Plyer v. Doe, the Education of Undocumented Children, and the Polity

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It is hard to know how Supreme Court decisions will come to be regarded, but one thing is certain: none of them exists 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. Plyer 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, Plyer 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, Plyer 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 consider first how the controversy developed and was treated on the ground, in school districts in Texas. Second, once the

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case quickened, it took on unusual procedural dimensions that warrant discussion. After the various strands of the cases were consolidated, its actual litigation strategy required case management, with complex back-stage maneuvers essential to gaining traction for the parties. Because the decision itself is one with "epochal significance" for the undocumented population generally, in Peter Schuck's evocative characterization, the third section dissects the case and examines some of the extensive commentary it prompted. Finally, as a postscript, I examine the path Plyler's teachings followed, 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.

**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.

The Litigation and the Principal Players

Prologue

The first case to challenge 21.031 was Hernandez v. Houston Independent School District, filed in spring 1977 in state courts, by a local Houston attorney, Peter Williamson. The district court and the court of civil appeals rejected his due process and equal protection arguments against the statute.8 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.”9

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 were generally referred to as “free public schools,” the issue appears to have come onto the national radar in the late 1970s, 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). It was addressed to the MALDEF National Director
for Education Litigation, Peter Roos, located at the organization’s national headquarters in San Francisco, California. Avila 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.\textsuperscript{30}

This letter contains the spores of the \textit{Plyler} case (without referencing the \textit{Hernandez} litigation that was underway in the state courts in Houston at the same time), even though Avila does not appear to have appreciated the full dimensions of the matter that had been flagged by MALDEF board member (and one of the organization’s founders in the mid-1960s) Pete Tijerina. To Avila, the issue kicked up to San Francisco was whether the revised Texas statute improperly affected the residency of undocumented students, by requiring the parents or formal legal guardians to reside in the district. This was a related issue, but one far less essential to the algebra of undocumented school attendance than the tuition issue presented eventually in \textit{Plyler}, especially for school districts in the interior, away from the border. Indeed, a year after \textit{Plyler} ruled in favor of the schoolchildren, the exact issue Avila noted in his letter reached the Supreme Court in \textit{Martinez v. Bynum},\textsuperscript{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 detail.

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. He looked especially at 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 that derived from 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. Historian Steven White has noted the origins of 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 unofficial 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.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 Plyler as the Mexican American Brown v. Board of Education: a vehicle for consolidating attention to 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 organized a successful nation-
wide grape boycott. 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 1973 decision by the U.S. Supreme Court, *San Antonio Independent School District v. Rodriguez.* The 5–4 ruling seemed designed to call a halt to any expansions in the use of the 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 law suits 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%), four in employment (4.3%), three in school finance (3.2%), seven in political rights (7.5%), six 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 toward 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. They wanted to have a larger impact than they could expect from dozens of smaller cases in various state courts in the Southwest. If Mexican American plaintiffs could not win the school finance case in _San Antonio Independent School District v. Rodriguez_, 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 its clients. A case involving vulnerable schoolchildren in rural Texas being charged a thousand dollars for what was available to other children for free seemed to be that vehicle. The MALDEF lawyers 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, while those born in Texas held U.S. citizenship. 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.

**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 asked the Dallas district 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.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. 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.27

As a part of the overall trial strategy, Roos, Martínez, 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.28 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 Washington, D.C., during this time and cutting class one night to attend a small fundraiser at a local hotel, 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.29 Immediately after, the state moved for leave to re-open the case, citing the decision’s implications for other school districts in the state and seeking a chance to bolster the record. Observers have suggested that the state had simply underestimated the plaintiffs’ case, inasmuch as the Hernandez case in state court had sustained the statute fairly readily. But Judge Justice overruled the motion, because the “amended complaint does not state a cause of action against any school district other than the Tyler Independent School District and since this court intends to order relief only against the Tyler Independent School District…” 30

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 decision had not spawned similar state court litigation; MALDEF and others turned to the federal courts so as to avoid having to litigate 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 in Houston, before Judge Woodrow Seals. Judge Seals held a 24-day trial.  

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.  

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 Issias 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 that 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. Indeed, MALDEF General Counsel Vilma Martinez had worked at the Legal Defense Fund with Marshall's former colleague and successor, Jack Greenberg; 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."  

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 succeed, Judge Seals rendered a favorable decision on the merits on July 21, 1980. The plaintiff schoolchildren prevailed in a big way, most importantly on the issues of whether the State of Texas could enact a statute to discourage immigration and whether equal protection applied to the undocumented in such an instance. Judge Seals determined that strict scrutiny applied because the law worked an absolute deprivation of education. Texas' concern for fiscal integrity was not a compelling state interest, and 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. 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. 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. In March, 1979, he had written to Drew Days, the Assistant Attorney General for Civil Rights, urging the government to join the litigation. Later he persuaded the Secretary of Health, Education, and Welfare, Joseph Califano, to write the Solicitor General urging him to enter into the fray on the side of the children, which the government did. Other MALDEF letters went to state officials in Califor-
nia and elsewhere, requesting their support. After the Reagan administration took office in January of 1981, Roos wrote William Cloohan, Under Secretary of the newly created Department of Education, to urge him to continue the actions of the Carter administration. Fortunately for Roos, the Reagan administration did not seek to overturn the lower court decisions, although it did not formally enter its amicus brief on the side of the plaintiffs (as had the Democrat lawyers), and it took no position on the crucial equal protection issue. In fact, the brief stressed the primacy of the federal government in immigration, a position that favored the schoolchildren.\textsuperscript{37}

\textbf{The Supreme Court’s Ruling}

In June, 1982, the Supreme Court gave the schoolchildren 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.”\textsuperscript{38} 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.”\textsuperscript{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.”\textsuperscript{40} This line of argumentation had been rejected in an earlier case, \textit{Graham v. Richardson}, 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 benefits.\textsuperscript{41} In addition, he relied on the findings of fact from the \textit{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),\textsuperscript{42} and barring those children would “not necessarily improve the quality of education.”\textsuperscript{43}

The State also argued that it had enacted the legislation in order to protect itself from an influx of undocumented aliens.\textsuperscript{44} 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.”\textsuperscript{45} The Court also noted that immigration and naturalization policy is within the exclusive powers of federal government.\textsuperscript{46}

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.\(^{47}\) 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.\(^{48}\) 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."\(^{49}\)

Prior to Plyler, the Supreme Court had never taken up the question of whether undocumented aliens could seek Fourteenth Amendment equal protection.\(^{50}\) The Supreme Court had long held that aliens are "persons" for purposes of the Fourteenth Amendment,\(^{51}\) and that undocumented aliens are protected by the due process provisions of the Fifth Amendment.\(^{52}\) However, Texas argued that because undocumented children were not "within its jurisdiction,"\(^{53}\) 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.\(^{54}\)

After the 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 classification,\(^{55}\) 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."\(^{56}\) He was more emphatically concerned with education, however, carefully elaborating the nature of the entitlement to it. While he reaffirmed the earlier Rodriguez holding that public education was not a fundamental right (undoubtedly to attract the vote of Justice Powell, the author of the Rodriguez majority opinion), he recited a litany of cases holding education to occupy "a fundamental role in maintaining the fabric of our society."\(^{57}\) He also noted that "[i]lliteracy is an enduring disability,"\(^{58}\) 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.\(^{59}\) Chief Justice Burger's dissent, in contrast, stuck with the customary formulation, requiring only "a rational relationship to a legitimate state purpose."\(^{60}\) As a result of Brennan's 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.

Further, while the Court did not reach the claim of federal preemption, it did draw a crucial distinction between what states and the federal government may do in legislating treatment of aliens. The Court had upheld state statutes restricting alien employment and access to welfare benefits, largely because those state measures mirrored federal classifications and congressional action governing immigration. For example, in *Decenas v. Bica*, the Supreme Court had held that a state statute punishing employers for hiring aliens not authorized to work in the United States was not preempted by federal immigration law. In public education, however, Brennan wrote, distinguishing *DeCanas*, “we perceive no national policy that supports the State in denying these children an elementary education.”

**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 immanent 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.”

Surveying the line of equal protection cases involving aliens from *Yick Wo* through *Graham* to *Plyler* and beyond, Linda Boeniak 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 Latinos—in the United States. Given the poor overall educational achievement evident in this population, even this one success story has significance.89 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.70

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.71 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, their overarching strategic vision had enabled them to avoid the many centripetal forces that threatened Plyler at every turn. To be sure, good fortune appeared to have intervened at all the key times: sympathetic clients with a straightforward story to tell confronting 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 responsive and helpful, continuity in federal support for the plaintiffs despite a change in the national administration, 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 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. In 1996 he won a MacArthur Foundation “genius” fellowship after several years in private practice concentrating on voting rights; he now is a law teacher at Seattle University. Whatever became of the undocumented schoolchildren 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 United States and regularize their status.72
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’ determination 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 1994, an unpopular governor of California, Pete Wilson, revived his reelection campaign by backing a ballot initiative known as Proposition 187, which would have denied virtually all state-funded benefits, including public education, to undocumented aliens. Proposition 187 passed with nearly 60 percent of the vote and Wilson was re-elected, but the federal courts enjoined implementation of most of the ballot measure, relying prominently on *Plyler.* During the congressional debates that eventually led to the enactment of the Illegal Immigration and Immigrant Responsibility Act of 1996, Representative Elton Gallegly (R.-Cal.) proposed an amendment that would have allowed states to charge tuition to undocumented students or exclude them from public schools. He was banking that, in the wake of such federal legislation, the courts would distinguish *Plyler* and sustain the state measure. The provision became quite politicized, receiving prominent support from Republican presidential candidate Robert Dole. Gallegly might have been right that the Constitution would not be read by the Court of the 1990s to nullify a federal enactment of the kind he proposed, but he never got a chance to find out, because *Plyler* proved to have considerable strength in the political arena. The Gallegly amendment drew heated opposition in Congress and in the media, and critics relied heavily on the values and arguments highlighted in *Plyler*—and often on the decision itself. After
months of contentious debate, the amendment was dropped from the final legislation, and no provisions became law that restricted alien children’s right to attend school. Plyler and the policy appear to have settled the question.75

Although Plyler had addressed the issue of public school children in the K–12 setting, questions arose almost immediately after the ruling about how far the decision could be extended, notably whether it would protect undocumented college students. Before long, Peter Roos was going for the long ball again, litigating postsecondary Plyler cases in California.77 The cases have mostly denied relief, although the record is mixed. 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.78 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 the Texas innovation.79 And in Congress, conservative Utah Senator Orrin Hatch co-authored the Development, Relief, and Education for Alien Minors (DREAM) Act.80 If enacted, it would remove a provision from federal law that discourages states from providing in-state tuition status to undocumented college students, and would also allow the students the opportunity to regularize their federal immigration status—an enormous benefit that would go well beyond what a state could provide.81 Plyler clearly is alive and well in its adolescence.

ENDNOTES


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, and this background elaborates upon why “illegal alienage” has developed in immigration policy and practice as essentially a concept of guarding our Southern border (our “front-


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, 506 S.W. 2d 121(1977). The case was tried in Austin rather than Houston because of 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 (2003). Ramirez was a local civil rights attorney who was affiliated with MALDEF in its early years, although he was not an employee. For additional studies of Houston schooling, see William H. Kollar, Make Haste Slowly: Moderates, Conservatives, and School Desegregation in Houston (1999); Angela Valenzuela, Subtractive Schooling: U.S.-Mexican Youth and the Politics of Caring (1999).


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).


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.
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. Doe v. 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. Merten, 305 F.Supp.2d 585 (E.D.Va. 2004), and 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 schoolchildren. 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, Isaac 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). Roos was also trying at this time to address similar issues in California, as a series of letters in the MALDEF files revealed. He 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); M0873, 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 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 below, note 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. The judge refused to accept this too-little-too-late intervention. Geier v. Alexander, 801 F. 2d 799 (6th Cir. 1986); see also Geier v. Blanton, 427 F. Supp. 644 (M.D.Tenn.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 Issias 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.


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

34. 501 F. Supp. 544 (S. D. Tex. 1980). His remarks about the Spanish language had occurred on the final day of the plaintiffs’ testimony.

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, filing instead only an amicus curiae. 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 Olohan, Undersecretary, U.S. Dept. of Education, 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 United States 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 sought and then shored up support for their clients.

38. 457 U.S. at 227.
39. Id.
40. Id.
41. 403 U.S. 365, 375 (1971).
43. 457 U.S. at 229.
44. Id. at 229-30.
45. Id. at 228.
46. Id. at 225-26.
47. Id. at 229-30.
48. Id. at 230.
49. Id. at 230.

50. “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.

51. 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”).

52. Wong Wing v. United States, 163 U.S. 228 (1896). See Chapter 2 in this volume.
53. 457 U.S. at 211.
54. Id. at 213. In the dissent, Chief Justice Burger concurred that the equal protection clause applies to undocumented aliens. Id. at 243.
55. 457 U.S at 219, n.19.
57. 457 U.S. at 221 (citations omitted).
58. Id. at 222.
59. Id. at 223–24.
60. Id. at 248.


66. 457 U.S. at 226. This sentence became the focus of efforts to change federal law in 1996, led by Representative Elton Gallegly (R. Calif.), to incorporate an explicit provision authorizing exclusion of undocumented children from public schools. These efforts are discussed in the final part of this Chapter.


69. See Guadalupe San Miguel, "Let All of Them Take Heed": Mexican Americans and the Campaign for Educational Equality in Texas, 1910–1981 (1987); 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); Gilbert G. Gonzalez, Chicano Education in the Era of Segregation (1990). While there is an increasing amount of attention to this complex history of Latino/a schooling, there is still much that needs attention by future scholars. 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).


72. 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 Fabon Lopez for bringing this source to my attention.

74. 457 U.S. at 227 n.22.

76. Stephen Legomsky, Immigration and Refugees Law and Policy 1162 (3rd ed. 2002); Thomas Alexander Alainikoff, David A. Martin, Hiroshi Motomura, Immigration and


79. Olivas, at Table One (cited in note 78).
