

Introduction

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SYMPOSIUM

INTRODUCTION

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This issue of the *St. John's Law Review* includes several Articles that were initially presented at the *Law Review's* Fall 2022 virtual symposium. The symposium commemorated the 40th anniversary of the Supreme Court's landmark decision in *Plyler v. Doe*¹ as a starting point for discussing current immigration law in the United States. It was dedicated in memory of Professor Michael A. Olivas, who held the William B. Bates Distinguished Chair in Law (Emeritus) and was the Director of the Institute for Higher Education Law and Governance at the University of Houston Law Center. Professor Olivas, a passionate advocate of immigration reform and the rights of immigrants, was the author of *No Undocumented Child Left Behind: Plyler v. Doe and the Education of Undocumented Schoolchildren*,² the definitive book on the decision.

In June 1982, by a 5-4 vote, the Supreme Court in *Plyler v. Doe* upheld the right of undocumented children to free public education. The litigation was in response to a 1975 statute adopted by the Texas legislature that withheld from local school districts state funds for the education of children who were not legally present in the country. The law further authorized school districts to deny enrollment to those children. While some school districts continued to admit them, in 1977 the Tyler Independent School district decided to impose a \$1,000 tuition fee for any child who could not provide documentation of U.S. citizenship. The Mexican American Legal Defense and Educational Fund ("MALDEF"), of which Michael Olivas served several terms on the Board of Directors, sued on behalf of four immigrant Mexican American families. As Professor Olivas later recounted, for the

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¹ 457 U.S. 202 (1982).

² MICHAEL A. OLIVAS, *NO UNDOCUMENTED CHILD LEFT BEHIND: PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN* (2012).

group's attorneys, *Plyler* was the "Mexican American *Brown v. Board of Education*: a vehicle for consolidating attention to the various stands of social exclusion that kept Mexican-origin persons in subordinate status."³

The Court based its ruling on the Equal Protection Clause of the Fourteenth Amendment, which states that, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁴ Despite the State's claims to the contrary, the Court affirmed that individuals without legal status in the country were "persons" within the State's jurisdiction and entitled to the protections of the Amendment.⁵ Speaking for the Court majority, Justice William Brennan stated that holding children accountable for their parents' actions "does not comport with fundamental conceptions of justice."⁶ He warned that denying them a "basic education" would "deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."⁷ It would result in a "subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."⁸ Though *Plyler* was a 5-4 decision, all nine justices agreed that charging tuition to undocumented children was unacceptable as a matter of public policy. Chief Justice Warren Burger opened his dissenting opinion by stating that, "it is senseless for an enlightened society to deprive any children . . . of an elementary education."⁹ He recognized that "it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language."¹⁰

At the end of the day, the children in question were mere pawns in a deeper and even more contentious battle over immigration. Responding to the Court's decision, state officials were outraged that Washington was burdening the states with the cost of fixing a problem that stemmed from the federal

³ *Id.* at 12.

⁴ U.S. CONST. amend. XIV, § 1.

⁵ *Plyler*, 457 U.S. at 213.

⁶ *Id.* at 220 (citing *Trimble v. Gordon*, 430 U.S. 762, 770 (1977) (applying higher scrutiny to classifications disadvantaging children born outside of marriage).

⁷ *Id.* at 223.

⁸ *Id.* at 230.

⁹ *Id.* at 242 (Burger, C.J., dissenting).

¹⁰ *Id.*

government's failure to enforce immigration laws. The Governor of Texas made clear that education was only "peripheral" to the real issue: "illegal immigration and undocumented workers."¹¹ Those sentiments were not confined to the State of Texas. In the four decades since the *Plyler* ruling, other states and local school districts have attempted to undermine the letter and spirit of the decision. One common ploy has been to ask families about the immigration status of their children, dissuading them from enrolling the children in school for fear of deportation. None of these attempts has withstood constitutional challenge.

A dark cloud, nonetheless, continues to loom over the decision and over the present and future of many children and their families. The Governor of Texas, Greg Abbott, has threatened to mount a frontal attack on the decision itself and once again push the issue of educating undocumented children to the Supreme Court. The obvious question is whether the Court's conservative majority will more favorably consider a legislative repeat of the 1975 Texas statute. In a related matter, the Texas Governor has warned that the Biden Administration's decision to end Title 42,¹² the Trump Administration order expediting the removal of migrants at the southern border, would lead to "education obligations, as well as other obligations, that are simply unsustainable and unaffordable."¹³ Immigration, he has claimed, is "different" today than it was when *Plyler* was decided. The only language barrier initially was Spanish. Now we have people coming from more than 105 different countries across the globe, demanding more teachers with more "expertise" and at a greater "cost."¹⁴

¹¹ ROSEMARY C. SALOMONE, *TRUE AMERICAN: LANGUAGE, IDENTITY, AND THE EDUCATION OF IMMIGRANT CHILDREN* 177 (2010).

¹² Public Health Service Act, 42 U.S.C. §§ 201–300 (What has become known as "Title 42" was a Trump Administration public health order from March 2020 intended to reduce the spread of the coronavirus. It was adopted under a 1944 federal law, the Public Health Act, which granted federal authorities emergency powers to prevent the spread of diseases); see Bernd Debusmann Jr., *Title 42: What Is the Immigration Rule and Why Has It Ended?*, BBC (May 12, 2023), <https://www.bbc.com/news/world-us-canada-65477653> [<https://perma.cc/6MPG-67LT>].

¹³ Niki Griswold, *Abbott Says Texas Could 'Resurrect' SCOTUS Case Requiring States to Educate All Kids*, AUSTIN AM.-STATESMAN, <https://www.statesman.com/story/news/2022/05/04/gov-greg-abbott-supreme-court-case-requiring-education-undocumented-children/9652463002> [<https://perma.cc/AP6T-THAQ>] (May 6, 2022, 7:51 PM).

¹⁴ Kate McGee, *Gov. Greg Abbott Says Federal Government Should Cover Cost of Educating Undocumented Students in Texas Public Schools*, TEX. TRIB. (May 5,

The influx of migrants, broadly defined, following Title 42's demise has once again stoked the fires of immigrant hostility and placed *Plyler v. Doe* in further jeopardy. At the same time, the link between the decision and broader issues underlying immigration law and policy has become increasingly palpable. *Plyler*, explicitly and implicitly, in majority and dissenting opinions, raises questions of equal citizenship, democratic participation, majoritarian decision making, state autonomy, and the federal role in regulating immigration. As the papers presented in this symposium demonstrate, all those questions bear in some way not only on the rights of undocumented children, but also on those of other immigrants, refugees, and asylum seekers seeking legal entry into, and permanence in, the United States. From the rights of unaccompanied minor children, to the recognition of "state created dangers" at the border, to the option of "parole in place" to regularize the status of those who have entered illegally, and to the efficacy of grassroots engagement to undo xenophobic measures, each of these papers opens a distinct window on the challenges that weigh on immigration reform in the United States and how those challenges might be more humanely and effectively met.

In closing, it is fitting that the *Law Review* has dedicated the symposium to the memory of Professor Michael Olivas, an acclaimed legal scholar, lawyer, activist, academic leader, and the recipient of multiple prestigious awards. At most, this brief introduction can only offer some of the highlights of his many accomplishments. He authored or co-authored sixteen books and scores of scholarly articles on immigration and education including, as noted, *No Undocumented Child Left Behind*, as well as *Perchance to Dream: A Legal and Political History of the DREAM Act and DACA*.¹⁵ He was an elected member of the American Bar Foundation, the American Law Institute, and the National Academy of Education. At various points in his distinguished career he served as General Counsel to the American Association of University Professors, as President of the Association of American Law Schools, and as a member of the editorial boards of more than twenty scholarly journals.

2022), <https://www.texastribune.org/2022/05/05/greg-abbott-plyler-doe-education> [https://perma.cc/47P2-5LVG].

¹⁵ MICHAEL A. OLIVAS, PERCHANCE TO DREAM: A LEGAL AND POLITICAL HISTORY OF THE DREAM ACT AND DACA (2020).

Michael Olivas worked tirelessly to increase diversity in legal academia and was a generous friend and mentor to dozens of law professors. Like so many others, I gained much personally from his friendship and professionally from the many doors he opened to me. I first met him in the mid 1980s when I invited him to speak at an alumni/ae weekend focused on Higher Education and the Law that I was organizing for Harvard University's Institute for Educational Management, where I was then a lecturer. Through the following decades, I came to know him well through the network of education law professors within the Association of American Law Schools. My last contact with him was just days before he passed on. He had agreed to speak on academic freedom to the St. John's Law faculty. In the weeks preceding his planned virtual visit, we shared numerous emails catching up on life through the pandemic and lamenting how academic freedom was under siege. I can imagine the lively conversation he would have generated had that visit occurred. I mostly regret what we all lost going forward.