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**Immigrant Education and
the Promise of
Integrative Egalitarianism**

IHELG Monograph

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IMMIGRANT EDUCATION AND THE PROMISE OF INTEGRATIVE EGALITARIANISM

Victor C. Romero*

Abstract

Although not an equal protection case, *Martinez v. Regents of the University of California* challenges us to grapple with the Supreme Court's post-*Brown* commitment to equal opportunity within the context of immigrant higher education. Sadly, *Brown*'s progeny from *Bakke* to *Parents Involved* reveals the cost of embracing a colorblind constitutionalism unmoored from a fundamental commitment to vigilantly combat subordination and dismantle unearned privilege. More optimistically, the Supreme Court's gay rights jurisprudence developed in *Romer v. Evans* and *Lawrence v. Texas* provides insights into how a conservative court can accurately distinguish irrational discrimination from democratic deliberation, a lesson that might help us better understand how the immigrant education case, *Plyler v. Doe*, is a true heir to the legacy of *Brown* and its promise of integrative egalitarianism – that society should invest in the education of all, noncitizens included.

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I. *Martinez* in Context: Keeping the DREAM Alive for All Americans

I believe our post-Civil War, amended, federal Constitution is best read to ensure that democratically-enacted laws and ordinances work as they should – that while they should reflect the noblest aspirations and values of our community writ large, they should also ensure that the least among us are not unduly disfavored simply because they lack a seat at the table. The Equal Protection Clause of the Fourteenth Amendment commands that “no state shall ... deny to any person within its jurisdiction the equal protection of the laws;”¹ the Due Process Clause of the Fourteenth Amendment declares that no person shall be deprived “of life, liberty, or property without due process of law.”² Following the Civil War, these two bulwarks of the Fourteenth Amendment, along with the eradication of badges of slavery in the Thirteenth and the provision of voting rights in the Fifteenth, were intended to safeguard the rights of the newly-freed African slaves. In modern constitutional law, the Supreme Court has solemnly invoked these twin provisions – equal protection and due process – to ensure that “discrete and insular minorities”³ are protected from the whims of a sometimes overreaching majority.

Nowhere is the Court’s concern for dismantling unearned privilege and invidious stereotype more on display than in the canonical case of *Brown v. Board of Education*.⁴

¹ U.S. CONST., amend. XIV.

² U.S. CONST., amend. XIV; *see also* U.S. CONST., amend. V (due process clause). The Fifth Amendment also contains a due process clause that has been interpreted as containing an equal protection guarantee to individuals against the federal government. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (declaring Washington, D.C. schools unconstitutionally segregated by race).

³ *U.S. v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

⁴ 347 U.S. 483 (1954).

In *Brown*, the Court declared null and void *Plessy v. Ferguson*'s⁵ doctrine of "separate but equal," ruling that public schools could not be operated on a racially-segregated basis. State-sanctioned divisions based on an accident of birth stamped upon poor black children a badge of inferiority, even if facilities at white and black schools were presumed of rough equivalence. While ensuing desegregation efforts were met with massive resistance by the local schools and states,⁶ *Brown* is best read as the Court's landmark effort at what may be termed "integrative egalitarianism" to ensure that lingering inequities - bequeathed minority children by slavery and begat by Jim Crow - were thoroughly dismantled so that blacks became fully integrated into societal citizenship.⁷

Understood from this modern perspective, education laws that seek to help smart, hard-working students attain their full potential without regard to their circumstances of birth can rightfully claim to be heirs to *Brown*.⁸ Like the Court's desegregation command, progressive, affirmative laws that remove roadblocks created by poverty, race, and immigration status help students reach their full potential while simultaneously invest

⁵ 163 U.S. 537 (1896).

⁶ "Southern support for segregation remained so strong that the first public elementary and secondary schools in Mississippi were not integrated until 1964, and even then all integration statewide involved a total of only sixty African-American students attending White schools in four different districts." Kristi L. Bowman, *The Civil Rights Roots of Tinker's Disruption Tests*, 38 AM. U. L. REV. 1129, 1132-33 (2009).

⁷ See, e.g., Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689 (2005) (describing the development of the Court's unfinished equality project from *Plessy* to *Brown* to *Grutter*); Michael A. Olivas, *Brown and the Desegregative Ideal: Higher Education, Location, and Racial College Identity*, 90 CORNELL L. REV. 391 (2005).

⁸ See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) (examining the contested notions of equality that emerge out of *Brown*, one focusing on antisubordination and the other on anticlassification); Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1 (1988).

in improving society as well. Put another way, these laws embrace the principle that all deserve a shot at the American dream.

Let me introduce you to one pseudonymous student whom the law has helped and has in turn helped her community. By dint of hard work, the encouragement of mentors, and the beneficence of favorable laws, “Nicole” was able to acquire lawful immigration status, complete her college degree, and earn her doctorate in education. Like many families seeking greener pastures, Nicole’s family brought her to the United States from Mexico when she was only four years old. Like many immigrant children, she struggled to learn English and then to convince her teachers that her rudimentary language skills betrayed her sharp mind, all the while trying to balance her schoolwork with her many chores at home. Her perseverance paid off. By the time she reached high school, Nicole knew she had the ability and work ethic to set her sights on applying to university. Unfortunately, she was rudely awakened in her junior year when she discovered that she did not possess the proper documents allowing her to reside in the United States, thereby disqualifying her from receiving much-needed financial support:

“I remember talking to my parents about it and my mom expressing some concern about it. I was telling her I wanted to go to a four-year college and I kept talking about it because I was excited about the idea or the opportunity of just applying. Then I remember her telling me that it wasn’t possible for me to go to college because I didn’t have papers. I think it was confusing for me because it was a topic that was never really discussed.”⁹

⁹ WILLIAM PEREZ, WE ARE AMERICANS 143 (2009).

Fortunately, Nicole's story has a happy ending. After she spent a few years at a community college, Nicole's family adjusted to lawful status under then-applicable amnesty laws and she therefore became eligible for financial aid at the two University of California schools that had accepted her. Following her successful college stint, she entered a doctoral program in education and now seeks to give back to those less fortunate:

“For me, meaningful work in the field of education means working with districts or with programs that are targeting low-performing schools and low-performing students. Working with the students who are the most underserved, and the teachers, principals, and districts that are the most underserved. That kind of work is very meaningful to me. I want to have a presence in conversations when the leaders in my field are having discussions about the plight of English learners and having the opportunity to have a voice in that room.”¹⁰

Now that she has completed her formal education, what does this newly-minted Ph.D. in Education have to say about the desirability of investing in students who could be deported at any time and who have no right to be in the U.S.?

“I would say that if a student's test scores, drive, motivation, good grades, responsibility, and potential is based on their success in high school or before, then I would say, foster that learning and success so that we have more productive individuals in this society. By limiting the education of an individual who is undocumented, you are limiting the potential of young people who could be great leaders.”¹¹

¹⁰ *Id.* at 145.

¹¹ Comment of “Nicole,” a newly-minted Ph.D. in Education, to author William Perez, summarizing her views on the education of undocumented students. *Id.* at 141. For Nicole's entire story, *see id.* at 141-145.

Nicole's story and struggle reveal the promise effective laws have in helping individuals reach their full potential. For talented students who happen to be undocumented, cursed solely because they dutifully accompanied their parents across the border and often unaware of their "illegality," laws that help them adjust to a resident immigration status serve as a practical solution both for them and the nation. While the United States benefits from a well-educated workforce, little benefit¹² seems likely to ensue by deporting an intelligent, hardworking person who happens to be removable. Indeed, if domestic data reveal that more immigrants are in highly skilled than unskilled jobs,¹³ and if immigration, especially over time, has been a net benefit to the country,¹⁴ then encouraging more immigrants to become highly skilled through higher education seems a sound investment. This is a model of integration, as well as one of equality, hence, the phrase "integrative egalitarianism."

Yet, perhaps because of its prominent role in the United States' racial history,¹⁵ educating the undocumented has been a wedge issue for those studying educational

¹² Save perhaps the formalistic notion that removing someone who is deportable is generally preferable to doing nothing, although even at that general level of abstraction, the law itself recognizes certain higher-order goals that serve as mitigating circumstances, for instance, the possibility of extreme hardship. *See, e.g.*, 8 U.S.C. § 1182(b)(v) and 8 C.F.R. § 1212.7 (describing hardship waiver and I-601 application process, respectively). Furthermore, even accepting the contested notion that deporting all undocumented students would have a positive net economic benefit to the U.S., one wonders whether a better immigration policy would be to find a pathway to citizenship for the best and brightest of these, a policy that seems to partly undergird California's thinking in AB540 and supporters of the federal DREAM Act.

¹³ *See, e.g.*, Julia Preston, *Work Force Fueled by Highly Skilled Immigrants*, N.Y. TIMES, April 16, 2010, at A1 (available at <http://www.nytimes.com/2010/04/16/us/16skilled.html>).

¹⁴ *See, e.g.*, Howard Chang, *Guest Workers and Justice in a Second Best World*, 34 U. DAYTON L. REV. 3, 12-13 (2008) ("The National Research Council finds that, on average, the fiscal impact of the descendants of an immigrant 'is always positive, regardless of the immigrant's age of arrival and education level.'").

¹⁵ *See, e.g.*, KEVIN R. JOHNSON, *THE "HUDDLED MASSES" MYTH* (Temple 2004) (arguing that discriminatory immigration laws mirrored the discriminatory domestic laws of their time, leading to the disadvantaging of individuals on the basis of race, gender, class, and sexual orientation, among others). *See also* Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 Harv.

equity and access, especially over the last ten years or so.¹⁶ Opponents cite upholding the “rule of law” as an inviolable first principle, noting the irony of providing governmental assistance to students who have no right to live in this country in the first place.

Most recently, out-of-state students attending California’s many public colleges and universities have sued the state over Assembly Bill 540 (AB540), which provides in-state tuition to all who have attended a California high school for three years, and have obtained a high school diploma signifying completion, without regard to where they currently reside. For example, a U.S. citizen from Oregon who attends and graduates from boarding school in California will qualify for in-state tuition at a California public college.¹⁷

What troubles the out-of-state plaintiffs in *Martinez v. Regents of the University of California*, however, is their belief that federal law preempts California’s in-state

J. Race & Ethnic J. 163 (2010) (arguing that anti-immigration laws discriminate against Latina/os the same way that Jim Crow laws discriminated against African-Americans).

¹⁶ Many commentators have written about the educational challenges faced by immigrant and Latina/o students, see, e.g., Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented Student Residency*, 30 J.C.U.L. 435 (2004); Michael A. Olivas, *Undocumented College Students, Taxation, and Financial Aid: A Technical Note*, 32 REVIEW OF HIGHER EDUCATION 407 (2009); Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99 (2008); Victor C. Romero, *Postsecondary School Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT’L L. & COMM. REG. 393 (2002); Kevin R. Johnson, *A Handicapped, Not “Sleeping,” Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1269, 1281-82 (2008) (discussing the federal DREAM Act). Noteworthy book-length treatments include PATRICIA GÁNDARA & FRANCES CONTRERAS, *THE LATINO EDUCATION CRISIS* (2010); MARIA PABÓN LÓPEZ & GERARDO R. LÓPEZ, *PERSISTENT INEQUALITY: CONTEMPORARY REALITIES IN THE EDUCATION OF UNDOCUMENTED LATINA/O STUDENTS* (2009); PEREZ, *supra* note 9; ROSEMARY SALOMONE, *TRUE AMERICAN: LANGUAGE, IDENTITY, AND THE EDUCATION OF IMMIGRANT CHILDREN* (2010).

¹⁷ See Latino Justice/PRLDEF, [Proposed] Amicus Curiae Brief in Support of Respondents, *Martinez v. Regents* (available at http://latinojustice.org/civil_rights/cases/education_access_to_college/) for examples of out-of-state residents who would benefit from AB 540. See also Josh Keller, *U.S. Citizens Reap Unintended Benefit from California’s Immigrant-Tuition Law*, CHRONICLE OF HIGHER EDUCATION, Dec. 6, 2009 (“In a little-known quirk of the state law, thousands of students who receive in-state tuition under the provision are not, in fact, undocumented immigrants. They are legal U.S. residents, who are able to take advantage of the law’s broad language to avoid paying higher, out-of-state tuition.”).

tuition policy because the state doesn't simultaneously allow all nonresident U.S. citizens to qualify for lower tuition, just those – like my hypothetical Oregon boarding student – who have attended and graduated from a California high school.¹⁸

My interest in *Martinez* stems not from the fine points of preemption, plain meaning, or “privileges and immunities” analysis raised by the parties. As with many constitutional issues, strong arguments can be raised by both sides, and indeed, they have. Rather, I hope to show that AB540 and its federal sister,¹⁹ the proposed Development, Relief, and Education for Alien Minors (“DREAM”) Act, should properly be read in light of the equal protection guarantees of our amended federal Constitution. When viewed in this light, Nicole’s prescription for what to do with talented undocumented students is clearly correct: The country should invest in them as it does others by making sure that higher education is accessible and affordable so that these students and their adopted homeland mutually benefit from their academic potential and future success.

In making this case, I examine two sets of the Supreme Court’s equal protection and due process jurisprudence. The first is *Brown* and its recent progeny, which has veered slowly off course over the past thirty years, substituting colorblind constitutionalism for integrative egalitarianism, and in the process, threatens to dislodge

¹⁸ See generally the California appellate court’s discussion of 8 U.S.C. §§ 1621 & 1623 in *Martinez v. Regents of the University of California*, 166 Cal. App. 4th 1121 (2008), currently on appeal to the California Supreme Court. For analysis of the pending *Martinez* litigation, see Kristen Miller & Celina Moreno, *Martinez v. Regents: Mis-Step or Wave of the Future?* (IHELG Monograph 08-07) (available at <http://www.law.uh.edu/ihelg/monograph/08-07.pdf>); Ralph W. Kasarda, *Affirmative Action Gone Haywire: Why State Laws Granting College Tuition Preferences to Illegal Aliens are Preempted by Federal Law*, 2009 BYU EDUC. & L.J. 197.

¹⁹ As of this writing, California is but one of ten states that provide in-state tuition for graduates of state high schools, including undocumented students. The federal DREAM Act has been in play for some ten years now, prompting Senators Durbin and Lugar to ask DHS Secretary Napolitano to grant deferred action to undocumented students who would qualify if the DREAM Act passed. See *Durbin, Lugar Ask Secretary Napolitano to Stop Deportations of DREAM Act Students*, April 21, 2010 (available at <http://durbin.senate.gov/showRelease.cfm?releaseId=324015>).

Plyler v. Doe as the high-water mark of the immigrant rights movement. The second, and in my view, more supportive, precedent comes from the gay rights movement, in which this conservative court has been a strong ally against majoritarian forces that have threatened to keep sexual minorities from enjoying basic freedoms others take for granted. It is in the progression from *Bowers v. Hardwick* to *Romer v. Evans* and *Lawrence v. Texas* that I find clues to why an otherwise conservative court might be willing to utilize constitutional doctrines or statutory interpretation techniques to uphold democratically-enacted initiatives intended to alleviate subordination, embrace integration, and promote equality, consistent with the promises of our amended Constitution. Such a reading of the equality guarantees helps firmly establish that *Plyler v. Doe* is a legitimate and proper heir to *Brown*'s ideal of integrative egalitarianism, rather than as a precedent under siege from those apparently obsessed with policing the bright line between "legals" and "illegals" for no better reason than that the law allows it.

II. From *Brown* to *Parents Involved*: Rejecting Antisubordination, Embracing Colorblind Constitutionalism

While correctly hailed as a monumental moral victory recognizing the inherent equality of the races, *Brown v. Board of Education*²⁰ was not without its critics. Derrick Bell, for instance, opined that *Brown* would, over time, be limited in its reach, that a white majority would not easily cede power to minorities of color unless it was ultimately in the majority's interest.²¹ This "interest convergence"²² theory has certainly proven

²⁰ 347 U.S. 483 (1954).

²¹ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). More recently, Risa Goluboff questioned whether the decision to abandon workers'

prescient when viewed in light of the Court's desegregation and affirmative action decisions, especially from the 1970s on. A review of the Court's opinions reveals a slow unraveling of its commitment to overseeing societal integration for the benefit of the minority.²³ Beginning with its opinion on desegregation remedies in *Brown II*, the Court steadily withdrew from its role as protector of equal rights, adopting instead a colorblind faith in legislative majorities and downplaying the gap between the haves and have-nots.²⁴

A. Desegregation and Massive Resistance

Realizing the need for a strong statement outlining how *Brown I* was to be enforced, the Court began on a road to compromise with its unfortunately equivocal command to the states in *Brown II*.²⁵ Recognizing the practical limitations of detailing implementation procedures for each of the myriad Southern school districts charged with effectuating desegregation, the Court placed primary oversight of the process in the local federal district courts: "The ... cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are

rights theories in favor of a direct assault on *Plessy v. Ferguson* led to an abandonment of material equality as a touchstone of the Civil Rights movement. RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 15 (2007). See also Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (arguing that the Equal Protection Clause was intended to protect disadvantaged groups, like African-Americans).

²² See generally Bell, *supra* note 21.

²³ This analysis borrows greatly from Erwin Chemerinsky's cogent summary of this important period. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 721-732 (3d ed. 2006).

²⁴ Of course, this retrenchment was not relegated to the area of education, but involved other equal protection claims brought by minorities in criminal law (e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987)), employment (e.g., *Washington v. Davis*, 426 U.S. 229 (1976)), and housing (e.g., *Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252 (1977)), among others.

²⁵ 349 U.S. 294 (1955).

necessary and proper to admit to public schools on a racially nondiscriminatory basis with all *deliberate speed* the parties to these cases.”²⁶ This was an unfortunate choice of words: While “speed” suggested urgency, “deliberate” implicitly condoned “delay” – and, not surprisingly, the southern states resisted mightily. Consequently, from the late 1950s through the late 1960s, the Court found itself taking a number of appeals, striking down a voluntary transfer plan that would privilege student choices to re-segregate,²⁷ a scheme to close a local public school system rather than desegregate,²⁸ and a “freedom of choice” plan that allowed students to choose to remain in segregated schools.²⁹

In a case that perhaps marked the pinnacle of its desegregation power, the Court in *Swann v. Charlotte-Mecklenburg Board of Education*³⁰ approved a sweeping remedial plan established by the district court over the objections of the local school board. Focusing on the issue of how majority and minority students were to be assigned to Charlotte, North Carolina’s schools, the Court vested broad authority in the local federal court to consider racial balance and quotas, the elimination of single-race schools, the demarcation of school boundaries and attendance zones, and the remedial efficacy of busing, although noting that “[j]udicial authority enters only when local authority defaults.”³¹

²⁶ *Id.* at 301. See generally CHARLES OGLETREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION (2004); see also JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 337 (2006) (“‘deliberate speed’ came to mean much more deliberation than speed.”).

²⁷ See *Goss v. Board of Education*, 373 U.S. 683 (1963).

²⁸ See *Griffin v. County School Bd.*, 377 U.S. 218 (1964).

²⁹ See *Green v. County School Bd.*, 391 U.S. 430 (1968).

³⁰ 402 U.S. 1 (1971).

³¹ *Id.* at 16.

It is this recognition of limited judicial authority amid a sweeping affirmation of court oversight in *Swann* that presaged its inevitable retreat. From the 1970s through the early 1990s, the Court progressively withdrew judicial resources in the battle over desegregation, preferring instead to allow local authorities autonomy to decide when and to what extent integration was sufficiently achieved.

Thus, in *Milliken v. Bradley*, a short three years after *Swann*, a scant majority of the Court struck down Detroit's desegregation plan encompassing both the inner metropolitan area and its adjacent suburban school districts. Writing once again for the Court, Burger opined that any official segregation in Detroit was limited to the city proper, and therefore, the suburban schools should not have been burdened with a remedy. The four dissenters were quick to respond that segregation in Detroit was affected by a prior statewide policy of segregated schools thereby undercutting the efficacy of a plan limited solely to the city. Put differently, if inner-city Detroit was predominantly black and the suburbs were predominantly white, and yet, a legal desegregation order would only involve inner-city schools, then "the more difficult it would be to avoid having a substantial number of all-black or nearly all-black schools,"³² a factor which Burger himself thought appropriate to consider in *Swann*.

By the mid-1970s, the Court had all but lost its appetite for judicial intervention in the school desegregation project.³³ In *Pasadena City Board of Education v. Spangler*, the

³² 418 U.S. 717, 764 (1974) (White, J., dissenting).

³³ That is not to say that the 1970s were bereft of desegregation lawsuits; for some groups, the 1970s marked a litigation explosion. For instance, Kristi Bowman outlines how Latina/o students seeking better educational opportunities began seeing lower court victories during the early 1970s. Kristi Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 911, 925 (2010) (in cases from 1969 and 1970, two district courts held that "Latinos/as were an identifiable ethnic minority group protected by *Brown* and were also separate from Whites and African Americans.").

Court refused to affirm a lower court's order that a previously-segregated school system redraw its attendance lines yearly in order to combat the increasing re-segregation of schools from 1970 to 1974.³⁴ Because nondiscriminatory student assignment was achieved in 1970 and residential shifts during subsequent years would be inevitable, the Court held that judicial intervention was no longer appropriate.

In a trio of cases from the 1990s, the Court completed its withdrawal, holding judicial oversight of a local desegregation plan unconstitutional when: (1) "local authorities have operated in compliance with it for a reasonable period of time"³⁵ notwithstanding the persistence of segregative effects; (2) the school district has fully complied with the particular order at issue, even if it hasn't complied with others;³⁶ and (3) the lower court had exceeded its authority by requiring a unitary school system to seek majority students from outside the district, improve teacher's salaries, and correct test score disparities between majority and minority students.³⁷ It seemed the Court had little patience for remedying the *de facto* effects of desegregation as long as formal *de jure* segregation had been dismantled. That many inner-city public schools today are predominantly minority while many suburban and rural schools are predominantly majority may be the function of private residential choices, but it is difficult to discount

³⁴ 427 U.S. 424 (1976).

³⁵ Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991).

³⁶ Freeman v. Pitts, 503 U.S. 467 (1992).

³⁷ Missouri v. Jenkins, 515 U.S. 1139 (1995).

the role official *de jure* government segregation and its long-term effects have had on white flight and the ensuing re-segregation of public schools.³⁸

B. The Advent of Colorblind Constitutionalism

In this section, we explore *Brown*'s progeny outside the desegregation context. In equal protection decisions covering affirmative action, poverty, and immigrant status, we see the Court shift from a strong commitment to integrative egalitarianism to colorblind constitutionalism, from a desire to support racial integration and equality to a growing concern over reverse discrimination and perceived governmental heavy-handedness.

1. The Rise and Decline of Affirmative Action

A second (near) casualty in the battle over desegregation and civil rights post-*Brown* is affirmative action. Just as the Court lost its appetite for monitoring school district desegregation efforts, it also became increasingly disinterested in affirmative action programs designed to help level the educational and employment playing fields for minorities by setting aside admissions seats or public monies for them, or by otherwise providing preferences to minority over majority competitors for jobs and education. From the late 1970s to the present, we see a pattern of retrenchment and a shift in focus away from affirmative action that paralleled the Court's withdrawal from the school desegregation project begun after *Brown II*.

³⁸ See, e.g., GARY ORFIELD & NANCY MCARDLE, *THE VICIOUS CYCLE: SEGREGATED HOUSING, SCHOOLS, AND INTERGENERATIONAL INEQUALITY* 4 (2006) ("The overall pattern of segregation by residence is serious, but the consequences are intensified considerably for young people. White families with children live in more segregated communities than whites in general, and the public schools—where the vast majority of nonwhites attend—are even more segregated than the residential patterns of the school age population would suggest. Private and charter schools are more segregated still. School segregation is not just by race but almost always by poverty as well for black and Latino schools.") (available at www.jchs.harvard.edu/publications/.../w06-4_orfield.pdf).

The Court's first notable foray into affirmative action programs was a sharp 5-4 split in *Regents of the University of California v. Bakke*, wherein the majority struck down a sixteen slot set-aside for minority students at the U.C. Davis medical school.³⁹ Concerned that the set-aside denied Allan Bakke, a white man, the opportunity to compete for all 100 slots in the medical school's entering class, five justices voted in his favor although no majority opinion was produced outlining the appropriate standard for reviewing such programs. Should strict scrutiny apply, rendering any race-based affirmative action plan presumptively suspect unless the state can advance a compelling interest achieved by a sufficiently narrowly-tailored policy? Or should some heightened, but less-than-strict, scrutiny apply, deferentially upholding the plan as long it achieves some important goal worth pursuing, such as remedying the long-term effects of Jim Crow? Although he wrote only for himself, it was Justice Powell's endorsement of the Harvard plan – in which an individual's race could be used as a factor in furthering the university's compelling interest in promoting diversity – that provided guidance to higher education administrators who desired more inclusive admissions policies.

While public schools derived some utility from its opinions, *Bakke* proved to raise more questions than it answered as to the proper standard of review (strict or intermediate scrutiny) for what level of government intervention (state, federal, or local), requiring the Court to issue further rulings on the constitutional contours of affirmative action. As a ruling on a *state educational* affirmative action plan, *Bakke* provided no clear guidance

³⁹ 438 U.S. 265 (1978). For some of the many insightful writings on *Bakke*, see, e.g., Akhil Reed Amar, *Bakke's Fate*, 43 U.C.L.A. L. REV. 1745 (1996); Drew S. Days, III, *Minority Access to Higher Education in the Post-Bakke Era*, 55 U. COLO. L. REV. 491 (1984); Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065 (1997); Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 GEO. L.J. 981 (1999).

on other governmental policies outside higher education, as evidenced in *Fullilove v. Klutznick*, where the Court upheld a *federal* program requiring that minority-owned *businesses* receive a ten percent set-aside of federal public works monies, expressly noting that *Bakke* did not establish any binding test for evaluating affirmative action programs.⁴⁰ To add to the confusion, the Court in *Richmond v. J.A. Croson Company* invalidated a *municipal* plan to set aside 30 percent of local public works funds for minority-owned businesses.⁴¹ Although the *Croson* majority held that strict scrutiny should be the proper standard for evaluating affirmative action plans, it was unclear what effect that would have on older precedents such as *Fullilove*, which produced no majority standard of review, but upheld a *federal* set-aside.

Metro Broadcasting, Inc. v. Federal Communications Commission (FCC) tried to reconcile *Fullilove* and *Croson* by holding that federally-enacted affirmative action plans would be subjected to intermediate scrutiny only, and not the more stringent *Croson* standard, upholding a federal FCC broadcast licensing policy preferring minority-owned businesses.⁴² The Court reasoned that Congress's motivations were not invidious, but benign, and should therefore be afforded deference. Following the retirement of four of the justices in the *Metro Broadcasting* majority and their replacement by more conservative jurists,⁴³ the Court took a decidedly different approach in *Adarand Constructors v. Peña*, overruling *Metro* and clearly establishing that strict scrutiny would

⁴⁰ 448 U.S. 448, 492 (1980) (Burger plurality) (noting that the “opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in cases such as [*Bakke*]”).

⁴¹ 488 U.S. 469 (1989).

⁴² 497 U.S. 547 (1990).

⁴³ See Chemerinsky, *supra* note 23, at 735.

be the lens through which all affirmative action plans – federal, state, and local -- would be evaluated. After *Adarand*, all programs, irrespective of their benign purpose to further the integration of racial minorities, would be subject to strict scrutiny review, upheld only if the government is able to demonstrate a compelling interest that it wished to advance and that the policy it had chosen is narrowly tailored to further that objective.⁴⁴

At first blush, one might be puzzled by what appears to be the Court's inconsistency in withdrawing from its post-*Brown* desegregation project while simultaneously enhancing its review of affirmative action plans. However, this apparent inconsistency is illusory. Embracing an ideology that all race-based government action is equally suspect and that therefore the government should either refrain from playing morals police or treat all individuals as individuals, regardless of race, the Court embarked on parallel paths in its desegregation and affirmative action jurisprudence over the past 40 years or so. Over time, race was viewed by the majority as a thorny issue, and it became increasingly unwilling to defer to governments that sought to help disadvantaged minorities because of these programs' effects on disgruntled majority individuals, like Messrs. Bakke and Adarand.

2. The Role of Poverty and Immigrant Status in Education

Aside from the emergence of strict scrutiny as the standard of review of all affirmative action programs, the Court also began to back away from its lofty rhetoric in *Brown* extolling the importance of education in U.S. society for all, regardless of status. In *Brown*, the Court highlighted the significance of public education to our democracy:

⁴⁴ 515 U.S. 200 (1995).

“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”⁴⁵

In *San Antonio Independent School District v. Rodriguez*, Mexican-American parents took these words to heart in arguing that Texas’s unequal property tax-based funding of its schools violated equal protection guarantees.⁴⁶ For instance, even though plaintiffs were assessed a higher school property tax than those in a nearby wealthy district (\$1.05 versus \$0.85 per \$100 of assessed property), plaintiffs’ school district had much less to spend on each child than the wealthy district (\$356 versus \$594 per pupil).⁴⁷ While affirming its importance, the Court found neither explicit nor implicit protection for public education in the Constitution: “Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for

⁴⁵ *Brown*, 347 U.S. at 493.

⁴⁶ 411 U.S. 1 (1973).

⁴⁷ *Id.* at 35.

saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. ... Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [one's First Amendment freedoms or right to vote,] we have no indication that the present levels of educational expenditures in Texas provide an education that falls short."⁴⁸ Put another way, unequal funding, even if arguably severe, does not violate constitutional guarantees of equal treatment under the law. This was certainly a limitation on the seemingly expansive language of *Brown. Rodriguez* appeared to distinguish *Brown* to the extent *Brown* concerned itself with the denial of education based on status; *Rodriguez* did not treat poverty as debilitating as race, despite the large funding gap between the rich and poor school districts in Texas.

Fortunately, the Court had an opportunity to further refine this poverty/status distinction in *Plyler v. Doe*, challenging the denial of a free public education to undocumented students in Texas. In an effort to conserve public funds, Texas required all children to prove they were in the country legally before they could receive a free public education.⁴⁹ Students who could not prove their legal immigration status would be required to pay tuition. In yet another 5-4 decision, the Court invalidated the Texas law. While undocumented status was not irrelevant to fiscal decisionmaking, Texas was not permitted to relegate undocumented children, whose immigration status was not their own fault, to a permanent underclass of uneducated youth. Citing *Rodriguez*, the Court

⁴⁸ *Id.* at 36-37.

⁴⁹ 457 U.S. 202 (1982).

reaffirmed that public education is not a constitutional right, but “neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.”⁵⁰

Instead of viewing *Plyler* and *Rodriguez* as points along a spectrum of school funding, the Court decided that the Texas law in *Plyler* was a total deprivation of a public education rather than a tax on poor families, as in *Rodriguez*. Put differently, the *Plyler* Court could have easily decided that, because undocumented status is a rational means for differentiating between individuals and because conserving scarce public monies is a legitimate governmental interest, requiring undocumented children to pay to attend Texas public schools was reasonable and hence constitutional.⁵¹

Yet, the *Plyler* majority correctly assessed the Texas law for what its probable effect would be – to impose “a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility

⁵⁰ *Id.* at 221.

⁵¹ Despite the Supreme Court’s holding many years ago, some are concerned that *Plyler*’s grant of free public education to undocumented children imposes an undue fiscal burden upon states and localities. *See, e.g.,* Michael McNutt, *Bill Seeks Details on non-U.S. students in Oklahoma schools*, NEWSOK.COM, Feb. 25, 2010 (available at <http://www.newsok.com/bill-seeks-details-on-non-u.s.-students-in-oklahoma-schools/article/3442072#ixzz0gePB30fU>) (“A measure requiring school districts to report to the state the number of students who are illegal immigrants and how much it’s costing to educate them was passed by a House committee....”); Nina Bernstein, *No Visa, No School, Many New York Districts Say*, N.Y. TIMES, July 23, 2010, at A16 (“Three decades after the Supreme Court ruled [in *Plyler*] that immigration violations cannot be used as a basis to deny children equal access to a public school education, one in five school districts in New York State is routinely requiring a child’s immigration papers as a prerequisite to enrollment, or asking parents for information that only lawful immigrants can provide.”).

that they will contribute in even the smallest way to the progress of our Nation.”⁵² In *Rodriguez*, the poor Mexican-American children were at least able to attend public school, impoverished as it was compared with the rich school district; in contrast, in *Plyler*, the Texas law would have effectively denied the undocumented children an opportunity to attend at all. Read together, *Rodriguez* and *Plyler* stand for the proposition that, a free public education is important enough to guarantee that the state provide it to all individuals, although it is not required to ensure that all students within the state receive roughly equivalent school funding.

And so, in *Rodriguez* and *Plyler*, we see the Court establishing what seems to be a constitutionally-required minimum floor of educational rights, post-*Brown*. Just as it withdrew from a robust commitment to both desegregation and affirmative action the more time had elapsed since *Brown*, the Court in *Rodriguez* and *Plyler* also retreated from what seemed to be a clear mandate to ensure the full integration of schools regardless of status -- whether racial, economic, or immigrant -- given the singular importance of public education. Instead of a constitutionally thick conception of the public education rights of all children, we have instead a rather stunted view, one that leaves the poorest and most vulnerable without assurances of a more level playing field (*Rodriguez*) beyond the minimum guarantee that they at least get to play on a public education field with the rest of the children (*Brown* and *Plyler*⁵³).

⁵² *Plyler*, 457 U.S. at 223.

⁵³ Note, too, that the Court has expressed, in dicta, that *Plyler*'s result was unique, suggesting its reluctance to expand *Plyler*'s version of educational rights as a constitutional matter (although this says nothing about the constitutionality of a state law like AB540 that extends *Plyler*'s reach to protect undocumented college-bound students). See *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 459 (1988) (rejecting claim of right to free school transportation).

3. Desegregation/Affirmative Action Redux: *Grutter*, *Gratz* and *Parents Involved*

Having clarified the boundaries of a state's obligations to provide educational access under *Brown* through its *Rodriguez* and *Plyler* opinions, the Court in the last decade decided three opinions further exploring whether certain traditionally disadvantaged groups could be provided governmental assistance to ensure their integration into society writ large, culminating in the *Parents Involved* case, one that arguably muddies the doctrinal distinctions typically drawn between the Court's desegregation precedents and its affirmative action jurisprudence.

The first two opinions return to the issue of affirmative action in higher education. In *Grutter v. Bollinger*⁵⁴ and *Gratz v. Bollinger*,⁵⁵ the Court was confronted with two affirmative action plans challenged by white applicants to the University of Michigan's Law School and College of Literature, Science, and the Arts, respectively. The Court issued a split decision, upholding the law school plan, but striking the college plan as unconstitutional. Applying *Adarand*'s strict scrutiny test and echoing Justice Powell's approach in *Bakke*, the Court ruled that enrolling a meaningfully diverse student body was a compelling interest a state university could choose to pursue, concluding that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."⁵⁶ However, the Court split 5-to-4 over the means by which the two Michigan schools aimed to achieve diversity. The law school's program hewed closely to Justice Powell's

⁵⁴ 539 U.S. 306 (2003).

⁵⁵ 539 U.S. 244 (2003).

⁵⁶ *Grutter*, 539 U.S. at 332.

view in which race was but one factor among many diversity factors, not one subject to specific quotas but rather focused on the applicant as a whole person, all the while keeping an eye to admitting a critical mass of underrepresented minorities.

In contrast, the undergraduate college's program of assigning a specific number of quality points to applicants based on certain attributes – among which was minority status – operated more like a quota system by preventing non-minority candidates from obtaining any points solely because of their racial background. Just as colleges and universities closely studied Powell's *Bakke* opinion, higher education administrators have, in turn, parsed *Grutter* and *Gratz*, seeking ways to promote meaningful diversity notwithstanding Justice O'Connor's prediction of a twenty-five year sunset on affirmative action plans⁵⁷ and various referenda ending affirmative action in states like California⁵⁸ and Washington.⁵⁹ Although affirmative action is not constitutionally dead, it is clear that, beginning with *Bakke*, and then progressing through *Croson* to *Adarand* to *Gratz*, *Grutter* proves a narrow exception to the general rule barring governmental initiatives to improve the employment and educational prospects of minorities, unless such laws benefit all students by creating a diverse learning environment. *Rodriguez* and *Plyler* further teach us that such learning environments need not be uniformly funded as long as they are open to all, regardless of socioeconomic or immigration status.⁶⁰ Once

⁵⁷ “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” *Grutter*, 539 U.S. at 343.

⁵⁸ California Civil Rights Initiative, Proposition 209 (approved Nov. 1996).

⁵⁹ Washington Initiative 200 (approved Nov. 1998).

⁶⁰ For more on school finance litigation, see, e.g., Bowman, *supra* note 33; Preston C. Green, III, Bruce D. Baker, and Joseph Oluwole, *Achieving Racial Equal Educational Opportunity through School Finance Litigation*, 4 STAN. J. CIV. RTS.-CIV. LIB. 283 (2008); Preston C. Green, III, Bruce D. Baker & Joseph O. Oluwole, *Race-Conscious Funding Strategies and School Finance Litigation*, 16 B.U. PUB. INT. L.J. 39

again, Professor Bell’s “interest convergence” idea is instructive: A majority of the Court appears willing to endorse governmental interventions that benefit the underprivileged only where these do not offend majoritarian sensibilities because they offer broader lessons for all (diversity is good, *Grutter*) or they do not unduly interfere with existing privilege (rich schools remain rich, *Rodriguez*).⁶¹

The final case in the trilogy from the past decade is *Parents Involved in Community Schools v. Seattle School Dist. No. 1* (“*Parents Involved*”),⁶² which held unconstitutional two public school student assignment plans that relied on comparing the race of the transferred students to the existing racial composition of the schools in order to ensure that residentially-isolated minority students were not foreclosed from enrolling in the most desirable schools. Because the school districts were not attempting to remedy *de jure* segregation but were instead aiming to stem *de facto* re-segregation, the 5-to-4 majority was unwilling to defer to the districts’ assessment of what constituted an equitable racial balance even if the district’s goals could be characterized as inclusive and not invidious.

(2006); Molly S. McUsic, *The Use of Education Clauses in School Finance Litigation*, 28 Harv. J. on Legis. 307 (1991).

⁶¹ In the same “interest convergence” vein, *Plyler* might appropriately be read as acceptable because, even though it prevents states from charging undocumented students tuition, rich students (and more to the point, their rich parents) won’t be directly affected by this because they will be able to attend the rich school districts implicitly endorsed by *Rodriguez*.

⁶² 551 U.S. 701 (2007). For more on *Parents Involved*, see, e.g., Preston C. Green, III, Julie F. Mead, and Joseph Oluwole, *Parents Involved, School Assignment Plans, and the Equal Protection Clause: The Case for Special Constitutional Rules*, __ BROOKLYN L. REV. __ (forthcoming 2011) (draft on file with author) (arguing that the Court’s adoption of the colorblind principle is not supported by the history and text of the Fourteenth Amendment and is inconsistent with the Court’s jurisprudence regarding constitutional conflicts between school districts and students).

Invoking *Brown*, Chief Justice Roberts concluded that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁶³ Concurring, Justice Thomas likened the school districts to the segregationists in *Brown*, stating in contrast that his “view [of a colorblind constitution] was the rallying cry for the lawyers who litigated *Brown*.”⁶⁴ In dissent, Justice Stevens questioned the majority’s faithfulness to *Brown*’s principles: “The Chief Justice fails to note that it was only black schoolchildren who [were discriminated against]; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice rewrites the history of one of this Court’s most important decisions.”⁶⁵

Parents Involved teaches us at least three important lessons about the legacy of *Brown* in light of the Court’s desegregation and affirmative action jurisprudence: First, doctrinally, *Parents Involved* seems to blur the line between the school desegregation and affirmative action cases because the student assignment plans at issue were not designed to remedy segregation and therefore bore a closer resemblance to the recent educational affirmative action cases, *Grutter* and *Gratz*. While the *Parents Involved* majority limited *Grutter*’s diversity principle to the higher education context, the rhetoric of the opinion closely resembles then Chief Justice Rehnquist’s view in *Gratz*. Both Roberts and Rehnquist appear to assert that even assuming its benign motives for providing educational access to students of color, the state may not use race to discriminate against majority students absent specific proof of unconstitutional discrimination requiring

⁶³ *Parents Involved*, 551 U.S. at 748.

⁶⁴ *Id.* at 772 (Thomas, J., concurring).

⁶⁵ *Id.* at 799 (Stevens, J., dissenting).

remediation. Any re-segregation of the classroom is presumptively due to private choices (based on residential patterns, *Parents Involved*) or the application of neutral admissions standards (*Gratz*), not governmental interference.

Second, and related to the first point, the Court's reluctance to permit aggressive legislative integration policies in pursuit of desegregation and affirmative action suggests how far the colorblind conception of equal rights has permeated its jurisprudence. Recall the difference in how *Brown* was cited by the various *Parents Involved* justices in the majority and minority. For Roberts and Thomas, *Brown* is about never treating others differently based on skin color and embracing the colorblind ideal; for Stevens, *Brown* is about alleviating the subordination of a minority group at the hands of a majority group. The school districts in *Parents Involved* were discriminating on the basis of race, and that fact alone was enough to render their actions unconstitutional in Roberts's and Thomas's eyes. Stevens and the other dissenters appreciated the context of the school districts' decisions: they saw the government wanting to make sure that black children were not barred access to the more desirable schools, not unlike how they were historically barred in *Brown*. Viewed in this light, *Grutter* and *Plyler*, not *Gratz* and *Rodriguez*, are the proper heirs to *Brown*, for the former uphold the promise of integrating students from less-privileged backgrounds into society's mainstream; in contrast, the latter maintain the status quo (as does *Parents Involved*, for that matter) notwithstanding that doing so relegates minority students – whether by racial, socioeconomic, or immigrant status -- to the back of the proverbial bus.

Third, *Parents Involved* also supports the “interest convergence” thesis through its revisionist reading of *Brown*. Whereas, in its most iconic sense, *Brown* might have stood

for the idea that absolute equality in public education is a constitutional imperative, in its current incarnation in light of *Parents Involved* (and *Gratz*, *Bakke*, and *Rodriguez*), *Brown* embraces the notion of a colorblind Constitution that protects all individuals regardless of race, no matter that one's lived experience in the U.S. (and in its public schools) cannot help but be shaped by one's racial, socioeconomic, and immigrant status.

In sum, the Court's failure to promote desegregation and affirmative action bespeaks its reluctance to fully embrace a robust version of *Brown*'s "integrative egalitarianism" principle: aggressive government action to help those at society's margins effectively integrate into and become part of the mainstream community. The current miserly reading of our Constitution's equality principles challenges all federal, state, and local government entities to find ways to promote education among the least fortunate, while raising awareness of the lost promise and potential of *Brown* as a precedential vehicle for transformative, integrative change.

C. Situating *Martinez* in the post-*Brown* Context

Reflecting on *Brown*'s legacy sheds new light on the *Martinez* litigation. In AB540, the California legislature is attempting to further *Brown*'s commitment to equality and integration by permitting talented, dedicated California graduates the opportunity to attend its colleges and universities at reduced cost, regardless of their immigration status. AB540 extends by policy what *Plyler* guaranteed to undocumented students constitutionally: an opportunity for students like "Nicole" to further their education and fulfill their promise as productive members of society. And analogous to Michigan's calculus in *Grutter*, California believes that investing in its high school

graduates will benefit not only undocumented students, but their classmates, the university, and the state as well.

Of course, the out-of-state plaintiffs in *Martinez* do not see things this way. Instead, they believe that their status as U.S. citizens provides them protection under federal law that should trump California's desire to help further the education of its undocumented high school graduates. In their view, federal laws limiting benefits to the undocumented dictate that California has but two choices, either to extend tuition subsidies to all persons, regardless of where they currently reside or where they attended high school, or to repeal AB540; otherwise, the *Martinez* plaintiffs believe the federal courts should rule that AB540 is preempted by federal law.

In a sense, the *Martinez* plaintiffs invoke an exception to the "colorblind constitution" rule. The Constitution recognizes and preserves differences between U.S. citizens and noncitizens, and our federal laws limit how states might treat undocumented persons in their midst. Yet, the *Martinez* plaintiffs' privileging of their citizenship status works a similar injustice as the privileging of the white race did prior to *Brown*. Put differently, just as one's majority race operates as a privilege, so does one's citizenship status.

This leaves the federal courts with a choice. Should courts abide U.S. citizenship as a federalism trump, denying California its opportunity to level the educational playing field? Or should they embrace the integrationist, egalitarian ideals of *Brown* and recognize that AB540 is not designed to discriminate against U.S. citizens, but is instead intended to invest in talented undocumented noncitizens?

The problem with framing the issue this way is that most U.S. citizens readily accept the U.S. citizen-noncitizen divide as a rational one, and indeed, the Supreme Court has affirmed the federal government's supremacy in legislating the borders of that bright line.⁶⁶ Indeed, in many ways, the long history of *Brown*'s desegregation and affirmative action jurisprudence suggests that the integrative egalitarianism ideal is not one the Court readily embraces where race is at issue. Put differently, *Brown*'s legacy has been more about maintaining white privilege than dismantling it, and the few gains by minorities can be readily explained by Bell's interest convergence principle.

Yet, if we think outside the box for a moment, there might be a different explanation for minorities' gains apart from interest convergence, and that becomes apparent by examining the Court's recent gay rights jurisprudence. Applying a standard no stricter than rational basis, the Court in *Romer v. Evans* and *Lawrence v. Texas* affirmed the idea that unpopular or disfavored minority groups may not be discriminated against just because they are in a minority group. As applied to the *Martinez* litigation, we can see that AB540 does not discriminate against a minority group; at best, it discriminates against a privileged group – a sub-class of U.S. citizens -- and it does not do so because of any animus, but because it aims to uphold the egalitarian, integrative vision of *Brown* by helping underprivileged but talented undocumented students attend college.

Indeed, should the *Martinez* plaintiffs prevail, one might question what interest the federal government has in denying California the right to enact educational policy as

⁶⁶ Within immigration law, this has come to be known as the "plenary power" doctrine. See, e.g., Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995).

it sees fit. Might siding with the plaintiffs be more akin to the animus found in *Romer* and *Lawrence*? Citizens have many options for private and public higher education within their own state and others (and, indeed, some former California high school graduates will be unintended beneficiaries of the law). What interest would the federal government have in denying California the opportunity to level the playing field for the undocumented? Why must U.S. citizens who never attended a California high school be entitled to a subsidized college education over an undocumented person who has simply because the former is a U.S. citizen? Does U.S. citizenship entitle one to a subsidized California education?

Shifting focus from *Brown*'s progeny and race to the struggle for gay rights provides yet another way of looking at the issue. Whereas the post-*Brown* struggle for racial equality and educational equity shifted from concerns over effectively integrating underrepresented minorities in the desegregation and affirmative action contexts to colorblind evenhandedness and the impact such efforts had on the majority, recent Supreme Court jurisprudence regarding gay rights has focused more on the limits of a majority's power to marginalize an identifiable minority group. It is this frame – the constitutional limits on majoritarian power -- that may prove to be the more salient one when examining what egalitarian integration might mean in the context of the *Martinez* plaintiffs' assertion that their federal citizenship rights trump California's modest attempt to foster a more inclusive society.

III. From *Bowers* to *Romer* to *Lawrence*: Lessons from Another Struggle

While the Court has retreated from a more robust commitment to antidisubordination in its desegregation and affirmative action jurisprudence, it has simultaneously found for gay rights plaintiffs in two prominent cases decided in the late 1990s and early 2000s. That these decisions were authored by a politically conservative Court that had limited civil rights in several race cases over the same period is particularly interesting. These two cases – *Romer v. Evans* and *Lawrence v. Texas* – provide important clues as to when the Court might be inclined to find that democratically-enacted laws more likely reflect animus or invidious discrimination rather than the shared values of a community striving to accurately define itself in pursuit of the common good.

But before *Romer* and *Lawrence*, there was *Bowers v. Hardwick*,⁶⁷ infamous for its pernicious view of sexual minorities. In *Bowers*, the Court upheld a Georgia law that criminalized sodomy. Although the law did not differentiate between heterosexual and gay sodomy, the case involved the prosecution of a gay man, Michael Hardwick. Writing for a 5-to-4 majority, Justice White opined that gay persons did not have a constitutional right to engage in private, consensual sex under the Due Process Clause. White cited the long history of antisodomy laws and Georgia's belief in the immorality of homosexual conduct as reasons for the Court deferring to the state. Interestingly, Justice Powell, who had supplied the swing vote for the majority, publicly acknowledged in later years that he had erred in siding against Michael Hardwick.⁶⁸

⁶⁷ 478 U.S. 186 (1986).

⁶⁸ JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL 530 (2001) (Powell conceding his mistaken vote in *Bowers v. Hardwick* at a 1990 NYU lecture).

Ten years after *Bowers*, the Court had a second opportunity to consider a sexual orientation discrimination case in *Romer v. Evans*.⁶⁹ In an effort to stem the tide of municipal laws protecting sexual minorities from employment and housing discrimination, the people of Colorado passed Amendment 2 to the state constitution, outlawing all such laws. Framed as a “no special rights” initiative, Amendment 2’s proponents waged an aggressive campaign, warning against the evils of homosexuality and arguing that sexual minorities should not be entitled to special rights simply because of their practices.⁷⁰ In a 6-3 decision, the Court deemed Amendment 2 an unconstitutional violation of the Equal Protection Clause. Although it did not find sexual minorities a suspect class and therefore purported to apply but a rational basis review, the Court found the sheer breadth and scope of the law untenable:

“[T]he amendment imposes a special disability upon these persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. ... These are protections taken for granted by most people either because they already have them or do not need them⁷¹; these are protections against exclusion

⁶⁹ 517 U.S. 620 (1996).

⁷⁰ A recent case from last term provides additional insight into this “special rights versus equal rights” debate. Although styled as a First Amendment, not gay rights, case, in *Christian Legal Society (CLS) v. Martinez*, 130 S. Ct. 2971 (2010), the Court found that CLS had no right to be formally recognized by the Hastings Law School, which revoked the group’s student organization status following CLS’s admission that it precluded gays from membership. CLS had argued that it was the Law School that had unlawfully discriminated against CLS by singling it out for punishment. Justice Ginsburg’s majority opinion concluded otherwise: “CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings’ policy. The First Amendment shields CLS against state prohibition of the organization’s expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity.” *CLS*, 2010 WL 2555187 at *24-25. Unlike gay rights advocates in *Romer*, it was CLS that sought preferential treatment; gay rights advocates simply wanted to enjoy rights and privileges everyone else enjoyed, including fair access to housing and employment.

⁷¹ See, e.g., Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack* (1988) (“As a white person, I realized I had been taught about racism as something that puts others at a disadvantage, but had

from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”⁷²

From the Court’s perspective, to take the unprecedented route of amending a state constitution to specifically deny equal rights to a class of people simply because one has the votes to do so suggested an irrational prejudice. Citing *Department of Agriculture v. Moreno*, the Court opined: “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”⁷³

Predictably, Justice Scalia’s stinging dissent raised the specter of *Bowers*, which was still good law. In his view, even if Colorado’s amended constitution made it more difficult for sexual minorities to seek legal protection, such a result was no worse than the criminalization of sodomy upheld in *Bowers*: “If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct.”⁷⁴ That *Romer* was an equal protection case striking down a law that reached sexual orientation, not just conduct, whereas *Bowers* more narrowly focused on sanctionable conduct under substantive due process, seemed legal distinctions that required reconciliation and clarification.

been taught not to see one of its corollary aspects, white privilege, which puts me at an advantage.”) (Excerpt from McIntosh 1988 Working Paper #189, published in *Peace and Freedom*, July/August 1989; reprinted in *Independent School*, Winter 1990).

⁷² *Romer*, 517 U.S. at 631.

⁷³ *Id.* at 634-35 (citing *Moreno*, 413 U.S. 528, 534 (1973)).

⁷⁴ *Id.* at 641 (Scalia, J., dissenting).

The Court finally resolved this inherent tension between *Bowers* and *Romer* by deciding *Lawrence v. Texas*⁷⁵ in 2003. At issue in *Lawrence* was Texas's antisodomy statute, criminalizing same-sex activity as "deviant." In another 6-to-3 decision, the Court overruled *Bowers*, noting that the Due Process Clause protects the right of all adults to engage in private, consensual sexual activity, irrespective of their sexual orientation. While acknowledging the long history of anti-sodomy laws, the majority noted that anti-same-sex sodomy statutes were of more recent vintage. That fact, combined with its decisions in *Planned Parenthood v. Casey*⁷⁶ (reaffirming the substantive content of due process) and *Romer* (invalidating as irrational an anti-homosexual law), led the Court to conclude that Texas had no legitimate interest in criminalizing private sexual conduct between consenting adults. Moral disapproval of same-sex conduct could not, by itself, be sufficient to justify its criminalization.⁷⁷

⁷⁵ 539 U.S. 558 (2003).

⁷⁶ 505 U.S. 833 (1992).

⁷⁷ Relatedly, the controversy over the pending repeal of the Pentagon's "don't ask, don't tell" controversy continues. See, e.g., David S. Cloud, *Pentagon survey on 'don't ask, don't tell' criticized as biased*, L.A. TIMES, July 9, 2010 (available at <http://articles.latimes.com/2010/jul/09/nation/la-na-military-gays-20100710>); Assoc. Press, *Lawyers Seek Injunction to Halt Military Gay Rule*, July 23, 2010 (available at http://www.google.com/hostednews/ap/article/ALeqM5hxIyhWP4o0LCQi15rYE_GrzGWauwD9H4KES00). Intended to help maintain unit coherence, the policy punishes openly gay servicemen with discharge, but does not ask about the sexual orientation of those who serve. Pursuant to this policy, Lt. Dan Choi was ordered discharged in June 2009, but then was subsequently allowed to re-deploy in early 2010. He explains, "I was put on trial [for violating 'don't ask, don't tell'] and they recommended discharge. But [as of March 2010] it's been nine months, 10 months, and I have been recalled to drill with my unit. Our unit is going to deploy and they need experienced leadership. I've been deployed to Iraq before. I graduated from West Point with a degree in Arabic and I speak Arabic with a degree of proficiency. There has been no disruption in my unit [as a result of my coming out]. It is certainly proof that our country can deal with the repeal just like all the other countries in NATO.... But in the last nine months, hundreds of soldiers have been kicked out for doing just what I did. The policy must end." See *New America Media Interview, Dan Choi: Repeal 'Don't Ask, Don't Tell' Now* (available at <http://newamericamedia.org/2010/04/dan-choi-repeal-dont-ask-dont-tell-now.php>). Unfortunately, Mr. Choi was discharged in July 2010. See *'Don't Ask' critic Dan Choi honorably discharged*, WASH. POST (BLOG), July 23, 2010 (available at http://voices.washingtonpost.com/federal-eye/2010/07/dont_ask_critic_dan_choi_honor.html). To me, the parallels between Nicole, the undocumented student-turned-Ph.D., and Mr. Choi are striking. Both are talented individuals whose status was (and in Mr. Choi's case, remains) a barrier to full citizenship and service.

As applied to the *Martinez* plaintiffs' assault on California's AB540, *Romer* and *Lawrence* reflect a Court reluctant to allow a majority to impose its morals and values upon a minority group simply because it can. From an antisubordination perspective, the Court reads the due process and equal protection components of the Fourteenth Amendment in the spirit they were originally intended -- to ensure that no one is denied the opportunity to pursue her American dream simply because of an accident of her birth. State DREAM Acts like California's AB540 further, rather than hinder, their beneficiaries' American dreams by providing a pathway to full citizenship and membership for those unfairly burdened by circumstances beyond their control.

Unlike the unconstitutional laws struck down in *Romer* and *Lawrence*, state DREAM Acts have a legitimate purpose: to help talented students achieve their fullest potential through higher education, unfettered by their immigration status.⁷⁸ Viewed in this light, it is the *Martinez* plaintiffs' position that appears unreasonable. By reading the federal statutes so strictly that they prevent the states from pursuing legitimate ends and by assuming that U.S. citizenship automatically entitles the plaintiffs to state benefits seems a stretch. After all, nothing in AB540 prevents the *Martinez* plaintiffs from also receiving tuition subsidies if they also attend and graduate from a California high school.

⁷⁸ To the extent that immigration status is properly a federal, and not a state, concern, California is exactly right to regard it as irrelevant to its determination of which students it should support. Put differently, California is interested in supporting a core group of dedicated California high school graduates regardless of their immigration status. Just as Arizona's anti-immigration bill SB1070 was popularly viewed as a way to prompt federal action on comprehensive immigration reform, California's AB540 (and the other state DREAM Act laws) should also be considered a nudge in the direction of passing the federal DREAM Act. A recent report by the Migration Policy Institute suggests that California should be particularly interested in the federal DREAM Act's passage as approximately 500,000 Californians would likely benefit. See Jeanne Batalova & Margie McHugh, Migration Policy Institute, *DREAM v. Reality: An Analysis of Potential DREAM Act Beneficiaries* 10 (July 2010).

By its terms, the law discriminates, if at all, on the basis of high school attendance and graduation, not on citizenship.

One objection to this line of reasoning might be that the law operates as a *de facto* residency requirement, and therefore runs afoul of the federal law. Presumably, the federal government has a legitimate interest in preventing states from favoring undocumented persons, who are barred from residence anywhere in the United States, over U.S. citizens. Thus, the high school attendance and graduation requirement favors California residents, including undocumented persons, over out-of-state U.S. citizens.

As defenders of the California law are quick to point out, first, undocumented persons themselves are required to comply with the attendance and graduation requirements, regardless of their residence, and second, there are any number of non-resident U.S. citizens who would be eligible for this benefit such as “U.S. citizens who attended high school in California but have resided in another state after completing high school and before enrolling in college or graduate school; students who attend boarding school for part of the year in California while maintaining a permanent residence in another state; students living in an adjoining state which is contiguous to a California school district who attend the California school; and students whose actual and legal residence is in a foreign country adjacent to this state, and who regularly return within a twenty four-hour period to said foreign country.”⁷⁹

If, as the Court noted in *Romer*, the Equal Protection Clause stands for nothing if not that majorities may not impose their will upon a disfavored group simply because they can, and if *Lawrence* warns us against the dangers of adopting majoritarian notions

⁷⁹ See Latino Justice/PRLDEF brief in *Martinez*, *supra* note 17, at 12-13.

of morality for their own sake, we must take seriously the consequences of siding with the *Martinez* plaintiffs. While a critic might contend that a vote for the plaintiffs is a vote for the rule of law and the primacy of citizenship as an important legal and social status, what might the cost be? Even if we're not persuaded by the analogies to the Court's recent gay rights jurisprudence, the parallels are worth thinking about. What is to be gained by depriving hardworking students like "Nicole" the opportunity to further their education? If one function of education is to improve society through an investment in the best and the brightest, what is gained by effectively denying access to one segment of society based on an accident of birth?

Perhaps the strongest argument in favor of state and federal DREAM acts is an economic one. It makes little sense to invest in the primary and secondary education of all students pursuant to *Plyler* only to abandon the undocumented based purely on their status. Finding ways to help the most talented students succeed, regardless of their race, poverty, or immigrant status, inevitably pays dividends to the society writ large. Taken together, state and federal DREAM acts seek to eliminate the major fiscal and immigration barriers to students who, by an accident of birth, do not have the same educational opportunities as middle-class U.S. citizens. While clearly not a guarantee of success,⁸⁰ these acts invest in some of the best and the brightest, helping them to

⁸⁰ Even if students are successful in making it to college, those from disadvantaged backgrounds are more likely to have difficulty graduating. See, e.g., Tamar Lewin, *Once a Leader, U.S. Lags in College Degrees*, N.Y. TIMES, July 23, 2010, at A11 (As Michael McPherson, president of the Spencer Foundation, put it, "We spend a fortune recruiting freshmen but forget to recruit sophomores."). See also Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, __ WAYNE L. REV. __ (forthcoming 2010) (noting the particular challenges faced by the relatively small number of undocumented students who currently attend college, an estimated 50,000 to 60,000 out of 18 million nationwide, or substantially less than 1% of total enrollment) (unpublished draft on file with author). A preliminary study of the impact the Texas and California DREAM Acts have had on increasing undocumented access suggest a slight positive effect, especially among older Mexican men, although overall benefit appears negligible; the authors caution, however, that the data they examined may

eventually become, like Nicole, full contributing members of our nation and their communities.⁸¹

IV. *Plyler* Redux: Reclaiming the Antisubordination Promise of our Amended Constitution

At the end of the day, we are left to ruminate on the true meanings of *Brown* and *Plyler*. Viewing these landmark civil rights education cases through the lens of *Romer* and *Lawrence* adds depth to our analysis for we realize how irrelevant and irrational alienage discrimination is in the education context. If *Brown* stands for integrative egalitarianism, and *Plyler*, for the irrationality of denying a basic education to a blameless class based on their immigration status, and if *Romer* and *Lawrence* teach us that the Fourteenth Amendment requires a vigilant awareness of how majorities can prejudicially disenfranchise minorities, then it seems patently clear that the *Martinez* plaintiffs should not prevail. California correctly understands that one's immigration status is irrelevant to one's ability to succeed as a student and to become a contributing member of society. Those who invoke federal law as an absolute bar to state

have been too soon after the laws' passage in 2001 to usefully predict any long-term effects of the law. See Aimee Chin and Chinhui Juhn, *Does Reducing College Costs Improve Educational Outcomes for Undocumented Migrants? Evidence from State Laws Permitting Undocumented Immigrants to Pay In-State Tuition at State Colleges and Universities*, National Bureau of Economic Research, working paper 15932, April 2010 (available at <http://www.nber.org/papers/w15932>).

⁸¹Viewed in this way, undocumented college-bound students are an untapped resource that would be a tremendous benefit to the U.S. through the federal DREAM Act. See Romero, *supra* note 16, at 416 ("But an arguably untapped source of potential future labor would be those undocumented postsecondary school students who are precluded from pursuing a college education because of their immigration status or limited finances. If Congress would formally acknowledge that education is work, and that superior high school performance leading to college admission is a sign of employment potential, it would avail the country of a future labor source already educated within and familiar with the U.S. school system. Just as an employment-based immigrant visa may be viewed as a fair exchange for the anticipated contributions of the immigrating employee, the [federal bill's] adjustment of status provision implicitly acknowledges the work undocumented high school students have done to gain acceptance into a U.S. college or university.").

antibordination pursuits, privileging U.S. citizenship and disparaging undocumented status, should bear the burden of proof as to how immigration status – like race or sexual orientation – might be a relevant basis for denying someone her chance to fulfill her own American dream.

* * *

To close, I'd like to share a recent medical study that gives a lie to the danger of assuming a blanket preference for U.S. citizens over noncitizens. Dr. John Norcini and his colleagues discovered that foreign-born medical doctors who graduated from foreign medical schools perform just as well as those born and trained in the U.S. Interestingly, they also found that U.S. citizens who graduated from foreign medical schools did not perform as well as their peers; the researchers surmised that foreign-trained U.S. citizens' poorer performance may be because they could not get in to selective medical schools stateside.⁸² Put differently, this extensive study of over 240,000 hospitalizations in Pennsylvania over 2003 to 2006 suggests that U.S. foreign-trained students performed less well than immigrant foreign-trained students; the noncitizen students did better on average than the U.S. citizens. In a similar vein, California's decision to provide access to undocumented students makes sense – not because they might be better than U.S. citizens, but because we should encourage success in the best and brightest, regardless of citizenship. Providing access to college for excellent undocumented students does just that.

⁸² See Denise Grady, *Foreign-Born Doctors Give Equal Care in the U.S.*, N.Y. TIMES, Aug. 3, 2010, at D7. For the full study, see John J. Norcini et al., *Evaluating the Quality of Care Provided By Graduates of International Medical Schools*, 29 HEALTH AFFAIRS 1461 (2010).