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### The Keys to the Nation's Educational Future: The Latina/o Struggle for Educational Equity

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## The Keyes to the Nation's Educational Future: The Latina/o Struggle for Educational Equity

# THE KEYES TO THE NATION'S EDUCATIONAL FUTURE: THE LATINA/O STRUGGLE FOR EDUCATIONAL EQUITY

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## ABSTRACT

This Essay outlines emerging Latina/o educational equity issues in the new millennium. Although Latina/os face challenges similar to those of other minority groups, those challenges differ in important respects from those of other groups because of the complexities of the longstanding and ongoing migration of Latina/os to the United States. Desegregation of the public schools as a means of ensuring access to education for racial minorities was part of the monumental civil rights struggle of the twentieth century. Immigration, and the resulting increase in the percentage of Latina/os as part of the population, has transformed the educational access concerns facing the nation as well as the nature of the political activism directed at increased educational access in the United States.

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## INTRODUCTION

A successor to a series of landmark school-desegregation cases spawned by *Brown v. Board of Education*,<sup>1</sup> the Supreme Court's decision in *Keyes v. School District No. 1*<sup>2</sup> is well-known in its own right. It has

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1. 347 U.S. 483 (1954).

2. 413 U.S. 189 (1973). See generally Philip B. Kurland, "Brown v. Board of Education Was the Beginning": *The School Desegregation Cases in the United States Supreme Court: 1954-1975*,

provoked considerable scholarly analysis and foreshadowed important developments in educational desegregation and civil rights litigation in the United States.<sup>3</sup>

In *Keyes*, the Supreme Court addressed a constitutional challenge to the segregation of the public schools in a major Northern school district that included Latina/os as well as African Americans and whites.<sup>4</sup> The Court thus decided a case that goes beyond the rigid, legally sanctioned, black–white segregation at issue in *Brown*. As the Court succinctly observed, “Denver is a tri-ethnic, as distinguished from a bi-racial, community.”<sup>5</sup>

Among other things, scholars have analyzed *Keyes* as an example of how modern civil rights concerns in the United States go well beyond the binary relationship between African Americans and whites.<sup>6</sup> The pressing civil rights issues at any historical moment necessarily reflect the ever-changing racial mosaic, which in modern times unquestionably includes Latina/os, Asian Americans, Native Americans, and other people of color. The Supreme Court’s decision in *Keyes* exemplifies why influential civil rights scholars have pressed for analysis beyond the conventional black–white paradigm.<sup>7</sup>

In important respects, the civil rights terrain has changed dramatically in the forty years since the Court decided *Keyes*. A revolution marked by *Brown* eliminated de jure discrimination from American public law, although it took a generation to effectively dismantle the remnants of Jim Crow. Indeed, *Keyes* itself involved de facto segregation in

1979 WASH. U. L.Q. 309 (tracing the legacy of *Brown v. Board of Education* and subsequent school desegregation decisions of the Supreme Court).

3. See, e.g., George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555, 595–99, 601–02 (1994).

4. See *Keyes*, 413 U.S. at 195, 197–98. The prolonged litigation also raised issues of bilingual education for limited English proficiency students, many of whom were Latina/o. See Michael Jackson, *Bilingual Education Litigation in Denver: The School District’s Perspective*, 1 LA RAZA L.J. 250, 250 (1986); *infra* text accompanying notes 31–32 (noting how Latina/os at one time pressed for greater access to bilingual education).

5. *Keyes*, 413 U.S. at 195.

6. See, e.g., Rachel F. Moran, *Courts and the Construction of Racial and Ethnic Identity: Public Law Litigation in the Denver Schools*, in LEGAL CULTURE AND THE LEGAL PROFESSION 153, 155 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996); Rachel F. Moran, *Getting a Foot in the Door: The Hispanic Push for Equal Educational Opportunity in Denver*, 2 KAN. J.L. & PUB. POL’Y 35, 36–38 (1992); Tom I. Romero, II, *¿La Raza Latina?: Multicultural Ambivalence, Color Denial, and the Emergence of a Tri-Ethnic Jurisprudence at the End of the Twentieth Century*, 37 N.M. L. REV. 245, 262–68 (2007); Tom I. Romero, II, *Our Selma Is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado, and Multiracial Conundrums in American Jurisprudence*, 3 SEATTLE J. SOC. JUST. 73, 74–75 (2004).

7. See Richard Delgado, *Rodrigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black–White Binary*, 75 TEX. L. REV. 1181, 1196–97 (1997); Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CALIF. L. REV. 1213, 1213 (1997).

a Northern, not Southern, city without the same history of slavery followed by generations of de jure segregation.<sup>8</sup>

Despite the monumental changes brought about in American social life by the civil rights revolution, school segregation remains firmly entrenched due to persistent residential segregation throughout the nation—North, South, East, and West.<sup>9</sup> Unfortunately, increasing residential resegregation of the United States over the last quarter century has made certain public school districts more, not less, racially separated than they were in the heyday of Jim Crow.<sup>10</sup> In response, some well-intentioned districts have sought in recent years to promote greater racial diversity in the public schools through creative means, only to, ironically enough, have their efforts rebuffed by an unsympathetic Supreme Court.<sup>11</sup>

With the relatively rapid growth of the Latina/o population in the United States,<sup>12</sup> pressing Latina/o civil rights concerns, including education,<sup>13</sup> are much more well-known today than they were when the Supreme Court decided *Keyes* in 1973. There has also been a growing awareness that African Americans and Latina/os are increasingly concentrated in public school systems across the United States. As summarized by one scholar:

In seventy of the one hundred largest districts, whites comprise less than fifty percent of the student population. In more than one-third of these districts, seventy-five percent of the student membership is non-white. *Seven of the ten largest school districts are comprised of student populations that are more than seventy-five percent non-*

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8. See *Keyes*, 413 U.S. at 191.

9. See Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 795–96 (1996).

10. See GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 4 (2007) (“The country’s rapidly growing population of Latino and black students is more segregated than they have been since the 1960s and we are going backward faster in the areas where integration was most far-reaching.”).

11. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (invalidating two local public school district plans considering race in school assignments in an attempt to ensure diverse schools). Critics assert that the Court’s decision in *Parents Involved* is unfaithful to the spirit, if not to the letter, of *Brown v. Board of Education*. See, e.g., Goodwin Liu, “History Will Be Heard”: An Appraisal of the Seattle/Louisville Decision, 2 HARV. L. & POL’Y REV. 53, 61 (2008); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 151–52 (2007).

12. See *infra* text accompanying notes 17–26.

13. See generally Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 911 (2010) (analyzing Latina/o struggle for educational opportunity in the United States).

white. This data reveals a striking trend toward re-segregation in school districts across the country.<sup>14</sup>

This symposium marks the fortieth anniversary of *Keyes v. School District No. 1*. In light of the many changes to the American landscape in those four decades, the symposium offers a timely opportunity to reassess the place of race and class in educational institutions in the twenty-first century. This contribution hopes to add meaningfully to that reassessment.

This Essay outlines emerging educational equity issues specific to Latina/os in the new millennium. Importantly, as has long been the case, Latina/os face challenges similar to those of other minority groups.<sup>15</sup> However, although desegregation of the public schools as a means of ensuring access to education for racial minorities was part of the monumental civil rights struggle of the twentieth century, the battle for access to a public education in the new millennium differs in salient respects.<sup>16</sup> Namely, immigration, and the resulting increase in the percentage of Latina/os as part of the general and student populations, has transformed the nature of educational access issues facing the nation as well as the nature of the political movement for greater educational access in the United States.

Part I of this Essay considers generally the modern struggle for educational access by Latina/os in the United States. Part II looks specifically at Latina/o educational opportunity in the elementary and secondary schools. Part III analyzes contemporary struggles for access to colleges and universities, with a specific focus on the much-publicized political activism of immigrant students. Part IV concludes by evaluating the proper avenues for pursuing greater educational equality for Latina/os in the twenty-first century.

#### I. MODERN EDUCATIONAL EQUALITY AND ACCESS ISSUES FOR LATINA/OS

As is frequently trumpeted in the popular press,<sup>17</sup> Latina/os today constitute the nation's largest minority group in the United States, with more than fifty million people constituting roughly 16.5% of the U.S.

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14. Jamie Gullen, *Colorblind Education Reform: How Race-Neutral Policies Perpetuate Segregation and Why Voluntary Integration Should Be Put Back on the Reform Agenda*, 15 U. PA. J.L. & SOC. CHANGE 251, 253–54 (2012) (emphasis added) (footnotes omitted).

15. See, e.g., Gabriel J. Chin, *Sweatt v. Painter and Undocumented College Students in Texas*, 36 T. MARSHALL L. REV. 39 (2010) (drawing analogies between African American students seeking desegregation of public universities and undocumented college students pressing for greater access to a college education).

16. See *infra* Parts II, III.

17. See, e.g., Ryan Lytle, *Hispanics Are Now the Largest Minority in College*, U.S. NEWS & WORLD REP. (Aug. 31, 2012), <http://www.usnews.com/education/best-colleges/articles/2012/08/31/hispanics-are-now-the-largest-minority-in-college>.

population.<sup>18</sup> The growing Latina/o population has increasingly affected national politics<sup>19</sup> as well as the racial composition of public schools from coast to coast. Hispanics today comprise nearly 25% of the enrollment in the country's public elementary and secondary schools.<sup>20</sup> Moreover, Hispanics today comprise the largest minority group on U.S. college campuses, about 16.5% of college enrollment.<sup>21</sup>

Regional settlement patterns of Latina/o immigrants and resulting population demographics in the United States also have changed over the last quarter century. Having emerged in the last decade as a national rather than strictly regional phenomenon, Mexican migration has transformed the racial demographics of the American South and Midwest, in turn provoking a variety of legal and other responses that have dramatically changed the civil rights landscape in those regions.<sup>22</sup>

Increasing percentages of Hispanics in public schools have been accompanied in some states, such as California, by a steady decline in funding per pupil for public school systems.<sup>23</sup> The first decade of the new millennium saw state and local public educational systems decimated by budget reductions.<sup>24</sup> As the largest (and a growing) minority group in the

18. See RICHARD FRY & MARK HUGO LOPEZ, PEW HISPANIC CTR., *HISPANIC STUDENT ENROLLMENTS REACH NEW HIGHS IN 2011*, at 5 (2012).

19. See Julia Preston & Fernanda Santos, *A Record Latino Turnout, Solidly Backing Obama*, N.Y. TIMES, Nov. 8, 2012, at P13 (reporting that Latina/os voted overwhelmingly for President Obama in the 2012 presidential election).

20. See FRY & LOPEZ, *supra* note 18, at 4.

21. See *id.*; see also Marie C. Scott, *Resegregation, Language, and Educational Opportunity: The Influx of Latino Students into North Carolina Public Schools*, 11 HARV. LATINO L. REV. 123, 123 (2008) ("In 2003, Latinos represented the largest minority group outnumbering African Americans for the first time in U.S. history. Today Latinos make up over fourteen percent of the U.S. population, and they are projected to comprise nearly twenty-five percent of the population in 2050." (footnotes omitted)).

22. See Kevin R. Johnson, *The End of "Civil Rights" As We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1491–95 (2002); Sylvia R. Lazos Vargas, *"Latina/o-ization" of the Midwest: Cambio de Colores (Change of Colors) as Agromaquilas Expand into the Heartland*, 13 LA RAZA L.J. 343, 360–65 (2002); Lisa R. Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135, 137–40 (2009); Laura Rothstein, *Introduction to the Symposium Issue on Immigration in the Heartland*, 40 BRANDEIS L.J. 849, 849 (2002). See generally JOSÉ MARÍA MONTERO, *LATINOS AND THE U.S. SOUTH* (2008) (analyzing increasing migration of Mexican immigrants to the South); BEING BROWN IN DIXIE: RACE, ETHNICITY, AND LATINO IMMIGRATION IN THE NEW SOUTH (Cameron D. Lippard & Charles A. Gallagher eds., 2011) (to the same effect); Robert Aponte & Marcelo Siles, *Latinos in the Heartland: The Browning of the Midwest* (Julian Samora Res. Inst., Research Report No. 5, 1994) (discussing migration of Latina/os to the Midwest). Hate crimes against Latina/os have been one of the unsavory responses to the emerging Latina/o population in some regions of the country. See Kevin R. Johnson & Joanna Cuevas Ingram, *Anatomy of a Modern-Day Lynching: The Relationship Between Hate Crimes Against Latina/os and the Debate over Immigration Reform*, 91 N.C. L. REV. 1613, 1629–36 (2013). State and local immigration-enforcement laws represent another response to the changing immigration patterns. See *infra* text accompanying notes 45–46.

23. See Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1239, 1240–42 (2000).

24. See Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1857 (2011) ("Extensive reductions in state and local funding for public education since the economic downturn that began in 2008 have resulted in sub-

United States,<sup>25</sup> Latina/os have been disadvantaged in increasing numbers by the continuous budget cuts. The inequality of public school financing, with the poorest districts generally being heavily minority, has not diminished—and may well have grown—due to the recessionary economy and constricting state and local budgets.<sup>26</sup>

In 1973, the same year that it decided *Keyes*, the Supreme Court decided a case involving a constitutional challenge to the unequal distribution of funding of public school districts in Texas. In *San Antonio Independent School District v. Rodriguez*,<sup>27</sup> the Court rejected a claim that the U.S. Constitution required equal financing of school districts in the state. The seasoned civil rights litigators who brought the suit no doubt understood the racially disparate impacts of unequal school financing and the relationship between those inequalities and the segregation of the public schools. In addition, the Supreme Court in *Rodriguez* and *Keyes* likely appreciated the interrelationship between school finance and desegregation litigation, with the ultimate goal of both types of litigation being equal access to quality education for all students.<sup>28</sup>

With the Supreme Court's refusal in *Rodriguez* to intervene in state and local school finance matters, political ferment<sup>29</sup> and litigation in state courts<sup>30</sup> about school funding inequalities continued for decades. Although school financing disparities persist and have in some instances increased, other issues have emerged since the Court decided *Keyes* that affect educational access for immigrants and Latina/os.

For a time, in the pursuit of educational equality, Latina/os demanded access to bilingual education in public schools and initially enjoyed some political success.<sup>31</sup> However, support for bilingual education de-

stantial cutbacks in educational services and, in many cases, have put in jeopardy students' constitutional right to the opportunity for a "sound basic education." (quoting N.Y. CONST. art. XI, § 1)).

25. See *supra* text accompanying notes 17–21.

26. See Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47 (2012) (offering a strategy for providing services to promote education and reduction in societal inequality).

27. 411 U.S. 1 (1973); see also Camille Walsh, *Erasing Race, Dismissing Class: San Antonio Independent School District v. Rodriguez*, 21 LA RAZA L.J. 133 (2011) (analyzing critically the *Rodriguez* decision).

28. See Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 LAW & INEQ. 81, 83–93 (2006) (analyzing the relationship between the two different kinds of school litigation represented by *Keyes* and *Rodriguez*).

29. See *infra* Part II.

30. See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 251–52 (1999) (analyzing school finance litigation and the relationship to school desegregation litigation); see, e.g., *State v. Lobato*, 304 P.3d 1132, 1144 (Colo. 2013) (upholding Colorado public financing scheme in face of state constitutional challenge); *Edgewood Ind. Sch. Dist. v. Meno*, 917 S.W.2d 717, 755 (Tex. 1995) (upholding Texas public school finance scheme).

31. See Bowman, *supra* note 13, at 924–31 (discussing rise and decline in bilingual education litigation from the 1970s to present); see also Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CALIF. L. REV. 321 (1987) (contending that bilingual education was an issue about which there is conflict between Anglos and Latina/os for status in American social life); Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CALIF. L. REV.



creased over time. In 1998, for example, California voters passed an initiative known as Proposition 227 that barred bilingual education in the state's public schools and indirectly targeted Spanish-speaking immigrant and Latina/o students.<sup>32</sup> Today, the issue of bilingual education no longer is the focal point that it once was in the Latina/o struggle for educational access.

## II. *PLYLER V. DOE*<sup>33</sup> AND ACCESS TO K–12 EDUCATION

Under the Supreme Court's 1982 ruling in *Plyler v. Doe*, states generally cannot bar undocumented immigrants from public elementary and secondary schools.<sup>34</sup> Consequently, the Court ensured undocumented immigrants access to public schools in school districts across the United States for more than three decades. The civil rights litigators who brought *Plyler* no doubt viewed the cases as part of the larger struggle of Latina/os for educational equality.<sup>35</sup>

Although decided more than thirty years ago, the Court's monumental decision in *Plyler* continues to generate controversy, as well as regular political and legal challenges.<sup>36</sup> A number of states have passed laws that directly and indirectly challenge the Court's decision.<sup>37</sup> The political responses to the decision in contemporary times have frequently been tied to concerns with undocumented immigration generally and to the costs of providing an education to undocumented immigrants in a time of shrinking state and local budgets.

The ruling in *Plyler*, which detractors might characterize as an "unfunded mandate,"<sup>38</sup> has unquestionably proven costly to state and local governments. As one observer stated:

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1249 (1988) (analyzing federal role in the promotion of bilingual education). Bilingual education also was an ancillary issue in the *Keyes* litigation. See *supra* note 4.

32. See Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1027–28 (N.D. Cal. 1998) (declining to enjoin Proposition 227 from going into effect); Johnson & Martínez, *supra* note 23, at 1247–61, 1263 (analyzing the discriminatory impacts of the initiative); see also Rosemary C. Salomone, *Multilingualism and Multiculturalism: Transatlantic Discourses on Language, Identity, and Immigrant Schooling*, 87 NOTRE DAME L. REV. 2031 (2012) (exploring issues of language and identity in public education). For analysis of the end of bilingual education in California, see Rachel F. Moran, *Bilingual Education, Immigration, and the Culture of Disinvestment*, 2 J. GENDER RACE & JUST. 163, 169–70, 172–73, 175 (1999), and Rachel F. Moran, *Equal Liberties and English Language Learners: The Special Case of Structured Immersion Initiatives*, 54 HOW. L.J. 397 (2011).

33. 457 U.S. 202 (1982).

34. *Id.* at 230.

35. See *supra* text accompanying notes 27–32. For analysis of the litigation strategy employed by the Mexican American Legal Defense and Educational Fund in *Keyes*, *Rodriguez*, and *Plyler*, see Michael A. Olivas, *From "A Legal Organization of Militants" into a "Law Firm for the Latino Community: MALDEF and the Purposive Cases of Keyes, Rodriguez, and Plyler*, 90 DENV. U. L. REV. 1151 (2013).

36. See *infra* text accompanying notes 38–63.

37. See *infra* text accompanying notes 38–63.

38. See Ross Ramsey, *Focusing on Education, with an Eye on the Voters*, N.Y. TIMES, Sept. 21, 2012, at A19 (referring to federal and state "unfunded mandates" on education provided by local school districts).

The [Congressional Budget Office] credited education costs as the “largest single expenditure in state and local budgets.” Pursuant to the landmark case of *Plyler v. Doe*, “state and local governments bear the primary fiscal and administrative responsibility of providing schooling” for the nearly two million undocumented migrant children currently living in the United States. Public efforts to educate these children . . . who do not speak English fluently can be between 20% and 40% higher than that of educating native-born, English-speaking children. In 2000, 1.5% of all children enrolled in kindergarten through the fifth grade, and 3% of children enrolled in the sixth through the twelfth grade, were undocumented.<sup>39</sup>

Budgetary concerns associated with the costs of educating undocumented students unquestionably have contributed to support for state measures designed to limit access of undocumented students—many of whom are Latina/o—to public elementary and secondary schools.<sup>40</sup> More generally, costs blamed on undocumented immigrants for public services and benefits often trigger calls for limiting immigration and reduction of benefits available to all immigrants.<sup>41</sup> Despite the costs at the state and local levels of providing an education, immigrants generally are a net national economic benefit, with significant revenues flowing to the federal government by the taxing of income of undocumented individuals, and businesses employing them.<sup>42</sup>

The political responses to *Plyler* began many years ago. In 1994, California voters overwhelmingly passed Proposition 187, an initiative that a federal court enjoined as unconstitutional.<sup>43</sup> If the law had been implemented, it would have denied access of undocumented students to the Golden State’s public elementary and secondary schools. The initiative also would have required school officials to verify the immigration status of enrolled students and their parents.

Despite the judicial invalidation of the core of Proposition 187, political activists—who often decry undocumented immigration—continue to rally against *Plyler*.<sup>44</sup> Those efforts most recently arose again in 2012

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39. Corrie Bilke, Note, *Divided We Stand, United We Fall: A Public Policy Analysis of Sanctuary Cities’ Role in the “Illegal Immigration” Debate*, 42 IND. L. REV. 165, 172 (2009) (footnotes omitted) (quoting U.S. CONG. BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 4, 7 (2007)).

40. See *infra* text accompanying notes 43–63.

41. See KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDER AND IMMIGRATION LAWS 150–55 (2007).

42. See *id.* at 137–43.

43. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 763 (C.D. Cal. 1995); see also KEVIN R. JOHNSON, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1563–67 (1995) (analyzing the impacts of the initiative on discrete groups of minorities).

44. See Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-first Century*, 8 LA RAZA L.J. 42, 47–48 (1995) (summarizing political efforts in California to force the Supreme Court to reconsider its ruling in *Plyler v. Doe*).

when the Alabama legislature passed House Bill 56,<sup>45</sup> one of many state immigration enforcement measures in the last few years following the lead of Arizona's famous Senate Bill 1070.<sup>46</sup>

The Alabama law went further than many of the other state immigration-enforcement laws, most of which focused primarily on law enforcement measures as a way of responding to undocumented immigrants. House Bill 56 would have required, among other things, local school districts to collect information about the immigration status of students and their parents, and English as a Second Language students.<sup>47</sup> Given the circumstances of its passage, the law was arguably motivated in part by anti-immigrant, as well as anti-Mexican, sentiment.<sup>48</sup> In enjoining the implementation of other provisions of the law, a district court specifically found that "there is evidence that the legislative debate on HB 56 was laced with derogatory comments about Hispanics. *This evidence reinforces the contention that [the] term illegal immigrants (the purported target of HB 56) was just racially discriminatory code for Hispanics.*"<sup>49</sup> The court further recognized that "the State's actions in enforcing [the section] of HB 56 [at issue] will have a disproportionate effect on Latinos in Alabama."<sup>50</sup>

The stated goal of House Bill 56's school data-collection provisions was to gather the information necessary to help persuade the Supreme

45. H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011); see also Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609 (2012) (analyzing civil rights implications of the growing number of state immigration-enforcement laws). Provisions of many of the state immigration-enforcement laws, including Alabama's, have been successfully challenged as unconstitutional. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2501-07 (2012); *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012), cert. denied, 133 S. Ct. 2022 (2013); *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1269 (11th Cir. 2012); *United States v. South Carolina*, 2013 U.S. App. LEXIS 14917 (4th Cir. July 23, 2013).

46. See *Arizona*, 132 S. Ct. at 2501-07 (striking down as unconstitutional three of four provisions of S.B. 1070).

47. See Ala. H.B. 56, § 28. See generally Maria Pabón López et al., *The Prospects and Challenges of Educational Reform for Latino Undocumented Children: An Essay Examining Alabama's H.B. 56 and Other State Immigration Measures*, 6 FIU L. REV. 231 (2011) (analyzing educational access impacts of H.B. 56); Udi Ofer, *Protecting Plyler: New Challenges to the Right of Immigrant Children to Access a Public School Education*, 1 COLUM. J. RACE & L. 187 (2012) (studying efforts to limit the access of undocumented children to public education).

48. See *infra* text accompanying notes 49-50.

49. *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1193 (M.D. Ala. 2011) (emphasis added) (finding that federal law preempted provision of H.B. 56 barring undocumented immigrants from registering for mobile home permits); see also Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55 (2009) (contending that local immigration ordinances that bar rental of housing to undocumented immigrants increase the likelihood of housing discrimination against Latina/os); Sofia D. Martos, Note, *Coded Codes: Discriminatory Intent, Modern Political Mobilization, and Local Immigration Ordinances*, 85 N.Y.U. L. REV. 2099, 2102 (2010) (stating that local immigration ordinances "can . . . serve as 'coded codes'—facially neutral ordinances enacted to address immigration concerns and target specific communities").

50. *Magee*, 835 F. Supp. 2d at 1197.

Court to reconsider *Plyler*,<sup>51</sup> which was also a goal of California's Proposition 187.<sup>52</sup> In striking down the Texas law, the Court found that the state failed to provide a compelling justification for barring undocumented students from the public schools, such as evidence of the economic and other costs of undocumented student attendance.<sup>53</sup> Section 2 of Alabama's House Bill 56 explains that

[b]ecause the costs incurred by school districts for the public elementary and secondary education of children who are aliens not lawfully present in the United States can adversely affect the availability of public education resources to students who are United States citizens or are aliens lawfully present in the United States, *the State of Alabama determines that there is a compelling need for the State Board of Education to accurately measure and assess the population of students who are aliens not lawfully present in the United States, in order to forecast and plan for any impact that the presence such population may have on publicly funded education in this state.*<sup>54</sup>

Although the stated purpose was to be better able to forecast and plan educational expenditures, House Bill 56's educational provisions had a direct impact on Latina/o school attendance. Immediately after its passage, Latina/o absences reportedly increased dramatically—doubling what they would have been on a normal day.<sup>55</sup> Parents of undocumented students understandably worried that information provided to school officials about their immigration status could end up in the hands of U.S. immigration enforcement authorities and result in their and their families' deportation from the United States.<sup>56</sup> The record number of removals of noncitizens in the last few years,<sup>57</sup> as well as the increasing state

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51. See John C. Eastman, *Papers, Please: Does the Constitution Permit the States a Role in Immigration Enforcement?*, 35 HARV. J.L. & PUB. POL'Y 569, 589–91 (2012); Campbell Robertson, *Critics See "Chilling Effect" in Alabama Immigration Law*, N.Y. TIMES, Oct. 28, 2011, at A14.

52. See Johnson, *supra* note 43, at 1564–67.

53. See *Plyler v. Doe*, 457 U.S. 202, 227–30 (1982).

54. H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011) (emphasis added).

55. See Richard Fausset, *In Alabama, Strict New Immigration Law Prompts Alarm*, L.A. TIMES, Oct. 9, 2011, at A18; see also Jeremy B. Love, *Alabama Introduces the Immigration Debate to Its Classrooms*, 38 HUM. RTS. 7, 7–8 (2011) ("The Monday after H.B. 56 took effect, 2,285 Latino students were absent from school out of the 34,000 students statewide. *That absentee rate is nearly double what it would be on a normal day.*" (emphasis added)).

56. See JONATHAN BAUM ET AL., IN THE CHILD'S BEST INTEREST? THE CONSEQUENCE OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 7–9 (2010); Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-border Perspectives*, 88 N.C. L. REV. 1799, 1814 (2010).

57. See, e.g., OFFICE OF IMMIGRATION STATISTICS, 2011 YEARBOOK OF IMMIGRATION STATISTICS 102 (2012) (reporting the removal by the U.S. government of nearly 400,000 noncitizens, a new record, in 2011). As observed by one commentator:

This is an era of unprecedented immigration enforcement. Never before in the history of the United States has the government removed so many noncitizens in so short a time frame. Between 2003 and 2008, the U.S. government removed 1,446,338 noncitizens from the United States. And not all noncitizens placed in removal proceedings were ultimately removed. Removals are merely the tip of the iceberg with regard to enforcement actions. For every noncitizen who receives a formal order of removal, another four depart "voluntarily" as a result of their encounters with the immigration enforcement bu-

and local government cooperation with federal immigration authorities,<sup>58</sup> suggest that such concerns are not far-fetched. For example, the risks of removal to any noncitizen who has a brush with the law have increased precipitously in recent years with high-level officials in the Obama Administration regularly proclaiming that the U.S. government's immigration enforcement efforts seek to promote public safety by focusing on "criminal aliens."<sup>59</sup>

Concerned about the new law's potentially discriminatory impacts, the U.S. Department of Justice requested that Alabama school districts provide the information necessary to determine whether House Bill 56 adversely affected the civil rights of Latina/os and immigrant schoolchildren.<sup>60</sup> The data led the Justice Department to conclude that "H.B. 56 has had significant and measurable impacts on Alabama's school children, impacts that have weighed most heavily on Hispanic and English language learning students. . . . [O]ur investigation suggests that the legislation overall has had continuing and lasting consequences in the education context."<sup>61</sup> Finding that those impacts undermined the right to public

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reaucacy. At the same time, federal prosecutions of immigration crimes in criminal courts have reached an all-time high. Over the past five years, immigration crimes have risen to the top of the list of federal prosecutions, and now make up more than half of the federal criminal docket.

Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1565 (2010) (footnotes omitted). For critical analysis of modern U.S. deportation practices, see BILL ONG HING, *DEPORTING OUR SOULS* (2006); DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* (2012); and DANIEL KANSTROOM, *DEPORTATION NATION* (2007).

58. See, e.g., Katarina Ramos, *Criminalizing Race in the Name of Secure Communities*, 48 CAL. W.L. REV. 317, 321, 342 (2012); Rachel R. Ray, *Insecure Communities: Examining Local Government Participation in U.S. Immigration and Customs Enforcement's "Secure Communities" Program*, 10 SEATTLE J. SOC. JUST. 327, 330 (2011); see also Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrest, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011) (analyzing critically state and local cooperation with the federal government in immigration enforcement and efforts at removal of "criminal aliens").

59. See Robert Farley, *Deportation of Criminals Up 70%, Obama Says*, ST. PETERSBURG TIMES (St. Petersburg, Fla.), May 11, 2011, at 4A. Scholars have harshly criticized the criminalization of violations of the immigration laws and the prioritization of the deportation of noncitizens charged with crimes. See, e.g., Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1834–35 (2007); Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 257–58 (2011); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 107–08 (2012); Rachel F. Moran, *Defining the Outsider*, 58 UCLA L. REV. 1389, 1390 (2011). But see Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 370 (1999) (analyzing various ways to expedite the removal of "criminal aliens").

60. See Tracy Russo, *AAG Perez Reminds Alabama School Districts Children Deserve Equal Access to Public Education*, JUST. BLOG (Nov. 1, 2011), <http://blogs.usdoj.gov/blog/archives/1710>.

61. Letter from Thomas E. Perez, Assistant Attorney General, U.S. Dep't of Justice, to Dr. Thomas R. Bice, Ala. State Superintendent of Educ. (May 1, 2012), available at [http://images.politico.com/global/2012/05/doj\\_letter\\_5-1-12.html](http://images.politico.com/global/2012/05/doj_letter_5-1-12.html).

education for undocumented children guaranteed by *Plyler*,<sup>62</sup> a court of appeals enjoined the provision from going into effect.<sup>63</sup>

In summary, as exemplified by Alabama's House Bill 56, the battle over *Plyler* and its guarantee of a K–12 public education to undocumented students is far from over. The nation can expect continued political and legal efforts to overrule the decision and deny access to undocumented students to public schools, with clearly disparate impacts on Latina/os.

### III. ACCESS TO COLLEGE AND UNIVERSITY EDUCATION

Over at least the last decade, the access of undocumented immigrant students, who are not eligible for most federally insured loan and other programs,<sup>64</sup> to public colleges and universities has become a deeply contested issue. Besides raising important issues over access to higher education in general, such access is inextricably entangled with the ongoing national debate over immigration reform.<sup>65</sup> Moreover, the access of undocumented students to public colleges and universities has consequences for the diversity of college and university student bodies. Such consequences follow from the fact that many undocumented students initially came as children from Latin America and Asia.<sup>66</sup>

With some exceptions, academic administrators and policy-makers generally embrace race-conscious affirmative action in higher education as a tool to ensure diverse college student bodies.<sup>67</sup> After years of attempts, the constitutional challenges to affirmative action at public colleges and universities stalled—at least for a time. In 2003, the Supreme Court decided a pair of affirmative action cases involving the University of Michigan,<sup>68</sup> which together made it clear that a narrowly tailored, race-conscious admissions scheme could pass constitutional muster.

After the Supreme Court's decision in the University of Michigan cases, opponents of affirmative action resorted to the political process.

62. See *Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1245–49 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013).

63. See *id.* at 1249–50.

64. See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* § 505, 8 U.S.C. § 1623 (2012); Laura S. Yates, *Plyler v. Doe and the Rights of Undocumented Immigrants to Higher Education: Should Undocumented Students Be Eligible for In-State Tuition Rates?*, 82 WASH. U. L.Q. 585, 585–86 & n.5 (2004); *Immigration Law—Education—California Extends In-state Tuition Benefits to Undocumented Aliens—Act Relating to Public Postsecondary Education*, 115 HARV. L. REV. 1548, 1548–49 & n.2 (2002).

65. See Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1634 (2009).

66. See Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549, 1572 (2011).

67. See *id.* at 1550.

68. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (rejecting constitutional challenge to the University of Michigan Law School's carefully calibrated, race-conscious affirmative action program); *Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003) (invalidating University of Michigan's undergraduate admissions scheme that relied excessively on race).

Voters in Michigan passed an initiative like one previously passed in California that ended race-conscious affirmative action.<sup>69</sup> Many factors have contributed to the popularity of anti-affirmative action initiatives. U.S. racial demographics have changed significantly in recent years, with a much-publicized increase in the minority, particularly Latina/o and Asian, population.<sup>70</sup> In no small part due to immigration, the percentage of Latina/os attending elementary and secondary schools across the United States has been consistently increasing.<sup>71</sup> Some have found the demographic changes to be unsettling. At the same time, competition for admission to public universities has increased, public funding has decreased, and tuition and fees have risen.<sup>72</sup> Not coincidentally, the legal and political struggle over affirmative action continues, with the Supreme Court in 2013 once again effectively holding that a public law school can constitutionally fashion a narrowly tailored affirmative action program.<sup>73</sup> Despite various anti-affirmative action measures, many universities remain firmly committed to enrolling more diverse student bodies.<sup>74</sup>

When it comes to Latina/o access to a public education, slightly different issues arise in connection with higher education than with respect

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69. See Tamar Lewin, *Michigan Rejects Affirmative Action, and Backers Sue*, N.Y. TIMES, Nov. 9, 2006, at P16; see also Khaled Ali Beydoun, *Without Color of Law: The Losing Race Against Colorblindness in Michigan*, 12 MICH. J. RACE & L. 465 (2007) (analyzing the anti-affirmative action initiative campaign in Michigan). In 2012, a court of appeals invalidated the initiative on constitutional grounds. See *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 491 (6th Cir. 2012) (en banc), cert. granted sub nom. *Schuetz v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013). But see *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1136 (9th Cir. 2012) (refusing to entertain constitutional challenge to California initiative's prohibition of race-conscious affirmative action). In 1996, California voters passed Proposition 209, which barred the consideration of race and gender in public college and university admissions. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 697 (9th Cir. 1997). See generally Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997) (analyzing critically California's anti-affirmative action initiative and its impacts). Washington voters in 1998 approved a similar law, which also survived a court challenge. See *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1200-01 (9th Cir. 2000).

70. See *supra* text accompanying notes 17-26.

71. See *supra* text accompanying note 17-26.

72. See Lee Garner & Goldie Blumenstyk, *At Calif. Public Colleges, Dreams Deferred*, CHRON. HIGHER EDUC., Aug 13, 2012, at 40, 40.

73. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (remanding to court of appeals for further review of University of Texas admissions scheme). Many universities and academics filed briefs in support of the University of Texas's race-conscious admissions scheme. See e.g., Brief of Amici Curiae American Council on Education and 39 Other Higher Education Organizations in Support of Respondents, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3418823; Brief for Amici Curiae Ass'n of American Medical Colleges et al. in Support of Respondents, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3308291; Brief of Social and Organizational Psychologists as Amici Curiae Supporting Respondents, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3308289.

74. See Johnson, *supra* note 66, at 1550; Arthur L. Coleman & Scott R. Palmer, *No Time for Complacency on Racial Diversity*, CHRON. HIGHER EDUC., Feb. 18, 2011, at 27, 28.

to other minority groups.<sup>75</sup> Consider specifically the impacts of demographic transformation in public education in California. The state once had one of the most well-funded—and high quality—public school systems in the United States. California's spending per pupil, however, failed to keep up with that of other states.<sup>76</sup> Access to higher education decreased in California as state financial support declined and tuition and fees increased dramatically.<sup>77</sup> The cumulative result is that Latina/os today face serious educational impediments to gaining admission to public colleges and universities—a problem that has been exacerbated by the end of race-conscious affirmative action in the state.<sup>78</sup>

#### A. *The DREAM Act*

The Supreme Court's decision in *Plyler*<sup>79</sup> did not involve access to post-secondary education. Consequently, undocumented students' access to public colleges and universities generally remains dependent upon the laws of the individual states.

Access to public higher education of Latina/os and immigration overlap in the debate over whether undocumented students, many of whom came to the United States as children from Mexico, should be permitted to pay the same tuition and fees as other state residents. Recent years have seen the emergence of a potent political movement in which undocumented students and their allies have demanded greater access to public colleges and universities, including eligibility for in-state resident tuition and fees.<sup>80</sup>

For more than a decade, Congress has considered various iterations of a proposed law, known generically as the Development, Relief, and Education for Alien Minors (DREAM) Act, which would expressly authorize states to allow undocumented students to pay in-state fees to attend public colleges and universities and permit the U.S. government to regularize the immigration status of eligible students.<sup>81</sup> Versions of the DREAM Act have been actively debated on the national scene for years

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75. See Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259, 1280–81 (2008).

76. See Johnson & Martinez, *supra* note 23, at 1241–42.

77. See Larry Gordon, *Prop. 30 Inspires Voter Registration Drives Aimed at Students*, L.A. TIMES, Oct. 13, 2012, at A31.

78. See *supra* note 69 and accompanying text.

79. See *supra* text accompanying notes 34–36.

80. See *infra* text accompanying notes 81–91.

81. See Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1785–86, 1788 (2009). For a proponent's perspective on the Act, see Cardinal Roger M. Mahony, *The DREAM Act: We All Benefit*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 459 (2012).



and have been the subject of energized political activism on college campuses across the United States.<sup>82</sup>

The activism of many immigrants and their supporters amounts to nothing less than an inspired struggle for equal access to higher education, akin in certain aspects to the civil rights movement for desegregation of public universities in the 1950s and 1960s.<sup>83</sup> At the same time, immigration restrictionists vigorously criticize the DREAM Act, invoking claims based on the rule of the law that, among other things, the Act would reward unlawful conduct and amounts to an irresponsible “amnesty” for undocumented immigrants.<sup>84</sup>

Through the DREAM Act, undocumented students for the most part seek to be placed on the same footing as other similarly situated residents of the state.<sup>85</sup> Importantly, these students do not argue for affirmative action<sup>86</sup> for undocumented students for admission to public universities and colleges.

Consistent with the general aims of the DREAM Act, the Obama Administration in 2012 announced a new program known as the Deferred Action for Childhood Arrivals (DACA) program; it promised that the U.S. immigration authorities would not seek to deport certain noncitizens brought to the United States as children.<sup>87</sup> The program responded to the continued political pressure of the DREAMers, as the undocumented student activists were popularly known, as well as to the politics of an election year in which securing the Latina/o vote was a priority.

Despite providing a certain degree of relief for undocumented students, DACA’s administrative measures cannot substitute for compre-

82. See Laura Corruner, “Coming Out of the Shadows”: *DREAM Act Activism in the Context of Global Anti-deportation Activism*, 19 *IND. J. GLOBAL LEG. STUD.* 143, 145–46 (2012); René Galindo, *Undocumented & Afraid: The DREAM Act 5 and the Public Disclosure of Undocumented Status as a Political Act*, 44 *URBAN REV.* 589, 590 (2012); Janell Ross, *DNC Marks Dream Activists’ Entrance into the Political Mainstream*, *HUFFINGTON POST* (Sept. 6, 2012, 10:02 PM), [http://www.huffingtonpost.com/2012/09/06/dnc-dream-activists\\_n\\_1863066.html](http://www.huffingtonpost.com/2012/09/06/dnc-dream-activists_n_1863066.html); see also Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil-Rights Movement*, 42 *HARV. C.R.-C.L. L. REV.* 99, 99 (2007) (analyzing the immigrant rights marches of 2006 and the possibility of the emergence of a new immigrant civil rights movement).

83. See generally Victor C. Romero, *Immigrant Education and the Promise of Integrative Egalitarianism*, 2011 *MICH. ST. L. REV.* 275, 277 (analyzing the significance of the modern struggle of immigrants for greater educational access).

84. See, e.g., Kathleen Hennessey, *Dream Act May Come Back to Haunt the GOP*, *L.A. TIMES*, Dec. 14, 2010, at A1 (reporting that Republican Senators denounced the DREAM Act as an “amnesty” for lawbreakers); see also Hiroshi Motomura, *What Is “Comprehensive Immigration Reform”?* *Taking the Long View*, 63 *ARK. L. REV.* 225, 234–35 (2010) (analyzing critically the objections to a legalization program as part of comprehensive immigration reform).

85. See *supra* text accompanying notes 79–82.

86. See *supra* text accompanying notes 64–74 (discussing race-conscious affirmative action).

87. See Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

hensive immigration reform, or the DREAM Act, which could more fundamentally change the law in more durable ways.<sup>88</sup> Absent action by Congress, the DREAMers will not secure a regularized immigration status that affords them a lasting degree of security. Only Congress has the authority to provide the legal changes necessary to confer that status on a large group of undocumented immigrants.

Some states, notably California, have moved in a direction consistent with the DREAM Act and improved access of undocumented students to public colleges and universities.<sup>89</sup> In 2001, the California legislature passed a law allowing undocumented students to be eligible for in-state fees at state colleges and universities.<sup>90</sup> It subsequently passed a pair of laws, referred to collectively as the California DREAM Act, which, among other things, allowed certain students who were brought to the United States as children without proper immigration documentation to apply for state-funded student financial aid.<sup>91</sup>

### *B. The Anti-DREAM Act Measures*

Contrary to the generous aims of the DREAM Act, several states, including Alabama, Florida, and Georgia, acted to affirmatively restrict, if not deny, access of undocumented immigrants to public colleges and universities.<sup>92</sup> Such prohibitions can be expected to have a disparate impact on Mexican nationals who comprise roughly 60% of the undocumented population.<sup>93</sup>

Section 8 of Alabama's House Bill 56 prohibits undocumented students from enrolling in the state's public colleges and universities. It is noteworthy that Alabama at one time aggressively—and famously—resisted racial integration of its flagship public university, the University of Alabama.<sup>94</sup> Although a district court initially enjoined that section of House Bill 56 from going into effect, a court of appeals later lifted the injunction.<sup>95</sup>

Other states have taken similar steps toward barring undocumented students from public colleges and universities. Georgia prohibited un-

88. For critical analysis of the Obama Administration's DACA program, see Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 540, 542–45 (2012).

89. See Kevin R. Johnson, *Immigration and Civil Rights: Is the "New" Birmingham the Same as the "Old" Birmingham*, 21 WM. & MARY BILL RTS. J. 367, 395–96 (2012).

90. See *Martinez v. Regents of Univ. of Cal.*, 241 P.3d 855, 860–61 (Cal. 2010) (rejecting claims that the law violated federal law), *cert. denied*, 131 S. Ct. 2961 (2011).

91. See Assembly Bill 130, 2011–2012 Leg. Sess. (Cal. 2011) (codified at CAL. EDUC. CODE §§ 68130.7, 66021.7); Assembly Bill 31, 2011–2012 Leg. Sess. (Cal. 2011) (codified at CAL. EDUC. CODE §§ 68130.7, 66021.6, 69508.5, 76300.5).

92. See Johnson, *supra* note 89, at 395.

93. See JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, at i (2009).

94. See Johnson, *supra* note 89, at 391.

95. See *Hispanic Interest Coal. v. Governor of Ala.*, 691 F.3d 1236, 1242–43 (11th Cir. 2012).

documented students from selective state colleges and universities; South Carolina, like Alabama, banned undocumented students from all public colleges and universities.<sup>96</sup> Florida went even further and made all students, including U.S. citizens born on American soil, ineligible for in-state fees at public colleges and universities if they failed to prove the lawful immigration status of *their parents*.<sup>97</sup> A federal court struck down the policy as a violation of the constitutional rights of U.S. citizen college students.<sup>98</sup>

#### IV. STRATEGIES FOR IMPROVING EDUCATIONAL ACCESS ISSUES FOR UNDOCUMENTED IMMIGRANTS

For those interested in improving educational access for minority communities, the question is the proper means to that end under modern circumstances. In light of the current composition of the courts, including the U.S. Supreme Court, political remedies generally hold more promise for positive change than litigation-oriented ones do.<sup>99</sup>

Given limited Latina/o and immigrant political power, there are obvious barriers to the ability to effectuate change through political avenues.<sup>100</sup> Still, Latina/o political power has grown with the increasing Latina/o population, and political action remains the most likely avenue for securing enduring change. At the same time, it seems highly unlikely that a Supreme Court led by Chief Justice John Roberts would constitutionally or otherwise require the states to provide a more-accessible public college and university education to undocumented students.<sup>101</sup> Consequently, the political process appears to be the best bet for expanding educational access for Latina/os and immigrants.

The 2012 presidential election highlighted the current potential for political action to improve access for undocumented college students

96. See Johnson, *supra* note 89, at 395. After the State of Georgia announced its policy, University of Georgia professors volunteered to teach classes to undocumented students at a newly created Freedom University. See Libby Sander, *In a Secret Classroom in Georgia, Immigrants Learn to Hope*, CHRON. HIGHER EDUC., Dec. 10, 2012, at A1, A1; Gracie Bonds Staples, *Freedom University Helps Immigrants Achieve Dreams*, ATLANTA J.-CONST. ONLINE (July 30, 2012), <http://www.ajc.com/news/news/local/freedom-university-helps-immigrants-achieve-dreams/nQXQ6/>; FREEDOM U., <http://www.freedomuniversitygeorgia.com/> (last visited Aug. 16, 2013).

97. See Linda Greenhouse, *Sins of the Parents*, N.Y. TIMES OPINIONATOR (Nov. 30, 2011), <http://opinionator.blogs.nytimes.com/2011/11/30/sins-of-the-parents/>. The measure can be seen as building on the general antipathy for “anchor babies,” U.S. citizen children of undocumented immigrants, which has led to a call to reconsider the rule of birthright citizenship. See, e.g., Johnson, *supra* note 89, at 378–82; Mariana E. Ormonde, Note, *Debunking the Myth of the “Anchor Baby”*: *Why Proposed Legislation Limiting Birthright Citizenship Is Not a Means of Controlling Unauthorized Immigration*, 17 ROGER WILLIAMS U. L. REV. 861 (2012).

98. See Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1331–33 (S.D. Fla. 2012).

99. See Johnson, *supra* note 44, at 50–55.

100. See Johnson, *supra* note 75, at 1264–70.

101. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 577 U.S. 701, 747 (2007) (invalidating two local school district plans considering race in public school assignments in an attempt to ensure diverse schools).

through comprehensive immigration reform. In an election year, the Obama Administration announced the creation of the DACA program,<sup>102</sup> which is popular among many Americans.<sup>103</sup> The DREAM Act has proven consistently popular with the general public as well.<sup>104</sup> As Republicans look to attract Latina/o voters, some version of the DREAM Act, as well as comprehensive immigration reform, may become more politically palatable to them.<sup>105</sup>

Many efforts to improve educational access for Latina/os in recent years have been in the political arena.<sup>106</sup> The Supreme Court's decision in *Plyler* arguably had the broadest impact on the education of Latina/o immigrant youth in the last thirty years; it has allowed for the education of no less than a generation of undocumented students.<sup>107</sup> The decision, however, has produced a political backlash that puts its future in jeopardy.<sup>108</sup> In addition, prominent constitutional law scholars have criticized the legal basis of the decision; it therefore is vulnerable to being overruled by a conservative Supreme Court.<sup>109</sup> Similarly, affirmative action upheld by the courts also experienced a political retrenchment and may ultimately be limited by the courts.<sup>110</sup>

The rise and fall of bilingual education as a tool for securing educational equity for Latina/os proves instructive. Bilingual education was initially spurred on by acts of Congress, only to be stifled subsequently in the political process.<sup>111</sup> A number of states, including California, eliminated bilingual education.<sup>112</sup> This was accomplished politically with little room for the courts to intervene.<sup>113</sup>

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102. See *supra* text accompanying notes 87–88.

103. See Jason Bush, *Immigration Reform May Be on Horizon*, SAN ANTONIO EXPRESS-NEWS ONLINE (Nov. 17, 2012), [http://www.mysanantonio.com/news/local\\_news/article/Immigration-reform-may-be-on-horizon-4044972.php](http://www.mysanantonio.com/news/local_news/article/Immigration-reform-may-be-on-horizon-4044972.php) (reporting that a poll showed that “77 percent of Latino voters support deferred action” and “[f]ifty-seven percent of all voters favor the policy”).

104. See Robert Samuels, *Trying to Make the DREAM Act a Reality*, WASH. POST, Oct. 24, 2012, at B8.

105. In 2013, President Obama and a bipartisan group of U.S. Senators again attempted to spur discussion of immigration reform. See Peter Wallsten & Rosalind S. Helderman, *Deal on Migrants Faces Big Obstacle*, WASH. POST, Feb. 1, 2013, at A1. As this Essay goes to press, Congress debates a comprehensive immigration reform proposal.

106. See *supra* Part III.

107. See *supra* Part II.

108. See *supra* text accompanying notes 38–63.

109. See, e.g., 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-23, at 1553 (2d ed. 1988) (analyzing *Plyler* and observing that some commentators “will quite properly wish that the Court’s head had proven equal to its heart and that a sturdier analytic foundation had been provided for the result reached”); Dennis J. Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167, 184 (“*Plyler* cut a remarkably messy path through other areas of the Court’s jurisprudence.”).

110. See *supra* text accompanying notes 64–78.

111. See William Ryan, Note, *The Unz Initiative and the Abolition of Bilingual Education*, 43 B.C. L. REV. 487, 491–99 (2002) (tracing the political history of bilingual education, with congressional action fueling its growth followed by a political reaction leading to its demise).

112. See *supra* text accompanying notes 31–32.

113. See *supra* text accompanying notes 31–32.

As this brief history demonstrates, the particular strategies designed to improve access to education change with the times. Resorting to the courts was popular in the heyday of the liberal Warren Court and the years immediately following, with occasional victories exemplified by *Keyes* and *Plyler* combined with notable failures such as in *Rodriguez*.<sup>114</sup>

The fight for educational access for minorities, including Latina/os, must adjust and recalibrate with the times. In a time when the courts are unlikely to move forward on improving educational access, political action is well-advised, particularly because Latina/o political power is on the upswing.<sup>115</sup>

#### CONCLUSION

As the old adage goes, the more things change, the more they stay the same. This adage holds true for educational access for Latina/os in the United States.

Although school segregation and financing inequality issues continue to plague public education systems, the law has reformed and matters have improved in certain respects. Today, the problems of rigid segregation are secondary to the educational equity and access issues facing many undocumented immigrants, with Latina/os disproportionately represented in this group.

Undocumented immigrants, a majority of them Latina/o, continue to face substantial barriers to primary, secondary, and post-secondary education. This is as true today as it was in 1954, and the raw numbers of Latina/os and undocumented immigrants affected has grown dramatically.

Litigation has improved matters to a certain extent over time. Nonetheless, the political process promises to provide greater improvements in the future, especially in times in which the courts do not appear to be as interested as they once were in promoting social change, whether it be increased educational access, more equitable school funding, or affirmative action. In the long run, the DREAMers correctly understand that political activism more likely promises to bring about change than litigation ever could.

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114. See *supra* text accompanying notes 27–30.

115. See *supra* text accompanying notes 102–05.

