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PERSONHOOD, PROPERTY, AND PUBLIC EDUCATION:
THE CASE OF *PLYLER V. DOE*

*Rachel F. Moran**

Property law is having a moment, one that is getting education scholars' attention. Progressive scholars are retooling the concepts of ownership and entitlement to incorporate norms of equality and inclusion. Some argue that property law can even secure access to public education despite the U.S. Supreme Court's longstanding refusal to recognize a right to basic schooling. Others worry that property doctrine is inherently exclusionary. In their view, property-based concepts like residency have produced opportunity hoarding in schools that serve affluent, predominantly white neighborhoods. Many advocates therefore believe that equity will be achieved only by moving beyond property-based claims, for instance, by recognizing education as a public good or human right.

The Court has upheld a constitutional right of access to public schools on just one occasion. In Plyler v. Doe, the Justices found that Texas could not bar undocumented students from schools or charge them tuition. The Court did not declare education a fundamental right or alienage a suspect classification. Instead, the opinion relied on several rationales, some property-based and some not. Residency, for instance, featured prominently in the case, but so did a trope of childhood innocence. Recently, there have been calls to revisit Plyler, making this an opportune moment to evaluate how its reasoning will fare. Despite growing interest in property-based entitlements as a strategy for inclusion, Plyler's fate will likely turn on considerations that transcend property: the blamelessness of children, the cruelty of relegating them to a lifetime of illiteracy, and the implications that such deliberate indifference has for our democratic integrity.

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INTRODUCTION

In thinking about education and property, much of the dynamic is driven by disenfranchisement. In 1973, the U.S. Supreme Court's decision in *San Antonio Independent School District v. Rodriguez* made the right to education a constitutional orphan.¹ The Court refused to find that the Equal Protection Clause included protection for equal education.² Nor was education the kind of bulwark of liberty, namely the kind that supports participation in the political process, that received any special protection under the First Amendment.³ Although the Court suggested that there might be a right to a basic education, the Justices have yet to endorse this principle.⁴ In the intervening years, education has been searching for a constitutional home, and property has presented itself as a possibility. Law professor Matthew Shaw, for example, has argued that education is a protected property interest under substantive due process.⁵ Although the odds of succeeding with such a claim have dimmed considerably since the Supreme Court rejected a substantive due process right to reproductive freedom in 2022,⁶ the notion that education has property-like qualities persists. Often, these qualities are equated with privilege and exclusion rather than equity and inclusion.⁷

Even so, scholars still hope that treating education as a form of property can promote access for disadvantaged children. For instance, Professor Shaw cites *Plyler v. Doe*⁸ as the Supreme Court opinion that comes closest to ensuring a right to education for vulnerable students.⁹ He believes that the decision rested on unspoken recognition of a vested property interest in public education.¹⁰ In *Plyler*, the Court declared that Texas violated the Equal Protection Clause when it allowed public schools to bar undocumented students or charge them tuition.¹¹ The opinion did not declare a right to a basic education but instead offered a mélange of

1. 411 U.S. 1 (1973).

2. *Id.* at 28.

3. *Id.* at 35–37.

4. *Id.* at 25 & n.60; Matthew Patrick Shaw, The Public Right to Education, 89 U. Chi. L. Rev. 1179, 1181 (2022).

5. Shaw, *supra* note 4, at 1183–88.

6. See *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 5 (U.S. June 24, 2022) (rejecting a substantive due process right to an abortion because the right does not appear in the Constitution and is not “implicit in the concept of ordered liberty” (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))).

7. See, e.g., LaToya Baldwin Clark, Education as Property, 105 Va. L. Rev. 397, 398–401, 408–10 (2019) [hereinafter Baldwin Clark, Education as Property]; LaToya Baldwin Clark, Stealing Education, 68 UCLA L. Rev. 566, 575–77 (2021) [hereinafter Baldwin Clark, Stealing Education].

8. 457 U.S. 202 (1982).

9. Shaw, *supra* note 4, at 1220–26.

10. *Id.* at 1223–26.

11. *Plyler*, 457 U.S. at 230.

reasons for its holding. Some justifications were rooted in property-like entitlements, but others reflected a fraught discourse over immigration by invoking conceptions of the public good as well as norms of fundamental human decency.¹² The Court's recent opinion overturning the right to an abortion has sparked calls to challenge *Plyler* as similarly misguided judicial activism,¹³ so it seems timely and worthwhile to consider the likely staying power of the decision's varied rationales.

First, this Essay will consider competing conceptions of property as they bear on education. To make property-like entitlements consistent with full access to education, scholars have modified traditional doctrinal principles to serve broader objectives of distributive fairness. For critics of property-based approaches, though, even elastic interpretations of the concept cannot reliably advance equal educational opportunity. As a result, some scholars have adopted alternative approaches that focus on education as a public good or a human right.

Next, this Essay will discuss how property-like concepts played a complex role in finding a right to education in *Plyler*. Undocumented families invoked an entitlement based on residency in the school district to deflect exclusion based on their immigration status. Although property-like claims figured significantly in the case, other factors were at work as well. The trope of childhood innocence allowed undocumented children to counter arguments that they should be punished for their parents' decision to enter the country illegally. The students' blamelessness became a shield against the inherited stigma that came with their parents' immigration status.

This Essay closes with a reflection on *Plyler's* likely fate if it were to return to the Court today. Residency remains an important way to allocate educational resources. However, its power derives from policymaking rather than any constitutional guarantee. Meanwhile, Congress and the states have grown bolder in enacting restrictive legislation that denies public benefits to undocumented individuals. Only *Plyler* has stood in the way of extending these policies to elementary and secondary education. Interestingly, the decision's most enduring argument may be based not on property-like entitlements but on the innocence of children. The fear that dehumanizing border-enforcement practices threaten fundamental democratic values is likely to remain a critically important element of any defense of *Plyler*.

12. See *infra* Part II.

13. See David Martin Davies, Texas Matters: Why Abbott Wants *Plyler v. Doe* Overturned, Tex. Pub. Radio (May 16, 2022), <https://www.tpr.org/podcast/texas-matters/2022-05-16/texas-matters-why-abbott-wants-plyler-v-doe-overturned> [<https://perma.cc/8K8H-LKPB>]; Kate McGee, Gov. Greg Abbott Says Federal Government Should Cover Cost of Educating Undocumented Students in Texas Public Schools, Tex. Trib. (May 5, 2022), <https://www.texastribune.org/2022/05/05/greg-abbott-plyler-doe-education/> [<https://perma.cc/F3LG-HXSE>].

I. COMPETING CONCEPTIONS OF EDUCATION: PROPERTY-BASED
ENTITLEMENTS AND THE ALTERNATIVES

Property is having a moment, one that is getting education scholars' attention. Though property was long associated with rights of exclusion, there are now efforts to redefine property and deploy it in the service of distributive justice.¹⁴ That reformist impulse has assumed a new urgency as growing divides in wealth and income leave some individuals without the basic wherewithal to lead a decent and dignified life.¹⁵ Because access to education is closely associated with an individual's life chances, it should come as no surprise that conceptions of property have been increasingly prominent in debates over schooling. At a global level, the right to education is framed as one that "straddles the division of human rights into civil and political, on the one hand, and economic, social and cultural, on the other hand."¹⁶ A neoliberal framework treats students as "homo economicus, for whom education is a matter of value added by way of credentials and—if lucky—the skills that will ensure competitiveness in the global job market."¹⁷ Because neoliberalism mainly treats education as an individual entitlement, that is, a private rather than a public good,¹⁸ economic considerations overshadow other conceptions of a right to learn, deepening inequality in access to schooling.¹⁹

Most commentary on the privatization of education in the United States has focused on the rise of school choice through the creation of charter schools and voucher programs.²⁰ However, recent scholarship has

14. See, e.g., Timothy M. Mulvaney & Joseph William Singer, *Essential Property*, 107 *Minn. L. Rev.* 605, 635–38 (2022). The review of these extensive developments in property law is necessarily limited and highlights innovations of particular relevance to education law.

15. *Id.* at 647–51.

16. Katarina Tomaševski, *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* 9 (2001), https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf [<https://perma.cc/S3F4-CQ37>] [hereinafter Tomaševski, *Human Rights Obligations*].

17. James Murphy, *Neoliberalism and the Privatization of Social Rights in Education*, in *Economic and Social Rights in a Neoliberal World* 81, 93 (Gillian MacNaughton & Diane F. Frey eds., 2018).

18. *Id.* at 92–93.

19. See Steven J. Klees & Nisha Thapliyal, *The Right to Education: The Work of Katarina Tomasevski*, 51 *Comp. Educ. Rev.* 497, 505 (2007); Jennifer LaFleur, *Centring Race in Contemporary Educational Privatization Policies: The Genealogy of U.S. 'Private School Choice' and Its Implications for Research*, 26 *Race Ethnicity & Educ.* 205, 212–13 (2023) (describing theories that anti-Blackness is embedded in neoliberalism); see also Johanna Crighton, *Book Review*, 37 *Compare* 121, 122–23 (2007) (reviewing Katarina Tomaševski, *Speaking Truth to Power: Human Rights Obligations in Education: The 4-A Scheme* (2006)) (describing how promises of free, compulsory education are undermined by treating education as a "traded service").

20. See Lois Weiner, *Privatizing Public Education: The Neoliberal Model*, 19 *Race Poverty & Env't*, no. 1, 2012, at 35, 35 (arguing that accountability testing under the No Child Left Behind Act was a means to "replac[e] locally controlled, state-funded school systems with a collection of privatized services governed by the market"); Jason Blakely, *How*

tried to deploy property-like concepts more broadly in evaluating education law and policy. This Part first explores efforts to reimagine property in ways that bolster its capacity to promote inclusion. These innovations usually incorporate public-regarding aspects of property that depart from an emphasis on an exclusionary right of individual enjoyment. Then, the analysis contrasts these reimagined notions of property with the views of scholars concerned about the exclusionary effects of treating education as property. The final section considers alternative frameworks that largely reject property-based conceptions of schooling. Some treat education as a public good, focusing on broad social benefits rather than individual gains. Still others treat education not as a market commodity but as a human right essential to achieving full personhood.

A. *Education as Property: Competing Accounts*

The task of considering the role of property in shaping access to education is greatly complicated by widely disparate notions of what property means. In the face of growing inequality, progressives have tried to retool the concept to make it more sensitive to concerns about distributive fairness, including access to educational opportunities. At the same time, many scholars believe that property is inextricably linked to principles of exclusion that perpetuate inequality, including opportunity hoarding in public schools. This section will evaluate these competing accounts and their widely divergent implications for education.

1. *Reconceptualizing Property to Make It More Inclusive.* — In recent years, scholars have openly questioned conceptions of property law as a bundle of individual rights.²¹ These rights typically include “a right of exclusion, a right of use, a right of possession, and a right of alienation.”²² The entitlements are associated with private market transactions, but as property law scholars Timothy M. Mulvaney and Joseph William Singer point out, this framework of rights and privileges derives from “an exercise of public power” and thus cannot be indifferent to distributive consequences that undermine basic human dignity.²³ Progressive property law scholars have tried to redefine the doctrine’s normative underpinnings to

School Choice Turns Education Into a Commodity, *Atlantic* (Apr. 17, 2017), <https://www.theatlantic.com/education/archive/2017/04/is-school-choice-really-a-form-of-freedom/523089/> (on file with the *Columbia Law Review*).

21. See Katrina M. Wyman, *The New Essentialism in Property*, 9 *J. Legal Analysis* 183, 188 (2017) (“The starting point for the new essentialist project is a powerful critique of the bundle picture.”).

22. *Id.* (citing Shane Nicholas Glackin, *Back to Bundles: Deflating Property Rights, Again*, 20 *Legal Theory* 1, 3 (2014)).

23. Mulvaney & Singer, *supra* note 14, at 631.

promote just allocation of resources.²⁴ In their view, property must incorporate principles of nondiscrimination and realistic opportunities,²⁵ both of which are clearly implicated by equal access to schooling.

These recent calls for a revised understanding of property build on earlier efforts to adapt the doctrine to changing circumstances. One of the most important innovations was to move away from the idea that property had to be a “thing.”²⁶ As Professor Charles Reich recognized, many Americans’ most significant entitlements—what he termed “the new property”—turned on government largesse.²⁷ Far from being private property that guaranteed individual autonomy, the new property left people largely at the mercy of the state, which set the terms and conditions of benefits like social security, unemployment compensation, and public assistance.²⁸ In Reich’s view, public education was the most important form of government largesse because of its great value to the student.²⁹ This seminal work made it possible to conceive of opportunity creation through the schools as a form of entitlement.

Reich recognized that because the new property left individuals deeply dependent on the state, it was critical to revise property doctrine to protect these entitlements.³⁰ Progressive law scholars have answered this call by envisioning a basic safety net that reflects “an ethic of social solidarity” that ensures “resilience against our vulnerabilities.”³¹ While this effort to ensure principles of human dignity springs from interdependency, a sense of shared fate,³² property scholar Margaret Radin relies on personhood to infuse property law with norms of just distribution. In her view, “to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment.”³³ She draws a critical distinction between how closely “resources are bound up with the individual” and how readily they can “be traded or held for trade.”³⁴ Radin concludes that fungible property easily exchanged on the market should enjoy less protection than property closely identified with a person’s autonomy and individuality.³⁵ As Radin explains,

24. *Id.* at 635–38.

25. *Id.* at 643–51.

26. See Wyman, *supra* note 21, at 206–09 (describing calls by property essentialists to resurrect the requirement that property be a thing).

27. Charles A. Reich, *The New Property*, 73 *Yale L.J.* 733, 733 (1964).

28. *Id.* at 734, 737–38.

29. *Id.* at 737.

30. *Id.* at 787.

31. Mulvaney & Singer, *supra* note 14, at 651–53.

32. *Id.* at 651.

33. Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957, 957 (1982).

34. *Id.* at 982.

35. *Id.* at 981–82, 986.

[A] welfare rights theory incorporating property for personhood would suggest not only that government distribute largesse in order to make it possible for people to buy property in which to constitute themselves but would further suggest that government should rearrange property rights so that fungible property of some people does not overwhelm the opportunities of the rest to constitute themselves in property.³⁶

Under Radin's framework, education must enjoy special protection because it creates the conditions for constituting oneself as an individual. By making education compulsory and imposing taxes to support the public schools, the state prioritizes largesse that advances opportunities to develop as a person over private use of those monies in fungible market transactions.

To achieve a fairer allocation of schooling, Professor Shaw treats education as a form of property that should enjoy protection under the Due Process Clause.³⁷ The hybridity of his proposal, reflecting links between property and personhood, is immediately apparent. He wants constitutional protection for "the public right to education," which is simultaneously an individual entitlement.³⁸ Shaw draws especially heavily on Reich's notion of the new property, arguing that states have created an entitlement by establishing public schools, making school attendance compulsory, and heavily regulating the quality of instruction.³⁹ In his view, this comprehensive government largesse gives rise to a vested property interest that allows students to challenge efforts to diminish those rights.⁴⁰ As a result, federal courts should apply heightened scrutiny to official actions that change "constitutions, statutes, regulations, curricula, and even 'rules or understandings' that establish the 'legitimate claim of entitlement' to public education."⁴¹ By adopting a public-regarding notion of an individual entitlement, Shaw repackages property as a means to promote inclusive education.

Efforts to reconceptualize property reveal what a protean concept it can be. In the face of growing inequality, progressives have tried to redefine property to advance a just distribution of resources, including the opportunity to receive an education. All of these innovations make property a more capacious concept, expanding its relevance to schooling and equity. Even so, some critics still find that property remains an inadequate foundation for advancing educational opportunity, as the next section demonstrates.

2. *The Exclusionary Effects of Characterizing Education as Property.* — For all the hopeful accounts of a new property that can advance progressive

36. *Id.* at 990.

37. Shaw, *supra* note 4, at 1186–87.

38. *Id.*

39. *Id.* at 1215–20.

40. *Id.* at 1189.

41. *Id.* at 1228 (footnotes omitted).

values, some scholars remain convinced that it will continue to be a force for exclusion and inequality.⁴² Of particular interest are accounts of how property-like concepts lead to opportunity hoarding in public schools, contribute to patterns of racial subordination, and entrench stark differences based on citizenship status. Professor LaToya Baldwin Clark's work exemplifies efforts to conceptualize education as property to explain exclusionary practices like opportunity hoarding in public schools.⁴³ She has identified "stealing education" as a crime that makes sense only "if stakeholders regard education as a property right bearing the essential functions of property, including the right to exclude."⁴⁴ The crime of stealing education turns heavily on residency in a school district. That is, a violation occurs when a parent knowingly makes a false statement about the family's principal place of residence to enroll a child in a public school outside the neighborhood.⁴⁵ Baldwin Clark argues that these stealing-education statutes convert education into a traditional form of property because they treat it as transferrable, confer the right of use and enjoyment, and allow the lawful exclusion of others.⁴⁶ As she explains, education is transferrable because taxpayers convey the right to attend neighborhood schools to resident children and deny it to nonresident children.⁴⁷ Education is for exclusive enjoyment because "taxpayers, and taxpayers only, should receive the benefit of their taxes," which allows for "the exclusion of nonresidents."⁴⁸ Finally, laws that criminalize stealing education create a right to exclude nonresident children through official surveillance and state prosecution.⁴⁹

Baldwin Clark contends that the commodification of schooling exacerbates both race and class inequality. In her view, "communities justify the unequal system that hoards opportunity by conceiving of education as property."⁵⁰ These justifications often rest on a "master narrative" of "Black cultural inferiority."⁵¹ Although residency itself is a facially neutral basis for excluding students, Baldwin Clark believes that prosecutions for stealing education are supported by stereotypical assumptions about Black families as interlopers who diminish the quality of schooling in the district.⁵² Moreover, she concludes that although school officials use the race-neutral language of residency to justify enforcement actions, "they

42. See, e.g., Wyman, *supra* note 21, at 185.

43. Baldwin Clark, *Education as Property*, *supra* note 7, at 398, 401–02; Baldwin Clark, *Stealing Education*, *supra* note 7, at 575.

44. Baldwin Clark, *Education as Property*, *supra* note 7, at 402.

45. *Id.* at 405–06; Baldwin Clark, *Stealing Education*, *supra* note 7, at 589–97.

46. Baldwin Clark, *Education as Property*, *supra* note 7, at 410.

47. *Id.* at 411.

48. *Id.* at 413.

49. *Id.* at 416–20.

50. Baldwin Clark, *Stealing Education*, *supra* note 7, at 598.

51. *Id.* at 600.

52. *Id.* at 605–17.

most certainly know that school funding inextricably connects to race and class precisely because of the relationship between property and race-class residential segregation.”⁵³ Judges, too, Baldwin Clark argues, must be aware that “constitutionalizing local administration of education is far from race-neutral or class-neutral given its race-class-conscious pedigree.”⁵⁴

At this juncture, Baldwin Clark’s analysis of residency requirements as a form of race- and class-based subordination intersects with the work of critical race scholar Cheryl Harris. Harris argues that whiteness itself is property.⁵⁵ Harris, like Radin, departs from conventional notions of property by extending the concept to an intangible property interest closely linked to personhood and identity.⁵⁶ Harris claims that the “reputational interest in being regarded as white” is “a thing of significant value,” that is, “a form of status property.”⁵⁷ In fact, people have used and enjoyed their property interest in whiteness “whenever [they] took advantage of the privileges accorded white people simply by virtue of their whiteness.”⁵⁸ In other ways, Harris’s account of property is quite traditional: She examines exclusive rights of possession, use, and disposition; the right to transfer or alienate; the right to use and enjoyment; and the right to exclude others.⁵⁹ Harris contends that even if whiteness is inalienable, it can still qualify as a form of property with “perceived enhanced value” because of its centrality to personal identity.⁶⁰ Significantly, she finds that “[t]he right to exclude was the central principle . . . of whiteness as identity” and that legal avenues were available to enforce this right.⁶¹ Although a right to exclude was evident during slavery and Jim Crow segregation, Harris asserts that purportedly race-neutral means still can be deployed to protect a property interest in whiteness.⁶² Like Baldwin Clark, Harris treats property-like concepts as tools for perpetuating inequality that have “allowed expectations that originated in injustice to be naturalized and legitimated.”⁶³

These discussions of education and race as forms of exclusionary property are heavily focused on the United States. In the analysis of whiteness as property, Harris alludes to the ways in which white identity rests on “aspects of citizenship that were all the more valued because they were

53. *Id.* at 623.

54. *Id.*

55. Cheryl I. Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1707, 1709 (1993).

56. *Id.* at 1724–25.

57. *Id.* at 1734.

58. *Id.*

59. *Id.* at 1731.

60. *Id.* at 1734.

61. *Id.* at 1736.

62. *Id.* at 1766, 1778.

63. *Id.* at 1777.

denied to others.”⁶⁴ She does this, however, to highlight the second-class citizenship that permitted racial subordination to persist in the United States. Other scholars have gone considerably farther in characterizing citizenship as a form of inherited property.⁶⁵ In particular, legal scholars Ayelet Shachar and Ran Hirschl argue that birthright citizenship laws allocate political membership based on parentage and territoriality and thus qualify as a form of inherited property.⁶⁶ In their view, these laws “distribute[] opportunity on a global scale” because:

In a world where membership in different political communities translates into very different starting points in life, upholding the legal connection between birth and political membership clearly benefits the interests of some (heirs of membership titles in well-off polities), while providing little hope for others (those who do not share a similar ‘birthright’).⁶⁷

In short, citizenship serves a gatekeeping function that permits global haves to exclude the global have-nots.⁶⁸ This gatekeeping produces vast disparities in, among other things, educational attainment and achievement between developing and developed nations.⁶⁹

In analogizing birthright citizenship to property, Shachar and Hirschl acknowledge that “[p]roperty is notorious for escaping any simple or unidimensional definition.”⁷⁰ In their view, property should be understood as “a human-made and multi-faceted institution that creates and maintains certain *relations* among individuals in reference to things.”⁷¹ This reconceptualization of property rejects narrow concepts of market alienability and instead focuses on property as a web of social relationships.⁷² Shachar and Hirschl define citizenship as perhaps the ultimate exemplar of the new property: “a status-entitlement that is dispensed by the state, an entitlement that bestows a host of goods and benefits to its beholders.”⁷³ Though communally generated, the claim to birthright citizenship belongs to individuals.⁷⁴

Property rules govern access to scarce resources, and birthright citizenship is a prime example of the power to exclude.⁷⁵ The state jealously guards its borders, restricting entry by “those arriving from low-income or

64. *Id.* at 1744.

65. See Ayelet Shachar & Ran Hirschl, *Citizenship as Inherited Property*, 35 *Pol. Theory* 253, 254 (2007).

66. *Id.*

67. *Id.* at 254–55.

68. *Id.* at 255.

69. *Id.* at 257.

70. *Id.* at 259.

71. *Id.*

72. *Id.* at 262.

73. *Id.* at 261.

74. *Id.* at 262.

75. *Id.* at 260.

politically unstable countries.”⁷⁶ Reflecting concerns of progressive law scholars, Shachar and Hirschl believe that citizenship can perform an “opportunity-enhancing function” for those who enjoy its benefits.⁷⁷ Citizens have a right not to be excluded, which can include “a fair share of equal liberties, access to public goods, and non-discriminatory participation in economic and labor markets” or, more broadly, a right to the mitigation of inequalities or the provision of basic necessities for a decent existence.⁷⁸ At the same time, though, birthright citizenship can become the basis for opportunity hoarding as it takes on the dimensions of an entailed estate, one that provides for hereditary transfer of power and wealth.⁷⁹ In Shachar and Hirschl’s view, the deep inequalities engendered by citizenship as property should be redressed, although their analysis recognizes the difficulty of persuading “the reluctant citizens of wealthy polities” to forego “their ‘tax-free’ membership inheritance.”⁸⁰

For this group of scholars, property is synonymous with a range of practices that entrench inequality in neighborhood schools, the nation-state, and the world. The power to subordinate lies in the emphasis on an individual right of enjoyment and the authority to exclude others from that enjoyment. This individualistic framework legitimates opportunity hoarding as a right, one that is not tempered by concerns about the greater good or distributive justice. For that reason, the prospects for property-like concepts to advance progressive values seem dim. Those doubts have prompted some reformers to embrace alternative frameworks, as described in the next section.

B. *Alternative Frameworks that Reject Education as Simply a Property Interest*

For some scholars, treating education as a property interest impoverishes an understanding of schooling’s central role in advancing societal well-being and human flourishing. As a result, they use alternative frameworks that transcend the imagery of the market. For those who conceive of education as a public good, schooling generates benefits that cannot be captured by looking solely to individual student gains. Ignoring collective benefits by characterizing education as solely a private good significantly undervalues it. For others, educational access cannot be reduced to dollars and cents because it is foundational to being fully human. Education therefore is a human right, a dignitary imperative that defies commodification.

1. *Education as a Public Good.* — Critics of education as property bemoan the ways in which “[n]eoliberalism has positioned itself as the

76. Id. at 266.

77. Id. at 267.

78. Id. at 268.

79. Id. at 269–74.

80. Id. at 281.

arbiter of common sense in education, and substantially eroded the mutuality that defines the unique character of education as a social right.⁸¹ For them, education is a public good—one that yields broad societal benefits and not just individual advantages. Some definitions of education as a public good are still tethered to traditional conceptions of property, which emphasize the right to enjoyment and the right to exclude. According to this view, education qualifies as a public good only if it is both nonrivalrous and nonexcludable.⁸² As economists explain, “consumption of a nonrivalrous good does not in any way affect another individual’s opportunity to consume that good,” while a nonexcludable good is something “that can’t be excluded from someone’s use.”⁸³ Because overcrowding in public schools diminishes educational quality and because schools restrict access based on criteria like residency, neighborhood schools lack the defining characteristics of a public good.

But this purely market-based definition ignores the possibility that education can be a public good because it generates collective benefits in addition to individual gains.⁸⁴ The magnitude of these collective benefits can be hard to measure, but there may be widespread consensus that, for example, schooling promotes not only improved employment prospects for students but also enhanced civic engagement that, in turn, produces better political outcomes.⁸⁵ Under this framework, opportunity hoarding leads not only to individual harm but also to social injury by depriving communities of benefits that would come with a more equitable distribution of quality education.

In some instances, the collective advantages of schooling are linked to democratic integrity. Schools can play an important role in cultivating the solidarity necessary for diverse democracies to function. According to political philosopher Will Kymlicka, national solidarity is foundational to a welfare state that provides for basic needs because “justice amongst members is egalitarian, whereas justice to strangers is humanitarian, and social justice in this sense arguably depends on bounded solidarities.”⁸⁶ Unfortunately, those bounded solidarities create “endemic risks for all those who are not seen as belonging to the nation, including indigenous peoples,

81. Murphy, *supra* note 17, at 98.

82. See Matthew T. Lambert, *Privatization and the Public Good: Public Universities in the Balance* 79 (2014); Simon Marginson, *Higher Education and the Public Good*, 65 *Higher Educ. Q.* 411, 417–18 (2011); Sandy Baum & Michael S. McPherson, *Is Education a Public Good or a Private Good?*, *Chron. Higher Educ.* (Jan. 18, 2011), <https://www.chronicle.com/blogs/innovations/is-education-a-public-good-or-a-private-good> [<https://perma.cc/6FAC-ZTZF>].

83. Lambert, *supra* note 82, at 79.

84. *Id.*

85. See *id.* at 80–81. This assumption lies at the heart of the description of the foundational importance of education in *Brown v. Board of Education*, 387 U.S. 483, 493 (1954).

86. Will Kymlicka, *Solidarity in Diverse Societies: Beyond Neoliberal Multiculturalism and Welfare Chauvinism*, 3 *Compar. Migration Stud.*, no. 17, 2015, at 4.

substate national groups[,] and immigrants.”⁸⁷ Assumptions about the untrustworthiness and unfitness of these groups is bolstered by social stigma and racialization.⁸⁸ As a result, trade-offs arise between the multiculturalism necessary to legitimate liberal nationalism and the strong bonds of nationhood essential to secure stability and solidarity.⁸⁹

Due to the need for bounded solidarities, nation-states face two unsatisfactory choices: neoliberal multiculturalism (that is, solidarity without inclusion) or welfare chauvinism (that is, inclusion without solidarity).⁹⁰ In an educational setting, these two choices are illustrated by Baldwin Clark’s account of education as property. When a community rigorously enforces its residency requirements to prevent nonresident parents from stealing education, the school district achieves solidarity without inclusion. Indeed, a sense of insular identity is expressed through the exclusionary practices.⁹¹ At the same time, when Black children qualify as residents eligible to enroll in a neighborhood school, schools can track them by perceived ability in ways that produce racially identifiable classrooms.⁹² These assignment patterns reflect inclusion without solidarity as students become entrenched in separate and unequal educational settings.

Kymlicka’s preferred state is one of inclusive solidarity, though he wonders whether such an outcome is even possible.⁹³ The prospects are hindered by forces of commodification that emphasize individualism and undermine solidarity.⁹⁴ Baldwin Clark’s work demonstrates how those impulses operate in prosecutions for stealing education, while Kymlicka’s account pays especially close attention to the treatment of immigrants. In his view, nation-states must “develop . . . a form of multiculturalism that enables immigrants to express their culture and identity as modes of participating and contributing to the national society.”⁹⁵ This “multicultural liberal nationalism” characterizes immigrants as permanent residents and future citizens rather than temporary migrants.⁹⁶ That characterization in turn leads to widespread recognition that “permanent residents and future citizens have a clear self-interest in investing in society, becoming members, and contributing to it.”⁹⁷ A sense of membership allows for norms of reciprocity: Immigrants with a long-term stake belong and are included because they reciprocate through their own contributions to the

87. *Id.* at 5.

88. *See id.*

89. *See id.* at 6.

90. *See id.* at 8.

91. *See* Baldwin Clark, *Stealing Education*, *supra* note 7, at 628–29.

92. *Id.* at 627–28.

93. Kymlicka, *supra* note 86, at 8.

94. *Id.*

95. *Id.* at 12.

96. *Id.* at 13.

97. *Id.*

nation-building enterprise.⁹⁸ As Kymlicka makes clear, multicultural liberal nationalism supports the full inclusion of immigrant children in the public schools.

2. *Education as a Human Right.* — Although some scholars transcend a framework that treats education as property by highlighting schooling's broader social benefits, others understand education as an individual right but reject the inherently privatizing tendencies of property-like entitlements. According to this view, privatization can weaken claims to personhood—or, as Hannah Arendt put it, “the right to have rights”—by diminishing the public sphere and “transforming the foundations of citizenship from social and political to contractual and civil.”⁹⁹ As a result, those who treat education as a human right insist on nonnegotiable conditions of dignity and personhood. Human rights scholars like Katarina Tomaševski reject an approach that turns education, which should be “affirmed as each child's birthright,” into “a long-term development goal” by avoiding “the language of human rights or public responsibilities.”¹⁰⁰ Under Tomaševski's framework, free and compulsory education for all is a minimum condition for human flourishing, which government is obligated to provide.¹⁰¹ Respecting this obligation is essential because the importance of the right to education reaches far beyond education itself. Many individual rights are beyond the grasp of those who have been deprived of education, especially rights associated with employment and social security. Education operates as a multiplier, enhancing the enjoyment of all individual rights and freedoms where the right to education is effectively guaranteed, while depriving people of the enjoyment of many rights and freedoms where the right to education is denied or violated.¹⁰²

This conception of education as a human right resonates with efforts to recast property to include minimum principles of distributive justice that preserve human dignity. However, human rights scholars treat the conditions for personal flourishing as axiomatic and not merely constraints on the worst excesses of a market economy. Like Reich, Tomaševski understands education as an essential form of government largesse, but she rejects his concern that dependency on the state will leave individuals vulnerable to government overreach. Instead, she sees an educated citizenry as a critical safeguard against official abuse.¹⁰³

For Tomaševski, property-like concepts have prevented the United States from recognizing a fundamental right to education. In contrast to her view that education is essential to human flourishing, the U.S.

98. See *id.* at 12–13.

99. Murphy, *supra* note 17, at 98.

100. Katarina Tomasevski, *The State of the Right to Education Worldwide: Free or Fee: 2006 Global Report*, at xx (2006), http://www.katarinatomasevski.com/images/Global_Report.pdf [<https://perma.cc/H7CG-BCEK>].

101. See Tomaševski, *Human Rights Obligations*, *supra* note 16, at 5.

102. *Id.* at 10.

103. *Id.* at 17.

Supreme Court has rejected the claim that a right to education is preservative of other rights, including the right to free speech and the right to vote.¹⁰⁴ Instead, the Court has adopted a hands-off approach to issues involving access to education, concluding that these matters are for taxpayers and state and local governments to decide. As Tomaševski observes:

Education is commonly financed out of general taxation, which in some countries places the mobilization of funding for education beyond the remit of domestic courts. A typical example is the United States, where economic and social rights are not recognized and, furthermore, the Supreme Court has declared taxation as well as economic and social policy to lie beyond its purview.¹⁰⁵

In short, Tomaševski argues, neoliberal pressures for commodification—in the form of taxpayer entitlements—have crimped the United States's ability to recognize a human right to education.

As this discussion demonstrates, property and education have a complicated relationship. Progressives have tried to reconceive of property to incorporate norms of distributive fairness, which include access to educational opportunities. Other scholars are convinced that traditional notions of private property, rooted in exclusive rights of enjoyment, are deeply entrenched and designed to perpetuate inequality. As a result, property-like claims about education exist alongside alternative frameworks that reject the commodification of education altogether. Whether education is treated like a public good or a human right, it is not simply an artifact of individual property entitlements or market forces.

This complexity means that advocates of educational opportunity have a range of strategies at their disposal. At a theoretical level, these approaches appear to be at loggerheads. A property-like entitlement, even a progressive one, can elevate the importance of education as a market transaction, obscuring its status as a nonnegotiable, noncommodifiable precondition for human flourishing. Meanwhile, the emphasis on an individual right to education can eclipse calls for a collective approach that recognizes schooling's broad social benefits. For litigators, however, theoretical purity must cede to the imperative of prevailing in court. Advocates can draw on different conceptions of educational entitlement, fit them into the appropriate legal claim, and plead all of them in the alternative. As Part II shows, this is precisely what happened in *Plyler v. Doe*. Property-like entitlements worked alongside visions of the public good and fundamental human dignity to produce a surprising victory.

104. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35–37 (1973) (declining to recognize education as “a constitutionally protected prerequisite to the meaningful exercise of either right”).

105. Tomaševski, *Human Rights Obligations*, *supra* note 16, at 20.

II. THE CASE OF *PLYLER V. DOE*

Professor Shaw claims that *Plyler* exemplifies how property-like entitlements can safeguard a right to education.¹⁰⁶ In his view, the Justices struck down a Texas law allowing school districts to bar undocumented students or charge them tuition because the statute, in effect, deprived children of a vested property interest in a previously free and open system of public education.¹⁰⁷ Shaw's is far from the only plausible interpretation of *Plyler's* reasoning. Because the Justices cataloged the statute's social harms in terms of "unemployment, welfare, and crime" that would result from having "a subclass of illiterates" in the community,¹⁰⁸ some scholars would argue that the Court was cognizant of education's importance as a public good. In addition, the Court observed that public education "has a fundamental role in maintaining the fabric of our society."¹⁰⁹ For Kymlicka, that language suggests a commitment to inclusive solidarity as a hallmark of multicultural liberalism.¹¹⁰ To complicate the picture even further, *Plyler* has been characterized as the "high water mark for constitutional personhood" in the Court's jurisprudence, suggesting that a human right was at stake.¹¹¹ Precisely because *Plyler* implicates notions of education as property and alternatives to that concept, it provides an intriguing case in which to evaluate the impact of these different frameworks. This Part turns to an in-depth exploration of the litigation and the role that different normative arguments played in allowing the Justices to find that Texas violated the constitutional rights of undocumented children under the Equal Protection Clause.

A. *The Plyler Litigation: A Surprising Victory and a Range of Rationales*

In *Plyler v. Doe*, the plaintiffs challenged an amendment to Texas's school funding formula for undocumented students.¹¹² Previously, the state had relied on head counts of all students (that is, average daily attendance) to calculate the amount of state support that a public school would receive. In 1975, the legislature prohibited schools from receiving those funds for undocumented students.¹¹³ To avoid financial hardship in

106. Shaw, *supra* note 4, at 1220–26.

107. *Id.*

108. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

109. *Id.* at 221.

110. See *supra* notes 94–98 and accompanying text.

111. AALS Education Law Section 2021 Annual Meeting Session (Co-Sponsored With the Section on Immigration Law): The Future of *Plyler v. Doe* on Its 40th Anniversary, AALS Educ. L. Section (Ass'n Am. L. Schs., D.C.), 2021, at 2, 4 (citing comments of Professor Rachel F. Moran).

112. *Plyler*, 457 U.S. at 202.

113. *Id.* at 205 & n.1.

districts serving these children, the statute allowed schools to bar undocumented pupils altogether or to charge them annual tuition of \$1,000.¹¹⁴ Two lawsuits were filed on behalf of undocumented school-aged youth that challenged the measure as unconstitutional because it violated the Supremacy Clause and the Equal Protection Clause.¹¹⁵ The Eastern District of Texas agreed on both grounds, and the U.S. Supreme Court ultimately affirmed based on equal protection arguments without reaching the preemption claims.¹¹⁶ The victory was surprising because the Justices had previously declined to find a constitutionally protected right to attend the public schools when children alleged unequal treatment based on wealth and language.¹¹⁷

The Court's analysis sidestepped significant issues even as it struck down the Texas statute. After concluding that the undocumented students were persons within the state's jurisdiction and thus entitled to equal protection,¹¹⁸ the majority declined to strengthen constitutional safeguards by declaring alienage a suspect class or education a fundamental right.¹¹⁹ Instead, the Court applied a rational relation test, the most lenient standard of constitutional review. In finding the statute irrational, the majority pointed to harms inflicted on innocent children as well as significant costs to the nation of creating a subclass of illiterate people.¹²⁰ The Court concluded that these damaging consequences outweighed the state's interest in conserving resources and deterring the flow of undocumented migrants.¹²¹ This balancing approach produced a majority opinion that rested on a number of rationales, some related to property-like entitlements and some not.

With respect to property-like entitlements, undocumented children held two statuses that worked at cross-purposes. They were residents of the school district, but they were not legally present in the United States. The children asserted that they should be able to attend the neighborhood school based on residency, but officials countered that they were ineligible because they lacked citizenship (or even permanent residence). These competing claims were complicated by the allocation of authority to define each status. While Texas was able to decide who qualified as a resident by

114. *Id.* at 206 n.2; Michael A. Olivas, *Plyler v. Doe*, Tex. St. Hist. Ass'n (Apr. 7, 2022), <https://www.tshaonline.org/handbook/entries/plyler-v-doe> [<https://perma.cc/Y757-4ELJ>].

115. *Plyler*, 457 U.S. at 208–10.

116. *Id.* at 210 n.8, 230.

117. *Lau v. Nichols*, 414 U.S. 563, 563–66 (1974) (refusing to find an Equal Protection Clause violation due to alleged unequal treatment based on language); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973) (holding that wealth is not a suspect classification).

118. *Plyler*, 457 U.S. at 210–16.

119. *Id.* at 220–23.

120. *Id.* at 223–24.

121. *Id.* at 227–30.

drawing school district boundaries, the federal government determined eligibility for citizenship and legal immigration status.

The lawsuits challenged how these statuses affected an undocumented child's access to public education. The Court allowed children to benefit from their parents' status as residents of the school district but questioned any taint of illegality for innocent children whose parents had entered the country illegally. Thus, residency could be a transferrable privilege, but it was not clear that undocumented status should be a heritable source of stigma. The Court also considered factors other than property-like claims. By pairing individual entitlements based on residency with demands for equal protection, the litigation made it possible to address the broader social importance of education. Although the U.S. Supreme Court declined to find a right to basic education, the intertwining factors in the case permitted it to weigh the collective harms that might be inflicted on society and the body politic if undocumented children were denied schooling. The following sections explore each of these dynamics.

B. *The Role of Property-Like Entitlements in Plyler*

There were two key elements of *Plyler* that turned on property-like entitlements. The first drew on a conventional notion, residency, that emphasized exclusive rights of enjoyment for neighborhood children to attend the public schools. Undocumented families were able to deploy this concept successfully to defend a right of educational access. The second reflected the notion of the new property, which turned on education as a form of government largesse. Here, however, the battle was over whether federal or state officials would get to set the terms for school enrollment. This conflict revealed a largely neglected complication of the new property, the insecurities that arise when multiple government actors claim authority to confer or deny largesse.

1. *How Residency Trumped Undocumented Status.* — Property-based concepts certainly played a role in *Plyler*. Although Baldwin Clark's work identifies the exclusionary implications of a property-like interest in residency,¹²² Shaw contends that *Plyler* illustrated the inclusionary potential of education as property.¹²³ A close examination of the case shows that both dynamics were at play. The attorneys challenging the Texas law argued that undocumented families had earned the right to send their children to public schools because they "in general contribute to the tax base of the schools in the same manner as other parents."¹²⁴ Parents did this either by paying property taxes directly as homeowners or indirectly as renters, and they also contributed through sales taxes.¹²⁵ There was some ambivalence

122. See *supra* notes 43–49 and accompanying text.

123. See *supra* notes 106–107 and accompanying text.

124. Appellees' Brief on the Merits at 3, *Plyler*, 457 U.S. 202 (No. 80-1538), 1980 WL 339676 [hereinafter Brief for Appellees].

125. *Id.* at 37.

on this point, however. Advocates questioned any attempt to turn public education into a fee-for-service arrangement, observing that “[i]t has never been permissible to tie access to State services to tax contributions.”¹²⁶ Even so, undocumented families had to address the issue because Texas impermissibly premised its legislation on “an unstated foundation . . . that services can be withdrawn from those children because of their lack of tax contribution.”¹²⁷

Interestingly, claims about the need to provide taxpaying families with access to quality education were echoed in an amicus brief filed by the Edgewood Independent School District.¹²⁸ Edgewood parents, who were predominantly Mexican American, had previously brought suit in *San Antonio Independent School District v. Rodriguez*, alleging that Texas’s system of school financing deprived their children of an equal educational opportunity in violation of the Fourteenth Amendment.¹²⁹ The case directly challenged the local property tax system as a denial of the fundamental right to education and a form of wealth discrimination.¹³⁰ The Court ultimately rejected both arguments, leaving open whether the U.S. Constitution guarantees minimum access to education.¹³¹ In doing so, the Justices expressed considerable deference to state and local autonomy over both education and taxation.¹³² At the time that *Plyler* was filed, some advocates saw it as an opportunity to revisit the right to a basic education given that some Texas school districts had effectively barred undocumented students from obtaining any schooling whatsoever.¹³³ This connection may have prompted the Edgewood school district to file an amicus brief in *Plyler*. Drawing on *Rodriguez*, the brief raised issues of tax equity, specifically, that undocumented families were entitled to enroll their children in public schools as taxpayer-consumers who had effectively paid for these services.¹³⁴ Texas did not deny that undocumented families

126. *Id.* at 36.

127. *Id.* at 37.

128. See Amicus Brief of Edgewood Independent School District in Support of Appellees at 10, *Plyler*, 457 U.S. 202 (No. 80-1538), 1981 WL 389976 (“It seems fair to say that if undocumented aliens are subject to the taxing power of the State, which they are, then they should not be denied the public education which is financed by those same taxes.”).

129. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4–5 (1973).

130. *Id.* at 18.

131. *Id.* at 18, 28–29, 30–37.

132. *Id.* at 38–44.

133. See, e.g., Brief of Amicus Curiae American Jewish Committee at 9–10, *Plyler*, 457 U.S. 202 (No. 80-1538), 1981 WL 389972 (“While this Court has never held education to be a fundamental interest, neither has it ruled on a state’s total deprivation of educational opportunities to school-age children within its borders.”).

134. Amicus Brief of Edgewood Independent School District in Support of Appellees, *supra* note 128, at 10; see also Brief of American Friends Service Committee et al., at 3, *Plyler*, 457 U.S. 202 (No. 80-1538), 1981 WL 389637 (“In short, undocumented residents contribute to the wealth of the nation, pay taxes, but are not expected to receive the benefit of their labor.”).

living within the school district paid taxes, whether directly or indirectly.¹³⁵ Instead, the state highlighted the extra expense of educating undocumented children who often arrived with little formal education, could not speak English, and lived in poverty.¹³⁶ That response suggested that under a fee-for-service model, the taxes that undocumented families contributed would not cover the increased costs of educating their children.

In addition, the Texas Attorney General's Office contended that undocumented children could not invoke constitutional protections because they were not persons "within its jurisdiction" for purposes of equal protection law.¹³⁷ Texas conceded that the Supreme Court already had extended protections under the Fourteenth Amendment's Due Process Clause to undocumented immigrants because they were persons.¹³⁸ However, the Equal Protection Clause also required that those persons be within the jurisdiction. According to Texas, because undocumented immigrants had entered the United States illegally, they did not meet this added requirement.¹³⁹ As a result, a Texas statute could properly distinguish between undocumented individuals and those who were citizens or permanent residents.¹⁴⁰ In fact, the Texas Attorney General asserted, legally present residents recognized the distinction and were reluctant to pass "bond issues to build schools for children from Mexico."¹⁴¹

At its core, the state's argument made residency—that is, physical presence in the district—irrelevant when undocumented students remained citizens of Mexico. In fact, Texas pointed out, "the children may remain in their native country or return thereto with or without their parents" to get an education, a result encouraged by the statute.¹⁴² During oral argument, the state attorney general even went so far as to argue that if the Court did not uphold the Texas law, children who lived in Mexico would be able to cross the border and attend public school in the United States.¹⁴³ In response, one of the Justices observed that any child who commuted to a Texas school from Mexico would not reside in the district so that a residency requirement alone would suffice to deal with the problem.¹⁴⁴

An amicus brief filed by several Texas school districts in the lower Rio Grande Valley reinforced the State's arguments. Like the attorney general,

135. See Transcript of Oral Argument at 12–13, *Plyler*, 457 U.S. 202 (No. 80-1538) [hereinafter Transcript of Oral Argument in *Plyler*].

136. Brief for the Appellants at 8–10, *Plyler*, 457 U.S. 202 (No. 80-1538), 1981 WL 389967.

137. *Id.* at 5, 14–17.

138. *Id.* at 14.

139. *Id.* at 14–15, 21–22.

140. *Id.* at 26.

141. *Id.* at 7.

142. Appellants' Reply Brief at 7, *Plyler*, 457 U.S. 202 (No. 80-1538), 1980 WL 339678.

143. Transcript of Oral Argument in *Plyler*, *supra* note 135, at 9–10.

144. *Id.* at 10.

the amici asserted that the relevant classification was “between residents, whether citizens or aliens, and non-residents, whether citizens or aliens.”¹⁴⁵ That is, undocumented children not legally present in the United States could not qualify as residents under Texas law. The districts argued that the children were unable to form the requisite domiciliary intent because they had no expectation of long-term presence while subject to deportation.¹⁴⁶ Echoing the attorney general’s claims, the districts’ brief cited taxpayer resentment at having to fund “the free education of illegal aliens at the expense of those who are legally here”¹⁴⁷ as well as the high costs of educating the undocumented children.¹⁴⁸ Most significantly, the districts insisted that any right to education these students had was one that Mexico was obligated to protect. If the children could not access that right, this was due to their parents’ voluntary choice to “trade[] away” their children’s educational opportunities to pursue economic opportunities in the United States.¹⁴⁹ Any reward for illegal entry, such as free public education, would simply condone lawlessness.¹⁵⁰

In the end, the Supreme Court rejected Texas’s argument that undocumented students were not persons within the state’s jurisdiction. Undocumented children were certainly persons based on any common understanding of the term, and because of their physical presence in Texas, they were subject to its laws.¹⁵¹ Moreover, the Court noted that undocumented pupils were entitled to coextensive protections under the Due Process and Equal Protection Clauses.¹⁵² As the opinion explained, equal protection was essential to abolish “all caste-based and invidious class-based legislation,” an “objective [that] is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless exempted from its protections.”¹⁵³

145. Brief of Amici Curiae School Districts: Harlingen Consolidated Independent School District, Mission Independent School District, Brownsville Independent School District, McAllen Independent School District, and San Benito Independent School District, in Support of Appellants at 3, *Plyler*, 457 U.S. 202 (No. 80-1538), 1981 WL 389992.

146. See *id.* at 7–10.

147. *Id.* at 17.

148. *Id.* at 12 (“The district court in *Doe v. Plyler* found the cost of educating a needy child of Mexican citizenship, whether legally or illegally present, to be thirty to forty percent higher than the cost of educating an ‘average pupil.’” (citing *Doe v. Plyler*, 458 F. Supp. 569, 577 (E.D. Tex. 1978))).

149. *Id.* at 17–18.

150. *Id.* at 18–20.

151. *Plyler*, 457 U.S. at 210, 215.

152. *Id.* at 211.

153. *Id.* at 213. The Solicitor General of the United States also concluded in his brief that undocumented immigrants were persons within the jurisdiction for purposes of the Equal Protection Clause. Brief for the United States as Amicus Curiae in No. 80-1538 and Brief for the United States in No. 80-1934 at 9, 24–26, *Plyler*, 457 U.S. 202 (No. 80-1538), 1981 WL 390001 [hereinafter Brief for the United States].

In short, residency based on physical presence overrode the significance of the children's undocumented status. This was critical to the victory in *Plyler* because it emphasized de facto membership in local communities rather than formal legal categories under federal immigration law. As Professor Linda Bosniak explains,

[T]he law has constructed alienage as a hybrid legal status category that lies at the nexus of two legal and moral worlds. On the one hand, it lies within the world of borders, sovereignty and national community membership. . . .

Yet alienage as a legal category also lies in the world of social relationships among territorially present persons. In this world, government power to impose disabilities on people is substantially constrained. Formal commitments to norms of equal treatment and to the elimination of caste-like status have shaped American public law in important ways over the past several decades. In this world, aliens appear to be at once indistinguishable from citizens and precisely the sort of social group that requires the law's protection.¹⁵⁴

While Baldwin Clark's work emphasizes how residency operates as a form of property to exclude and subordinate,¹⁵⁵ *Plyler* demonstrates how residency can work to deflect the implications of another property-like claim, one rooted in citizenship and legal permanent residency. The Court's framing made de facto membership in the community, through payment of taxes and an obligation to abide by the laws, critical to determining whether undocumented children deserved access to neighborhood schools. At the same time, residency continued to serve exclusionary purposes. As briefs in the case made clear, undocumented children generally resided in districts readily identifiable by ethnicity and poverty.¹⁵⁶ Because of the state's school finance system, these localities often were strapped for resources and struggled to provide a quality education.¹⁵⁷ Indeed, the Edgewood school district filed an amicus brief in part to make this very point.¹⁵⁸ As a result, *Plyler's* reliance on property-like notions of residency could not achieve Kymlicka's vision of inclusive solidarity given ongoing patterns of segregation and stratification in the Texas schools. Even so, the Justices at least rejected solidarity predicated on exclusion of undocumented children from a public education. In the end, as the Edgewood brief suggests, the Court effectively endorsed inclusion

154. Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* 38 (2006).

155. See Baldwin Clark, *Education as Property*, supra note 7, at 398–420; Baldwin Clark, *Stealing Education*, supra note 7, at 570–79.

156. See, e.g., *Brief of Amicus Curiae School Districts: Harlingen Consolidated Independent School District et al.*, supra note 145, at 1–4.

157. *Amicus Brief of Edgewood Independent School District in Support of Appellees*, supra note 128, at 1–4.

158. *Id.*

without solidarity by protecting undocumented students' participation in a system of separate and unequal schooling for poor children of color.

2. *How Preemption and Equal Protection Law Unsettled the Meaning of Education as New Property.* — Drawing on Reich's conception of the new property, Shaw claims that *Plyler* tacitly recognized a student's property interest in a state-provided education.¹⁵⁹ That is, the Justices believed that Texas's decision to alter the terms of its largesse triggered significant due process concerns. Interestingly, *Plyler* reveals a notably distinct complication for the new property: the difficulties that can arise when there are jurisdictional disputes over who determines the scope of government largesse. In *Plyler*, the claims were twofold. Although most scholars have focused on issues surrounding authority over immigration, attorneys for the undocumented children also made a preemption argument based on federal education law. This claim asserted that the U.S. government could set some terms of access to schooling, not through the Due Process Clause but through comprehensive legislation.

According to the plaintiffs, federal education policy had consistently been designed "to assure that those most disadvantaged have a fighting chance to overcome their disabilities."¹⁶⁰ The Texas statute directly contradicted this effort because it would relegate undocumented children to "virtual serfdom."¹⁶¹ As the plaintiffs noted, federal policy at no time excluded undocumented youth, for instance, by underfunding migrant and bilingual education programs.¹⁶² Texas strongly rebuffed these contentions. According to state officials, "[I]t is highly dubious that Congress had as a purpose the education of illegal aliens when it enacted educational programs which must supplement, not supplant basic educational programs."¹⁶³ Federal funds were not directed at basic educational needs, which remained the responsibility of state and local governments.¹⁶⁴ Texas officials thus made clear their primacy over educational decisionmaking, decisively rejecting any federal right to education based on statutory enactments. In short, state officials, not Congress, would set the terms of largesse in providing public schooling.

The preemption issues surrounding immigration policy were considerably thornier for Texas. State officials faced an uphill battle in framing the law as an effort to police national borders because of the combined effects of the Supremacy Clause and the Equal Protection Clause. Under the Supremacy Clause, plaintiffs' counsel argued, the U.S. government had sole authority to enforce the immigration laws, and the Texas statute

159. See Shaw, *supra* note 4, at 1186–1226.

160. Brief for Appellees, *supra* note 124, at 46.

161. *Id.* at 46, 49.

162. *Id.* at 49–51.

163. Appellants' Reply Brief, *supra* note 142, at 4–5.

164. *Id.*

impermissibly infringed on those prerogatives.¹⁶⁵ The plaintiffs' brief emphasized that "[o]nly the Federal Government has the power and right to regulate the flow of persons across a national border."¹⁶⁶ Although conceding that "not every State law that has some effect on immigration is preempted," the brief distinguished between a statute with an incidental and speculative effect on immigration and one with an express purpose to deter immigration.¹⁶⁷ If the Court upheld the law, the plaintiffs warned, many other states might try to regulate immigration, greatly undermining the federal government's authority in matters of international relations.¹⁶⁸

Texas could not easily dispense with the risk of preemption under immigration law. During oral argument, the Texas Attorney General noted that state officials "would like to reduce the incentive for illegal immigration, particularly of families and of school aged children," but "[i]t has been said that we don't have a permissible interest in that regard."¹⁶⁹ In its briefs and during argument, the state made clear that it was forced to act because the federal government had not enforced immigration laws effectively.¹⁷⁰ According to Texas officials, the state had a unique interest because "only Texas has a long international border with Mexico, each side of which is relatively densely populated" and "only Texas must bear the burden of providing an education to children in its public schools."¹⁷¹ Even so, Texas faced something of a catch-22: It could emphasize the need to deter illegal immigration and risk preemption, or it could downplay this objective and substantially weaken its rationale for adopting the law. Before the Supreme Court, the Reagan Administration's brief on behalf of the United States made clear that Texas need not grapple with this dilemma. According to the U.S. Solicitor General, the Texas statute was not preempted by federal law.¹⁷² By then, however, Texas had already been shaping its litigation strategy based on preemption concerns. As a result, it emphasized residency in the jurisdiction rather than immigration status throughout the case. Ultimately, the Court did not reach preemption issues.¹⁷³

Challenges in deploying property-like conceptions of residency and citizenship reflect the complexities of the new property when government itself is fragmented and hierarchical. As Bosniak explains, the federal courts have recognized "a division of labor" among national and state officials in the field of immigration:

165. Brief for Appellees, *supra* note 124, at 42–45.

166. *Id.* at 42.

167. *Id.* at 44.

168. *Id.*

169. Transcript of Oral Argument in *Plyler*, *supra* note 135, at 13.

170. Brief for the Appellants, *supra* note 136, at 5–6, 8; Transcript of Oral Argument in *Plyler*, *supra* note 135, at 14–16.

171. Appellants' Reply Brief, *supra* note 142, at 3.

172. Brief for the United States, *supra* note 153, at 6–8.

173. *Plyler v. Doe*, 457 U.S. 202, 210 n.8 (1982).

Since (the argument goes) the federal government is constitutionally understood to possess the power to regulate matters of immigration and naturalization, courts must yield to its decisions regarding the treatment of noncitizens. States, on the other hand, enjoy no such constitutional power; when states discriminate against aliens, therefore, courts must apply equal protection analysis full force.¹⁷⁴

As a result of this division of labor, Texas's critique of federal efforts to secure the nation's borders was largely ineffectual.

That point is brought home by a colloquy with the state's attorney general about the Immigration and Naturalization Service (INS) during oral argument:

MR. ARNETT: As far as whether we could reasonably expect INS to deport them, we think not. The evidence in this record is that INS gets complaints from citizens all the time that they don't follow, including addresses.

QUESTION: But this is not citizens. This is a state government.

...

QUESTION: You mean INS just paid no attention to a state complaint?

MR. ARNETT: Your Honor, INS apparently doesn't pay much -- INS is so underfunded, it is not INS's problem.¹⁷⁵

Rather than bolster Texas's claim about the need to deter unlawful immigration, one Justice responded that the INS's failures reinforced the opposing side's argument "that these children will remain in the school district because it is just too much of an administrative burden to get them deported, so they are going to be part of the community anyway."¹⁷⁶ The students' long-term presence in turn cast doubt on the propriety of leaving them uneducated.

The Equal Protection Clause further constrained Texas's ability to classify children based on immigration status. Because states had no authority to regulate immigration, officials were subject to heightened scrutiny if they used alienage-based classifications.¹⁷⁷ Once it was clear that undocumented immigrants were persons within the jurisdiction, it was far more difficult for Texas to assert that they could not be residents for purposes of school admissions. According to the plaintiffs, the state's argument that the law classified children based on residency rather than alienage was specious. As their brief explained, state officials "argue that an undocumented person cannot become a resident and that residence requirements are permissible The argument is circular. If undocumented children are 'persons within the jurisdiction' for purposes of the Equal Protection Clause the state cannot say that they are not residents

174. Bosniak, *supra* note 154, at 58–59.

175. Transcript of Oral Argument in *Plyler*, *supra* note 135, at 15–16.

176. *Id.* at 16.

177. *Id.* at 27–29.

because of their status.”¹⁷⁸ On the contrary, these students met traditional residency requirements by living in the school districts for a number of years.¹⁷⁹

Attorneys for the undocumented children argued vigorously that the statute relied on an alienage classification that should trigger strict scrutiny.¹⁸⁰ The “calamit[ous]” denial of public education was one that could be visited only on the “politically powerless” who suffered “arbitrary scapegoating” and had to “suffer injustice silently.”¹⁸¹ Texas officials countered that the rational relation test rather than strict scrutiny should apply.¹⁸² The Texas Attorney General insisted that any heightened standard of review based on alienage be limited to legally present immigrants because only they should be recognized as legitimate members of the community.¹⁸³ As Texas explained in its brief, because the statute’s classification turned on residency, it was “entirely consistent with the congressional determination to exclude the aliens from admission.”¹⁸⁴ That is, the state’s action comported with federal law because it was simply a smaller exercise of the power to exclude: that is, the state could keep undocumented children out of the public schools when the children could be excluded from the jurisdiction altogether.

The Court ultimately agreed that “[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’”¹⁸⁵ Although the decision purported to apply a rational relation test, the majority appeared to adopt a more exacting approach sometimes called rational relation with bite.¹⁸⁶ The Justices rejected Texas’s claim “that the undocumented status of these children *vel non* establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents.”¹⁸⁷ Echoing the lower court’s findings, the Justices concluded that the statute was a “ludicrously ineffectual attempt to stem the tide of illegal immigration.”¹⁸⁸ Moreover, there was no basis for singling out undocumented children because of any special burdens they placed on the public educational system. Texas offered no persuasive evidence that the children’s presence imposed unique costs or damaged the quality of education for

178. *Id.* at 28–29.

179. *Id.* at 29.

180. Brief for Appellees, *supra* note 124, at 27.

181. *Id.*

182. Brief for the Appellants, *supra* note 136, at 25.

183. *Id.* at 24–25.

184. *Id.* at 24.

185. *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

186. See Dennis J. Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 Sup. Ct. Rev. 167, 193 (describing *Plyler v. Doe* as evidence of the Court’s willingness to put “real ‘bite’ in the ‘mere rationality’ standard”).

187. *Plyler*, 457 U.S. at 224.

188. *Id.* at 228 (citing *Doe v. Plyler*, 458 F. Supp. 569, 585 (E.D. Tex. 1978)).

their peers.¹⁸⁹ Nor was it appropriate to bar them because they might not remain in Texas, given that many children could leave the state at some point during their lives.¹⁹⁰ In fact, many undocumented children were likely to “remain in this country indefinitely,” and some would “become lawful residents or citizens of the United States.”¹⁹¹ The prospect of long-term residency left the Court unwilling to exclude undocumented children because of their lack of citizenship or permanent resident status. In fact, the Court expressed considerable concern about the harm to “the innocent children who are [the law’s] victims” if they were to be relegated to a “subclass of illiterates.”¹⁹²

C. *Alternative Frameworks in Plyler*

Although property-like entitlements played a role in the *Plyler* litigation, they were far from the only principles at work. One of the most prominent elements of the opinion related to childhood innocence, which served to trump any claim that the stigma of undocumented status was a heritable disadvantage. In addition, the Court went out of its way to identify the social harms, both to public order and to democratic integrity, that might result if children were denied an education. In this way, the Justices acknowledged the collective stake in providing students with meaningful opportunities to learn.

1. *How the Innocence of Children Interrupted the Heritability of Parental Status.* — The role of childhood innocence in interrupting heritable stigma and dispossession is a significant feature of *Plyler* that has gone largely unremarked in discussions of education as property. Although commentators argue that birthright citizenship is an inherited form of property, *Plyler* makes clear that the converse need not be true. In fact, the Court used innocence to interrupt the intergenerational transfer of a stigmatized status, even as citizenship remained a tremendous source of privilege. This point emerged most clearly in analogies drawn to the treatment of illegitimate children under equal protection law. As the plaintiffs’ attorneys noted, their clients “have neither the power nor the right to determine their place of residence.”¹⁹³ Because “in our jurisprudence guilt is personal,”¹⁹⁴ these children, who had no choice in the matter, should not be punished for decisions that their parents made. For both undocumented and illegitimate youth, “[t]he parents have the ability to conform their conduct to societal norms but their children can affect neither their

189. *Id.* at 229.

190. *Id.* at 229–30.

191. *Id.* at 230.

192. *Id.* at 224, 230.

193. Brief for Appellees, *supra* note 124, at 24.

194. *Id.* (citing *Healy v. James*, 408 U.S. 169, 185–86 (1972); *Robinson v. California*, 370 U.S. 660, 666–67 (1962); *Scales v. United States*, 367 U.S. 203, 224 (1961)).

parents['] conduct nor their own status.”¹⁹⁵ Because Texas law penalized undocumented students for their parents’ acts, turning illegality into an inherited form of stigma, the attorneys argued that the Court should apply heightened review.¹⁹⁶ The Texas Attorney General rejected this claim because illegitimacy statutes could not prevent the birth out of wedlock, which already had taken place. By contrast, the Texas school finance statute could shape behavior because “the children may remain in their native country or return thereto with or without their parents.”¹⁹⁷ In short, as the attorney general explained during oral argument, “[t]he parents are free to effect the conduct in question [that is, illegal presence in the United States] at this time.”¹⁹⁸

The majority opinion cited the illegitimacy cases to conclude that undocumented children have no control over their parents’ conduct and that “[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”¹⁹⁹ The dissent took issue with the majority’s approach, noting that the Equal Protection Clause was “not an all-encompassing ‘equalizer’ designed to eradicate every distinction for which persons are not ‘responsible.’”²⁰⁰ On the contrary, legislatures could use classifications over which individuals have no control, such as mental health.²⁰¹ Moreover, the dissent noted, illegitimate children suffer due to a status assigned at birth, but undocumented children are penalized for their own illegal entry into the country.²⁰²

As Bosniak points out, the *Plyler* Court displayed considerable ambivalence about undocumented immigrants.²⁰³ In her view, the Justices put much of the blame for the children’s presence on their parents. Because the children’s status was acquired “involuntarily,” the Court concluded that they should not bear the consequences of their parents’ decision to enter the United States illegally.²⁰⁴ In fact, Bosniak argues that

[h]ad the case involved denial of state benefits to undocumented adults (whose undocumented status, it is assumed, would be the result of their own, voluntary, action), and had the case not specifically involved educational rights (which the Court treats as

195. *Id.* at 26 (citing *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

196. *Id.* at 24.

197. Appellants’ Reply Brief, *supra* note 142, at 7.

198. Transcript of Oral Argument in *Plyler*, *supra* note 135, at 69.

199. *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

200. *Id.* at 245 (Burger, C.J., dissenting).

201. *Id.*

202. *Id.* at 246.

203. Bosniak, *supra* note 154, at 66.

204. *Id.*

fundamentally important in [*Plyler*]), the outcome might well have differed very little from the one urged by the dissent.²⁰⁵

From the standpoint of a property-based approach, the *Plyler* decision left the notion of citizenship as heritable privilege largely intact. The Court nowhere questioned the substantial advantages that come with birthright citizenship. For example, children born in this country to undocumented parents can claim citizenship and its attendant advantages.²⁰⁶ In fact, undocumented students often come from mixed-status families in which some of their siblings are U.S. citizens.²⁰⁷ Moreover, during oral argument, the Court expressed the view that Texas could bar Mexican children residing across the border from attending the state's elementary and secondary schools. These students would have to be satisfied with the educational opportunities afforded to them in Mexico.²⁰⁸ At the same time, for undocumented children residing in the United States, the Justices recognized that notions of citizenship as heritable privilege can become dislocated and destabilized.²⁰⁹ The Court accorded these students a key privilege of birthright and naturalized citizens: attendance at a public school free of charge.²¹⁰ In doing so, *Plyler* complicated the national identity and loyalty of these youth. By attending public schools, undocumented students went through rituals of political socialization alongside their citizen and permanent resident classmates. As one undocumented youth explained:

They say go back to your country, but I don't even know the Mexican national anthem. It's kind of embarrassing around my cousins from Mexico, but I didn't grow up there. I sure do know all of our national songs. 'My Country, 'Tis of Thee,' 'America the Beautiful.' We learned them in school. It's like every American kid knows those songs because we learn them in school. It says something about me, where I'm from. It connects us.²¹¹

As sociologist Roberto G. Gonzales has explained, high school graduation is momentous for these students. After enjoying the protections of

205. *Id.* (citation omitted).

206. U.S. Const. amend. XIV. Recently, a member of Congress from Texas introduced a bill to redefine birthright citizenship so that it does not extend to the children of undocumented immigrants. See Birthright Citizenship Act of 2021, H.R. 140, 117th Cong. (2021).

207. See Randy Capps, Michael Fix & Jie Zong, Migration Pol'y Inst., Fact Sheet: A Profile of U.S. Children With Unauthorized Immigrant Parents 4 (2016), <https://www.migrationpolicy.org/sites/default/files/publications/ChildrenofUnauthorizedFactSheet-FINAL.pdf> [<https://perma.cc/EZZ4-HQRL>].

208. Transcript of Oral Argument in *Plyler*, *supra* note 135, at 9–11.

209. *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982) (describing how lax enforcement of immigration laws and employment restrictions created a “substantial ‘shadow population’ of illegal immigrants—numbering in the millions” and “raised the specter of a permanent underclass,” which posed “difficult problems for a Nation that prides itself on adherence to principles of equality under law”).

210. *Id.* at 221–23, 230.

211. Roberto G. Gonzales, *Lives in Limbo: Undocumented and Coming of Age in America* 76 (2015).

Plyler in elementary and secondary school, graduates embark on a transition to illegality that reveals the limits of their ability to fully integrate into American life.²¹² For that reason, undocumented youth find their lives in limbo: They cannot claim the benefits of citizenship in the United States, but they have been socialized to identify as American. Although many of these young people, known as the Dreamers, have pressed for full inclusion through comprehensive immigration reform, so far their efforts have failed.²¹³ To reinforce claims of innocence and desert, the Dreamers have emphasized not only the blamelessness of their arrival but also their hard work and personal rectitude while residing in the United States.²¹⁴ If at an earlier time these youth had no choice about coming into the country, they have since demonstrated their bona fides by making worthy choices. This strategy arguably reflects a property-based claim of belonging: Undocumented youth have earned the right to legal status through achievements that make them de facto Americans.²¹⁵ Even so, the Dreamers' passage to adulthood reinstates the heritability of citizenship as an unattainable privilege, one that cannot be attained even by faultless children who have grown into deserving adults.

2. *How Equality Concerns Allowed the Court to Transcend the Conception of Public Education as a Purely Private Good.* — Because *Plyler* focused heavily on inequality, it should come as no surprise that alternative conceptions of education as a public good and as a human right influenced the Court. The Court had to tread carefully, given its unwillingness to frame education as a fundamental right. The plaintiffs' attorneys argued vigorously that the Court must recognize their clients as persons who enjoyed equal protection lest they be subjected to arbitrary and irrational treatment wholly "at odds with the most fundamental principles of this Nation."²¹⁶ The National Education Association and the League of United Latin American Citizens filed an amicus brief that squarely situated *Plyler* in a broader historical framework of group subordination.²¹⁷ According to the brief, the Fourteenth Amendment was designed to end the "perpetuation of a permanent subclass of benighted individuals within the borders of a state neglectful of their interests."²¹⁸ For that reason, Southern states that had permitted slavery were allowed to rejoin the Union only if they afforded Black people access to education.²¹⁹ The amici asserted that the

212. *Id.* at 96.

213. Rachel F. Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals*, 53 U.C. Davis L. Rev. 1905, 1920–31 (2020).

214. *Id.* at 1919–20.

215. *Id.*

216. Brief for Appellees, *supra* note 124, at 14.

217. Brief Amici Curiae of the National Education Association & the League of United Latin American Citizens, Supporting Appellees at 3, *Plyler v. Doe*, 457 U.S. 202 (1982) (No. 80-1538), 1981 WL 389989.

218. *Id.* at 7–8.

219. *Id.* at 6–7.

history of discrimination against the Mexican-origin population in Texas “closely parallels the history of discrimination against slaves and post-Civil War freedmen.”²²⁰ More specifically, the brief claimed, “[T]he social and economic circumstances of undocumented aliens in Texas resemble in many ways the condition of those former slaves for whose benefit the Fourteenth Amendment was originally enacted.”²²¹ The brief concluded that the Court had to recognize an equal protection violation in order to prevent “the perpetuation of a permanently inferior caste, exposed to exploitation by the rest of society” and not all that different from enslaved people.²²²

The Court took these concerns quite seriously. The majority opinion expressly noted that “[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.”²²³ Although the Court declined to find a fundamental right to minimum access to education, it did acknowledge that undocumented students were persons who required education as a precondition for being fully human.²²⁴ In doing so, the Justices went beyond treating education as a property right without enshrining it as a human right.²²⁵ Given the uncertain status of a right to education,²²⁶ the opinion focused on the ways in which education is a public good as a way to evaluate broader societal concerns. The Justices, for instance, cited the significant social harms that the Texas statute would produce. As the majority observed, “It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a sub-class of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.”²²⁷ Moreover, the Court noted, the promise of universal education based on merit rather than caste was integral to any collective understanding of the promise of equal protection.²²⁸ As the opinion explained, the creation of a “permanent caste of undocumented resident aliens” would “present[] most difficult problems for a Nation that prides itself on adherence to principles of equality under

220. *Id.* at 8.

221. *Id.* at 44.

222. *Id.* at 51–56, 61.

223. *Plyler*, 457 U.S. at 213.

224. See *id.* at 222 (describing “[t]he inestimable toll of that [educational] deprivation on the social, economic, intellectual, and psychological well-being of the individual”).

225. *Id.* at 214–15.

226. *Id.* at 222.

227. *Id.* at 230.

228. *Id.* at 221–22.

law.”²²⁹ In Kymlicka’s parlance, solidarity without inclusion would do injury to a shared interest in democratic integrity.²³⁰

Equality claims often require a broader understanding of education than a traditional conception of property can provide. In the free market, inequality is tolerated as an inevitable by-product of individual differences in skills, resources, and effort.²³¹ However, when education is treated as a public good, there are ways to recognize that deep disparities can undercut shared democratic possibilities, especially when those differences coincide with identifiable traits like race or national origin.²³² Meanwhile, the emphasis on access to schooling as a human right suggests that educational opportunities cannot be so profoundly unequal that some children are denied a path to becoming fully functioning adults.²³³ Although the Court was unwilling to acknowledge a right to education, the majority in *Plyler* warned against policies that would rob children of their humanity.²³⁴ In doing so, the opinion suggested some limits on disparities that ultimately render a system of schooling antidemocratic.²³⁵

As this discussion of *Plyler* shows, even when property-like concepts play a role in education litigation, they can be far from decisive. This is in part due to the complexity and malleability of property itself. In *Plyler*, the Texas legislature had created an entitlement based on residency.²³⁶ Undocumented families clearly met the criteria by living in a school district and paying taxes either directly or indirectly.²³⁷ Except for their immigration status, these parents and their children had, by Texas’s own accounting, earned the right to attend a public school in their neighborhood. After long adhering to this paradigm and having recently defended it before the

229. *Id.* at 219.

230. See *supra* note 86 and accompanying text.

231. See M.D.R. Evans & Jonathan Kelley, Education Legitimizes Income Inequality: Normative Beliefs in Early Post-Communist and Market-Oriented Nations, 200 *Polish Socio. Rev.* 441, 443, 448–54 (2017) (describing a widespread belief that education should be rewarded based on its contributions to economic productivity and arguing that this belief results in tolerance of income inequality).

232. See Amy Gutmann, *Democratic Education* 45–46 (paperback ed. 1987) (describing a norm of nondiscrimination as a “principled limit on democratic education,” requiring that all educable children be prepared for deliberative self-governance as adults and rejecting exclusion of “entire groups of children from schooling,” including “racial minorities, girls, and other disfavored groups of children”).

233. Sharon E. Lee, Education as a Human Right in the 21st Century, 21 *Democracy & Educ.*, no. 1, 2013, at 1, 7.

234. See *supra* note 224 and accompanying text.

235. See Rachel F. Moran, The Constitution of Opportunity: Democratic Equality, Economic Inequality, and the Right to Compete, *in* *A Federal Right to Education: Fundamental Questions for Our Democracy* 261, 269–74 (Kimberly Jenkins Robinson ed., 2019).

236. *Plyer v. Doe*, 457 U.S. 202, 206 (1982).

237. See *id.* (noting that the plaintiffs resided in the school district).

U.S. Supreme Court,²³⁸ the state was hard-pressed to justify a newly created restriction on eligibility for undocumented students.

A shift in eligibility standards lies at the heart of Professor Shaw's claim that the Court saw the policy at issue in *Plyler* as a denial of substantive due process to undocumented children.²³⁹ Because families had relied on the traditional residency requirements, their children acquired a vested property interest in this government largesse. As a result, Texas could not deprive them of the entitlement in an arbitrary and capricious way. This analysis is fine so far as it goes, but it does not speak to the challenges of defining the new property when there are unclear lines of authority in areas like education and immigration. Without concerns about preemption, Texas's arguments about its rationale for the law might have looked quite different. Instead of relying solely on residency, the state could have invoked another property-like entitlement based on citizenship or legal status to bolster its claim that the change to the law was justified.

Moreover, Shaw's account of *Plyler* largely overlooks the ways in which the Court moved beyond property-based rationales. For one thing, the Justices rejected the heritability of a dispossessed status based on parents' conduct. The trope of innocence was a prominent feature of the opinion that largely rejected property-like entitlements. In addition, the Justices were preoccupied with equality concerns distinct from property interests under the Due Process Clause. Far from accepting the state's largesse as the benchmark for an entitlement to education, the Justices warned that a history of discrimination could make states unduly parsimonious in providing access to education.²⁴⁰ The fears of a caste system suggested that privileging individual claims to exclusive rights of enjoyment could perpetuate subordination of the nation's most vulnerable children.

III. *PLYLER*'S PROSPECTS: WILL IT SURVIVE RENEWED JUDICIAL ATTENTION?

Because *Plyler* relied on a miscellany of arguments, some property-based and some not, the plaintiffs' surprising victory has become something of a jurisprudential anomaly. Its reasoning has been narrowly construed and limited to the particular facts of the case.²⁴¹ As a result, the decision has not offered strong protection for the rights of undocumented youth in other educational settings. For instance, states have successfully passed legislation targeting undocumented college and university students for unequal treatment, most notably by charging them out-of-state tuition

238. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

239. See *supra* notes 4–5, 37–41 and accompanying text.

240. *Plyler*, 457 U.S. at 221–22 (noting the systemic denial of education to Black children and how “denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit”).

241. *Moran*, *supra* note 213, at 1941.

even when they are residents.²⁴² *Plyler*'s anomalous status has contributed to concerns about the opinion's staying power.²⁴³ Indeed, education law scholar Michael A. Olivas described *Plyler* as a "tenuous" decision that survived "with a substantial dose of luck and persistence and a powerful backstory of innocent children."²⁴⁴ On the other hand, perhaps because *Plyler* did not declare any fundamental constitutional right, no Justice has yet signaled opposition to the decision, although Chief Justice Roberts did prepare a private memorandum critical of the case when he served in the Reagan Administration in 1983.²⁴⁵

Despite the Justices' silence, this is an opportune moment to revisit the decision's reasoning because of newfound fears that *Plyler*'s luck finally may have run out. In May 2022, Governor Greg Abbott of Texas told a radio talk show host that the Supreme Court precedent he would most like to see overturned is *Plyler*.²⁴⁶ According to Abbott, "I think we will resurrect that case and challenge this issue again, because the expenses are extraordinary and the times are different than when *Plyler v. Doe* was issued many decades ago."²⁴⁷ For Abbott, the fact that *Plyler* has been binding precedent for over forty years has not cemented its hold on constitutional respectability. Because the decision failed to make pronouncements about education as a fundamental right or alienage as a suspect class, it may not seem to qualify as "a super precedent" that is "so well established that it would be unthinkable that it would ever be overruled."²⁴⁸ For critics, *Plyler*'s fragile status stems from its reliance on policy considerations, which, as Abbott notes, can shift over time.²⁴⁹ Although one immigration law scholar, Professor Jaelyn Kelley-Widmer, has predicted that overruling *Plyler* would have "catastrophic" consequences, it seems entirely possible that the Justices could return to the issue in the coming years.²⁵⁰ For that

242. *Id.* at 1915–16. Interestingly, Texas was the first state to allow undocumented students to pay in-state tuition. *Id.* at 1916.

243. *Id.* at 1941; Michael A. Olivas, No Undocumented Child Left Behind: *Plyler v. Doe* and the Education of Undocumented Children 44 (2012) [hereinafter Olivas, No Undocumented Child Left Behind] (describing how scholars criticized the decision as "messy," "ad hoc," and "divorced" from other precedents).

244. Olivas, No Undocumented Child Left Behind, *supra* note 243, at 92.

245. Matt Barnum, What You Should Know About *Plyler*, the Case Protecting Undocumented Students' Education Rights, Chalkbeat (May 11, 2022), <https://www.chalkbeat.org/2022/5/11/23067472/plyler-supreme-court-abbott-undocumented-students-schools> [<https://perma.cc/RYE2-72FZ>].

246. Davies, *supra* note 13.

247. *Id.*

248. Barnum, *supra* note 245.

249. See *supra* notes 118–121 and accompanying text.

250. Davies, *supra* note 13. At least one education law scholar, Professor Derek Black, has concluded that Governor Abbott's comments are "much ado about nothing" while admitting that given the polarization on the Court, *Plyler* might be overturned. Barnum, *supra* note 245. Black predicts, however, that were a state to bar undocumented children from the public schools, the ban would immediately be challenged. *Id.* In his view, a lower court

reason, it is worth reflecting on whether the *Plyler* Court's rationales will likely survive renewed judicial attention.

This Part will begin by exploring whether the Court's recent embrace of formalism renders *Plyler's* reasoning a nullity. The majority's reasoning adopted a pragmatic approach, but there is reason to believe that formalism could offer a new rationale rooted in the language and history of the Fourteenth Amendment to uphold the decision. But, assuming that the Court's analysis in *Plyler* remains relevant to at least some Justices, the discussion then turns to the ongoing persuasiveness of both property-like rationales and alternative frameworks. As this analysis will show, the backstory of innocence may be the most compelling, enduring feature of the case, even as it struggles—like education itself—to find a constitutional home.

A. *Will Formalism Override Plyler's Reasoning?*

Before exploring the justifications used in *Plyler*, it seems essential to ask whether the Court's turn to formalism will override the decision's balancing of policy interests. Justice Lewis Powell, the key swing vote in the case, favored an approach that weighed concerns about education and alienage.²⁵¹ To accommodate these preferences, Justice William Brennan revised the majority opinion to make clear that education was not a fundamental right and alienage was not a suspect classification. Instead, the two rationales were used to bolster one other.²⁵² Because the weighing of "too many considerations" led *Plyler* to read like a critique of Texas's social policy, constitutional law scholar Mark Tushnet has concluded that the decision had "almost no generative or doctrinal significance."²⁵³ Now, with the Court's increasingly formalist bent, it seems even less likely that the Justices will be partial to the artful balancing prized by Justice Powell.

To address this concern, Professor Steven G. Calabresi and historian Lena M. Barsky have proposed an originalist defense of the *Plyler* decision.²⁵⁴ In their view, the Due Process and Equal Protection Clauses protect all persons, including undocumented people, in contrast to the Citizenship Clause and the Privileges or Immunities Clause, which apply exclusively to citizens.²⁵⁵ In contrast to Shaw's emphasis on due process, Calabresi and Barsky conclude that only equal protection can safeguard

would strike down the state's law, citing *Plyler*, and the Supreme Court would decline to review the decision. *Id.*

251. Mark V. Tushnet, Justice Lewis F. Powell and the Jurisprudence of Centrism, 93 *Mich. L. Rev.* 1854, 1873–74 (1995).

252. *Id.* at 1871–73.

253. *Id.* at 1873.

254. Steven G. Calabresi & Lena M. Barsky, An Originalist Defense of *Plyler v. Doe*, 2017 *BYU L. Rev.* 225, 228.

255. *Id.* at 235–40.

an undocumented child's right to schooling under an originalist interpretation. As they explain, based on common understandings at the time of adoption, lack of access to public education did not deny life, liberty, or property.²⁵⁶ However, Calabresi and Barsky assert, the differential treatment of undocumented children would violate equal protection based on both the text and legislative history of the Fourteenth Amendment. As for the text, which refers to persons, the statute in *Plyler* impermissibly "gave less protection—shelter or refuge under the law—to illegal alien children than it gave to other children in the state of Texas."²⁵⁷ Although admitting that reliance on legislative history is controversial, Calabresi and Barsky use the record to conclude that the Fourteenth Amendment's protections for persons made no distinction between aliens legally and illegally present because there were no federal immigration laws at the time.²⁵⁸ Ultimately, Calabresi and Barsky find that *Plyler* was correctly decided based on an originalist interpretation of the Constitution.

This formalist approach is revealing in at least two ways. For one thing, it makes clear that *Plyler's* fate turns on equal protection. Consequently, the decision is not vulnerable to concerns about substantive due process rights that have no express grounding in the Constitution. Recently, the Court has shown considerable antipathy to recognizing such rights based on concerns about unwarranted judicial activism.²⁵⁹ In addition, Calabresi and Barsky's textual exegesis and historical review make plain that originalist interpretations will adhere to traditional conceptions of property, leaving little room for progressive notions that have evolved in the meantime to influence educational jurisprudence. All of this suggests that if *Plyler* is to have staying power under a formalist framework, the most successful arguments will turn on notions of equal treatment that transcend property claims rooted in exclusive rights of enjoyment.

B. *Property-Like Entitlements and the Future of Plyler*

Even with a new commitment to formalism, at least some Justices are likely to revisit the arguments in *Plyler*. If they do, one important question is how influential property-like notions will be in determining the decision's fate. Here, the answer is mixed. In the intervening years since the *Plyler* decision, efforts to privatize public education have only grown in significance in the United States. The most notable example is the expansion in school choice programs, whether in the form of vouchers or charter

256. *Id.* at 249.

257. *Id.* at 249–50.

258. *Id.* at 280, 286.

259. See Kenji Yoshino, Opinion, A Retro Reading of the Constitution Imperils Many Rights Beyond Abortion, *L.A. Times* (May 6, 2022), <https://www.latimes.com/opinion/story/2022-05-06/abortion-ro-supreme-court-draft-decision-unenumerated-rights> [<https://perma.cc/5PRC-GAXF>].

schools.²⁶⁰ Under a law that took effect in September 2022, Arizona has taken the most drastic step in this direction, authorizing vouchers of up to \$7,000 per year for every child eligible to enroll in its public schools.²⁶¹ The bill passed even though voters had decisively rejected a previous version of the legislation.²⁶² Although it is not clear what proportion of Arizona's more than one million students will use vouchers to exit the public school system, a Democratic legislator has described the statute as an effort to "kill public education."²⁶³ Opponents already have vowed to place the measure on an upcoming ballot so that Arizona voters once again can weigh in on its merits.²⁶⁴

As the Arizona program makes plain, privatization treats education as an individual entitlement, property-like in nature, rather than as a public good. That said, there are still significant uncertainties about whether that entitlement is secure. In the nearly four decades since *Plyler* was decided, the Court has yet to find a constitutional right to a minimum level of education.²⁶⁵ Nor has it recognized Shaw's argument that there is a right to education under the Due Process Clause. As a result, public education remains an insecure benefit, a form of largesse that a state may not be obligated to provide. *Plyler* evaded the issue by reasoning that education was important enough and undocumented children vulnerable enough to find an equal protection violation. Even as courts have recognized a fundamental right to education under state constitutions, the decisions have not had to address whether the right extends to undocumented children. Instead, *Plyler* decided the matter for them.²⁶⁶

1. *Will Residency Protect an Undocumented Child's Right to Public Education?* — An entitlement to education based on residency remains a

260. See Mark Berends, *The Current Landscape of School Choice in the United States*, Kappan (Aug. 23, 2021), <https://kappanonline.org/current-landscape-school-choice-united-states-vouchers-charter-schools-berends/> [https://perma.cc/E4TH-4YGJ].

261. Valerie Strauss, *Ignoring Voters, Arizona Approves Nation's Largest School Voucher Scheme*, Wash. Post (June 30, 2022), <https://www.washingtonpost.com/education/2022/06/30/arizona-passes-nation-biggest-voucher-program/> (on file with the *Columbia Law Review*).

262. Kathryn Joyce, *School's Out Forever: Arizona Moves to "Kill Public Education" With New Universal Voucher Law*, Salon (July 1, 2022), <https://www.salon.com/2022/07/01/schools-out-forever-arizona-moves-to-public-education-with-new-universal-voucher-law/> [https://perma.cc/WVJ2-R48T].

263. *Id.* Approximately 98,000 children already in private schools or home schools would be eligible to receive the vouchers. Bob Christie, *Arizona OKs Biggest US School Voucher Plan, Faces Challenge*, Associated Press (July 7, 2022), <https://apnews.com/article/education-arizona-doug-ducey-school-vouchers-7c5d7eb0498e5e7234d7eeb726027506> [https://perma.cc/9SSQ-KT3B]. Another 12,000 children already receive vouchers under Arizona's previous program. *Id.*

264. Christie, *supra* note 263.

265. Shaw, *supra* note 4, at 1181–82.

266. See Olivas, *No Undocumented Child Left Behind*, *supra* note 243, at 45 (asserting that "immigrant restrictionists [have chosen] not to touch the third rail of schoolchildren, at least not directly").

powerful tool in rationing access. This tool is mainly the product of state and local policymaking rather than any constitutional imperative. Although the plaintiffs in *Plyler* used residency to bolster claims to inclusion, the concept also has been deployed in exclusionary ways that resemble accounts of stealing education. One year after the victory in *Plyler*, the Court decided *Martinez v. Bynum*.²⁶⁷ In that case, Roberto Morales was a U.S. citizen born in McAllen, Texas. His parents, however, were Mexican citizens who had returned to their home country. Roberto moved to Texas to live with his sister and attend the neighborhood school. However, she was not his legal guardian.²⁶⁸ Under the district's residency requirement, a child had to be living with a parent or guardian to attend the public schools.²⁶⁹

In an opinion by Justice Powell, the Court held that the requirement was bona fide and allowed the district to exclude ineligible children to conserve resources for residents.²⁷⁰ However, the Court noted that Roberto might qualify as a resident if he planned to live permanently in the district and was not there solely for the purpose of attending school.²⁷¹ Justice Brennan, who had authored the *Plyler* opinion, concurred because Roberto might have a way to establish residency.²⁷² Only Justice Thurgood Marshall dissented,²⁷³ finding that the Texas statute violated equal protection. In his view, there was no adequate justification for excluding children like Roberto from a public education simply because their primary motivation was to attend school.²⁷⁴

During oral argument in *Plyler*, the Texas Attorney General had raised concerns about children from Mexico crossing the border to attend Texas public schools.²⁷⁵ The Court responded by pointing out that residency requirements alone could fully address that concern,²⁷⁶ and *Martinez* clearly reinforced this view. More recently, Professor Olivas reported that there is "growing evidence that this issue, long dormant, will rear its head, as a small number of U.S.-Mexico-border school districts have begun to police enrollments to ensure that the families are actually residing in the school boundaries, rather than sending their children . . . across bridges that span the two countries."²⁷⁷

Crackdowns that require proof of status as a parent or guardian to establish a child's residency can pose problems for undocumented adults.

267. 461 U.S. 321 (1983).

268. *Id.* at 322–23.

269. *See id.* at 323.

270. *Id.* at 326–33.

271. *Id.* at 332.

272. *See id.* at 333 (Brennan, J., concurring).

273. *See id.* at 334 (Marshall, J., dissenting).

274. *See id.*

275. *See* Transcript of Oral Argument in *Plyler*, *supra* note 135, at 10.

276. *Id.*

277. Olivas, No Undocumented Child Left Behind, *supra* note 243, at 59.

In some instances, they cannot show that they are legal parents or guardians because they lack basic forms of identification like social security numbers or driver's licenses.²⁷⁸ Here, lack of access to one form of state-created property can become a barrier to accessing another form of largesse, public education. In some cases, undocumented adults have relied on a different nation's largesse to meet credentialing requirements. In *Joel R. v. Board of Education*, an aunt used a notarized document from a Mexican court to establish that she was a child's legal guardian.²⁷⁹ As in *Martinez*, the child had been born in the United States, but his parents resided in Mexico. The school district refused to accept the document, but a court ultimately ordered that officials recognize the guardianship and admit the child.²⁸⁰

All of this suggests that residency, along with the property-like entitlement it confers, will remain a significant factor in allocating access to public education. Rather than bar undocumented children altogether, school districts can simply double down on proof of residency. If this proves a workable strategy, the Court may find it unnecessary to revisit *Plyler*. Instead, even if undocumented students cannot be formally barred from the public schools, concerns about stealing education will remain powerful barriers to their admission.

2. *Will Preemption Continue to Cast a Shadow Over States' Efforts to Bar Undocumented Children From Public Schools?*—*Joel R.* is yet another reminder that government largesse implicates which officials get to decide whether a benefit will be conferred. In that case, a Mexican judge established the prerequisites that allowed entry into an Illinois public school. In *Plyler* itself, the division of labor between the federal government and the State of Texas played a significant part in determining whether undocumented children have a right to attend public school. While the federal government was responsible for conferring the benefits of citizenship, the state was authorized to distribute access to public education. Although the Court did not reach preemption issues in *Plyler*, this federalist framework remains important today. Subsequent state efforts to deny undocumented immigrants opportunities, such as pursuit of employment, have regularly run afoul of the Supremacy Clause.²⁸¹

278. See *id.* at 48–50.

279. 686 N.E.2d 650 (Ill. App. Ct. 1997).

280. See *id.* at 656–67.

281. See, e.g., *Arizona v. United States*, 567 U.S. 387, 403–07, 416 (2012) (striking down Arizona's misdemeanor offense based on undocumented immigrants' knowing application to work as employees or independent contractors because the law was preempted by comprehensive federal regulation in the area); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 768–74, 776–86 (C.D. Cal. 1995) (striking down provisions that denied public benefits, health care, and elementary and secondary education to undocumented people as a violation of the federal government's authority in these areas).

Even so, the division of labor is not as clear-cut as it once was due to explicit agreements that authorize states to cooperate with federal authorities in enforcing immigration law. The Secure Communities program enabled state and local law enforcement to alert Immigration and Customs Enforcement (ICE) agents about the arrest or detention of a potentially undocumented immigrant. ICE could then obtain a detainer to deport the individual, regardless of the outcome of the state or local criminal action.²⁸² Some state and local governments have openly resisted this role by declaring themselves sanctuary jurisdictions.²⁸³ Although *Plyler* tried to create safe spaces for undocumented students, cooperative enforcement arrangements have sometimes affected public schools. For instance, in *Murillo v. Musegades*, a federal district court enjoined an El Paso high school from allowing the Border Patrol to have “a regular, consistent, and prominent presence on the . . . campus.”²⁸⁴ According to the court, agents parked in the school lot; drove along service roads, concrete sidewalks, and grassy areas; entered the football locker rooms; and surveilled students through binoculars.²⁸⁵ Students were regularly stopped, questioned, frisked, and even detained and arrested.²⁸⁶ The district court found that this racial profiling and targeting violated equal protection.²⁸⁷ The facts in *Murillo* were particularly egregious, but in other instances, schools have turned over students suspected of being undocumented to the Border Patrol or agents have waited just outside of school grounds to apprehend parents suspected of being in the United States illegally.²⁸⁸

Plyler formally rejected any property-like interest in citizenship or legal permanent resident status as a justification for excluding undocumented immigrants from a state’s public schools. Enforcing immigration laws is the exclusive province of federal authorities, and states cannot use education laws to deter migrant flows. In the shadow of *Plyler*,

282. Adam B. Cox & Thomas J. Miles, Policing Immigration, 80 U. Chi. L. Rev. 87, 92–97 (2013).

283. Catalina Amuedo-Dorantes, Thitima Puttitanun & Mary Lopez, Immigration, Sanctuary Policies, and Public Safety, 56 Int’l Migration Rev. 668, 670 (2022); Dara Lind, Why Cities Are Rebelling Against the Obama Administration’s Deportation Policies, Vox (June 6, 2014), <https://www.vox.com/2014/6/6/5782610/secure-communities-cities-counties-ice-dhs-obama-detainer-reform> [<https://perma.cc/3M94-6UUD>] (describing state and local backlash against Secure Communities and demands to opt out of the program).

284. 809 F. Supp. 487, 495, 503 (W.D. Tex. 1992).

285. See *id.* at 491–95.

286. See *id.*

287. See *id.* at 500.

288. See, e.g., Olivas, No Undocumented Child Left Behind, *supra* note 243, at 51–52; Trevor Hughes, Immigration Agents Accused of Targeting Parents Taking Their Kids to School, USA Today (Feb. 27, 2020), <https://www.usatoday.com/story/news/nation/2020/02/27/ice-criticized-detaining-parents-school-trump-enforcement-push/4891529002/> [<https://perma.cc/DEM4-HP83>] (reporting on use of the tactic in Colorado, Oregon, and Pennsylvania).

however, cooperative arrangements have authorized state and local agencies to participate in enforcement efforts and have sometimes eroded the status of schools as safe spaces. Even if *Plyler* protects formal access, immigration enforcement on or near public school grounds can make school attendance an illusory promise. Under these circumstances, policing the boundaries of the nation-state enforces a property-like claim that vitiates an undocumented child's constitutional right to go to school. Unfortunately, the *Plyler* decision standing alone cannot prevent these activities. However, it does provide jurisprudential cover for executive guidance declaring schools exempt from border enforcement tactics. In fact, in 2021 the Biden Administration issued guidelines on protected areas, including schools, where immigration agents must refrain from making arrests.²⁸⁹

The recent blurring of enforcement boundaries in part reflects the federal government's own admission of failure in enforcing existing laws and enacting comprehensive immigration reform. The Supremacy Clause still applies, even when federal authorities confess incompetence, but the politics of working with the most impacted states necessarily shift. That phenomenon is well illustrated by the controversies surrounding the Deferred Action for Childhood Arrivals (DACA) program. Under the Obama Administration, a 2012 administrative memorandum laid the foundation for DACA by putting a low priority on enforcing immigration laws for undocumented youth who had arrived in the United States while under sixteen years of age, resided continuously in the country for at least five years, successfully pursued educational opportunities or military service, were not involved in crimes or threats to national security, and were still under thirty years of age.²⁹⁰ To justify the program, federal officials said that they had to set appropriate priorities because they could deport only a tiny fraction, about four percent, of the undocumented persons living in the United States.²⁹¹ Texas, of course, had decried wholly inadequate federal enforcement efforts in the *Plyler* litigation but without such an explicit admission of failure to bolster its claim.²⁹²

289. See Charles R. Davis, Biden Administration Limits ICE Arrests at Schools, Churches, Daycares, and Other 'Protected Areas', *Bus. Insider* (Oct. 27, 2021), <https://www.businessinsider.com/biden-administration-limits-ice-raids-at-schools-churches-daycares-2021-10> [<https://perma.cc/7DXT-BXVF>].

290. See Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs. & John Morton, Dir., U.S. Immigr. & Customs Enf't, Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/85WA-DRN9>].

291. See Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [<https://perma.cc/TC58-NBL6>].

292. See *supra* notes 169–170 and accompanying text.

In 2014, the Obama Administration expanded DACA and extended the program of deferred action to the undocumented parents of citizens or permanent residents.²⁹³ As was true of the original version of DACA, the new programs made clear that they granted neither substantive rights nor a pathway to citizenship.²⁹⁴ Even so, the expansion—especially to parents—was a bridge too far for Texas and twenty-five other states. They sued, alleging that the 2014 programs violated the Administrative Procedure Act because they were not adopted pursuant to notice-and-comment rule-making, exceeded the scope of federal enforcement officials’ authority, and failed to faithfully execute the laws of the United States.²⁹⁵ Revealingly, the states relied on the federal government’s abdication of its responsibility to enforce immigration laws as a basis for standing.²⁹⁶ In doing so, the plaintiffs cited federal authorities’ own admission that they could deport only a tiny fraction of the undocumented population.²⁹⁷ The district court acknowledged that this theory of standing was “not well-established”²⁹⁸ but concluded that, if accepted, this litigation provided “a textbook example” of federal abdication.²⁹⁹ The Fifth Circuit acknowledged the theory but ultimately found standing on more traditional grounds.³⁰⁰ On the merits, the lower courts concluded that the programs should have been adopted pursuant to a rulemaking procedure and that officials had exceeded their authority.³⁰¹ The courts did not reach the question of whether officials had taken care to faithfully execute immigration laws.³⁰² The Supreme Court affirmed the lower court holdings in a one-line opinion by an evenly divided vote.³⁰³

293. See Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigr. Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf’t & R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot., Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children and With Respect to Certain Individuals Whose Parents Are U.S. Citizens or Permanent Residents 4 (Nov. 20, 2014), <https://www.aila.org/infonet/dhs-exercising-prosecutorial-discretion> [<https://perma.cc/B6HJ-74S7>].

294. Memorandum from Jeh Charles Johnson, *supra* note 293, at 5; Memorandum from Janet Napolitano, *supra* note 290, at 3.

295. See *Texas v. United States*, 86 F. Supp. 3d 591, 614, 664–72, 677–78 (S.D. Tex. 2015), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d* by an equally divided Court, 579 U.S. 547 (2016).

296. See *id.* at 636–37.

297. See *id.* at 637.

298. *Id.* at 640.

299. *Id.* at 643.

300. See *Texas v. United States*, 787 F.3d 733, 746–54 (5th Cir. 2015) (noting that the district court had relied on a theory of “abdication standing” but that the court of appeals would instead rely on evidence that Texas suffered a “concrete, particularized, and actual or imminent injury” based on the cost of issuing driver’s licenses).

301. *Texas*, 86 F. Supp. 3d at 677, *aff’d*, 809 F.3d 134, 171–83, 186 (5th Cir. 2015).

302. *Texas*, 809 F.3d at 146, 149.

303. *United States v. Texas*, 579 U.S. 547, 548 (2016) (per curiam).

After the ruling, only the original 2012 DACA program survived intact. However, the Trump Administration rescinded the original DACA program in 2017, triggering new litigation.³⁰⁴ Ultimately, the U.S. Supreme Court found that the rescission was arbitrary and capricious and therefore unlawful on procedural grounds.³⁰⁵ In particular, the Court concluded that the Department of Homeland Security (DHS) should have distinguished between deferring deportation and conferring benefits—for instance, the right to obtain a driver’s license and legal employment. According to the Justices, DHS could have rescinded eligibility for benefits while refraining from pursuing deportation efforts.³⁰⁶ In addition, DHS failed to weigh the reliance interests of DACA recipients who would experience a significant change in circumstances due to the rescission.³⁰⁷

Under the Biden Administration, the original DACA program has remained in effect, and Texas has continued to challenge it.³⁰⁸ The procedural and substantive grounds are the same as those that figured in the earlier litigation. In 2021, a district court in Texas found the program unlawful; the Fifth Circuit affirmed in 2022.³⁰⁹ While the litigation was pending, the Biden Administration pursued notice-and-comment rule-making and issued a final rule establishing the DACA program in August 2022.³¹⁰ As a result, the Fifth Circuit remanded the case to the district court for review of the new rule. In the meantime, a nationwide stay remains in place to prohibit new DACA applications, although existing DACA recipients can retain their status.³¹¹

As the ongoing controversy makes clear, decades of congressional inaction and frank admissions of inadequate border enforcement have complicated claims to exclusive federal authority over immigration matters. In *Plyler*, Texas portrayed itself as unable to do much about lax enforcement because the federalist system assigned authority over immigration to the national government.³¹² At that time, comprehensive federal

304. See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1903 (2020).

305. *Id.* at 1910–12.

306. *Id.* at 1912–13.

307. *Id.* at 1913–15.

308. Memorandum of January 20, 2021: Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 86 Fed. Reg. 7053, 7053–54 (Jan. 25, 2021); Press Release, Ken Paxton, Att’y Gen. of Tex., Paxton Leads Coalition to Defeat DACA After Biden Administration Attempts to Salvage the Illegal Immigration Policy (Dec. 16, 2022), <https://www.texasattorneygeneral.gov/news/releases/paxton-leads-coalition-defeat-daca-after-biden-administration-attempts-salvage-illegal-immigration> [<https://perma.cc/N9FK-EANK>].

309. See *Texas v. United States*, 549 F. Supp. 3d 572, 624 (S.D. Tex. 2021), *aff’d in part and remanded*, 50 F.4th 498, 508 (5th Cir. 2022).

310. *Deferred Action for Childhood Arrivals*, 87 Fed. Reg. 53,152 (Aug. 30, 2022) (to be codified at 8 C.F.R. pts. 106, 236, 274a).

311. *Texas v. United States*, 50 F.4th 498, 531–32 (5th Cir. 2022).

312. See *supra* notes 169–170 and accompanying text.

immigration reform was imminent under the Reagan Administration—in fact, many of the undocumented schoolchildren in *Plyler* used the Immigration Reform and Control Act of 1986 to become legal residents and eventually citizens of the United States.³¹³ Today, however, protracted congressional inaction has “[e]ft immigration policy squarely in the hands of the executive branch.”³¹⁴ As a result, state leaders have been emboldened to challenge federal authority directly. Now, they are focused on the separation of powers at the federal level, questioning agency officials’ power to confer government largesse on undocumented individuals.

So far, Ken Paxton, the attorney general of Texas, has led a coalition of states in filing eleven immigration-related lawsuits against the Biden Administration.³¹⁵ In fact, the steady stream of cases has prompted one news outlet to describe Texas as a “legal graveyard” for the President’s agenda.³¹⁶ Before that, Democratic attorneys general pursued similar strategies to block immigration policy under the Trump Administration.³¹⁷ Importantly, regardless of which administration is in charge, litigation is used to stymie the executive branch when it attempts to remedy congressional inaction. As former U.S. Attorney General Jeff Sessions explained, “A plaintiff only needs to win once to stop a national law from taking effect or a national policy. But the government needs to win every time to carry out policies. That makes governing all but impossible.”³¹⁸ The potential to obstruct a national agenda is especially significant when advocates can forum shop for sympathetic judges, many of whom are ideologically identified with the administration that appointed them.³¹⁹

313. Olivas, No Undocumented Child Left Behind, *supra* note 243, at 3, 7–8.

314. Caitlin Dickerson, The Secret History of Family Separation: “We Need to Take Away Children,” *Atlantic* (Aug. 7, 2022), <https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604/> (on file with the *Columbia Law Review*).

315. Press Release, Ken Paxton, Att’y Gen. of Tex., AG Paxton Again Sues Biden Over Border: New Immigration Rules Drastically Lower “Asylum Bar,” Forming New Incentives for Next Flood of Aliens (Apr. 28, 2022), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-again-sues-biden-over-border-new-immigration-rules-drastically-lower-asylum-bar-forming> [<https://perma.cc/XL7V-B8C4>].

316. Tierney Sneed, Why Texas Is a Legal Graveyard for Biden Policies, *CNN* (Mar. 3, 2022), <https://www.cnn.com/2022/03/03/politics/texas-biden-court-losses-paxton-bush/index.html> [<https://perma.cc/6GCF-X7HC>].

317. See Joel Rose, Texas Takes Its Fight Over Biden’s Border Policies to Judges Appointed by Trump, *NPR* (Feb. 14, 2022), <https://www.npr.org/2022/02/14/1080548542/texas-takes-its-fight-over-bidens-border-policies-to-judges-appointed-by-trump> [<https://perma.cc/UB4W-M5YU>] (describing ways in which attorneys general from both parties have used lawsuits to block executive immigration policies).

318. *Id.* (describing how litigation has been used to stymie immigration reforms under both Democratic and Republican administrations).

319. See Sneed, *supra* note 316 (describing conservative advocates’ preference to sue in Texas because of a large proportion of Republican-appointed judges on the federal bench).

Ongoing struggles to recalibrate the balance of power over immigration law and policy have complicated the division of labor that underlies preemption doctrine. These battles may have larger implications as well. Congress's plenary power over immigration has been one factor in treating alienage as a category that prompts heightened scrutiny under the Equal Protection Clause. Although the federal government is free to classify on this basis to manage the nation's borders, states do not enjoy similar prerogatives.³²⁰ Texas disputed this allocation of authority in *Plyler*, but it did so at a time when direct assaults on federal authority were still relatively uncommon. In 1994, however, California enacted Proposition 187, a popular referendum that denied a range of government benefits to undocumented immigrants and openly flouted *Plyler*.³²¹ Although the initiative was largely overturned on preemption grounds,³²² it ushered in an era of state efforts to control undocumented immigration.³²³

Ongoing uncertainty about the scope of federal power likely reinforces the Court's wavering treatment of the relevant standard of review in alienage cases. If states have some authority to supplement federal enforcement efforts, it is not clear that heightened scrutiny should apply to these classifications. The Justices failed to explicitly endorse more than a rational relation test in *Plyler*, though the decision implicitly applied a more exacting approach. If the Court does revisit the question of undocumented students' access to the public schools, intensifying conflicts over federal and state authority to regulate immigration could weaken the power of preemption claims and dilute the scrutiny that Justices apply to alienage classifications. The authority to define the terms of government largesse in the form of public education for undocumented children would then shift to state and local officials.

As this discussion makes clear, property-like entitlements are a precarious foundation for preserving the *Plyler* decision. The role of residency reveals property's protean nature, which allows it to be deployed in the service of both inclusion and exclusion. The families in *Plyler* were able to

320. See Stephen Lee, *Monitoring Immigration Enforcement*, 53 *Ariz. L. Rev.* 1089, 1133 (2011) (noting that immigration restrictions are usually understood to fall within the federal government's plenary powers and thus considered preemptive of state efforts).

321. See Phillip J. Cooper, *Plyler at the Core: Understanding the Proposition 187 Challenge*, 17 *Chicano-Latino L. Rev.* 64, 64–65 (1995).

322. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 787 (C.D. Cal. 1995).

323. See, e.g., *Supporting Our Law Enforcement and Safe Neighborhoods Act*, S.B. 1070, 49th Leg., 2d Sess. § 1 (Ariz. 2010) (describing “a compelling interest in the cooperative enforcement of federal immigration laws” as a way to achieve “attrition through enforcement” by “discourag[ing] and deter[ring] the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States”); Gary Reich & Jay Barth, *Immigration Restriction in the States: Contesting the Boundaries of Federalism?*, 42 *Publius* 422, 429 (2012) (explaining that the initiative increased media coverage of immigration and prompted legislators in other states to act).

assert their desert based on their status as taxpaying residents of the district. Yet the challenges of establishing bona fide residency can operate as powerful barriers to access, as undocumented children are accused of stealing education. Meanwhile, the fragmented and shifting nature of governmental authority can make the new property a similarly treacherous ground for an entitlement to schooling. Whether a benefit is secure will depend on who gets to set the terms and conditions of access. When states challenge federal authority and partisan conflict leads to volatile policy pronouncements, the long-term prospects for largesse can seem dim. The changing fortunes of DACA recipients exemplify these vagaries, but because *Plyler* rested heavily on a balancing of policy considerations, its constitutional future could also be uncertain.

C. *Beyond Property: Alternative Frameworks and the Future of Plyler*

If property-like entitlements offer limited possibilities for upholding *Plyler*, then a key question is whether alternative frameworks provide stronger grounds for preserving undocumented students' right to public education. The trope of childhood innocence remains a powerful one, but the challenge is to find a constitutional home for widely shared, fundamental norms of decency. As for education as a public good, one that is integral to democratic integrity, the greatest stumbling block is the Court's consistent refusal to recognize even basic education as a fundamental right. The failure to do so tacitly rejects both dignitary claims and distributive justice as worthy of constitutional protection.

1. *Will Childhood Innocence Protect Undocumented Children Against Inherited Stigma and the Burden of Illiteracy?*— One important lesson of *Plyler* is that even if citizenship involves some inherited privilege, undocumented status need not be a heritable dispossessed status. The Court relied heavily on childhood innocence to conclude that parents' actions should not be a basis for punishing undocumented students. This image of blamelessness came under attack when former President Donald J. Trump tweeted that undocumented youth who received protections under DACA are “no longer very young” and “are far from ‘angels.’”³²⁴ Indeed, he noted, “[s]ome are very tough, hardened criminals.”³²⁵ Of course, these observations did not apply to elementary and secondary students, but the Trump Administration pursued other initiatives that undercut protections for young undocumented children. When there was a surge of unaccompanied minors at the border, some were required to appear in immigration

324. Donald J. Trump (@realDonaldTrump), Twitter (Nov. 12, 2019), <https://twitter.com/realDonaldTrump/status/1194219655717642240> [<https://perma.cc/QUL5-NQXT>]; see also Quint Forgey, Trump Claims He'll Strike Deal for Dreamers With Dems if SCOTUS Overturns DACA, Politico (Nov. 12, 2019), <https://www.politico.com/news/2019/11/12/donald-trump-dreamer-deal-supreme-court-overturns-daca-069802> [<https://perma.cc/PV2L-L39Q>].

325. Trump, *supra* note 324.

court alone because they could not afford representation.³²⁶ Given that some minors were infants and toddlers, they were effectively denied any way to exercise their rights in the proceedings.³²⁷ Youthful innocence did not protect them against being deported. In fact, children unrepresented by counsel were substantially more likely to be subject to deportation or voluntary removal orders.³²⁸ Nor was this an unusual circumstance. From 2005 to 2017, about one-third of unaccompanied minors lacked representation.³²⁹ The Biden Administration recently initiated an eight-city initiative to provide government-funded counsel to minors in some immigration proceedings,³³⁰ but the longstanding neglect of these youth suggests an indifference that innocence has yet to overcome.

Perhaps even more stark was the Trump Administration's effort to use family separations to promote a zero-tolerance policy for immigration at the border. In May 2018, then-Attorney General Sessions announced that every person entering the country illegally would be prosecuted. The policy extended to parents with children, which meant that families had to be separated while the prosecutions proceeded.³³¹ By the time President Trump announced a change in policy one month later, thousands of children had been taken from their parents; a substantial number have yet to be reunified.³³² While many problems were blamed on administrative incompetence,³³³ it is also important to understand how claims of childhood innocence became damaged in the process. During the detentions, young children, including infants and toddlers, had their mug shots taken and were held in wire cages.³³⁴ Even when officials in the field brought these

326. See Sarah Burr, Opinion, *Why Are Children Representing Themselves in Immigration Court?*, Hill (Oct. 24, 2021), <https://thehill.com/opinion/judiciary/578076-why-are-children-representing-themselves-in-immigration-court/> [https://perma.cc/363Z-Y723].

327. *Id.*

328. Erica Bryant, Alyssa Snider & Becca DiBennardo, *No Child Should Appear in Immigration Court Alone*, Vera (Jan. 28, 2022), <https://www.vera.org/news/no-child-should-appear-in-immigration-court-alone> [https://perma.cc/S4UM-K2UE].

329. *Id.* For a valuable discussion of how unaccompanied minors are perceived as choosing to enter the country illegally and therefore are deemed presumptively guilty rather than innocent, see Nina Rabin, *Second Wave DREAMers*, Yale L. & Pol'y Rev. (forthcoming) (on file with the *Columbia Law Review*).

330. Hamed Aleaziz, *The Biden Administration Is Providing Legal Representation for Certain Immigrant Children in Eight US Cities*, BuzzFeed News (Sept. 28, 2021), <https://www.buzzfeednews.com/article/hamedaleaziz/immigrant-children-attorneys-biden> [https://perma.cc/NH25-3JGN].

331. Julie Hirschfeld Davis & Michael D. Shear, *Border Wars: Inside Trump's Assault on Immigration* 255–57, 262–65 (2019); Dickerson, *supra* note 314.

332. Davis & Shear, *supra* note 331, at 277–78; Dickerson, *supra* note 314.

333. Dickerson, *supra* note 314.

334. *Id.*

concerns to Attorney General Sessions's attention, the detainees' blamelessness did not dissuade him from an unshakeable belief that "[w]e need to take away children."³³⁵

Instead, to shield the policy from public scrutiny, the federal government denied access to detention facilities where minors were being held.³³⁶ Eventually, when ProPublica released a leaked tape of separated children wailing for their parents, the trope of innocence reasserted itself. In public comments on the story, one person described how "[m]y heart breaks hearing these innocent children crying," while another said, "Never have I been more ashamed with America."³³⁷ The outcry led Trump to discontinue the policy, demonstrating that sympathy for innocent children remains a powerful shield against government overreaching. Any effort to bar undocumented students from the public schools would be a highly visible incursion on claims of innocence, and a lawsuit to overturn *Plyler* would once again test our nation's compassion for vulnerable children.

The power of innocence may be especially important in upholding protections for undocumented children because of the prospect that personhood is waning as a constitutional value. The Court today seems more willing to defer to states when it comes to claims of personhood, even if that judicial deference renders undocumented people largely invisible and unprotected. In another case arising out of Texas, *Evenwel v. Abbott*, the plaintiffs alleged that the state violated their right to equal protection by apportioning seats in the state legislature based on total population rather than the population of eligible voting-age citizens.³³⁸ The plaintiffs lived in districts with "particularly large eligible- and registered-voter populations."³³⁹ As a result, the lawsuit argued, their votes were impermissibly devalued compared to those of voters in districts with large numbers of residents ineligible to vote.³⁴⁰ To avoid this harm, the plaintiffs asserted, the Equal Protection Clause required "voter equality" based on voter-eligible population, not total population.³⁴¹ Texas contended that it had the flexibility to choose among baselines, including total population as well as voter-eligible population.³⁴² In an opinion by the late Justice Ruth

335. *Id.* (internal quotation marks omitted) (quoting U.S. Attorneys' notes characterizing a phone call with Sessions, as recorded in a Department of Justice review of the family separation policy).

336. *Id.*

337. *Id.*; see also Davis & Shear, *supra* note 331, at 272–74 (describing how the release of the audio recording by ProPublica "crystallized the human dimensions of the family separation policy" and how "[i]mages of children sleeping under metallic blankets behind chain-link fences quickly captured the public imagination").

338. 136 S. Ct. 1120, 1124–26 (2016).

339. *Id.* at 1125–26.

340. *Id.*

341. *Id.* at 1126.

342. *Id.* at 1126–27.

Bader Ginsburg, the Court held that Texas could constitutionally rely on total population in drawing its state legislative districts but left open the possibility that it also could use the voting-age population, registered voters, or some other metric.³⁴³

During the litigation, the parties offered competing visions of representation. The plaintiffs argued that the relevant constituents are those eligible to vote and that electoral systems need to accord potential voters equal weight and respect.³⁴⁴ Texas responded by emphasizing the state's autonomy to select an apportionment method of its choosing,³⁴⁵ but amici curiae contended that political officials are obligated to consider the welfare of all who reside in their districts. As a result, fair representation requires equal access to legislators, regardless of whether an individual can or does vote. Under this view, total population is the proper basis for drawing district lines because each person has an equivalent opportunity to seek assistance from an elected official.³⁴⁶ The Court declined to decide which theory of representation better fits our democratic process, and precedents have not been entirely consistent on this point.³⁴⁷

Latinx residents would have been most affected by the proposed change in *Evenwel* because of the disproportionate youthfulness of the population as well as the large proportion of noncitizens, including undocumented residents. An amicus brief filed by the Leadership Conference on Civil and Human Rights reported that 79.1% of the non-Hispanic white population in the United States qualified as eligible voting-age citizens compared to 70.2% of the Black population, 54.5% of the Asian population, and 45.2% of the Latinx population.³⁴⁸ According to the brief, only 1.5% of the non-Hispanic white population and 4.1% of the Black population were noncitizens, while 23.7% of the Latinx population and 27.2% of the Asian population were.³⁴⁹ Another amicus brief noted that in Texas, adult noncitizens made up less than 8% of the population,

343. *Id.* at 1132–33.

344. Brief for Appellants at 26, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 4624625.

345. Brief for Appellees at 18, 20, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 5562189.

346. See, e.g., Brief for Amici Curiae Texas Senators in Support of the Appellees at 5–7, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 5719749; Brief of the Texas Senate Hispanic Caucus & the Texas House of Representatives Mexican American Legislative Caucus as Amici Curiae in Support of Appellees at 17–19, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 5731666.

347. See *Evenwel*, 136 S. Ct. at 1130–33.

348. Brief of the Leadership Conference on Civil & Human Rights et al. as Amici Curiae in Support of Appellees at 1, IAAA app. C, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 5766319.

349. *Id.*

but the majority were Latinx and lived in identifiably Latinx communities.³⁵⁰ As a result, any shift away from total population would adversely affect Latinx access to political representation.³⁵¹

Later on, a memorandum prepared by the late Thomas Hofeller, a Republican Party consultant sometimes called the “Michelangelo of gerrymandering,” came to light.³⁵² An influential Republican donor had funded Hofeller’s August 2015 analysis when considering whether to finance litigation advancing the arguments in *Evenwel*.³⁵³ Hofeller concluded that counting eligible voting-age citizens would be advantageous to Republicans and non-Hispanic whites in Texas because “the maps would exclude traditionally Democratic Hispanics and their children from the population count” and “would translate into fewer districts in traditionally Democratic areas, and a new opportunity for Republican mapmakers to create even stronger gerrymanders.”³⁵⁴ Hofeller noted, however, that the approach was unworkable without a citizenship question on the United States Census.³⁵⁵ Because *Evenwel* left open the possibility that states could use the number of eligible voting-age citizens, rather than total population, to draw state district lines, this approach could still be adopted in upcoming reapportionment processes.³⁵⁶ In fact, Missouri voters already have approved the state’s use of eligible voting-age citizens to draw district boundaries if officials choose to do so.³⁵⁷ The Trump Administration’s unsuccessful effort to add a citizenship question to the 2020 Census may have slowed down these efforts, but they remain a distinct possibility.³⁵⁸

What these recent events demonstrate is the confluence of two trends. The *Evenwel* litigation reveals the ongoing tendency to accord states more autonomy in matters affecting noncitizens, while family separations and

350. Brief of the Texas Senate Hispanic Caucus & the Texas House of Representatives Mexican American Legislative Caucus as Amici Curiae in Support of Appellees, *supra* note 346, at 8.

351. *Id.* at 11–19.

352. Michael Wines, Deceased G.O.P. Strategist’s Hard Drives Reveal New Details on the Census Citizenship Question, *N.Y. Times* (May 30, 2019), <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html> (on file with the *Columbia Law Review*).

353. *Id.*

354. *Id.*

355. *Id.*

356. Yurij Rudensky, Ethan Herenstein, Peter Miller, Gabriella Limón & Annie Lo, Brennan Ctr. for Just., Representation for Some: The Discriminatory Nature of Limiting Representation to Adult Citizens 4 (2021), <https://www.brennancenter.org/our-work/research-reports/representation-some> [<https://perma.cc/AR2C-BBAZ>].

357. *Id.*

358. *Id.*; see also *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2574 (2019) (“It is hardly improper for an agency head to come into office with policy preferences and ideas And yet, viewing the evidence as a whole, we share the . . . conviction that the decision to reinstate a citizenship question cannot adequately be explained in terms of DOJ’s request”).

the treatment of unaccompanied minors suggest the declining role of personhood as a nationally protected value. Taken together, these trends relegate the claims of innocent children to the realm of politics rather than civil rights. That move can seem like a cynical one given that undocumented people are not only disenfranchised but often go unheard and unseen. Dehumanization is most easily accomplished in the shadows, away from the glare of media scrutiny and public accountability. To the extent that states continue to assert greater authority over undocumented individuals and rely on the political process to exercise that control, there is a growing danger that undocumented people's humanity will be obscured, often in ways that veil the claims of innocent children.

To avert that risk, it will be critical to give childhood innocence and norms of personhood a clear constitutional home. At present, the options seem limited in part because the Constitution does not include clear structural safeguards for inclusive solidarity, even though it is essential to the nation's democratic integrity. The most significant protection is the Fourteenth Amendment's prohibition on caste, arguably the worst transgression against solidary values. Absent a more comprehensive framework, the Court's emphasis on innocence in *Plyler* functioned as a kind of constitutional metaphor for these broader concerns. For these reasons, moving beyond metaphor will not be easy and is likely to be only partially satisfying. For instance, blamelessness might be used to bolster a due process analysis by emphasizing the right of the innocent to be free of unwarranted deprivations of an interest in education. Alternatively, dignitary claims of personhood could once again be invoked to call for recognition of a federal right to basic education. That right would become a minimum condition of human flourishing. Without some decisive change in our constitutional framework, however, widely shared norms of fundamental decency will remain unprotected and at risk.

2. *Will Equality Remain an Effective Way to Broaden the Conversation About Education of Undocumented Children?*—As *Plyler* demonstrates, equality claims can have a salutary effect in alerting courts to the broader implications of educational access. However, the current state of equality jurisprudence makes it hard to acknowledge structural inequities. As already mentioned, growing deference to state and local initiatives on immigration has weakened the rationale for heightened judicial scrutiny of alienage classifications under equal protection law. However, there are other reasons to be concerned about how impactful equality claims will be in preserving undocumented students' access to public schools. As the demographic diversity of the United States continues to increase, Americans may be suffering from "pluralism anxiety" that shapes constitutional jurisprudence in important ways.³⁵⁹ According to legal scholar Kenji Yoshino, there are widespread fears that a proliferation of differences will diminish

359. Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 751 (2011).

the nation's sense of shared fate in ways that imperil its democratic prospects.³⁶⁰ For that reason, he argues, the Supreme Court has turned away from equality jurisprudence, growing increasingly reluctant to recognize new group-based classifications that trigger exacting constitutional scrutiny.³⁶¹ To avoid dangers of balkanization, the Court instead has emphasized universal interests in individual liberty.³⁶² Yoshino believes that advancing liberty-based claims to dignity has the wholesome effect of “stress[ing] the interests we have in common as human beings rather than the demographic differences that drive us apart.”³⁶³ The hope is that the recognition of freedoms that everyone enjoys will build “a broader, more inclusive form of ‘we.’”³⁶⁴

This rhetoric invokes a sense of our shared humanity, but for undocumented children seeking to maintain *Plyler's* protections, there is one great stumbling block. In 1973, the Supreme Court held that there is no fundamental right to equal education under the Constitution.³⁶⁵ In the intervening decades, the Court refrained from enshrining even a right to basic education, despite clear recognition of schooling's importance to human flourishing and a healthy democracy.³⁶⁶ There are no signs that today's Court will find a right to education, whether equal or adequate. Indeed, recent evidence suggests a growing reluctance to find constitutional entitlements, including one to education, when they are not expressly mentioned in the Constitution.³⁶⁷ Short of judicial recognition of a fundamental right, Congress could act to protect an entitlement to adequate schooling through comprehensive educational reform.³⁶⁸ So far, though, Congress has shown little appetite for such an endeavor, in part due to concerns about cost and a conviction that education remains primarily a state and local matter.³⁶⁹

If the Court retreats from group-based protections yet declines to find a fundamental right to education, the foundations of *Plyler's* equal protection analysis will face new challenges. If property-like entitlements are insufficient to secure the decision's future, alternative frameworks will fill

360. Id. at 751–52.

361. Id. at 755–59.

362. Id. at 748–49.

363. Id. at 793.

364. Id. at 776.

365. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

366. See Kimberly Jenkins Robinson, Introduction, *in A Federal Right to Education: Fundamental Questions for Our Democracy*, supra note 235, at 1, 10–12, 16–19 (describing how the *Rodriguez* decision shifted litigation to the state courts as well as recent efforts to revive a federal right, including under the Due Process Clause).

367. See *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 5 (U.S. June 24, 2022) (rejecting substantive due process as a basis for protecting reproductive rights).

368. Kimberly Jenkins Robinson, A Congressional Right to Education: Promises, Pitfalls, and Politics, *in A Federal Right to Education: Fundamental Questions for Our Democracy*, supra note 235, at 186, 187.

369. Id. at 187, 198–201.

the gap only to the extent that they can find constitutional traction. There is great irony in the divergence between the state of the law and our most prized values. Two of these values are protecting innocent children and preserving the conditions for human flourishing. Neither, however, has found a clear constitutional home when it comes to safeguarding educational access for undocumented children. For now, there do not seem to be new ways to express these normative commitments beyond analogies to illegitimacy and allusions to the dangers of a caste-like system. If *Plyler* is reconsidered, advocates must hope that these indirections will suffice or that the Court will find firmer ground in formalism or a reinterpretation of the Fourteenth Amendment. Whatever the rationale, though, only upholding *Plyler* will align the Constitution with a vision of inclusive solidarity.

CONCLUSION

The *Plyler* case reveals the underlying complexities of treating education as a form of property. The decision clearly implicated the earned entitlements of residency, even as the opinion is remembered as a high-water mark of personhood. Claims to personhood were strengthened by characteristics of the plaintiffs themselves: innocent young children who had yet to achieve their full potential. Relegating youth to a dehumanized and degraded state of illiteracy struck at the heart of the nation's foundational democratic precepts, most notably an abhorrence of caste systems based on ascribed traits assigned at birth.

Today, concepts of property and personhood continue to influence thinking about access to public education for undocumented students. The privatization of education has elevated property-like claims to schooling based on residency. However, the federal government's ability to define the terms of government largesse in this area has been greatly weakened by congressional inaction and repeated attacks on the executive branch's authority. There have been recent incursions on the portrayal of undocumented children as innocents, but public backlash against their punitive treatment has been swift and forceful. *Plyler* remains good law not only because children have a property-like entitlement in schooling but also because the polity has a stake in preserving norms of fundamental decency.