internet, cable television, and other media”).

¹¹ See Symposium, *Comprehensive Immigration Reform Symposium: Problems, Possibilities and Pragmatic Solutions*, 55 WAYNE L. REV. 1599, 1600 (2010). In early 2013, Congress and the President returned to the discussion of possible immigration reform. See Zachary A. Goldfarb & Rosalind Helderman, *Obama Urges Congress: Don't Dally on Immigration*, WASH. POST, Jan. 30, 2013, at A1.

¹² See, e.g., *Arizona*, 132 S. Ct. 2492 (striking down several core provisions of Arizona's immigration enforcement law); *Whiting*, 131 S. Ct. 1968 (upholding Arizona immigration enforcement law); *Alabama*, 691 F.3d 1269 (addressing Alabama's law); *Georgia Latino Alliance for Human Rights*, 691 F.3d 1250 (same for Georgia); *South Carolina*, 2012 U.S. Dist. LEXIS 170752 (same for South Carolina).

¹³ See *infra* Part II.

¹⁴ See *infra* text accompanying notes 49-54.

United States as children and attend American public elementary and secondary schools.¹⁵ Undocumented college students, popularly known as DREAMers, have captured the national imagination; their political struggles also have resulted in meaningful changes in policy.¹⁶

The natural educational progression for a cohort of college graduates is to attend graduate and professional school. Professional licensing is ordinarily the next step for professional school graduates. Part I of this Essay sketches the history of the exclusion by the various states of immigrants from the legal profession. Part II considers the possibility of licensing undocumented immigrants as lawyers.

In thinking about professional licensing, it is important to recall that a large percentage of immigrants in modern times originate in Mexico or Central America and Asia.¹⁷ We should also acknowledge that the legislatures and the courts historically have limited the rights of noncitizens in many respects¹⁸ — including barring them from serving on juries — in the criminal and civil justice systems in the United States. Like other minorities, immigrants have been denied full membership in American society and, specifically, long have suffered exclusion in the American justice system. Today, many of those noncitizens are people of color.

I. THE HISTORICAL EXCLUSION OF IMMIGRANTS FROM THE LEGAL PROFESSION

Similar to many aspects of American social life, the licensing of attorneys has been marred by widespread discrimination against women and racial minorities.¹⁹ Such exclusion is consistent with the

¹⁵ See *infra* text accompanying notes 49-51 (discussing *Plyler v. Doe*).

¹⁶ See *infra* text accompanying notes 60-72.

¹⁷ See OFFICE OF IMMIGRATION STATISTICS, *supra* note 9, at 6-19.

¹⁸ See Kevin R. Johnson & Joanna Cuevas Ingram, *Anatomy of a Modern Day Lynching: The Relationship Between Hate Crimes Against Latinas/os and the Debate over Immigration Reform*, 91 N.C. L. REV. (forthcoming 2013) (manuscript at 33-34) (on file with author) (noting that noncitizens today cannot serve on American juries).

¹⁹ See, e.g., *Bradwell v. Illinois*, 83 U.S. 130 (1872) (affirming denial of admission of women to the bar by the state of Illinois); *In re Taylor*, 48 Md. 28 (1877) (denying admission of African American to the Maryland bar). Other barriers existed for African Americans to practice law in the United States. Many law schools and bar associations, including the American Bar Association, excluded African Americans until well into the twentieth century. See Ernest Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L.J. 1069, 1070 (1968); J. Clay Smith, *The Black Bar Association and Civil Rights*, 15 CREIGHTON L. REV. 651, 651 (1982); see, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that University of Texas law school unconstitutionally discriminated against an African American law school applicant).

discrimination against women and minorities in American social life generally. For decades, states also denied licenses to practice law to immigrants in the United States,²⁰ which is entirely consistent with the history of anti-immigrant sentiment in this country.²¹ Fortunately, such discrimination has declined over time.²² Nonetheless, the long and enduring history of exclusion suggests that circumspection is warranted in considering whether the denial of a license to practice law to undocumented immigrants can be justified on permissible grounds or, alternatively, is indicative of invidious bias.

A. *State Exclusion of Immigrants from the Practice of Law*

Consider briefly the history of the exclusion of immigrants from the legal profession. In *Ex parte Thompson*,²³ the North Carolina Supreme Court in 1824 denied two noncitizens licenses to practice law. It reasoned that noncitizens only possess a temporary allegiance to the United States²⁴ and expressed fear that the legal profession “should not fall into such hands as would lower it in the national opinion.”²⁵ The court further observed that “[t]here is no profession relative to which the public good more imperiously requires that its members should duly appreciate, and honestly maintain, the freedom, the purity, and the genuine spirit of our political institutions.”²⁶

The exclusion of noncitizens from the practice of law historically has had pernicious racial impacts. For much of U.S. history, American law required that an immigrant be “white” to naturalize and become a U.S. citizen.²⁷ In combination with the citizenship requirement for a bar license, the whiteness prerequisite for naturalization indirectly barred Asian immigrants — including lawful immigrants — from the practice of law. In the case of *In re Hong Yen Chang*,²⁸ for example, the

²⁰ See generally Kiyoko Kamio Knapp, *Disdain of Alien Lawyers: History of Exclusion*, 7 SETON HALL CONST. L.J. 103 (1996) (summarizing the history of exclusion of noncitizens from the legal profession in the United States).

²¹ See generally JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-925* (paperback ed. 2008) (documenting lengthy period of high anti-immigrant sentiment in the United States).

²² See *infra* Part I.A-B.

²³ *Ex parte Thompson*, 10 N.C. 355, 361-64 (1824).

²⁴ See *id.* at 361-62.

²⁵ *Id.* at 363.

²⁶ *Id.*

²⁷ See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 124 (10th anniversary ed. 2006) (analyzing the “whiteness” requirement for naturalization under U.S. immigration and nationality law).

²⁸ *In re Hong Yen Chang*, 24 P. 156, 157 (Cal. 1890); see *Agg Large v. State Bar of*

California Supreme Court held that an immigrant from China was not eligible to practice law because he was not a U.S. citizen and was ineligible for U.S. citizenship. Similarly, in *In re Yamashita*,²⁹ the Washington Supreme Court denied the bar application of a Japanese immigrant who was not a U.S. citizen and was ineligible for U.S. citizenship. Exclusion from the practice of law constituted one of a myriad of forms of discrimination against Asian immigrants through reliance on racially discriminatory naturalization requirements.³⁰

In 1952, Congress eliminated the whiteness requirement for U.S. citizenship.³¹ Nonetheless, a number of states continued to exclude noncitizens from professions such as medicine, teaching, and law.³² Over time, however, the courts began to extend increasing constitutional protections to immigrants, particularly lawful permanent residents. In an early case of this variety, the Supreme Court in 1915 held that a lawful immigrant possessed a constitutionally-protected right to work, “the very essence of . . . personal freedom and opportunity.”³³

The 1970s saw the beginning of a general expansion of the constitutional rights of immigrants.³⁴ The courts ultimately extended

Cal., 23 P.2d 288, 288-89 (Cal. 1933) (relying on concerns with the allegiance of noncitizens as the basis for excluding them from the California bar and denying a British solicitor a license to practice law until he became a U.S. citizen). In *In re Hong Yen Chang*, the court found that a naturalization certificate issued by a New York state court had been issued to a person of “Mongolian nativity” in violation of American law and was void. See *Hong Yen Chang*, 24 P. at 157.

²⁹ 70 P. 482, 483 (Wash. 1902).

³⁰ See Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 40 B.C. L. REV. 37, 37-40 (1998) (analyzing the state “alien land laws” that barred noncitizens ineligible for citizenship — namely Asian immigrants — from owning real property). See generally BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990* (1993) (detailing history of discrimination under U.S. immigration laws against immigrants from Asia).

Mexican immigrants were not similarly affected by the various state citizenship requirements for bar admission in large part because they were deemed to be “white,” and therefore eligible for naturalization. See *In re Rodriguez*, 81 F. 337, 354 (W.D. Tex. 1897). For a critical analysis of *In re Rodriguez*, see George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 326-27 (1997).

³¹ See HANEY LÓPEZ, *supra* note 27, at 27-28.

³² See Knapp, *supra* note 20, at 112-13.

³³ *Truax v. Raich*, 239 U.S. 33, 41 (1915).

³⁴ See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (invalidating, on Equal Protection grounds, state welfare law denying benefits to lawful permanent residents). *But see Mathews v. Diaz*, 426 U.S. 67, 81-87 (1976) (holding that discrimination against legal immigrants in federal health benefits program did not violate the Equal Protection Clause).

to lawful immigrants eligibility for licensing as an attorney. The Alaska Supreme Court in 1971 held that U.S. citizenship had no “rational connection” with a person’s ability to practice law.³⁵ The next year, the California Supreme Court concluded that there is no valid connection between U.S. citizenship and the practice of law, and ruled that a citizenship requirement for admission violated the Equal Protection Clause of the Fourteenth Amendment.³⁶ Ultimately, the U.S. Supreme Court in 1973 in *In re Griffiths*³⁷ invalidated the state of Connecticut’s citizenship requirement for the practice of law and denial of an attorney’s license to a lawful permanent resident from the Netherlands. The Court rejected the state’s argument that, because a lawyer is an officer of the court, U.S. citizenship was a necessary proxy for American allegiance.³⁸

B. The Modern Denial of Nonimmigrants from the Practice of Law

The Supreme Court in *In re Griffiths* addressed a lawful permanent resident’s right to be a lawyer.³⁹ In *LeClerc v. Webb*,⁴⁰ the U.S. Court of Appeals for the Fifth Circuit in 2005 upheld the state of Louisiana’s prohibition of nonimmigrants — noncitizens, who although lawfully in this country, lack the right under the U.S. immigration laws to remain permanently in the United States⁴¹ — from being licensed as attorneys. Louisiana had barred nonimmigrants, as opposed to lawful permanent residents, from eligibility for admission to the bar.⁴² The court noted that, unlike lawful permanent residents (who, it said, “are similarly situated to citizens in their economic, social, and civic . . .

³⁵ *In re Park*, 484 P.2d 690, 695 (Alaska 1971).

³⁶ *See Raffaelli v. Comm. of Bar Exam’rs*, 496 P.2d 1264, 1268-71, 1275 (Cal. 1972).

³⁷ *In re Griffiths*, 413 U.S. 717, 718 (1973).

³⁸ *See id.* at 723-24.

³⁹ *See id.* at 722 (“Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities.”).

⁴⁰ *LeClerc v. Webb*, 419 F.3d 405, 410 (5th Cir. 2005); *see Van Staden v. St. Martin*, 664 F.3d 56, 57 (5th Cir. 2011) (following *LeClerc* in upholding state denial of nursing licenses to nonimmigrants), *cert. denied*, 133 S. Ct. 110 (2012).

⁴¹ *See* Immigration and Nationality Act § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2006) (listing various nonimmigrant visas); INA § 214, 8 U.S.C. § 1184 (providing for admission of nonimmigrants); *see also* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 355-58 (5th ed. 2009) (offering background on nonimmigrant visas).

⁴² *See LeClerc*, 419 F.3d at 410.

conditions”⁴³), nonimmigrants by definition possessed only a “temporary connection to this country”⁴⁴ and therefore could be constitutionally denied admission to the bar. Several other states besides Louisiana prohibit nonimmigrants from bar admission.⁴⁵ Some courts, however, have rejected state efforts to bar nonimmigrants from obtaining other types of professional licenses.⁴⁶

II. UNDOCUMENTED LAWYERS?

Several states are currently weighing how the Supreme Court’s holding in *In re Griffiths* applies to undocumented immigrants.⁴⁷ Given the enrollment of undocumented students in the public schools, including law schools, the issue is likely to recur for the indefinite future.⁴⁸

A. Undocumented College Students

Federal, state, and local governments, as well as the courts, have long grappled with the existence of undocumented immigrants living in the United States. In 1982, the Supreme Court in *Plyler v. Doe*, in words that ring true today, observed that:

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial “shadow population” of illegal migrants — numbering in the millions — within our borders. *This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits*

⁴³ *Id.* at 418.

⁴⁴ *Id.* at 417.

⁴⁵ See NAT’L CONFERENCE OF BAR EXAM’RS & ABA SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2012 2-3 (2012).

⁴⁶ See *Dandamudi v. Tisch*, 686 F.3d 66, 70 (2d Cir. 2012) (invalidating state law prohibiting nonimmigrant aliens from receiving pharmacist licenses); *Kirk v. N.Y. State Dep’t of Educ.*, 562 F. Supp. 2d 405, 407 (W.D.N.Y. 2008) (same for veterinary licenses).

⁴⁷ See J. Austin Smithson, Comment, *Educate Then Exile: Creating a Double Standard in Education for Plyler Students Who Want to Sit for the Bar Exam*, 11 SCHOLAR 87, 110-13 (2008) (analyzing how *In re Griffiths* applies to undocumented immigrants).

⁴⁸ See *infra* Part II.A.

*that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.*⁴⁹

In making that observation, the Court struck down a Texas law that effectively barred undocumented students from receiving an elementary and secondary school public education. The Court emphasized that “[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”⁵⁰

Based on that reasoning, the Court held that Texas could not impose[] a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the Texas law], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.⁵¹

In 2009, an estimated eleven million undocumented immigrants lived in the United States.⁵² Because of the continued availability of jobs for undocumented workers, greatly escalating border enforcement — although increasing the risks of apprehension or even death for border crossers — has had limited impacts on decreasing the undocumented population.⁵³ Rather, the recession, not heightened

⁴⁹ *Plyer v. Doe*, 457 U.S. 202, 218-19 (1982) (emphasis added).

⁵⁰ *Id.* at 219-20. See generally MARIA PABÓN LÓPEZ & GERARDO R. LÓPEZ, PERSISTENT INEQUALITY: CONTEMPORARY REALITIES IN THE EDUCATION OF UNDOCUMENTED LATINA/O STUDENTS (2010) (analyzing legal developments concerning access to public education by undocumented students in the United States); OLIVAS, *supra* note 10 (to the same effect).

⁵¹ *Plyler*, 457 U.S. at 223-24.

⁵² See Jeffrey Passel & D’Vera Cohn, *U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade*, PEW RES. HISP. CENTER (Sept. 1, 2010), <http://www.pewhispanic.org/2010/09/01/us-unauthorized-immigration-flows-are-down-sharply-since-mid-decade>.

⁵³ See KEVIN R. JOHNSON & BERNARD TRUJILLO, IMMIGRATION LAW AND THE US-MEXICO BORDER 220-21 (2011).

border enforcement, stabilized, and reduced somewhat, the undocumented immigrant population in the United States.⁵⁴

To address the issue of undocumented immigration, both Presidents Bush and Obama have advocated comprehensive reform of the U.S. immigration laws and called for regularizing the status of certain categories of undocumented immigrants.⁵⁵ As this essay goes to press, Congress, however, has been unable to pass comprehensive immigration reform.⁵⁶ Whether right or wrong (or constitutional or not),⁵⁷ many state and local governments have stepped in to enact immigration enforcement legislation.⁵⁸ In so doing, the complicated policy question facing the states is how, in the absence of what they perceive to be an effective national enforcement scheme, to respond to the substantial undocumented population in the United States.

The Texas law at issue in *Plyler v. Doe* did not address access to post-secondary education.⁵⁹ The U.S. government instead has generally left it to the states to determine whether undocumented

⁵⁴ See Passel & Cohn, *supra* note 52.

⁵⁵ See President George W. Bush, *President Bush Proposes a New Temporary Worker Program*, NATIONAL ARCHIVES (Jan. 7, 2004, 2:45 PM), <http://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040107-3.html> (observing that undocumented immigrants “who seek only to earn a living end up in the shadows of American life – fearful, often abused and exploited”); Jesse Lee, *President Obama on Fixing Our Broken Immigration System: “E Pluribus, Unum”*, WHITE HOUSE BLOG (May 10, 2011, 5:52 PM), <http://www.whitehouse.gov/blog/2011/05/10/president-obama-fixing-our-broken-immigration-system-e-pluribus-unum> (calling for reform of “broken” immigration system and advocating passage of the DREAM Act because “we should stop punishing innocent young people for the actions of their parents”).

⁵⁶ See *supra* text accompanying notes 10-11.

⁵⁷ See, e.g., *supra* note 12 (citing cases in which state immigration enforcement laws were challenged).

⁵⁸ See NAT’L CONFERENCE OF STATE LEGISLATURES, 2010 IMMIGRATION-RELATED BILLS AND RESOLUTIONS IN THE STATES (JAN.-MAR. 2010) 1 (Ann Morse ed., 2010), available at <http://www.ncsl.org/issues-research/immig/2010-immigration-related-bills-and-resolutions865.aspx> (“With federal immigration reform stalled in Congress, state legislatures continue to tackle immigration issues at an unprecedented rate.”); Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1674-75 (2011) (“In response to the widespread perception that the federal government cannot or will not control the border, state legislatures are now furiously enacting immigration-related laws, with stricter enforcement schemes predicted to come. These attempts to wrestle control of enforcement decisions from the federal government have cast into doubt the doctrinal core of immigration law: federal exclusivity.”).

⁵⁹ The Supreme Court, however, has struck down as unconstitutional on federal pre-emption grounds discrimination by states against domiciled nonimmigrant residents in the fees charged by state colleges and universities. See *Toll v. Moreno*, 458 U.S. 1, 17 (1982).

students are eligible for enrollment (and under what terms) in public colleges and universities.⁶⁰ Recent years have seen undocumented college students mobilize politically in the pursuit of ensuring greater educational opportunities.⁶¹

In this vein, Congress for the last decade has considered various incarnations of the DREAM (Development, Relief, and Education for Alien Minors) Act, which, generally speaking, would allow for the regularization of the immigration status of undocumented college students and facilitate their access to public universities.⁶² Congress has failed to pass the DREAM Act.⁶³ In 2012, the Obama administration responded administratively in a limited way to that failure through a program known as Deferred Action for Childhood Arrivals (DACA). DACA effectively halted, through the exercise of prosecutorial discretion, the removal of eligible noncitizens who were brought without proper authorization to the United States as children.⁶⁴

Some states have acted to ease the burdens on undocumented students seeking to attend public colleges and universities. The California legislature in 2001 passed a law that made undocumented

⁶⁰ The U.S. Department of Homeland Security “does not require any school to request immigration status . . . or to report to the government if they know a student is out of status, except in the case of those who came on student visas or for exchange purposes and are registered with the Student Exchange and Visitor Program.” Letter from U.S. Dep’t of Homeland Sec., Immigration and Customs Enforcement, to Jim Hackenberg (Mar. 9, 2008), available at <https://salsa.democracyinaction.org/o/371/images/ICE%20Statement%20on%20Enrollment%20of%20Undocumented.pdf>.

⁶¹ See *infra* text accompanying notes 62-71.

⁶² See generally Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463 (2012) (analyzing efforts to enact DREAM Act); Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009) (same).

⁶³ See Roberto Suro, *A Lost Decade for Immigration Reform*, WASH. POST, Dec. 26, 2010, at B3.

⁶⁴ See Memorandum from Janet Napolitano, Sec’y of the Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Servs., and John Morton, Dir., U.S. Immigration on Customs Enforcement 1 (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (providing guidance on the exercise of discretion with respect to individuals who came to the United States as children).

For the claim that the DACA program is unconstitutional, see John C. Yoo & Robert J. Delahunty, *Dream On: The Obama Administration Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013).

students who graduated from California high schools eligible for in-state fees at California colleges and universities.⁶⁵ In 2011, the legislature passed a pair of laws referred to collectively as the California DREAM Act that permit certain children who were brought without proper immigration documentation to apply for state-funded student financial aid.⁶⁶ In sharp contrast to the political movement of the DREAMers, other states have sought to bar undocumented immigrants from public universities.⁶⁷ In the name of immigration enforcement, Georgia, Alabama, South Carolina, Florida, and other states have followed this path.

In the face of formidable barriers, such as being ineligible for federal financial aid and loan programs,⁶⁸ some undocumented students have navigated their way to graduation from colleges and universities; a few can be found as students in law schools.⁶⁹ Not surprisingly, the attorney licensing authorities of several states, with the states regulating the licensing of attorneys in their jurisdiction, are now being confronted with the question of whether to license undocumented attorneys.⁷⁰ Once again, the nation faces the challenge of how to treat “aliens” in American social life.⁷¹

B. *The Case of Sergio Garcia*

Although reliable statistics are not readily available, the number of undocumented law students in the United States is “likely small”; the “best estimate” is that there are “likely around one hundred, attending roughly a dozen U.S. law schools. [It appears], however, that the

⁶⁵ See *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 859 (Cal. 2010) (rejecting claim that California law violated federal law), *cert. denied*, 131 S. Ct. 2961 (2011).

⁶⁶ See California Dream Act of 2011, 2011 Cal. Legis. Serv. Ch. 93 (A.B. 130) (West); Act of Oct. 8, 2011, 2011 Cal. Legis. Serv. Ch. 604 (A.B. 131) (West).

⁶⁷ See Kevin R. Johnson, *Immigration and Civil Rights: Is the “New” Birmingham the Same as the “Old” Birmingham?*, 21 WM. & MARY BILL RTS. J. 367, 394-96 (2012).

⁶⁸ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 505, 8 U.S.C. § 1623 (2012).

⁶⁹ See Raquel Aldana, Beth Lyon & Karla Mari McKanders, *Raising the Bar: Law Schools and Legal Institutions Leading to Educate Undocumented Students*, 44 ARIZ. ST. L.J. 5, 6 (2012) (estimating that roughly one hundred undocumented law students currently attend about a dozen law schools in the United States).

⁷⁰ See *id.* at 13-40 (reviewing various state rules concerning the licensing of undocumented immigrants to practice law).

⁷¹ See generally LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006) (analyzing the ambivalence of many Americans toward treatment of aliens).

number of undocumented students entering law school will continue to grow.”⁷² Several states, including California, Florida, and New York, are currently considering the issue of licensing undocumented immigrants as attorneys.⁷³

Born in Mexico, Sergio Garcia was first brought to the United States by his parents when he was seventeen months old.⁷⁴ After graduating from California State University, Chico in rural northern California, Garcia attended California Northern Law School, an unaccredited law school, and subsequently passed the California bar examination.⁷⁵ He disclosed his immigration status in his bar application and, after an interview, satisfied the California State Bar that he possessed the “good moral character” necessary for the practice of law.⁷⁶ Importantly, no state bar rule or regulation barred Garcia’s licensing.

Although currently lacking proper immigration documentation, Garcia is eligible, and has applied, for an immigrant visa.⁷⁷ Because of a long backlog of visa applications from his native country of Mexico, however, the U.S. government has not issued him one.⁷⁸ Garcia’s long wait for an immigrant visa results from a feature of the U.S. immigration laws known as the “per country ceiling” that limits the number of immigrants to the United States from any one nation in a single year; the lengthy delay in the issuance of visas to noncitizens from Mexico like Garcia — while similarly situated noncitizens from other countries are issued immigrant visas much more quickly — has been identified as one of many reasons why immigration reform is necessary.⁷⁹

Garcia has represented that he is fully committed to abiding by the highest ethical standards of a licensed attorney. He agreed to take the

⁷² See Aldana et al., *supra* note 69, at 6.

⁷³ See Lorelei Laird, *The Dream Bar: Children Living in the United States Illegally Grow Up – and Some of Them Want to be Attorneys*, A.B.A.J., Jan. 2013, at 50.

⁷⁴ See Maura Dolan, *Court Takes Up Bid of Illegal Immigrant to be Attorney*, L.A. TIMES, May 17, 2012, <http://articles.latimes.com/2012/may/17/local/la-me-immigrant-attorney-20120517>; see also Sergio C. Garcia, *Patience and Perseverance*, CAL. LAW., Nov. 2012, at 107, 107. Garcia was too old to be eligible for relief in the DACA program. See Memorandum from Janet Napolitano, *supra* note 64, at 1 (stating that individuals over thirty are not eligible for the program).

⁷⁵ See Dolan, *supra* note 74.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See Maura Dolan, *Justice Department Opposes Illegal Immigrant’s Bid to Practice Law*, L.A. TIMES, Aug. 12, 2012, <http://articles.latimes.com/2012/aug/12/local/la-me-immigrant-lawyer-20120813>.

⁷⁹ See Johnson, *supra* note 8, at 12-13.

oath to uphold the U.S. and California Constitutions. He has met each and every legal and regulatory requirement for a license to practice law in California. The State Bar concluded that the law and applicable regulations warranted the licensing of Garcia to practice law in the state of California.⁸⁰ The recommendation to license Sergio Garcia builds logically on the efforts of the California legislature to improve access to educational opportunities for undocumented students.⁸¹

After receiving the California State Bar's recommendation, the California Supreme Court issued an order to show cause why the motion for the admission of Sergio Garcia by the California State Bar should be granted.⁸² Briefs were filed in support of Garcia's admission by the California Attorney General, immigration law professors, bar associations, law school deans, and others; three briefs opposed the licensing of Garcia, one of them submitted by the U.S. government.⁸³ The U.S. government contended that 8 U.S.C. § 1621(c), which precludes the issuance of any professional license provided "by appropriated funds of a State or local government," bars Garcia's licensing as an attorney by the independent California state bar and California Supreme Court.⁸⁴

⁸⁰ See Dolan, *supra* note 74.

⁸¹ See *supra* text accompanying notes 65-66.

⁸² See *In re Sergio C. Garcia on Admission*, Bar Misc. 4186, No. S202512 (Cal. May 16, 2012), available at <http://www.courts.ca.gov/documents/5-16-order-issuing-OSC.pdf>.

⁸³ See Dolan, *supra* note 78 (discussing the U.S. government's brief in opposition). For a collection of the briefs submitted to the court, see *In re Sergio C. Garcia on Admission - S202512*, CAL. COURTS, <http://www.courts.ca.gov/18822.htm> (last visited Feb. 15, 2013).

I was one of the attorneys who represented the State Bar of California, which supported Sergio Garcia's admission to the bar, in the briefing on this matter before the California Supreme Court. See Opening Brief of the Committee of Bar Examiners of the State Bar of California Re: Motion for Admission of Sergio C. Garcia to the State Bar of California at 46, *In re Sergio C. Garcia on Admission*, Bar Misc. 4186, No. S202512 (Cal. June 18, 2012), available at <http://www.courts.ca.gov/documents/1-s202512-committee-bar-examiners-state-bar-of-ca-opening-brief-merits-061812.pdf>. The views expressed in this essay are my own. I do not speak on behalf of the California State Bar.

⁸⁴ See Application and Proposed Brief for Amicus Curiae United States of America at 5-12, *In re Sergio C. Garcia on Admission*, Bar Misc. 4186, No. S202512 (Cal. Aug. 3, 2012), available at <http://www.courts.ca.gov/documents/20-s202512-amicus-united-states-america-080312.pdf>. In opposing the U.S. government's position, the State Bar responded that admission to practice law is not provided by appropriated funds of the state, and that the Supreme Court is not an "agency" of the state. See Answer of the Committee of Bar Examiners of the State Bar of California to Amicus Brief of the United States of America at 5-9, *In re Sergio C. Garcia on Admission*, Bar Misc. 4186, No. S202512 (Cal. Sept. 6, 2012), available at <http://www.courts.ca.gov/documents/>

The issues raised by the applications to practice law by persons like Sergio Garcia are part of a larger set of issues concerning the status of undocumented immigrants in American social life. Eligibility for state driver's licenses, for example, has been a contentious political issue.⁸⁵ For at least a generation, the U.S. Supreme Court has addressed the questions surrounding the constitutional treatment of undocumented persons like Garcia brought to this country by their parents.⁸⁶ A number of undocumented immigrants in the United States are in a similar position to Sergio Garcia.⁸⁷

If denied a license to practice law, Sergio Garcia would in effect be punished for the decisions of his parents to unlawfully bring him as a toddler to this country, precisely the result that the Supreme Court in *Plyler v. Doe* sought to avoid.⁸⁸ Pursuant to the Court's holding in that case, undocumented students attend public elementary and secondary schools, and some, like Garcia, have beaten the odds to succeed academically.⁸⁹ Garcia's licensing as a lawyer would allow the state of California, which subsidized his elementary, secondary, and post-secondary education, to benefit from his economic and other contributions to the state as a lawyer. In addition, having spent virtually his entire life in the United States and succeeding in the American education system, Garcia, in almost all respects but his

22-s202512-committee-bar-examiners-state-bar-ca-resp-amicus-united-states-america-090612.pdf.

⁸⁵ See, e.g., Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 216-217 (2004) (analyzing the emerging controversy over undocumented immigrants' ability to obtain driver's licenses); Maria 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. 91 (2004) (discussing driver's license eligibility of undocumented immigrants pre- and post-9/11 and concluding that licensing concerns reflect wider societal conflicts on the status of noncitizens); Sylvia R. Lazos Vargas, *Missouri, the "War on Terrorism," and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 798-807 (2002) (considering the controversy in Missouri over driver's license eligibility of undocumented immigrants).

⁸⁶ See *supra* text accompanying notes 49-51 (discussing *Plyler v. Doe*).

⁸⁷ See *supra* text accompanying notes 72-73.

⁸⁸ See *supra* text accompanying notes 49-51.

⁸⁹ See, e.g., ALFREDO QUINONES-HINOJOSA, *BECOMING DR. Q.: MY JOURNEY FROM MIGRANT FARM WORKER TO BRAIN SURGEON* (2012) (chronicling the life of a brain surgeon who had been an undocumented immigrant); Douglas McGray, *The Invisibles; The Students in UCLA's Undocumented Immigrant Club Struggle for an Education Others Take for Granted, Getting by Without Financial Aid, Traditional IDs, Even a Place to Live*, L.A. TIMES, Apr. 23, 2006, <http://articles.latimes.com/2006/apr/23/magazine/tm-illegals17> (examining challenges faced by undocumented students in higher education).

immigration status (which is set for regularization as soon as a visa is issued),⁹⁰ is fully integrated into American society.

Besides legal arguments, a number of public policy concerns lurk in the background of Sergio Garcia's application to practice law. The California Supreme Court asked specifically for briefing on the question of whether policy reasons militated against the licensing of Garcia.⁹¹ In the heated debate over immigration, the allegedly negative economic impacts of undocumented immigration frequently are invoked to justify tighter immigration controls and tough enforcement policies.⁹² The consensus among economists, however, is that immigration is a net economic benefit to the United States.⁹³

Some critics of U.S. immigration policy contend that the employment of undocumented immigrants may arguably reduce jobs for U.S. citizens and other lawful residents. Congress has directly addressed this concern. The employer sanctions provisions of the Immigration and Nationality Act, as amended in 1986 by the Immigration Reform and Control Act,⁹⁴ generally prohibit businesses from employing undocumented immigrants. A central feature of the

⁹⁰ See *supra* text accompanying notes 77-79.

⁹¹ See *supra* note 82 (citing to Supreme Court order to show cause) and accompanying text.

⁹² See, e.g., ROY BECK, *THE CASE AGAINST IMMIGRATION: THE MORAL, ECONOMIC, SOCIAL AND ENVIRONMENTAL REASONS FOR REDUCING U.S. IMMIGRATION BACK TO TRADITIONAL LEVELS* (1996) (arguing for reduced immigration to the United States); GEORGE J. BORJAS, *HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY* (1999) (same); PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* 137-77 (1996) (same).

⁹³ See KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAW* 131-67 (2007). The Congressional Budget Office in 2007 summarized the existing research as follows: "the empirical social science literature on the fiscal impacts of immigration reveals a general consensus that undocumented immigrants' tax contributions exceed the costs of their use of government services, in the aggregate and over the long term." LEGOMSKY & RODRIGUEZ, *supra* note 41, at 1145 (citing U.S. CONGRESSIONAL BUDGET OFFICE, *THE IMPACT OF UNDOCUMENTED IMMIGRANTS ON STATE/LOCAL BUDGETS* (Dec. 2007)).

⁹⁴ See Immigration and Nationality Act § 274A, 8 U.S.C. § 1324a (2006) (added by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (IRCA)). Admittedly, scholars have seriously questioned the effectiveness of employee sanctions. See David Bacon & Bill Ong Hing, *The Rise and Fall of Employer Sanctions*, 38 *FORDHAM URB. L.J.* 77, 103 (2010); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 *U. CHI. LEGAL F.* 193, 195 (2007). Nonetheless, employer sanctions are central to the scheme that Congress has formulated to regulate the employment of undocumented immigrants.

1986 reform law was imposition of penalties on businesses — known as employer sanctions — that employ undocumented immigrants.⁹⁵

If licensed to practice law in California, Garcia necessarily must comply with all employment provisions of the U.S. immigration laws with respect to his representation of clients. Nothing in the mere licensing as an attorney suggests that a law firm, for example, could employ Garcia as an attorney. He could, however, consistent with the U.S. immigration laws, engage in the practice of law as an independent contractor or on a pro bono basis, without violating the employer sanctions provisions of federal immigration law.⁹⁶

If found to be eligible for bar admission, the impact of the small number of undocumented immigrants on the legal market would be negligible.⁹⁷ There are relatively few people like Sergio Garcia — brought to the United States by his parents as a young child who progressed through the public educational system and then graduated law school and passed the California bar examination.⁹⁸ We can expect only a small number of undocumented persons in the future to successfully navigate the many barriers to bar admission facing undocumented persons.⁹⁹

From a consumer protection standpoint, Sergio Garcia does not appear to pose any risks in the representation of clients different from those of any other newly-licensed attorney. Garcia's immigration status in no way impedes his ability to zealously represent his clients to the best of his abilities. Indeed, issuing a license to Garcia is consistent with California laws and regulations and does not encourage a violation of the law.¹⁰⁰ If Garcia in fact violates the law in some way, he would be subject to discipline by the California State Bar and face the possible loss of his license to practice law.¹⁰¹

Opponents of Garcia's licensing also might claim that his admission to the practice of law would encourage undocumented immigration and that a license would be a "magnet" to undocumented immigration. To the vast majority of immigrants (legal and otherwise),

⁹⁵ See LEGOMSKY & RODRIGUEZ, *supra* note 41, at 1158-64.

⁹⁶ See 8 C.F.R. § 274a.1(f) (2006) ("The term employee [for purposes of employer sanctions] means an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors . . .").

⁹⁷ See *supra* text accompanying notes 72-73.

⁹⁸ See *supra* text accompanying notes 72-79.

⁹⁹ See *supra* text accompanying notes 72-73.

¹⁰⁰ See *supra* text accompanying notes 74-82.

¹⁰¹ See, e.g., *In re Larkin*, 768 P.2d 604 (Cal. 1989) (suspending attorney's license to practice law because of a criminal conviction).

the magnet of legal and unauthorized immigration to the United States is jobs.¹⁰² But, as previously discussed,¹⁰³ Congress has addressed the concern with the employer sanctions provisions of the U.S. immigration laws. Any prospective employer of Garcia would be required to comply with the employer sanctions provisions of the U.S. immigration laws.¹⁰⁴

There is little, if any, evidence that many would-be migrants realistically would be encouraged to come to the United States to practice law if Sergio Garcia were admitted. Conversely, there is little, if any, evidence that denial of his admission would decrease undocumented immigration. Implicitly concluding that it would not materially encourage immigration in violation of the law, the California legislature, as a matter of fairness and equity, passed legislation designed to improve the accessibility to certain groups of undocumented student residents to public colleges and universities.¹⁰⁵

Moreover, in this instance, Sergio Garcia is eligible for a lawful immigrant visa, which the U.S. government in all likelihood will issue him in due course.¹⁰⁶ Having lived in the United States for decades, he is an American in all respects but his immigration status. Living without authorization in the United States, without more, is a civil (not a criminal) violation and, in any event, a violation of the law initiated by his parents when Garcia was an infant. Thus, Garcia cannot be somehow characterized as a criminal; indeed, the moral character requirement for bar admission screens out persons with certain criminal convictions from the practice of law.¹⁰⁷

If, as a policy matter, the California Supreme Court was somehow concerned that licensing undocumented persons to practice law might somehow encourage violations of the U.S. immigration laws, it could follow the lead of the California legislature in allowing undocumented students to qualify for resident fees at California colleges and universities. Enacted in 2001, section 68130.5(a)(4) of the California

¹⁰² See JOHNSON, *supra* note 93, at 131-67.

¹⁰³ See *supra* text accompanying notes 94-95.

¹⁰⁴ See *supra* text accompanying notes 94-95.

¹⁰⁵ See *supra* text accompanying notes 65-66.

¹⁰⁶ See *supra* text accompanying notes 77-79.

¹⁰⁷ See *supra* text accompanying notes 75-76 (noting that the California state bar had found that Sergio Garcia had the good moral character necessary to practice law); see also Hiroshi Motomura, *Making Legal: The DREAM Act, Birthright Citizenship, and Broad-Scale Legalization*, 16 LEWIS & CLARK L. REV. 1127, 1141-48 (2012) (contending that rule of law arguments are stronger in favor of the regularization of the status of undocumented immigrants than arguments against doing so).

Education Code¹⁰⁸ provides that an undocumented student must file “an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.” Similarly, undocumented bar applicants could be required to file an affidavit making similar representations to make efforts to legalize their immigration status. Sergio Garcia already has taken the necessary steps to regularize his immigration status.

CONCLUSION

In retrospect, the nation collectively considers the history of racial and gender exclusions from the practice of law as an unfortunate part of the nation’s history of discrimination. Today, we celebrate the elimination of those exclusions. In retrospect, these exclusionary chapters of U.S. history are difficult to reconcile with the nation’s robust commitment to equality. In 1973, the U.S. Supreme Court held that states cannot bar lawful permanent residents as a class from the practice of law.¹⁰⁹ One can only wonder how, a century from now, the nation would view the exclusion of undocumented immigrants from the legal profession.

The case of Sergio Garcia squarely raises the issue of licensing to practice law an undocumented immigrant who was brought to the United States by his parents as an infant. This specific issue has not yet been addressed by the U.S. Supreme Court and currently is being considered by the bars of several states.¹¹⁰

The eligibility of undocumented immigrants to practice law in the United States touches on profoundly important issues about the place of the undocumented — who number in the millions¹¹¹ — in American social life. The United States has grappled with this perplexing issue for decades. By failing to pass immigration reform that would afford certain undocumented immigrants a path to legalization, Congress has done little to help bring forth a solution. If denied access to practice law, Sergio Garcia, a resident of the United States for years and an American in all respects but his immigration status, will be forced by operation of law to live in a caste-like system that is antithetical to the promise of America.

¹⁰⁸ CAL. EDUC. CODE § 68130.5(a)(4) (West 2006).

¹⁰⁹ See *supra* text accompanying notes 37-38.

¹¹⁰ See *supra* Part II.B.

¹¹¹ See *supra* text accompanying notes 52-54.