The Story of Plyler v. Doe,

The Education of Undocumented Children and the Polity

IHELG Monograph

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The Story of *Plyler v. Doe*, The Education of Undocumented Children, and the Polity

Michael A. Olivas

It is hard to know how Supreme Court decisions will come to be regarded, but one thing is certain: none of them exist in a vacuum. Getting a case to federal or state court in the first place is a lightning strike, and very few make it all the way through the chute to the Supreme Court. Fewer still are genuinely memorable, even within the specialty area in which the case is situated. *Plyler v. Doe* always stood for its resolution of the immediate issue in dispute: whether the State of Texas could enact laws denying undocumented children free access to its own public schools. But it also dealt with a larger, transcendent principle: how this society will treat its alien children. Thus, for the larger polity, *Plyler* has become an important case for key themes, such as fairness for children, how we guard our borders, how we constitute ourselves, and who gets to make these crucial decisions. To a large extent, *Plyler* may also be the apex of the Court’s treatment of the undocumented, a concept that never truly existed until the 20th century.

In this Chapter, I treat the case in the following way: how the issue developed and was treated on the ground, in school districts in Texas. Second, once the case quickened, it took on unusual procedural dimensions that warrant discussion. Once the various strands of the cases were consolidated, its actual litigation strategy required case management, with complex backstage maneuvers essential to gaining traction for the parties. The decision itself is one with "epochal significance" for the undocumented population generally, in Peter Schuck’s evocative characterization; in the third section, I dissect the case and examine some of the extensive commentary it prompted. Finally, as a postscript, I examine its path, both in related Supreme Court cases on the same issue and
in allied settings, such as debates over federal legislation that would have mimicked the Texas law struck down in *Plyler*, and in postsecondary education residency litigation and legislation. Understanding *Plyler*’s provenance ultimately sheds light on how important legal cases become recurring fugues, with themes that build and influence subsequent decisions and sometimes the polity at large.

I. On the Ground in Texas: Undocumented School Attendance and the Legislative Reaction

In 1975, the State of Texas enacted section 21.031 of the Texas Education Code, allowing its public school districts (called "Independent School Districts" or ISDs in Texas) to charge tuition to undocumented children. The Legislature held no hearings on the matter, and no published record explains the origin of this revision to the school code. Discussions with legislators from that time have suggested that it was inserted into a larger, more routine education bill, simply at the request of some border-area superintendents who mentioned the issue to their representatives. The Statute, in pertinent part, read:

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either
citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district. 6

Although they were entitled under this statute to do so, not all ISDs in the State chose to charge tuition. In a 1980 random survey prepared by Houston’s Gulf Coast Legal Foundation once litigation commenced, six of the ISDs polled with more than 10,000 students reported that their districts would admit undocumented students without charge, six would charge tuition, eleven would exclude them entirely, while the rest did not respond or did not know how they would respond to such an occurrence. 7 For ISDs with enrollments under 10,000 students, seven would not charge tuition, five would charge tuition, three would exclude entirely, and sixteen did not know or did not respond. The State’s largest district, Houston ISD (with over 200,000 students), and a smaller one, Tyler (with approximately 16,000 students) would allow them to enroll, but required parents or guardians to pay $1000 annually for each child. In addition, several of the school districts nearest the border reported they excluded these children from enrolling, whether or not tuition were paid, such as Ysleta ISD (near El Paso and across the border from Ciudad Juarez) and Brownsville ISD (across the border from Matamoros), as did the State’s second largest district, Dallas ISD, many hundreds of miles from the border.

II. The Litigation and the Principal Players

A. Prologue

The first case to challenge 21.031 was Hernandez v. Houston Independent School District, filed on xxx in state courts, by a local Houston attorney, Peter Williamson. The state district court and the court of civil appeals rejected his due process and
equal protection arguments against the statute. In November, 1977, the appeals court held that such legislation was reasonable: "The determination to share [the State's] bounty, in this instance tuition-free education, may take into account the character of the relationship between the alien and this country." 

B. MALDEF's Role

While observers of thirty years ago recall some localized resistance across the state to the practice of charging the families tuition for what was generally regarded to as "free public schools," the issue appears to have come on a national radar, prompted by a September 26, 1977 letter from Joaquin G. Avila, director of the San Antonio office of the Mexican American Legal Defense and Educational Fund (MALDEF) to the MALDEF National Director for Education Litigation, Peter Roos, located at the MALDEF national headquarters in San Francisco, California, in which he wrote,

This statute was made effective on August 29, 1977. Basically, this statute seeks to regulate the number of students who move in with relatives to attend another school district. As the amended statute now provides (Section 21.031(a)), a student who lives apart from his parent, guardian, or other person having lawful control of him under an order of a court, must demonstrate that his presence in the school district was not based primarily on his or her desire to attend a particular school district. In other words, if a case of hardship can be established, a student will be able to attend the school district. Otherwise, the relatives will have to secure a court order of guardianship. This requirement will impose a hardship on those
families who cannot afford an attorney to process a guardianship. So far we have not received any complaints only a request by Pete Tijerina, our first general counsel to launch a lawsuit.

What are your feelings on the constitutionality of such a provision. What would we have to show to demonstrate a disparate impact. Please advise at your earliest convenience.¹⁰

This letter contains the spores of the Plyler case (without referencing the Hernandez litigation that was underway in the state courts in Houston at the same time), even though Avila does not appear to have fully appreciated the dimensions of the matter that had been first flagged by MALDEF board member (and one of the organization's founders, from the mid-1960's) Pete Tijerina. To Avila, the issue kicked up to San Francisco was whether or not the revised Texas statute affected the "residency" of undocumented students, or whether the parents or guardians had to reside in the district --- a related issue, but one far less essential to the algebra of undocumented school attendance than the tuition issue presented eventually in Plyler, especially for school districts in the interior, away from the border. Indeed, a year after Plyler ruled in favor of the school children, the exact issue Avila noted in his letter appeared in Martinez v. Bynum,¹¹ where it was resolved in favor of the school districts involved. By that time, however, the more fundamental and important threshold issue had been settled; all else was details.

But this was not clear in 1977, when Peter Roos began to sniff out the full extent of the practice in Texas and other states, especially in the Southwestern and Western states, where most undocumented families resided, where undocumented Mexican immigration was most pronounced (as opposed to undocumented immigration from other
countries and other hemispheres), and where MALDEF concentrated most of its program activities. MALDEF was in search of an appropriate federal court vehicle to consolidate its modest victories in the many small, state court cases it had taken on in its first decade of existence. Unlike the laser-like focus of its role model the NAACP Legal Defense Fund, which had strategically targeted desegregation as its reason for being, MALDEF had been somewhat behind the curve, in part due to its representation of ethnic and national origin interests for Mexican Americans and in part due to the diffuse focus of representing the linguistic, immigration, and even class interests of its variegated clients.

After all, Mexican Americans were not African Americans, although their histories of oppression and exclusion from American Anglo life were more similar than they were dissimilar. As historian Steven White has noted, regarding the different litigation theories employed by the two groups to combat school segregation,

The ... creation of MALDEF had less to do with the shift in thinking [about school desegregation strategies] than might be expected. The upheavals brought by the black civil rights struggle, the farm workers' movement, and antiwar protests inspired many disaffected Mexican-descended youths to adopt similar goals and direct action tactics--such as walkouts and other disruptive demonstrations--in order to combat the inequities they encountered. As a result, however, activists frequently found themselves sanctioned by school administrators or even law enforcement agencies. Instead of suing schools to change the rules of desegregation, therefore, MALDEF undertook a number of cases that established the new organization as something of an un-official civil liberties bureau for militant Chicano students. Significantly, in these cases, MALDEF’s attorneys did not argue--and in civil liberties cases had no reason to claim--that Mexican Americans were and
ought to be considered a group distinct from Anglos. Nevertheless, MALDEF's early victories in this field helped to reestablish litigation as a tool for vindicating Mexican Americans' civil rights.\textsuperscript{12}

My discussions with the various parties involved from the MALDEF side of this case clearly indicate that Roos and MALDEF President Vilma Martinez, a young Texas lawyer who had begun her civil rights career with the NAACP Legal Defense Fund, soon saw \textit{Plyler} as the Mexican American \textit{Brown v. Board}: as a vehicle for consolidating the various strands of social exclusions that kept Mexican-origin persons in subordinate status. This case promised to decide issues affecting Mexican migrant workers, who had been in the American imagination due to the charismatic leadership of Cesar Chavez, head of the United Farm Workers union who had drawn attention to the plight of farmworkers and organized successful grape boycotts.\textsuperscript{13} It concerned education in Texas schools, long considered the most insensitive to Mexicans and Mexican Americans. It incorporated elements of school leadership and community relations, where the political powerlessness of Chicanos was evident even in geographic areas where they were the predominant population. The tuition dimension resurrected school finance and governance issues, which had earlier been raised by Chicano plaintiffs seeking to have the radically unequal school financing scheme in Texas declared unconstitutional. After initial success, they had lost in a controversial and close 1973 decision by the U. S. Supreme Court, \textit{San Antonio Independent School District v. Rodriguez}.\textsuperscript{14} The 5-4 ruling seemed designed to call a halt to any expansions in the use of equal protection clause, and it specifically declared that education was not a fundamental right that would trigger strict scrutiny under that clause.
And finally, *Plyler* implicated immigration status, often dividing families based merely on the side of the Rio Grande where the mother had given birth. *Plyler* even held out the promise to unite the class interests between immigrant Mexicans and the larger, more established Mexican American community in a way that earlier, important cases litigating jury selection, school finance, and desegregation had not been able to achieve. Even though these cases all occurred in Texas over many years, and had even included some small victories, they had not appreciably improved the status of Chicanos or broken down the barriers for large numbers of the community.

In his pathbreaking study of Mexican American education litigation, historian Guadalupe San Miguel analyzed the litigation undertaken by MALDEF in Texas in the years 1970-1981, its earliest record. It undertook 93 federal and state court cases in the state during those years, and compiled a substantial record across several areas: 71 cases in the area of desegregation (76.3%), 4 in employment (4.3%), 3 in school finance (3.2%), 7 in political rights (7.5%), 6 in voting (6.5%), and two other education cases (2.2%). In addition, a number of the cases included collateral issues such as language rights and bilingual education. As an example of these cases, MALDEF undertook *United States v. Texas*, a comprehensive assault upon the worst exclusionary practices by school districts, such as class assignment practices and inadequate bilingual education. The judge in that district court decision noted with some bite: "Serious flaws permeate every aspect of the state's efforts...Since the defendants have not remedied the serious deficiencies, meaningful relief for the victims of unlawful discrimination must be instituted by court decree."

Over the years, MALDEF had joined forces with other Mexican American organizations, including more conservative groups such as the League of United Latin
American Citizens (LULAC) and the GI Forum, organizations active over the years in assimilationist and citizenship issues and Latino military veteran issues. Thus, these national organizations, all founded in Texas to combat discrimination, merged their divergent interests in order to effect solidarity, and have since served as plaintiffs in cases filed by MALDEF.²⁰

Just as Thurgood Marshall had traveled the South to execute the Legal Defense Fund's strategic approach of dismantling segregated schooling and the American apartheid system, seeking out the proper cases and plaintiffs, Martinez, Roos, and other MALDEF lawyers and board members had been seeking just the right federal case, so that they would have a larger remedy than they would have in dozens of smaller cases in various state courts in the Southwest. If Mexican American plaintiffs could not win the school finance case in *Rodriguez v. San Antonio School District*, with such demonstrable economic disparities as had been evident in that trial, MALDEF needed to win a big one, both to establish its credibility within and without the Chicano community and to serve their clients. A case involving vulnerable school children in rural Texas being charged a thousand dollars for what was available to other children for free seemed to be that vehicle. They found their Linda Brown in Tyler, Texas where the brothers and sisters in the same family held different immigration status; some had been born in Mexico and some in Texas, which conferred U.S. citizenship upon the latter. Perhaps more importantly, they found their Earl Warren in federal district court judge William Wayne Justice, widely admired and reviled for his liberal views and progressive decisions.²¹ Thus, in this small, rural setting in Tyler, Texas, the stage was set.

C. The Plyler Campaign
The first issue to arise after the case was filed was whether the children could be styled in anonymous fashion in the caption and conduct of the case, so that their identities and those of their families would not be divulged. Use of the actual names of the plaintiffs in the *Hernandez* case against the Houston schools had placed all of them at risk of deportation. In the Tyler case, even though Judge Justice permitted the case to proceed with “John Doe” plaintiffs, the risk persisted. The U.S. Attorney had apparently permitted the Dallas director of the Immigration and Naturalization Service (INS) to conduct immigration sweeps in the area, so as to intimidate the families into dropping their suit.\textsuperscript{22} In response, Roos wrote to the head of the INS in Washington, requesting that he call off any planned raids and characterizing them as trial-tampering. As it happened, in this endeavor MALDEF enjoyed a run of luck, which is always an ingredient of successful trials. The INS Commissioner at the time was Leonel Castillo, a native of Houston and a prominent Mexican American politician with progressive politics, himself a former Peace Corps volunteer who was married to an immigrant.\textsuperscript{23} At his direction, the INS ultimately made no such raids. After these initial skirmishes, Judge Justice issued a preliminary injunction on September 11, 1977, enjoining the Tyler ISD from enforcing 21.031 against any children on the basis of their immigration status.\textsuperscript{24}

As a part of the overall trial strategy, Roos, Martinez, and other MALDEF officials began to press public opinion leaders to "support the schoolchildren" and to develop a backdrop of public acceptance of their immigration status. As an example, Roos wrote leaders of the National Education Association (NEA), the progressive national teachers union, in October, 1977, to request support and assistance; NEA later filed a brief and provided additional support to MALDEF.\textsuperscript{25} In addition, MALDEF leaders traveled to meet with other Latino organizational leaders to enlist support and solicit resources, and to
encourage legal organizations to file amicus briefs on behalf of the plaintiff children. They asked for people to write editorials and to host fundraisers. I recall being a law student in DC during this time and cutting class one night to attend a small fundraiser at a local hotel, with such an event sponsored by Latino organizations and Washington professionals.

On September 14, 1978, after a two day hearing, Judge Justice issued his opinion, striking down 21.031 as applied to the Tyler ISD. He found that the state’s justifications for the statute were not rational and violated equal protection, and that the attempt to regulate immigration at the state level violated the doctrine of preemption, which holds immigration to be a function solely of federal law.26 Immediately after, the State moved for leave to re-open the case, citing its implications for other school districts in the state and seeking leave to bolster the record. Observers of the case have suggested that the state had simply underestimated the plaintiffs’ case, inasmuch as the Hernandez case in state court had been decided in the interim and had gone for the state. But Judge Justice overruled the motion, noting that this "amended complaint does not state a cause of action against any school district other than the Tyler [ISD] and since this court intends to order relief only against [TISD]...." 27

D. Case Management by MALDEF

During the federal trial, the issue of Plyler’s potential impact upon other Texas school districts arose, as word had spread to dozens of other communities, sparking many companion lawsuits. The original Hernandez state decision had not spawned similar state court litigation, affecting MALDEF’s decision to seek a favorable federal judgment, so as to avoid having to litigate the same issue several times in hostile state venues. MALDEF now confronted questions about how best to mesh its efforts, including its response to the
Plyler appeals filed by the Tyler ISD and the State of Texas, with proceedings in other venues. Some of the issues became clearer when the State's largest school district, Houston ISD, faced a lawsuit in federal court in September, 1978 by a group of local attorneys and another California-based public interest law firm, with civil rights lawyer (and South African immigrant) Peter Schey as lead counsel. By this time, with the good news spreading from the Tyler case, four cases raising these issues had been filed in the Southern District of Texas, and two in the Northern District. Moreover, the Eastern District court that had just decided Plyler faced six additional cases after the ruling.

Rather than just suing the particular ISDs, these suits included as defendants the State of Texas, the Texas Governor, the Texas Education Agency (the state agency that governed K-12 public education in the State), and its Commissioner. Eventually, all these cases were consolidated into In re Alien Children, which was tried in the Southern District of Texas court of Judge Woodrow Seals, in Houston. Judge Seals held a 24 day trial.28

These sprawling cases presented an even broader assault upon the system, whereas Plyler had been narrowly focused upon 21.031 and the Tyler ISD. The various cases were brought by several different attorneys on many fronts, relying upon several theories, hoping that they could replicate the victory Roos had carved out in his Tyler case. At this point, it became crucial that the various parties coordinate, because the defendants had deep pockets, legions of deputy attorneys general and private counsel, and other advantages, most importantly the staying power to mow down the plaintiffs at the trial and appellate levels. True, Roos had convinced the United States to intervene in his case on the side of the alien schoolchildren, but over the long haul, the federal government could not be wholly relied upon in civil rights cases, as its interests could change, depending upon the Administration in office.29
In May, 1979, after *Plyler* was decided at the trial level but before *In Re Alien Children* was to go to trial, the local Houston counsel for the plaintiffs in the case before Judge Seals wrote Peter Roos, requesting that MALDEF consolidate its efforts into their case, which was more complex and comprehensive than the original case against the Tyler ISD. Roos responded to attorney Isaias Torres, a Texas native who had just graduated from law school and was working for the Houston Center for Immigrants, Inc., that MALDEF felt "quite strongly that consolidation would not be in the best interests of our mutual efforts."  

After all, MALDEF had carefully selected Tyler as the perfect federal venue for arguing its case: progressive judge, sympathetic clients, a rural area where the media glare would not be as great. In addition, in Tyler the case could be made that excluding the small number of undocumented children (the practical effect of charging $1000 tuition to each) would actually lose money for the district, inasmuch as the State school funding formulae based allocation amounts upon head count attendance. In a large urban school district or a border school district, the fact questions and statistical proofs would be more complex and expensive to litigate for both sides. Moreover, because the Tyler trial had been a case of first impression at the federal level, the State’s legal strategy had not been as sophisticated as it would be in another similar trial. The *Hernandez* case in state court had not involved the full panoply of legal and social science expertise and financial support available to a national effort such as that mounted by MALDEF.

Roos noted to Torres that the State had tried to make a late-in-the-day correction for its ineffective original efforts by seeking the leave to re-open the record, a request that Judge Justice had denied. State counsel would not likely make that mistake again, and would mount a more aggressive strategy in their second go-around. Roos wrote: "While no
doubt you have been incrementally able to improve upon our record [developed in the Tyler trial], consolidation would allow the state and other parties to buttress their record. I believe that one could only expect a narrowing of the present one-sidedness [of the trial record in MALDEF’s favor]. Consolidation would play right into th[e] hands of [the State’s attorney] Mr. Arnett.”

Torres, on the other hand, worried that unless the cases were consolidated, the relief in *Plyler* might not extend beyond the small district. Tyler had folded, but what about Houston, Dallas, and the more important border districts? After all, Texas had over 1000 ISDs, and many of them had the same policies towards undocumented students as had Tyler; it was a state statute that gave them such permission. To this understandable concern, Roos indicated that his original strategy was aimed at winning once and then later applying it elsewhere, not joining up with other pending actions and thereby increasing the risk of losing on appeal: "Most importantly, I believe that once we have a Tyler victory, we will have started down a slippery slope which will make it impossible for the court to legally or logistically limit the ruling to Tyler." This approach mirrors that of the NAACP on the road to *Brown*, where Thurgood Marshall and his colleagues carefully picked their fights, each case incrementally building upon the previous litigation.32 Indeed, MALDEF General Counsel Vilma Martinez had worked at the Legal Defense Fund with Marshall’s former colleague and successor, Jack Greenberg, so she clearly understood the value of an overarching strategic vision.

But Roos had yet another reason for declining to join in the consolidated cases: he had drawn ineffective opposing local counsel, and wished to press his momentary advantage. He wrote, in a remarkable and candid assessment: "A final, but important reason for believing consolidation unwise is, frankly, the quality of opposing counsel. Our
[local] opposing counsel in Tyler is frankly not very good." He went on to say that this would likely not be the case in Houston, where the defense would include experienced attorneys from the specialized education law department of a major law firm, and where other districts would also contribute their efforts and resources. He added, "I believe it is our mutual interest to isolate the worst counsel to argue the case against us. Consolidation works against that. For the above-stated reasons, I would urge you not to seek consolidation. I just don’t believe that it serves our mutual interest of getting this statute knocked out."33

E. The Results

Although Roos did not agree to combine forces at the crucial early stages, this issue was eventually taken out of his hands at the U.S. Supreme Court. At the request of the State of Texas, the Judicial Panel on Multidistrict Litigation eventually did consolidate a number of the cases—but significantly, not Plyler—into the In Re Alien Children Litigation, and notwithstanding Roos' doubts about whether the Houston plaintiffs would prevail, Judge Seals rendered a favorable decision on the merits on July 21, 1980.34 The plaintiff schoolchildren prevailed in a big way, most importantly on the issues of whether the State of Texas could enact a statute to limit inducements to immigration and whether equal protection applied to the undocumented in such an instance. Judge Seals determined that Texas' concern for fiscal integrity was not a compelling state interest and that charging tuition to the parents or removing the children from school had not been shown to be necessary to improve education within the State. Most importantly, he concluded that
21.031 had not been carefully tailored to advance the state interest in a Constitutional manner.

In the Fifth Circuit, meanwhile, Judge Justice’s *Plyler* decision was affirmed in October, 1980, and in May, 1981, the U.S. Supreme Court agreed to hear the matter.\textsuperscript{35} The Fifth Circuit issued a summary affirmance of the consolidated Houston cases a few months later, and the Supreme Court combined the Texas appeals of both cases under the styling of *Plyler v. Doe*, handing Peter Roos the lead vehicle over Peter Schey’s cases.\textsuperscript{36} Having developed fuller records and armed with Fifth Circuit wins, the two Peters worked out a stiff and formal truce, dividing the oral arguments down the middle, but with MALDEF’s case leading the way.

Roos spent the time until the Supreme Court arguments shoring up political support, such as persuading Secretary of Health, Education, and Welfare Joseph Califano to write the Solicitor General to enter into the fray on the side of the children, which side the government did take. In March, 1979, Roos had also written to Drew Days, the Assistant Attorney for Civil Rights, to persuade the government to support the children. After the Reagan Administration took office in January of 1981, Roos sought the support of the successor Administration, writing William Clohan, the Department of Education Undersecretary, in May, 1981, to urge him to continue the actions of the Carter Administration. While the Reagan Administration did not enter its brief on the side of the schoolchildren as had the Democratic lawyers, fortunately for Roos they did not seek to overturn the lower court decisions. In fact, the brief stressed the federal preemption power concerning immigration, a position that favored the schoolchildren. Other MALDEF letters went to state officials in California and elsewhere, seeking their support. \textsuperscript{37}
III. The Supreme Court’s Ruling

In June, 1982, the Supreme Court gave Roos and Schey their win on all counts, by a 5-4 margin. Justice Brennan, in his majority opinion striking down the statute, characterized the Texas argument for charging tuition as "nothing more than an assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools." He employed an Equal Protection analysis to find that a State could not enact a discriminatory classification "merely by defining a disfavored group as non-resident." 39

Justice Brennan dismissed the State’s first argument that the classification or subclass of undocumented Mexican children was necessary to preserve the State’s “limited resources for the education of its lawful residents.” This line of argumentation had been rejected in an earlier case, Graham v. Richardson41 where the court had held that the concern for preservation of Arizona’s resources alone could not justify an alienage classification used in allocating welfare benefits42 In addition, he relied on the findings of fact from the Plyler trial: although the exclusion of all undocumented children might eventually result in some small savings to the state, those savings would be uncertain (given that federal and state allocations depended primarily upon the number of children enrolled) and barring those children would "not necessarily improve the quality of education."44

The State also argued that it had enacted the legislation in order to protect itself from an influx of undocumented aliens.46 The Court acknowledged the concern, but found that the statute was not tailored to address it: "Charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration." The
Court also noted that immigration and naturalization policy is within the exclusive powers of federal government.\textsuperscript{48}

Finally, the state maintained that it singled out undocumented children because their unlawful presence rendered them less likely to remain in the United States and therefore to be able to use the free public education they received in order to contribute to the social and political goals of the United States community.\textsuperscript{49} Brennan distinguished the subclass of undocumented aliens who had lived in the United States as a family and for all practical purposes, permanently, from the subclass of adult aliens who enter the country alone, temporarily, to earn money.\textsuperscript{50} For those who remained with the intent of making the United States their home, "[i]t is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."\textsuperscript{51}

Prior to \textit{Plyer}, the Supreme Court had never taken up the question of whether undocumented aliens could seek Fourteenth Amendment Equal Protection.\textsuperscript{52} The Supreme Court had long held that undocumented aliens are "persons,"\textsuperscript{53} protected by the due process provisions of the Fifth Amendment.\textsuperscript{54} However, Texas argued that because undocumented children were not "within its jurisdiction,"\textsuperscript{55} they were not entitled to equal protection. Justice Brennan rejected this line of reasoning, concluding that there "is simply no support for [the] suggestion that 'due process' is somehow of greater stature than 'equal protection' and therefore available to a larger class of persons."\textsuperscript{56}

After the \textit{Rodriguez} school finance decision, Justice Brennan had to walk a fine line to apply what amounted to scrutiny more demanding than the usual rational basis review. Although he rejected treating undocumented alienage as a suspect class, he
concluded that the children were not responsible for their own citizenship status and that treating them as Texas law envisioned would "not comport with fundamental conceptions of justice."\textsuperscript{57} He was more emphatically concerned with education, however, carefully elaborating the nature of the entitlement to it. While he reaffirmed the earlier \textit{Rodriguez} holding that public education was not a fundamental right, (undoubtedly to attract the vote of Justice Powell, the author of the \textit{Rodriguez} majority opinion), he recited a litany of cases holding education to occupy "a fundamental role in maintaining the fabric of our society."\textsuperscript{58} He also noted that "[i]lliteracy is an enduring disability,"\textsuperscript{60} one that would plague the individual and society. These observations enabled him to establish "the proper level of deference to be afforded 21.031." He concluded, in light of the significant ongoing costs, that the measure "can hardly be considered rational unless it furthers some substantial goal of the state"—subtle and nuanced phrasing that nudged the level of scrutiny to what would be characterized as intermediate scrutiny. Chief Justice Burger's dissent, in contrast, stuck with the customary formulation, requiring only "a rational relationship to a legitimate state purpose." As a result of this careful construction, the Court rejected the claim, which the dissent had found persuasive that the policy was sufficiently related to protecting the state's asserted interests.\textsuperscript{61}

Further, while the Court did not reach the claim of federal preemption,\textsuperscript{63} it did draw a crucial distinction between what states and the federal government may do in legislatively treating aliens.\textsuperscript{64} The Court has upheld state statutes restricting alien employment\textsuperscript{65} and access to welfare benefits,\textsuperscript{66} largely because those state measures mirrored federal classifications and congressional action governing immigration.\textsuperscript{67} For example, in \textit{DeCanas v. Bica},\textsuperscript{68} the Supreme Court had held that a state statute punishing employers for hiring unauthorized aliens to work in the United States was not preempted by federal immigration
law.69 In public education, however, Brennan wrote, distinguishing DeCanas, "we perceive no national policy that supports the State in denying these children an elementary education."70

IV. Reactions

Much of the considerable scholarly response to the Court’s reasoning in the case has evinced surprise that the majority went as far as it did in rejecting the state’s sovereignty. Peter Schuck, for example, characterized the decision as a "conceptual watershed in immigration law, the most powerful rejection to date of classical immigration law’s notion of plenary national sovereignty over our borders... Courts are expositors of a constitutional tradition that increasingly emphasizes not the parochial and the situational, but the universal, transcendent values of equality and fairness imminent in the due process and equal protection principles. In that capacity, they have also asserted a larger role in the creation and distribution of opportunities and status in the administrative state. In Plyler, the Supreme Court moved boldly on both fronts."71 Surveying the line of equal protection cases involving aliens from Yick Wo through Graham to Plyler and beyond, Linda Bosniak has summarized: "alienage as a legal status category means that the law of alienage discrimination is perennially burdened by the following questions: To what extent is such discrimination a legitimate expression, or extension, of the government’s power to regulate the border and to control the composition of membership in the national community? On the other hand, how far does sovereignty reach before it must give way to equality; when, that is, does discrimination against aliens implicate a different kind of government power, subject to far more rigorous constraints? To what degree, in short, is
the status of aliens to be understood as a matter of national borders, to what degree a matter of personhood, and how are we to tell the difference? These questions, I argue, shape the law’s conflicted understandings of the difference that alienage makes.”

Although *Plyler*’s incontestably-bold reasoning has not substantially influenced subsequent Supreme Court immigration jurisprudence in the twenty-plus years since it was decided, the educational significance of the case is still clear, even if it is limited to this small subset of schoolchildren—largely Lathos— in the United States. Given the poor overall educational achievement evident in this population, even this one success story has significance. Again, the parallel to *Brown* is striking: *Brown*’s legacy is questioned even after fifty years, largely due to Anglo racial intransigence and the failure of integration’s promise.

V. Postscript to *Plyler*—The Education of the Polity

In September of the same year, the Court denied petitions to rehear the case, and the matter was over. More than five years had passed since the issue had first appeared on the MALDEF radar screen, and the extraordinary skills and disciplined strategy of Roos and Martinez had prevailed. Indeed, the overarching strategic vision had enabled them to avoid the many centripetal forces that threatened *Plyler* at every turn. To be sure, luck and the grace of god appeared to have intervened at all the key times: sympathetic clients with a straightforward story to tell and an unpopular state statute that never had had its own compelling story, flying under big city legal radar and lucking into poor opposing local counsel, federal and state officials at the early stages who were sympathetic and helpful, a change in national officials that did not result in formal opposition, the ability to keep the
Tyler case on track and for the Houston-based cases to prevail at their own speed and upon their own legs, and the right array of judges hearing the cases as they wended their way through the system. This issue could have foundered at any one of the many turns, winding up like Rodriguez, with a similar gravitational pull but a more complex statistical calculus and worse luck. But the considerable legal and political skills of the MALDEF lawyers served the schoolchildren well, as they had lawyers of color and Anglo lawyers on the path to Brown.

Soon after Plyler, both Vilma Martinez and Peter Roos left MALDEF, she to a Los Angeles law firm and he to the San Francisco-based public interest organization, META, where he continued education litigation on bilingual rights and immigrant rights. The original MALDEF San Antonio lawyer who had written the first Plyler memo, Joaquin Avila succeeded Martinez as President and General Counsel, and then in 1996 won a MacArthur Foundation "genius" fellowship when he took up a voting rights private practice; he now is a law teacher at Seattle University.

The U. S. Supreme Court soon took up a related case, Martinez v. Bynum, and upheld a different part of section 21.031, which provided that the parents or guardians of undocumented children had to reside in a school district before they could send their children to free public schools. Although this was the element of the statute that first drew Avila’s attention and started the ball rolling towards MALDEF’s filing of the Plyler lawsuit, Martinez does not amount to a significant narrowing of Plyler, where the parents actually resided in the school districts, albeit in unauthorized immigration status. The student in Martinez was the U.S. citizen child of undocumented parents who had returned to Mexico after his birth and left him in the care of his adult sister, who was not his legal guardian. The Court in Martinez sustained Texas’ deter mination that the child did not reside in the
district and thus did not qualify for free public schooling there, ruling that *Plyler* did not bar application of appropriately defined bona fide residence tests. Interestingly, in *Plyler*’s footnote 22, the Court had indicated that the undocumented may establish domicile in the country, a much larger issue than that presented in *Martinez*, where the child’s parents had not established the requisite residence in the district. That footnote elaborated: "A State may not . . . accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group as nonresident. And illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State."  

In 1996, during the congressional debates that eventually led to the enactment of IIRIRA, Representative Elton Gallegly (R.-Cal.) proposed an amendment to the legislation that would have allowed states to do what Texas had proposed to do—charge tuition to undocumented students or exclude them from public schools. The provision became quite politicized, even making its way into the Republican presidential party platform of the Robert Dole campaign. The House of Representatives passed the measure as a separate bill, but it never became law. Presidential aspirant Pete Wilson also made this anti-immigrant proposal a centerpiece of his electoral program. Although these proposals were not enacted, it is clear that the topic of undocumented children’s education had entered a regular phase of the conservative agenda. If IIRIRA, PRWORA, California’s Pro position 187, and other immigrant legislation of the mid-1990s were indications of the prevailing anti-immigrant sentiment, at the end of the day no provisions became law that restricted alien children’s right to attend school. *Plyler* and the polity appear to have settled the question.
Although *Plyler* had addressed the issue of public school children in the K-12 setting, it was silent on the issue of whether the protections extended to the college setting. Almost immediately after the ruling, questions arose about how far the decision could be extended, most notably on the issue of whether or not the decision would reach to undocumented college students. The cases have mostly denied relief, although the record is mixed, and before long, Peter Roos was going for the long ball again, litigating postsecondary *Plyler* cases in California.\(^8^0\) That history is for a companion volume, but I will say this: the ultimate irony is that in 2001, just after Governor George Bush left Texas to become President George Bush, the State enacted H.B. 1403, establishing the right of undocumented college students to establish resident status and pay in-state tuition in the State's public colleges.\(^8^1\) In the 25 years since Texas had enacted 21.031, this was silent testimony to the idea that you reside where you live, quite apart from your immigration status. A dozen states have acted since Texas has done so.\(^8^2\) And in Congress, conservative Utah Senator Orrin Hatch co-authored the Development, Relief, and Education for Alien Minors (DREAM) Act. If enacted, it would clarify the issue of whether states could enact legislation on undocumented college students, and would allow the students the opportunity to regularize their federal immigration status—an enormous benefit that would be beyond any provision that a state could provide.\(^8^3\) *Plyler* clearly is alive and well in its adolescence.
* Kristen D. Werner and Eric L. Munoz provided excellent research assistance on this project. In addition, I wish to thank Professors Richard Delgado and Kevin R. Johnson for expert comments, and Professors David A. Martin and Peter H. Schuck for their editorial assistance and for undertaking this book enterprise. I acknowledge the extraordinary resources of the Green Library of Stanford University, and its Special Collections staff, particularly Roberto Trujillo (Head, Department of Special Collections and Frances & Charles Field Curator of Special Collections), Steven Mandeville-Gamble (Assistant Head and Special Collections Principal Manuscripts Processing Librarian), and Polly Armstrong (Public Services Manager). The MALDEF files gathered there are a treasure, and being in such a great reading room reminded me what all professors know—we lead a charmed and privileged life. While I agreed not to reveal the names of the several attorneys and other participants who talked to me about the Plyler case, thanks to all of them for their confidences.

Footnotes


2. The historian Mae M. Ngai, in a perceptive study concerning the history of undocumented immigration and the way in which different nationalities have been racialized by the immigration process, has concluded,

   [The process of how the nation constituted immigration] had an important racial dimension because the application and reform of deportation policy had disparate effects on Europeans and Canadians, on the one hand, and Mexicans, on the other hand. But, the disparity was not simply the result of existing racism. Rather, the processes of territorial redefinition and administrative enforcement informed divergent paths of immigrant racialization. Europeans and Canadians tended to be disassociated from the real and imagined category of illegal alien, which facilitated their national and racial assimilation as white American citizens. In contrast, Mexicans emerged as iconic illegal aliens. Illegal status became constitutive of a racialized Mexican identity and of Mexicans' exclusion from the national community and polity.

Her full length book, *Illegal Aliens and Alien Citizens: Immigration Restriction, Race, and Nation, 1924-1965*, outlines these differentiated developments in considerable detail,


5. In the Houston case challenging this statute, the federal court trial judge found:

The court cannot state with absolute certainty what the Legislature intended when passing the amendment to 21.031. Neither the court nor the parties have uncovered a shred of legislative history accompanying the 1975 amendment. There was no debate in the Legislature before the amendment was passed by a voice vote. There were no studies preceding the introduction of the legislation to determine the impact that
undocumented children were having on the schools or to project the fiscal implications of the amendment.

In re Alien Children Education Litigation, 501 F. Supp. 544, 555, n.19 (1980). The record, such as it is, showed that the legislation likely arose after a Texas Attorney General Opinion held that prior to 1975, the Texas education law did not differentiate among children, based upon their immigration status. Att'y Gen. Op. H-586 at 3 (1975).


7. The In re Alien Children record included considerable statistical testimony, including the data in this paragraph, prepared by then-law student Laura Oren and Houston lawyer Joseph Vail; I found copies of the original hand-tabulated data in the Oren files on this subject. (Copies on file with Author.) Both Professor Oren and Professor Vail are now my colleagues at the University of Houston Law Center, where both migrated after local law careers, including Professor Vail's later service as an Immigration Judge.

8. Hernandez v. Houston Independent School District, 558 S.W. 2d 121(1977). The case was tried in Austin, rather than Houston due to the administrative proceedings required to challenge the state administrative agency.
9. Id. at 125.

10. I found a copy of the letter in the Stanford University Green Library special Collections Room, MALDEF files. The concordance to these records is Theresa Mesa Casey and Pedro Hernandez, comps. and eds., Research Guide to the Records of MALDEF/PRLDEF (1996). The Avila-Roos letter was located in MALDEF, M0673, Box 115, Folder 5 (Avila to Roos, September 26, 1977). Additional files from early MALDEF work in Houston are available in the archives of the Houston Metropolitan Research Center (HMRC), particularly the Abraham Ramirez collection, used extensively by Guadalupe San Miguel, Jr. to explain earlier Houston school desegregation cases and bilingual education issues in his excellent study, Brown, Not White: School Integration and the Chicano Movement in Houston (2001). Ramirez was a local civil rights attorney who was affiliated with MALDEF in its early years, although he was not an employee.


17. Id. at 174 (Table 10); see Jorge C. Rangel and Carlos M. Alcala, De Jure Segregation of Chicanos in Texas Schools, 7 Harv. C.R. – C. L. L. Rev. 307 (1972).


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21. For example, Judge Justice was the trial judge in U.S. v. Texas, in which he found Texas and the school districts to have been out of compliance with regard to school desegregation and English language instruction obligations under federal law. 506 F. Supp. 405 (E.D. Tex. 1981); rev’d, 680 F. 2d 356 (5th Cir. 1982). For examples of his long record of progressive decisions, see John J. Dilulio, Governing Prisons (1987) (longstanding prison litigation). For this record, he earned an impeachment bill, H. RES. 168 (97th Cong.), introduced on June 24, 1981. See Frank R. Kemmer, William Wayne Justice: A Judicial Biography (1991).

22. The plaintiff in that early case was named Carlos Hernandez. See the letter from Peter Roos to Leonel Castillo (September 13, 1977), where he warns, “We have been informed that the local United States Attorney, John Hannah, has requested the Director of [the Dallas INS] to take steps to deport the plaintiffs in this case and possibly to conduct a sweep in the Tyler region.” M0673, Box 115, Folder 5. This issue arose in a recent case in which undocumented college students in Virginia who brought an action concerning a state statute that denied state college access to undocumented students sought to file their case anonymously. The judge ruled against them on this issue. Jane Doe I et al. v. Alan G. Merten, 219 F.R.D. 387, 184 Ed. Law Rep. 843 (E.D. Va., 2004).
And then he ruled against them on the larger issue, once alternative plaintiff organizations were enlisted as substitutes, holding that the State of Virginia could enact practices which denied undocumented students admission or residency status. *Equal Access Education v. Alan G. Merten* 305 F.Supp.2d 585 (E.D.Va. 2004); 325 F.Supp.2d 655 (E.D. Va. 2004) (finding that students did not have standing, absent evidence that institution denied admission on perceived immigration status).

23. In the *Plyler* trial court case and at the Fifth Circuit, the U.S. Department of Justice and the U.S. Attorney intervened on the side of the school children. After he left office, Castillo returned to Houston. In 1983, he wrote in a Foreword to a special immigration issue of a law review, “the authors are all persons of recognized ability and concern... [Among others, Isaias Torres and Peter Schey ] have all been involved in the daily battles of making the INA fit a particular individual’s situation at a particular time. During the time that I served as Commissioner (1977-79), it was my privilege to be sued by some of these individuals. I knew that regardless of the outcome, the ultimate goal of justice for immigrants would prevail because effective advocates help cure improper procedures and faulty legislation.” Leonel Castillo, Foreword, 5 Hou. J. Int’l L. 191 (1983).

24. See Doe v. Plyler, 628 F. 2d 448, 450 (5th Cir. 1980).
25. MALDEF files, M0673, Box 115, Folder 6 (Roos to Roy Fuentes, October 18, 1977). He was also trying at this time to address similar issues in California, as a series of letters in the MALDEF files revealed. Roos wrote California school districts that their attendance practices violated State guidelines for undocumented children: M0673, Box 61, Folder 8 (March 12, 1979); M0673, Box 62, Folder 1 (October 29, 1979); M0673, Box 62, Folder 1 (October 19, 1979).


Observers of this trial have reported that Judge Woodrow Seals committed an interesting gaffe during arguments when he asked, "whether anything of worldwide importance had ever been written in Spanish," or words to that effect. (Apparently he had not heard of the classic works by Miguel Cervantes, Octavio Paz, Juan Vasconcellos, Gabriel Garcia Marquez, Pablo Neruda, Sor Juana, or the many other Latino or Latina writers.) Witnesses report that it was an electric moment, one he sensed, and after which
he publicly apologized. See Juan R. Palomo, Judge Seals Calls Spanish Comment

‘Senseless, Dreadful,’ Houston Post, March 7, 1980, 3B.

29. See infra, n. 37 and accompanying text. A good example of this unreliability appeared in connection with a long-running dispute involving public colleges in Nashville, Tennessee. The U.S. Department of Justice supported the plaintiffs over the course of many years, and after working out the dispute among the many parties, the judge entered a final order that included racially specific remedies. Later, after the Reagan administration took office, the U. S. Department of Justice attempted to switch horses and get the court to strike down the agreement. However, the judge refused to accept the too-little-too-late intervention. Geier v. Alexander, 801 F. 2d 799 (6th Cir. 1986); see also Geier v. Blanton, 427 F. Supp. 644 (1977). The original case finally wound down on June 18, 2004, when the issue of attorney fees was decided. Geier v. Sundquist, 372 F. 3d 784 (6th Cir. 2004).

30. Roos to Isaias Torres, May 17, 1979, MALDEF files, M0673, Box 61, Folder 10. In the interest of full disclosure, I note that Mr. Torres was a Georgetown University Law Center classmate of mine.
31. These were some of the problems that had doomed the educational finance case.


Schools in the Southwest, 8 Hous. L. Rev. 929 (1971); Ricardo Romo, Southern
California and the Origins of Latino Civil Rights Activism, 3 W. Legal Hist. 379 (1990);
George Martinez, The Legal Construction of Race: Mexican-Americans and Whiteness, 2

33. Roos to Torres, MALDEF files, M0673, Box 61, Folder 10, page two (May 17, 1979).

had occurred on the final day of the plaintiffs’ testimony.


36. 452 U.S. 937 (1981) (noting probable jurisdiction). The procedural sequence is
more fully explained in the Plyler merits decision, 457 U.S. at 207-10.

37. Although the Carter Administration officials had actually supported MALDEF
and the Houston children’s attorneys in the earlier stages of the cases, including both the
trial court and Fifth Circuit phases, the Reagan Administration did not side with the
appellee children when the cases finally made their way to the Supreme Court. Rather,
the government's amicus curiae brief discussed its interest in the primacy of the federal
government in immigration matters, but took no position on the crucial equal protection
issue. 1981 WL 390001. As examples of the support MALDEF tried to line up for its
side, the MALDEF files include letters Roos wrote to Peter Schilla (Western Center on
Law and Poverty, Sacramento, May 19, 1981), M0673, Box 63, Folder 6; Norella Beni
Hall (May 14, 1981) [urging her support, but focusing upon education issue], M0673,
Box 63, Folder 6; California Board of Education member Lorenza Schmidt (June 25,
1981), M0673, Box 63, Folder 7; Associate AG Drew Days (March 28, 1979), M0673,
Box 61, Folder 8; and William Clohan, Undersecretary, U. S. Dept. of Education [Reagan
administration], May 20, 1981, M0673, Box 63, Folder 6. The files also include a letter
from HEW Secretary Joseph Califano to the U.S. Solicitor General Wade McCree, urging
the U.S. to enter the case on behalf of the children plaintiffs (July 17, 1979), M0673 Box
907, Folder 9. These letters and dozens more show the extent to which Roos and
MALDEF shored up and sought support for their clients.

38. 457 U.S. at 227.

39. Id.

40. Id.
41. Id. 403 U.S. 365, 375.

42. The classification involved state welfare benefits. 403 U.S. 365, 366.


44. Id. at 576-77.

45. 457 U.S. at 229.

46. Id. at 229-30.

47. Id. at 228.

48. Id. at 225-26.

49. Id. at 229-30.

50. Id. at 230.

51. Id. at 230.

52. "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1.

54. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (stating that Fourteenth amendment provisions "are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality").

55. 457 U.S. at 211.

56. Id. at 213. In the dissent, Chief Justice Burger concurred that the equal protection clause applies to undocumented aliens. Id. at 243.


58. 457 U.S. at 221 (citations omitted).


60. 457 U.S. at 222.

62. 457 U.S. at 221-22 (construing Meyer v. Nebraska, 262 U.S. 390, 400 (1923);
U.S. 68, 76-77 (1979); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).

63. 406 U.S. at 210. In a postsecondary alienage case decided soon after Plyer, Toll v.
Moreno, the decision turned on preemption. 458 U.S. 1 (1982). See Michael A. Olivas,
Plyer v. Doe and Postsecondary Admissions: Undocumented Adults and ‘Enduring

64. 457 U.S. at 224.


69. Id. at 356.

70. 457 U.S. at 226. This sentence became the focus of efforts to change federal law
in1996, led by Representative Elton Gallegly (R. Calif.), to incorporate an explicit
provision authorizing exclusion of undocumented children from public schools. See infra,
at text accompanying note 78. Whatever became of these children from Tyler, Texas?
According to a newspaper story following up on them, nearly all of them graduated and through various immigration provisions, obtained permission to stay in the U.S. and regularize their status. See Paul Feldman, Texas Case Looms over Prop. 187’s Legal Future Justice: U.S. High Court Voided that State’s ’75 Law on Illegal Immigrants, but Panel has Shifted to the Right, L.A. Times A1 (October 23, 1994). I thank Professor Maria Pabon Lopez for bring this source to my attention.


And if there is too little we know about the schooling of Chicanos, we know less yet of the education litigation undertaken by Puerto Ricans or of other Latino populations. See Antonia Pantoja, The Making of a Nuyorican: A Memoir (2002).


75. 458 U.S. 1131 (1982).


77. 457 U.S. at 227 n.22.

79. For a thorough analysis of these issues, see Kevin R. Johnson, Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class, 42 UCLA L. Rev. 159 (1995).

80. Roos later litigated such cases as Leticia "A" v. Board of Regents of the University of California, Tentative Decision, No. 588982-5 (Cal. Super. Ct. Alameda Cty., April 3, 1985); Judgment (May 7, 1985); Statement of Decision (May 30,
1985)(Leticia "A" I); Clarification (May 19, 1982) (Leticia "A" II). Peter D. Roos,
Postsecondary Plyler, IHELG Monograph 91-7 (1991); Michael A. Olivas, Storytelling
Out of School: Undocumented College Residency, Race, and Reaction, 22 Hast. Con. L.

Hits Include Judges’ Pay Hike, Houston Chronicle (June 18, 2001), at 1A (describing
tuition, revenue bill details). For insomniacs in the reading public, see Michael A. Olivas,
IIRIRA, The DREAM Act, and Undocumented College Student Residency, 30 J. Coll. &

82. Olivas, at Table One (cited in note 81).

83. Id. at 461-63.