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**PLYLER'S LEGACY:**

**IMMIGRATION AND HIGHER EDUCATION**

**IN THE 21ST CENTURY**

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# PLYLER'S LEGACY: IMMIGRATION AND HIGHER EDUCATION IN THE 21<sup>ST</sup> CENTURY

Michael A. Olivas\*

Kristi L. Bowman\*\*

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## INTRODUCTION

In the Spring of 2008, U.S. voters watched with fascination as the Republican candidates for their party's Presidential nomination argued over immigration policy, focusing especially on a topic that few had been involved in for many years—whether or not the undocumented should be allowed to attend college and receive resident tuition.<sup>3</sup> Of course, the economy, the wars in Iraq and Afghanistan, trade policy, and other significant issues soon reasserted their primacy and the topic receded again, not even enjoying the full fifteen minutes of fame accorded such topics by the late Andy Warhol.<sup>4</sup> Little has changed in the three years since then: the United

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\* William B. Bates Distinguished Chair in Law and Director of the Institute for Higher Education Law & Governance, University of Houston Law Center. A larger and expanded version of this Foreword will appear in MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED CHILDREN (forthcoming 2011, N.Y.U. Press).

\*\* Associate Professor of Law, Michigan State University College of Law; 2010 AALS Education Law Section Chairperson. Professor Bowman and the 2010 AALS Education Law Section Executive Committee thank Professor Michael Olivas, 2011 AALS President and a leading scholarly voice about immigration and education issues, for his thoughtful suggestions and assistance planning the panel and symposium. Professor Bowman also thanks Professor Emily Gold Waldman, 2011 AALS Education Law Section Chairperson, for coordinating the call for papers from which two papers in this symposium were selected. A podcast of the January 2011 panel is available at: <http://www.aals.org/2011AMpodcast.php>.

The authors also gratefully acknowledge the excellent research assistance of Todd Fraley, J.D., Michigan State University College of Law, 2010.

3. Michael Cooper & Michael Luo, *Exchanges in Latest Debate Highlight a New Dynamic in the Republican Field*, N.Y. TIMES, Jan. 11, 2008, at A14; David Leonhardt, *The Border and the Ballot Box*, N.Y. TIMES, Mar. 2, 2008, at 1; Michael Luo & David D. Kirkpatrick, *As Primary Day Looms in New Hampshire, Republican Rivals Go After One Another*, N.Y. TIMES, Jan. 7, 2008, at A16; Michael Luo, *Candidates Walk a Tightrope on Immigration*, N.Y. TIMES, Nov. 18, 2007, at 41; Julia Preston, *Issues Start Rush to Citizenship by Hispanics*, N.Y. TIMES, Feb. 5, 2008, at A15; Larry Rohter, *Obama and McCain Expand Courtship of Hispanics*, N.Y. TIMES, July 17, 2008, at A16.

4. Perry Bacon & Jennifer Agiesta, *Change vs. Experience All Over Again, The Trail, A Diary of Campaign 2008*, WASH. POST, June 8, 2008, <http://voices.washingtonpost.com/44/2008/06/change-vs-experience-all-over.html>; Frank Newport, *The Voters Speak: Reasons Behind the Support for Four Front-Runners*, GALLUP NEWS SERVICE, Mar. 30,

States Congress still has not enacted either comprehensive immigration reform or the popular DREAM (Development, Relief, and Education for Alien Minors) Act,<sup>5</sup> and, unimaginably, President Obama was heckled in Congress (“You Lie!”) when he discussed health care and immigrants.<sup>6</sup>

Yet, the debate that emerged briefly in 2008 has since become a more sustained controversy: should undocumented students be able to attend public colleges and universities and, if so, should they pay in-state rates? Because this issue is inescapably tied to a Supreme Court decision almost three decades old, *Plyler v. Doe*, we must first turn to the 1982 holding that undocumented schoolchildren can attend elementary and secondary public schools without regard to their immigration status.<sup>7</sup> As scholars have pored over the many treatments of *Plyler*, it has become possible to see its kaleidoscopic nature and thus come to appreciate anew its significance.

Justice William Brennan’s majority opinion in *Plyler* is amber-like, with several elements subsumed into its analysis. First, Justice Brennan held that the children’s illegal status was important, but not determinative.<sup>8</sup> Federal immigration policy thus continued to evolve largely independently

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2007, <http://www.gallup.com/poll/27052/Voters-Speak-Reasons-Behind-Support-Four-Frontrunners.aspx>; Julia Preston, *Immigration Cools as Campaign Issue*, N.Y. TIMES, Oct. 29, 2008, at A20; *Gallup’s Quick Read on the Election*, GALLUP NEWS SERVICE, Oct. 22, 2008, <http://www.gallup.com/poll/109759/Gallups-Quick-Read-Election.aspx>; *Keys to Victory on Super Tuesday*, CNN.com, Feb. 5, 2008, [http://articles.cnn.com/2008-02-05/politics/super.issues\\_1\\_latino-votes-black-voters-obama?\\_s=PM:POLITICS](http://articles.cnn.com/2008-02-05/politics/super.issues_1_latino-votes-black-voters-obama?_s=PM:POLITICS); The common phrase, “Fifteen minutes of fame” is attributed to a line that artist Andy Warhol wrote in the catalog to a 1968 exhibition of his work that stated, “In the future, everybody will be famous for fifteen minutes.” <http://www.phrases.org.uk/meanings/fifteen-minutes-of-fame.html>.

5. S. 3992, 111th Cong. (2010); H.R. 1275, 110th Cong. (2007); S. 2075, H.R. 1531, 109th Cong. (2005); S. 1545, H.R. 1684, 108th Cong. (2003); S. 2205, 110th Cong. (2007); S.1291, H.R. 1918, 107th Cong. (2001).

6. Catalina Camia, *Senate Blocks DREAM Act*, USA TODAY – ON POLITICS, Dec. 19, 2010, <http://content.usatoday.com/communities/onpolitics/post/2010/12/senate-dream-act-1>; Luis Miranda, *Get the Facts on the DREAM Act*, THE WHITE HOUSE BLOG (Dec. 1, 2010), <http://www.whitehouse.gov/blog/2010/12/01/get-facts-dream-act>; Scott Wong & Shira Toeplitz, *DREAM Act Dies in Senate*, POLITICO, Dec. 18, 2010, <http://www.politico.com/news/stories/1210/46573.html>; *Rep. Wilson Shouts, ‘You Lie,’ to Obama During Speech*, CNN.com, Sept. 9, 2009, [http://articles.cnn.com/2009-09-09/politics/joe.wilson\\_1\\_rep-wilson-illegal-immigrants-outburst?\\_s=PM:POLITICS](http://articles.cnn.com/2009-09-09/politics/joe.wilson_1_rep-wilson-illegal-immigrants-outburst?_s=PM:POLITICS).

7. *Plyler v. Doe*, 457 U.S. 202 (1982). The U.S. Department of Education and U.S. Department of Justice continue to enforce *Plyler*, reminding school districts of their obligations to educate undocumented elementary and secondary students in a May 2011 “Dear Colleague” letter. Letter from Russlyn Ali, Assistant Secretary, Office for Civil Rights, U.S. Dep’t of Educ.; Charles P. Rose, General Counsel, U.S. Dep’t of Educ.; Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Dep’t of Just., Dear Colleague (May 6, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201101.html>.

8. 457 U.S. at 219-20.

of educational access issues. After *Plyler*, not only did many of the undocumented children remain, but there were provisions in federal law that would make their legalization possible. Of course, Justice Brennan could not have foreseen the large scale legalization that would occur within five years of the case through the 1986 Immigration Reform and Control Act (IRCA).<sup>9</sup> But there had historically been such provisions, through various means, and immigration status was, at the least, not immutable.

Second, he also refuted the more-obvious objections that Texas had raised about the cost and efficacy of undocumented children in school, characterizing these efforts as “ludicrously ineffectual,”<sup>10</sup> a critique that surely is more apt today when the size of the illegal immigration stream is even more pronounced.<sup>11</sup> If anything, subsequent federal efforts at curbing unauthorized immigration have failed spectacularly, although not because the efforts were half-hearted, as they surely have not been.<sup>12</sup> Indeed, these ef-

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9. Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

10. 457 U.S. at 228.

11. Although the number of undocumented immigrants in the U.S. has decreased over the past few years, compared to thirty years ago when *Plyler* was issued, it has risen substantially. Compare Robert Warren & Jeffery S. Passel, *A Count of the Uncountable: Estimates of Undocumented Aliens Counted in the 1980 United States Census*, 24:3 DEMOGRAPHY 375 (1987), with MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 2010 (Feb. 2011), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf); see also *Population Estimates of Undocumented Immigrants in the US, 1969-2009*, <http://immigration.procon.org/view.resource.php?resourceID=000844#1980>. Regarding the trends over the past few years, see, e.g., Haya El Nasser, *Fewer Illegal Immigrants Entering USA*, USA TODAY, Sept. 22, 2010, [http://www.usatoday.com/news/nation/2010-09-01-illegal-immigrants\\_N.htm](http://www.usatoday.com/news/nation/2010-09-01-illegal-immigrants_N.htm); Julia Preston, *11.2 Million Illegal Immigrants in U.S. in 2010, Report Says No Change From ‘09*, N.Y. TIMES, Feb. 2, 2011, at A15; Julia Preston, *Number of Illegal Immigrants in U.S. Fell, Study Says*, N.Y. TIMES, Sept. 1, 2010, at A20; Julia Preston, *Decline Seen In Numbers of People Here Illegally*, N.Y. TIMES, July 31, 2008, at A14; Hope Yen, *Number of Illegal Immigrants in U.S. Steady at 1.2M*, CNSNEWS.COM, Feb. 1, 2011, [http://news.yahoo.com/s/ap/us\\_illegal\\_immigration](http://news.yahoo.com/s/ap/us_illegal_immigration); Hope Yen, *Number of Illegal Immigrants in U.S. Declining*, MSNBC.COM, Sept. 1, 2010, [http://www.msnbc.msn.com/id/38961638/ns/us\\_news-immigration\\_a\\_nation\\_divided/](http://www.msnbc.msn.com/id/38961638/ns/us_news-immigration_a_nation_divided/).

12. Many media sources document the passions behind a myriad of government efforts to curb immigration. See, e.g., Michael A. Olivas, *Some DREAM Students Face Nightmare Scenarios*, HOUS. CHRON., Apr. 5, 2011, <http://www.chron.com/dispatch/story.mpl/editorial/outlook/7508464.htm>; Randal C. Archibold, *Immigration Bill Reflects a Firebrand’s Impact*, N.Y. TIMES, Apr. 20, 2010, at A12; Robbie Brown, *Five Public Colleges in Georgia Ban Illegal-Immigrant Students*, N.Y. TIMES, Oct. 14, 2010, at A30; Damien Cave, *The Immigration Gap*, N.Y. TIMES, May 18, 2010, at A13; David Leonhardt, *The Border and the Ballot Box*, N.Y. TIMES, Mar. 2, 2008, at 1; James, C. McKinley Jr., *Debate Intensifies as a Federal Deportation Program is Set to Expand*, N.Y. TIMES, July 26, 2009, at A13; Julia Preston, *Immigrant Crackdown Leads to 1,800 Pink Slips*, N.Y. TIMES, Sept. 30, 2009, at A1; Frank Rich, *If Only Arizona Were the Real Problem*, N.Y. TIMES, May

forts have expanded to address the substantial role of employers in this complex transaction.<sup>13</sup> Prior to the IRCA in 1986 and to other legislation directed at employer sanctions and employment-related restrictions, virtually all the onus of illegality had fallen upon employees and undocumented workers, not upon the corporations, companies, and individuals that actively recruited, hired, and exploited workers.<sup>14</sup> Further, in several key cases that followed *Plyler*, undocumented immigrants were placed outside the traditional protections of civil rights jurisprudence and safety laws, rendering them more vulnerable and employers less accountable.<sup>15</sup>

Third, Justice Brennan's equal protection analysis left virtually no role for state, county, or local efforts to deal with these issues outside the law, writ large, or to go after the children without immigration status who were brought by their parents to the United States. Even without invoking the broad contours of the preemption doctrine, he reasoned that equal protection can deny the states and other jurisdictions the authority to differentiate be-

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2, 2010, at 10; Kim Severson, *Southern Lawmakers Focus on Illegal Immigrants*, N.Y. TIMES, Mar. 26, 2011, at A13; Rachel L. Swarns, *Failed Amnesty Legislation of 1986 Haunts the Current Immigration Bills in Congress*, N.Y. TIMES, May 23, 2006, at A20; Ginger Thompson, *Immigration Agents to Turn Their Focus to Employers*, N.Y. TIMES, Apr. 30, 2009, at A19; *Pushing Back on Immigration*, N.Y. TIMES, July 21, 2008, at A18; *Immigrants, History and the House*, N.Y. TIMES, Aug. 19, 1982, at A26; see generally Steven W. Bender, *Old Hate in New Bottles: Privatizing, Localizing, and Bundling Anti-Spanish and Anti-Immigrant Sentiment in the 21<sup>st</sup> Century*, 7 UNLV L. REV. 883 (2007); Virginia Martinez, Jazmin Garcia & Jasmine Vasquez, *A Community Under Siege: The Impact of Anti-Immigration Hysteria on Latinos*, 2 DEPAUL J. SOC. JUST. 101 (2008); Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163 (2010); *History of Immigration Legislation in the United States*, IMMIGR. LAW AND DEFENSE § 2:14 (2011).

13. Huyen Pham, *The Private Enforcement of Immigration Law*, 96 GEO. L.J. 777, 779 (2008).

14. *Id.* at 787 ("In 1971, fifteen years before ICRA, California passed a law that prohibited employers from knowingly hiring unauthorized workers and threatened them with civil fines of \$200 to \$1000 for violation. Ten states and one city soon followed suit, passing similar legislation. In at least eight of those states, however, few cases were ever prosecuted under the laws, largely because employer sanctions cases were considered low law enforcement priority. With the passage of ICRA in 1986, the federal government took the lead."). Indeed, the Supreme Court upheld Arizona's employer-focused legislation as recently as May 2011 in *Chamber of Commerce v. Whiting*, No. 09-115, slip op. at 1 (9th Cir. May 26, 2011).

15. *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.*, 535 U.S. 137 (2002) (holding that undocumented immigrants are not entitled to unemployment benefits); *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1984) (setting aside award of reinstatement and backpay to undocumented workers who were illegally reported by their employer to INS in retaliation for union activities); *Del Rey Tortilleria, Inc. v. N.L.R.B.*, 976 F.2d 1115 (7th Cir. 1992) (employee not entitled to back pay for period in which employee lacked authorization); see also Jennifer Berman, *The Needle and the Damage Done: How Hoffman Plastics Promotes Sweatshops and Illegal Immigration and What To Do About It*, 13 KAN. J.L. & PUB. POL'Y 585, *passim* (2004).

tween those citizens and noncitizens with permission to reside in the country and those who had no such permission (which he styled “inchoate permission”).<sup>16</sup> In doing so, he acknowledged the unevenness of federal policy that tacitly encouraged foreign workers to come, even if there were no formal means to do so.<sup>17</sup> This formulation strengthened the hand of the federal government to differentiate, but clearly limited the role of sub-federal governments to do so. It is this turn of events that has played out so surprisingly in the decades since *Plyler*: Americans’ changing, increasingly complicated attitudes about immigrants and immigration have visibly manifested in state and local law as well as in private citizens’ actions.

Paradoxically, in the early twenty-first century, there has been a rise in the country’s anti-immigrant sentiment, especially in the growing enactment of state and local ordinances, some of which are playing themselves out in courts and legislatures.<sup>18</sup> At the same time, as noted by immigration scholars as divergent in their views as Peter Schuck<sup>19</sup> and Hiroshi Motomura,<sup>20</sup> there have been widespread efforts to incorporate these children and undocumented families into the larger community, and not just in progressive enclaves, but in surprisingly mainstream and heartland areas.<sup>21</sup> When Nebraska or Kansas pass statutes to allow the undocumented to establish resi-

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16. *Plyler v. Doe*, 457 U.S. 202, 226 (1982).

17. *Id.*

18. See, e.g., Danielle Holley-Walker, *Searching for Equality: Equal Protection Clause Challenges to Bans on the Admission of Undocumented Immigrant Students to Public Universities*, 2011 MICH. ST. L. REV. 357; 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, 1759-85 (2009) [hereinafter Olivas, *The Political Economy*]; Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 6 SMU L. REV. 99, 101-04 (2008) [hereinafter Olivas, *Lawmakers Gone Wild?*]; Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27 (2007).

19. Immigration Stories, (Peter Schuck & David A. Martin eds., Foundation Press 2005); Peter Schuck, *In Diversity We (Sorta) Trust*, AM. LAW. (Dec. 2007), at 83-4; Peter Schuck, *Bordering on Folly*, AM. LAW. (Oct. 2007).

20. THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* (6th ed. 2008); HIROSHI MOTOMURA, *FORCED MIGRATION: LAW AND POLICY* (2007); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES*; Hiroshi Motomura, *What Is “Comprehensive Immigration Reform”? Taking the Long View*, 63 ARK. L. REV. 225 (2010); *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723 (2010); *Immigration Outside the Law*, 108 COLUM. L. REV. 2037 (2008).

21. See generally sources cited in footnotes 19, 20, and 22; see also Jillian Anthony & Shayna Meliker, *New Hispanic Majority Transforms Culture of Pa. Region*, USA TODAY, [http://www.usatoday.com/news/nation/2011-06-21-reading-pennsylvania-hispanic-population\\_n.htm?csp=34news](http://www.usatoday.com/news/nation/2011-06-21-reading-pennsylvania-hispanic-population_n.htm?csp=34news) (last updated June 27, 2011).

dency in state colleges, something is afoot.<sup>22</sup> When conservative U.S. Senator Orrin Hatch of Utah co-sponsors a major piece of legislation to provide legalization for undocumented college students, all political calculations and assumptions have to be reexamined.<sup>23</sup> These efforts may be driven by the wider acceptance by citizen families, because community leaders and politicians have seen undocumented children play and study with their own, as they live near them, and employ them. Or, it may just be the emerging evident sense that immigrant communities bring a great deal to the polity, and that efforts to integrate them are better than building chimerical walls and undertaking Canute-like efforts to stem the tide. There may even be a sense that the United States needs new entrants lest we become aging societies like Italy and Japan, demographically imbalanced without replenishment through children and workers.

Since *Plyler*, we have seen widespread acceptance of the children into civic life, especially after the IRCA legalization of 1986, when so many of these families found themselves eligible for U.S. citizenship. The community has also seen the hot breath of nativists and restrictionists, a number of whom appear to be anti-Mexican, especially at the far end of the spectrum, where racial violence, vigilantism, and xenophobia reside. In between, there are many variations of opinion, as it should be in a large family or in a democracy.

It is evident that there is a large portion of the U.S. community that bears no ill will towards immigrants, even in an attenuated fashion, and accepts that immigration is in the nation's interests, provided it is done in a lawful manner.<sup>24</sup> We have heard many observers say over the years, "my grandparents came over from Italy, Poland, (insert country here), and they waited their turn and were legally admitted. All these Mexicans, Central Americans, (insert country here) could and should do the same." However, it is unlikely that their families ever actually suffered numerical restrictions, and even with specific racial or other restrictions that worked against specif-

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22. KAN. STAT. ANN. § 76-731a (2004). For a complete list of states with enacted or pending legislation permitting or banning undocumented college and university students from receiving in-state tuition discounts at public colleges and universities, see *infra* note 50.

23. S. 1291, 107th Cong. (2001); Olivas, *The Political Economy*, *supra* note 18, at 1794.

24. A collection of public opinion on this topic solicited by major polling organizations over the past year is available at: <http://www.pollingreport.com/immigration.htm> (including polling data collected by Gallup, Pew, the *Wall Street Journal*, and others). For example, a December 2010 Gallup Poll asked, "Suppose that on Election Day you could vote on key issues as well as candidates. Please tell me whether you would vote for or against a law that would do each of the following. First, would you vote for or against a law that would allow illegal immigrants brought to the U.S. as children to gain legal resident status if they join the military or go to college?" 54% of respondents indicated they would vote for such a measure, 42% against, and 4% were unsure.



ic groups such as the Chinese in the 1880s,<sup>25</sup> Jews in World War II,<sup>26</sup> or Haitians under current practices,<sup>27</sup> many of these regimes have been abolished or shamed in the cycles of our national immigration and refugee history.<sup>28</sup>

At the same time, there has appeared a coarsening of the public discourse, especially notable is the rise of nativist hate speech and organized racial violence, which has been enabled and spread by restrictionist demagoguery, the internet, cable television, and other media.<sup>29</sup> While there are those who encourage these developments as means of allowing the citizenry to blow off steam, to alleviate their dissatisfaction with increased levels of immigration or with perceptions of failure to assimilate, the counter evidence is strong and lurid—forcing the undocumented deeper into the shadows as they are hunted down, harmed, or deported—in the contexts of employment, civic life, and the larger social community.

This situation has real consequences. Recent episodes of racial thugery, such as “beaner-hunting” or roving gangs that attack Latinos as outlaw “others” or as “illegals” have shown the degree to which the discourse truly matters, as it devolves into justifications for Anglos to “take back” their

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25. Ming-sung Kuo, *The Duality of Federalist Nation-Building: Two Strains of Chinese Immigration Cases Revisited*, 67 ALB. L. REV. 27, 39-40 (2003); see also Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 28-32 (1998).

26. Edward S. Shapiro, *World War II and American Jewish Identity*, 10:1 MODERN JUDAISM, 68-69 (Feb. 1990) (“While Jews learned English and became citizens more rapidly than virtually any other immigrant group, this had not as of 1941 earned them full acceptance as Americans. Jews faced Jewish quotas in the elite universities, restricted job opportunities in fields such as engineering, insurance, and banking, quotas on the number of Jews accepted by the country’s medical schools, and the firm opposition of American public opinion to modifying the country’s immigration laws to admit additional numbers of Jewish refugees . . . Even the Wagner-Rogers bill, which would have admitted several thousand Jewish children from Germany, could not pass Congress in the late 1930s without crippling amendments.”).

27. Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 691-97 (2009).

28. See, e.g., Alejandro Portes & Alex Stepick, *Unwelcome Immigrants: The Labor Market Experiences of 1980 (Mariel) Cuban and Haitian Refugees in South Florida*, 50 AMER. SOC. REV. 493 (1985); Julia Chaitin, J.P. Linstroth & Patrick T. Hiller, *Ethnicity and Belonging: An Overview of a Study of Cuban, Haitian and Guatemalan Immigrants to Florida*, 10 FORUM: QUALITATIVE SOC. RESEARCH No. 3, art. 12 (2009), <http://www.qualitative-research.net/index.php/fqs/article/view/1363/2856>.

29. See generally Rene Galindo & Jami Vigil, *Are Anti-Immigrant Statements Racist or Nativist? What Difference Does it Make?*, 4 LATINO STUDIES 419 (2006) (racist stereotypes); Michael A. Olivas, *Immigration-Related State Statutes and Local Ordinances: Preemption, Prejudice, and The Proper Role for Enforcement*, U. CHI. LEGAL F. 27 (2007) (nativist rhetoric); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) (discussing racial profiling).

rightful land and domain.<sup>30</sup> For example, Luis Ramirez, a Mexican immigrant and father of two, was beaten to death in Shenandoah, Pennsylvania in a 2008 hate crime.<sup>31</sup> U.S. legal resident and Ecuadorian citizen Marcello Lucero was stabbed to death by Patchogue, New York high school students who racially taunted him as an illegal “beaner,” mistaking him both for being undocumented and for being an undocumented Mexican.<sup>32</sup> In March 2004, a group of Mexican American citizens were violently assaulted, detained, and threatened with death by Arizona ranchers acting as vigilantes.<sup>33</sup> In September 2007, the Otero County, New Mexico sheriff and a number of deputies conducted a series of immigration raids against the Latino residents of Chaparral, New Mexico, including warrantless invasions of private homes, stops of pedestrians and drivers without probable cause, and filing of false charges against Latino residents of Chaparral.<sup>34</sup> The contradictory depiction of Latinos as alternately shiftless and lazy, but also too-eager to work and steal jobs, has directly and indirectly led to the rise of restrictionist laws and practices, especially as the United States economy has worsened. Scapegoating foreigners has a long and inglorious history in the United States, a national and paradoxical trait that competes regularly with the country’s more benign self-pride as welcoming all the huddled masses.

It is with the many conflicting legacies of and developments since *Plyler* in mind that this symposium examines current legal and policy debates about immigration and higher education. Considering the increasing mobility of students worldwide, the first article presents the global context for discussions about higher education students with documented status. According to the most recent comprehensive study of student mobility, a World Trade Organization report discussed by Professor Laurel Terry in her article *International Initiatives That Facilitate Global Mobility in Higher Education*, in 2007 nearly three million college and university students were

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30. See, e.g., Joye Brown, *In Marcelo Lucero’s Shoes*, *NEWSDAY*, Nov. 16, 2008; Cara Buckley, *Teenagers’ Violent ‘Sport’ Led to Killing on Long Island, Officials Say*, *N.Y. TIMES*, Nov. 20, 2008, at A26; J. Harry Jones, *Sixth Youth Pleads No Contest In Hate Attack on Migrants*, *SAN DIEGO UNION-TRIB.*, May 30, 2002; Greg Morgan, *Beating Verdicts Stun Onlookers – Two Teens Convicted In Boulevard Attack on Mexican Migrant Worker*, *SAN DIEGO UNION-TRIB.*, June 12, 2003; Greg Morgan, *3 Teens Sentenced in Migrant Attack – Activists Say Punishment of Jail, 5 Years’ Probation is Too Lenient*, *SAN DIEGO UNION-TRIB.*, Nov. 21, 2002.

31. *3 Police Officers Among 5 People Indicted In Race-Related Beating*, *CNN.com*, Dec. 15, 2009, <http://www.cnn.com/2009/CRIME/12/15/hate.crime/index.html>.

32. Buckley, *supra* note 30.

33. Nicholas Riccardi, *Mixed Verdict for Rancher in Migrant Case*, *L.A. TIMES*, Feb. 20, 2009, <http://articles.latimes.com/2009/feb/20/nation/na-illegal-immig-rancher20>.

34. Press Release, MALDEF, Families Sue Otero County Sheriffs Over Illegal Immigration Raids (Oct. 17, 2007), *available at* [http://www.maldef.org/news/releases/otero\\_cty8\\_1\\_3/index.html](http://www.maldef.org/news/releases/otero_cty8_1_3/index.html).

pursuing degrees in countries where they were not citizens.<sup>35</sup> Nearly one-quarter of these three million students attended colleges and universities in the United States, with the next-greatest percentages attending institutions in the United Kingdom (fourteen percent) or Australia (thirteen percent).<sup>36</sup> The international student population is diverse, although students from East Asia and the Pacific comprise nearly forty percent of it, followed by students from Central and Eastern Europe (roughly thirteen percent) and from South and West Asia (approximately ten percent).<sup>37</sup> Although the United States, Australia, the United Kingdom, and Western Europe receive large numbers of international students, they send comparatively few students abroad to pursue a degree.

The United States is a crucial part of the global context not only because it receives so many students from other countries, but also because it accepts various “hard law” and “soft law” obligations.<sup>38</sup> As Professor Terry discusses, the United States federal government has an inter-agency working group whose membership—representatives from more than twenty-five federal departments and agencies—underscores the complexity of legal issues of mobility and higher education, even when students have documented status.<sup>39</sup> The complexity of these issues arguably is underappreciated by lawmakers and by leaders of many colleges and universities in the United States—as is the dynamic relationship between law and society. As Professor Terry’s account makes clear and as we have seen in the United States, legal regulation does not only facilitate increased mobility for educational purposes, although that is part of the story. Increased mobility for educational purposes also influences legal regulation.<sup>40</sup>

Having established the global legal framework, the symposium turns to issues much closer to home. The symposium’s next two articles invoke *Plyler* more directly, turning to legal issues unique to the estimated 50,000-60,000 undocumented college and university students in the United States.<sup>41</sup> These students’ legal rights are largely unclear and untested because *Plyler* does not bind colleges and universities.<sup>42</sup> However, Professor Danielle Holley-Walker, in her article *Searching for Equality: Equal Protection Clause*

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35. Council for Trade in Services, *Education Services, Background Note by the Secretariat*, S/C/W/313 (Apr. 1, 2010) [hereinafter WTO 2010 Secretariat Report], available at <http://docsonline.wto.org/DDFDocuments/t/S/C/W313.doc>, at ¶ 34. Laurel Terry, *International Initiatives That Facilitate Global Mobility in Higher Education*, 2011 MICH. ST. L. REV. 305, 307. Between 1999 and 2007, this population increased by 66%. *Id.*

36. WTO 2010 Secretariat Report, *supra* note 35, at ¶ 37.

37. *Id.* at ¶ 35.

38. Terry, *supra* note 35, at Sections I and II.F.

39. *Id.* at Section II.F.

40. *Id. passim.*

41. Olivas, *The Political Economy*, *supra* note 18, at 1758.

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

*Challenges to Bans on the Admission of Undocumented Immigrant Students to Public Universities*, argues that there are good reasons for courts to import *Plyler*'s reasoning into the college and university setting, including the Supreme Court's emphasis on the importance of higher education in its recent decisions regarding affirmative action in colleges and universities.<sup>43</sup> The issue of access for undocumented students is not an abstract one. As Professor Holley-Walker describes, especially since 2008, state legislatures increasingly have required undocumented students to pay out-of-state tuition at public colleges and universities, if not banned them from attending entirely. It appears that this legislative trend is not waning.

Professor Victor Romero's article, *Immigrant Education and the Promise of Integrative Egalitarianism*, also explores the legal uncertainty surrounding undocumented students' access to higher education.<sup>44</sup> One would think that with the current state of Equal Protection Clause jurisprudence as Professor Romero describes it—a state downright discouraging to many civil rights advocates<sup>45</sup>—the pending DREAM Act and the California law challenged in the *Martinez v. Regents of the University of California*<sup>46</sup> litigation would have little hope of surviving constitutional scrutiny. However, taken together with the promise of *Brown* and also with *Plyler*, Professor Romero uses the Court's recent gay rights jurisprudence, with its focus on limiting a majority's ability to target an identifiable minority group, to argue in favor of undocumented students' access to higher education.<sup>47</sup>

To argue for undocumented students' rights, the jurisprudence requires the sort of creative approaches taken by Professor Holley-Walker and Professor Romero; the caselaw does not support a more straightforward legal argument. Given how few undocumented college students there are—in the United States, roughly 50,000-60,000<sup>48</sup>—and how few options they have until a version of the DREAM Act or comprehensive immigration reform is enacted, it is remarkable how much legal attention has been paid to this extremely vulnerable population, both in terms of litigation (state and

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43. Danielle Holley-Walker, *Searching for Equality: Equal Protection Clause Challenges to Bans on the Admission of Undocumented Immigrant Students to Public Universities*, 2011 MICH. ST. L. REV. 357.

44. Victor Romero, *Immigrant Education and the Promise of Integrative Egalitarianism*, 2011 MICH. ST. L. REV. 275.

45. See, e.g., James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 131-33 (2007) (describing the *Parents Involved* decision as “in one sense not terribly significant” given the political climate, but also noting that the decision has a larger symbolic impact, and “it is no small thing to dash hope”); Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 913, 949-55, 990 (2010).

46. 241 P.3d 855 (Cal. 2010), cert. denied, 79 U.S.L.W. 3494 (U.S. June 6, 2011) (No. 10-1029).

47. Romero, *supra* note 44, at 296-301.

48. Olivas, *The Political Economy*, *supra* note 18, at 1758.

federal cases),<sup>49</sup> legislation (almost twenty states have acted in some formal fashion),<sup>50</sup> and substantial legal and policy literature.<sup>51</sup> Proponents and op-

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49. See, e.g., *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007); *Day v. Sebelius*, 376 F. Supp. 2d 1022 (D. Kan. 2005); *Doe v. Merton*, 219 F.R.D. 387 (E.D. Va. 2004); *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585 (E.D. Va. 2004), *dismissed by*, 325 F. Supp. 2d 655 (E.D. Va. 2004); *Consent Decree, Student Advocates for Higher Educ. v. Bd. of Trs. of the Cal. St. Univ.*, No. CPF-06-506755 (Cal. Super. Ct. Apr. 19, 2007); *Martinez v. Regents of the Univ. of Cal.*, CV-05-2064, 2006 WL 2974303 (Cal. Super. Ct. Oct. 4, 2006); see also Olivas, *The Political Economy*, *supra* note 18, at 1767-68 (discussing litigation); Olivas, *Lawmakers Gone Wild?*, *supra* note 18; Nathan G. Cortez, *The Local Dilemma: Preemption and the Role of Federal Standards in State and Local Immigration Laws*, 47 SMU L. Rev. 61 (2008).

50. MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND, TABLE ONE (Aug. 1, 2011, N.Y.U. Press), available at <http://www.law.uh.edu/ihelg/documents/Statute2011.pdf>. The following states offer in-state tuition to undocumented college and university students: California (A.B. 540, 2001-02 Cal. Sess. (Cal. 2001); CAL. EDUC. CODE § 68130.5); Illinois (H.B. 60, 93rd Gen. Assemb., Reg. Sess. (Ill. 2003); 110 ILL. COMP. STAT. ANN. [amended by S.B. 2085, 97<sup>th</sup> Gen. Assemb., Reg. Sess. (Ill. 2011)]; 110 ILL. COMP. STAT. ANN.); Kansas (H.B. 2145, 2003-2004 Leg., Reg. Sess. (KS 2004); K.S.A. § 76-731a); Nebraska (L.B. 239, 99th Leg., 1<sup>st</sup> Sess. (Neb. 2006); NEB. REV. STAT. ANN. § 85-5020); New Mexico (S.B. 582, 47th Leg. Reg. Sess. (2005); N.M. STAT. ANN. §21-1-1.2); New York (S.B. 7784, 225th Leg., 2001 N.Y. Sess. (NY 2002); N.Y. EDUC. LAW §355(2)(h)(8)); Oklahoma (S.B. 596, 49th Leg., 1st Reg. Sess. (OK 2003) [financial assistance provisions rescinded, Oklahoma Taxpayer and Citizen Protection Act of 2007 (H.B. 1804)]; OKLA. STAT. ANN. TIT. 70, § 3242); Texas (H.B. 1403, 77th Leg., Reg. Sess. (Tex. 2001) [amended by S.B. 1528, 79th Leg., Reg. Sess. (Tex. 2005)]; TEX. EDUC. CODE ANN. § 54.052); Utah (H.B. 144, 54th Leg., Gen. Sess. (Utah 2002); UTAH CODE ANN. § 53B-8-106); Washington (H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003); WASH. REV. CODE ANN. § 28B. 15.012); Wisconsin (2009 A.B. 75 (2009 Wis. Act 28); WIS. STAT. § 36.27); Maryland (S.B. 167, 2011 Leg., Reg. Sess. (Md. 2011); MD. CODE ANN. § 15-106.8); and Connecticut (H.B. 6390, 2011 Leg., Reg. Sess. (Conn. 2011); CONN. GEN. STAT. § 10a-29). The following states prohibit undocumented college and university students from receiving in-state tuition: Arizona (Prop. 300, 2006); Colorado (H.B. 1023, 2006); Georgia (S.B. 492, 2008); South Carolina (H.B. 4400, 2008). The following states have pending legislation to allow undocumented college and university students to pay in-state tuition: Arkansas (S.B. 799) and Oregon (H.B. 2939, 2009). Finally, Tennessee (H.B. 0808) has pending legislation that would bar undocumented college and university students from receiving in-state tuition. See <http://www.nilc.org/immlawpolicy/DREAM/index.htm>.

51. See, e.g., Olivas, *The Political Economy*, *supra* note 18, at 1758; Olivas, *Lawmakers Gone Wild?*, *supra* note 18; Ragini Shah, *Sharing the American Dream: Towards Formalizing the Status of Long-Term Resident Undocumented Children in the United States*, 39 COLUM. HUM. RTS. L. Rev. 637 (2008); Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 473 (2006); Susana Garcia, Comment, *Dream Come True or True Nightmare? The Effect of Creating Educational Opportunity for Undocumented Youth*, 36 GOLDEN GATE U. L. REV. 247 (2006); Jessica Sharron, Comment, *Passing the DREAM Act: Opportunities for Undocumented Americans*, 47 SANTA CLARA L. REV. 599 (2007); Youngro Lee, Comment, *To Dream or Not To Dream: A Cost-Benefit Analysis of the Development, Relief, and Education for Alien Minors (DREAM) Act*, 16 CORNELL J.L. & PUB POL'Y 231 (2006); Aimee Deverall, Comment, *Make the DREAM a Reality: Why Passing the DREAM Act Is the Logical First Step in Achieving Comprehensive Immigration Reform*, 41 J. MARSHALL L. REV. 1251

ponents of the DREAM Act and similar state legislation may not agree on much, but they would seem to agree that this polarizing issue is finally receiving the attention it deserves.

In sum, like *Plyler* many years before, these three articles explore the continually evolving boundaries between “what counts as equality, what counts as inequality, and what is not even recognized as raising a question of equality or inequality,” to borrow a phrase from Professor Jack Balkin.<sup>52</sup> Terry describes these boundaries for international college and university students at the level of nation-states and international organizations. Picking up where *Plyler* left off, Professor Holley-Walker and Professor Romero both argue that denying undocumented college and university students access to public colleges and universities on the same terms as citizen or resident immigrants constitutes unacceptable inequality—it should not be an action that “is not even recognized as raising a question of equality or inequality.”<sup>53</sup>

The globalization of higher education, the shrinking of the world, and the preeminent role of the U.S. in the development of the higher education polity all assure that developments in the world will affect the U.S., and reciprocally, that the many complex developments in the U.S. will affect the world’s colleges. But these developments are truly reciprocal, and do not naturally flow in the favor of the U.S. Any reasonable assessment of these developments reveals that this country will retain the natural and acquired advantages it has held since the early twentieth century, especially if English remains the language of international academic discourse. Nevertheless, these advantages are not set in concrete and are certainly not permanent, especially as the People’s Republic of China, other Asian countries, and the EU hit their stride and invest more heavily in the higher education industry.<sup>54</sup> International students are, by definition, the most mobile and impressionable consumers of higher education, and they will gravitate toward countries and institutions that welcome them and accommodate their ambitions.<sup>55</sup> The papers in this special issue show how complex this entire

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(2008); Joshua A. Boggioni, Comment, *Unofficial Americans – What To Do with Undocumented Students: An Argument Against Suppressing the Mind*, 40 U. TOL. L. REV. 453 (2009).

52. Jack M. Balkin, Plessy, Brown, and Grutter: *A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1692 (2005).

53. *Id.*

54. Michael A. Olivas, *What the “War on Terror” Has Meant for U.S. Colleges and Universities*, in DOCTORAL EDUCATION AND THE FACULTY OF THE FUTURE 249-58 (Ronald G. Ehrenberg & Charlotte V. Kuh eds., 2009); Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 460-63, 467-61 (2004) (reviewing laws affecting colleges enacted in the wake of Sept. 11, 2001, terrorist attacks).

55. See generally Laurel S. Terry, *The Bologna Process and Its Impact in Europe: Much More than Degree Changes*, 41 VAND. J. TRANSNAT’L L. 107 (2008); Laurel S. Terry,

enterprise is, and U.S. legislators, policymakers, and educators ignore the warning signs at their peril.