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Education and Democracy from Brown to Plyler

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EDUCATION AND DEMOCRACY FROM *BROWN* TO *PLYLER*

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For Michael Olivas and Joaquin Avila:
you don't need many heroes
if you choose carefully.

Judicial review has often been cast in terms of democratic legitimacy. Democratic legitimacy is often linked to whether it institutes the will of the people through majoritarian rule and whether it creates processes for reevaluation of these prior decisions by newly constituted majorities. Judicial review of majoritarian decisions has often been criticized as a overriding or circumventing of these democratic processes. Beginning with *Brown v. Board of Education*, the Warren Court adopted a resolution of the "counter-majoritarian difficulty" of judicial review by tacitly accepting Justice Stone's formulation from footnote four of *United States v. Carolene Products* and engaging in a more searching judicial review of majoritarian decisions in instances where the pluralist political give-and-take had broken down.[1] While the subsequent Burger, Rehnquist, and Roberts Courts have undermined much of the Warren Court's

[†] Fellow, Carr Center for Human Rights, Harvard Kennedy School of Government. I would like to thank Shushma Raman, who provided me with the opportunity to be in community with the fellows at the Carr Center, Ann Marie Lipinski, Jeffrey Seglin, and the Nieman Foundation, Dean Micheal Simons, the editors and staff of the *St. John's Law Review*, and the feedback of Tanya Broder, Shereen Marisol Meraji, and Rachel Moran, who reminded me that educatational rights of undocumented children raises moral questions that transcend the political. This article is dedicated to the memories of two of my mentors: Joaquin Avila, who wrote the litigation memo that led to the *Plyler* litigation and was instrumental in esuring that Latinos were not locked out of the polical process, and Michael Olivas, who worked tirelessly to ensure educational oppotrunity for all, regardless of immigration status.

[1] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16, 244–45 (1962); Brown v. Bd. of Educ., 347 U.S. 483, 487–88, 492–93 (1954); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980) [hereinafter ELY, DEMOCRACY AND DISTRUST].

jurisprudence, a few of the most transformative decisions had seemed safe. This may have changed in the wake of the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, overturning the landmark *Roe v. Wade*, and causing some politicians to begin openly questioning whether the Supreme Court should consider overruling other long-established precedents.[2] One of these, *Plyler v. Doe,* like *Brown*, ensured educational access for a marginalized group and is similarly central to the contestations over judicial review and democratic legitimacy.[3]

Forty years ago, *Plyler* prohibited states from denying K-12 education to undocumented children.[4] Professor Michael Olivas did more than almost anyone to highlight *Plyler*'s importance in a multitude of areas, and my goal for this Article is to build on his work to highlight one more. I argue that *Plyler* is the direct inheritor of *Brown*'s normative view that judicial review is an essential mechanism to ensure democratic legitimacy. In both *Brown* and *Plyler*, the populations targeted for discrimination were "discrete and insular minorities" who were incapable of forming political majorities, and thus particualry vulnerable to majoritarian discrimination.[5] But the *Brown* and *Plyler* decisions justified judicial review for a second reason. In both, the Court understands equal access to education as essential for meaningful and continuing participation in civic life and necessary to ensure that existing majorities do not entrench their political power.[6] These cases underscore that judicial review is a fundamental mechanism to ensure democratic facilitation.

However, critics of expansive judicial review often use concern for democracy as a justification. For example, as young lawyers, William Rehnquist opposed *Brown*, and John Roberts opposed *Plyler*, because they viewed the Court as imposing its views over majority will.[7] These views reflect a theory that

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[2] Roe v. Wade, 410 U.S. 113, 164 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022); *see, e.g.*, Niki Griswold, *Abbott Says Texas Could 'Resurrect' SCOTUS Case Requiring States to Educate All Kids*, AUSTIN AM.-STATESMAN (May 6, 2022, 4:04 PM), https://www.statesman.com/story/news/2022/05/04/gov-greg-abbott-supreme-court-case-requiring-education-undocumented-children/9652463002/ [https://perma.cc/8B4N-5TQZ].

[3] *See generally* 457 U.S. 202 (1982).

[4] *Id.* at 230.

[5] *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

[6] *Brown*, 347 U.S. at 493; *Plyler*, 457 U.S. at 221.

[7] *See generally* Memorandum from William H. Rehnquist, L. Clerk, to J. Robert H. Jackson, A Random Thought on the Segregation Cases (1952), *reprinted in*

robust judicial review weakens democratic legitimacy because it fails to pay sufficient deference to the majority will, and because it risks enervating the political process, diminishing the ability of the public to resolve these issues.

Should *Plyler* be reconsidered by the current Court, failure to engage in searching judicial review of the denial of educational opportunity to undocumented children would undermine *Brown*'s legacy. In addition to *Plyler*'s importance as *Brown*'s theoretical heir, the decision illuminates the debates surrounding judicial review and democracy by providing an opportunity to evaluate the relative claims made about the role of judicial review empirically in fostering democracy. As Michael Olivas' work highlights, since *Plyler*, federal, state, and local governments have engaged and reengaged with the question of educational opportunity and inclusion of undocumented youth.[8] *Plyler*'s legacy provides strong evidence that judicial review, at least in this instance, does not undermine continued political engagement.

Moreover, *Plyler* demonstrates that Justice Stone and John Hart Ely's insights about the role of judicial review for democratic facilitation were correct.[9] In the forty years since the *Plyler* decision, generations of undocumented students have matriculated through primary and secondary school. Many have gone on to college, and many have become lawful permanent residents or citizens. During this time, immigrants and former immigrants have taken the lead in the immigrants' rights movement, contesting their exclusion and the terms by which the majority would limit immigrant inclusion. This movement's

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Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States: Hearings Before the S. Comm. on the Judiciary, 99th Cong. 324 (1986); Memorandum from Carolyn B. Kuhl, Special Assistant to the Att'y Gen. & John Roberts, Special Assistant to the Att'y Gen., to William F. Smith, U.S. Att'y Gen., *Plyer v. Doe*: "The Texas Illegal Aliens Case" (June 15, 1982), https://www.archives.gov/files/news/john-roberts/accession-60-98-0832/036-chron-file-3-1-82-8-31-82/folder036.pdf [https://perma.cc/Y7VL-E4GS].

[8] *See generally* MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN (2012) [hereinafter OLIVAS, NO UNDOCUMENTED CHILD].

[9] *See* discussion *infra* Part III; *Carolene Prods.*, 304 U.S. at 152 n.4 ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."); ELY, DEMOCRACY AND DISTRUST, *supra* note 1, at 87 (discussing the balancing of judicial review with the substantive values promulgated by the legislature).

development highlights how *Plyler*'s enshrinement of equal access to education helped create the kind of engagement with the political and public spheres necessary for democratic facilitation.

I. *BROWN* AS AN ENGINE OF LEGAL THOUGHT

The Supreme Court's seminal decision in *Brown v. Board of Education* was transformative in countless aspects of American political and social life. While the courts previously had been willing to override majoritarian will when it contradicted some other major force in society, such as the interests of business, it had been less willing to confront anti-Black racism and white supremacy directly.[10] These institutions were so ingrained in American life that the Court chose to concede to mob violence and abdication of enforcement rather than enforce statutory or constitutional protections.[11] Even in *Brown* itself, the Court doubted its ability to functionally override majority will, as is evidenced by its failure to require immediate implementation of its initial order to end segregation.[12]

But beginning with *Brown*, the Warren Court changed this calculous and began overriding majoritarian will on a greater scale.[13] This transformation of the scope of judicial review became a central concern of some of the most influential legal thinkers of the time, including Herbert Wechsler, Alexander Bickel, Robert Bork, and John Hart Ely.[14] In one way or another,

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[10] *See* Lochner v. New York, 198 U.S. 45, 64 (1905) (upholding the constitutional right to contract one's terms of employment). While the Court had previously overturned segregation in limited instances, they had never directly overruled *Plessy v. Ferguson* and the doctrine of "separate but equal" that was foundational to the legitimation of *de jure* segregation. 163 U.S. 537, 540 (1896); *see, e.g.*, Sweatt v. Painter, 339 U.S. 629, 633–34 (1950) (striking down segregated law schools in Texas on the grounds that it was impossible to have equal accommodations given the unique nature of law school but failing to completely overrule "separate but equal").

[11] CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 244–47 (2008); Giles v. Harris, 189 U.S. 475, 485, 488 (1903) (upholding a state constitution's requirements for voter registration that severely prejudiced minority communities).

[12] Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954); *see generally* Brown v. Bd. of Educ., 349 U.S. 294 (1955).

[13] Morton J. Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 8 (1993).

[14] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32–34 (1959); *see also* Thomas M. Melsheimer, *Bork's Apologia*, 64 ST. JOHN'S L. REV. 413, 425–26 (1990) (book review) (critiquing Bork's attempt to rectify *Brown*'s holding with his theory of originalism); John Hart Ely, *Foreword: On*

each was trying to grapple with what Bickel termed the "counter-majoritarian difficulty" presented by an unelected and relatively politically unaccountable judiciary overruling legislative acts.[15]

While this framing tacitly recognizes that majoritarianism is a core value of democratic self-determination, the question remains as to whether it subordinates other competing democratic concerns.[16] Thus, the question of how to resolve the counter-majoritarian difficulty turns on what theory of democracy is being deployed.[17] Was it merely majoritarianism? Was it only limited to those instances delimited by the original meaning of the founders?[18] Did it require counter-majoritarian protections to remedy hindrances to the political process? Did

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Discovering Fundamental Values, 92 HARV. L. REV. 5, 7 (1978) [hereinafter Ely, *Foreword*]. *See generally* BICKEL, *supra* note 1, at 1; ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 69, 76–78 (1990) (arguing that originalism provided one of the few ways to engage in judicial review without violating democratic decision-making).

[15] BICKEL, *supra* note 1, at 16.

[16] Erwin Chemerinsky has argued that the fundamental mistake of the constitutional theory emerging from Bickel's framing was the acceptance that democracy was synonymous with majoritarianism. *See* Erwin Chemerinsky, *Online Alexander Bickel Symposium: It's Alexander Bickel's Fault*, SCOTUSBLOG (Aug. 16, 2012, 10:17 AM), https://www.scotusblog.com/2012/08/online-alexander-bickel-symposium-its-alexander-bickels-fault/ [https://perma.cc/QGK7-4M62].

[17] Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 754 (2004) ("Democracy is what W.B. Gallie called an 'essentially contested concept,' the meaning of which is subject to intractable dispute.").

[18] The rise of originalism was at least initially seen as a way to reign in what was seen as a judiciary that had exceeded its constitutional role and had taken on an undemocratic function. *See* Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 252 (2019) (summarizing intellectual foundations which believed "[o]riginalism was necessary to restrain judges from imposing their personal preferences, and to maintain the separation of law from politics"). It is worth bracketing the question of whether originalism provides an answer to this question. For an originalist, what democracy requires from judicial review is fidelity to whatever arrangement was contemplated by the founders, either of the original Constitution or the reconstructed Constitution. However, original intent does not answer the question of democratic legitimacy for at least two reasons. First, both moments can be internally critiqued as lacking fundamental aspects of democratic consent given the large swaths of the population excluded from the decision-making process. Second, and this is something that requires elaboration beyond the scope of this paper, fidelity to the past constituted arrangement will forever be brought into question in new constituent moments, regardless of any attempt to ossify past arrangements. In other words, democratic legitimacy can never be justified simply with reference to the past. One suspects these considerations motivated the call to originalism in the first place: to hide the past transgressions, reify the present undemocratic arrangements as expressing universal democratic ideals, and to cut short new constituent moments.

these hindrances to the political process include "the social infrastructure of democracy" in addition to its formal procedures?[19] Should there be similar protections for laws disadvantaging "discrete and insular minorities" in various ways, given that these groups had been excluded or marginalized from the political process?[20]

John Hart Ely's scholarship, including his book *Democracy and Distrust*, attempted to answer many of these questions and explain the Warren Court's resolution of this difficulty.[21] He accepted the notion that majoritarianism, in general, was synonymous with democracy and that, in most instances, the pluralist give-and-take in the legislative process would allow for democratic legitimacy to be maintained.[22] Thus, he accepted Wechsler and Bickel's framing that counter-majoritarian judicial review was generally antithetical to democratic principles.[23] However, he also believed Justice Stone's footnote four in *United States v. Carolene Products* had correctly identified areas where the Court could legitimately override majoritarian will.[24] Like majoritarian and pluralist scholars, he recognized that Courts could strike down legislative acts that contradicted textual constitutional mandates.[25] However, he argued that they could also intervene where "the processes of the legislature are inadequate."[26] For Ely and others, Justice Stone's footnote four identified two instances where this was likely to occur:

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[19] Schacter, *supra* note 17, at 752.

[20] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[21] ELY, DEMOCRACY AND DISTRUST, *supra* note 1, at 73–74.

[22] *Id.* at 74–75.

[23] *Id.* at 54–57.

[24] *See Carolene Prods*., 304 U.S. at 152 n.4; Ely, *Foreword*, *supra* note 14, at 7 n.18. It is worth noting that even as Ely attempts to create a legal theory that prevents systematic lockout of marginalized voices, he failed to recognize that his intelectual interlocutors could themselves be members of these marginalized communities. *See id.* ("But the members of the Warren Court, like Justice Stone before them, recognized that throughout our history there have existed over substantial stretches of time minorities that *the rest of us* have insisted on seeing as 'different' and that have thus been rendered unable to participate effectively in the usual pluralist give and take." (emphasis added)). One of Michael Olivas' greatest contributions was his dedication to ensuring that the legal academy was a sphere that included all people, regardless of race, gender, or immigration status.

[25] *See id*. at 5–7.

[26] Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979) (describing footnote four and its historical role as "a framework for . . . judicial activism").

> (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[27]

The first instance looked at whether there was an "abridgment of the right to vote" such that an existing majority was entrenching its position and locking in place its power.[28] The second applied when there was a "victimization of a discrete and insular minority, a group disabled from forming coalitions and thus from effectively participating in majoritarian politics."[29] For Ely, these scenarios justified judicial review and the application of stricter judicial scrutiny because it was "representation-reinforcing" and could ultimately serve to enhance participation.[30]

Ely never identified exactly which government actions constituted unacceptable "choking off" of channels for political change.[31] Jane Schacter argues that much of Ely's scholarship seems to focus on "accountability-reinforcement" within the formal channels of political activity, such as elections and voting.[32] But she also notes that his "focus on the distorting lens of prejudice opens up the possibility that he saw some measure of social equality as part of political equality" or that an "emphasis on 'participation' contemplates participation by disadvantaged

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[27] ELY, DEMOCRACY AND DISTRUST, *supra* note 1, at 103.

[28] Fiss, *supra* note 26, at 9. While it is beyond the scope of this article, it is worth noting that in the past decade or so the Court permitted governmetal actions that hinder the functioning of the political process, from voter identification laws to partisan gerrymandering efforts. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (upholding Indiana's voter identification laws); Rucho v. Common Cause, 139 S. Ct. 2484, 2487 (2019) (finding political gerrymandeing claims to be nonjusticiable).

[29] *Id.* at 6.

[30] John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 469–70, 486–87 (1978) [hereinafter Ely, *Representation-Reinforcing*]; ELY, DEMOCRACY AND DISTRUST, *supra* note 1, at 86–88; Ely, *Foreword*, *supra* note 14, at 7.

[31] ELY, DEMOCRACY AND DISTRUST, *supra* note 1, at 103; Schacter, *supra* note 17, at 750.

[32] *Id.* at 744–46.

groups in a range of settings, not just in voting and elections."[33] Schacter characterizes this emphasis on social equality in additional settings as "democracy's horizontal dimensions."[34] Here:

> The central concern . . . is the larger culture of democracy—the idea of a democratic *society*, rather than solely a democratic *polity*. Declining to limit political equality to matters related to the franchise, this approach focuses on the terms of democratic citizenship and, in particular, the democratic imperative of accessible, broadly based opportunities for citizens to participate in the various arenas in which collective policies are forged, values are debated, and social knowledge is shaped, acquired, and transmitted. It posits that social marginalization and stigmatization are *democratic* problems because these dynamics undermine disadvantaged groups in both explicitly political processes (like voting and legislative representation) and in the more diffuse social and cultural processes that inform, frame, and shape politics.[35]

Schacter's horizontal democracy enrichment of Ely's framework provides a better description of the Court's motivation for judicial review in *Brown*. *Brown* dealt with an undeniably central tension in American life: the continued *de jure* discrimination and bias against African Americans who had been locked out in countless and chimerical ways from the political process and subjected to the whims of the majority-white electorate.[36] But the *Brown* Court also recognized that "education is perhaps the most important function of state and

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[33] *Id.* at 741–42. Derek W. Black has advanced an argument that a right to education "cannot simply be left to the complete whims of political majorities. Doing so poses risks of the logjams and malfunctions of which Ely warns." Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 808 (2018) [hereinafter Black, *Constitutional Compromise*]. Black argues that the right to education is a process-based right that, while not directly stated in the Constitution, can be inferred behind the purposes and structures of the Reconstruction Amendments. *See generally* Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW. U. L. REV. 1031 (2022) [hereinafter Black, *Freedom, Democracy*]. To this extent it shares a similar theoretical grounding with Ely's representation reinforcement theory, which he attempted to ground in various provisions of the Constitution, rather than abstract theories of democracy. *See generally* ELY, DEMOCRACY AND DISTRUST, *supra* note 1.

[34] Schacter, *supra* note 17, at 746.

[35] *Id.* at 746–47.

[36] Brown v. Bd. of Educ., 347 U.S. 483, 489–92 (1954); *see also* Additional Brief of the American Federation of Teachers as Amicus Curiae at 19, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1), 1953 WL 78285 [hereinafter Additional Brief of AFT].

local governments" because it is the "very foundation of good citizenship."[37]

This theme in *Brown* was articulated explicitly in an amicus brief filed by the American Federation of Teachers ("AFT").[38] They emphasized the historical linkages between education and democracy made by Presidents George Washington, John Adams, and Thomas Jefferson.[39] For AFT, ending segregated schools and ensuring educational equity was an essential step in maintaining a democratic form of government:

> A democratic society is founded on the belief that all men are equal and capable of governing themselves. It holds further that men create the institutions of government for the purpose of safeguarding their rights of "life, liberty and the pursuit of happiness." To govern wisely, as well as to use effective checks upon governmental authority to prevent abuses, requires an alert, well-educated citizenry.[40]

The Court ultimately held that segregating students on the basis of race was inherently unequal and a violation of the Equal Protection Clause.[41] This holding tracks Ely's justification for judicial review in instances where government action targets a discrete and insular minority. While the *Brown* Court did not invalidate the State's segregation of public schools because of the role of education in democracy, it explicitly recognized that education functions to maintain the channels of democracy.[42]

While the Court has since held that the right to education is not a fundamental right, its recognition that education is a crucial mechanism to prepare citizens for a democratic society has been consistently reaffirmed "both before and after *Brown* was decided."[43] As discussed below, one way to understand the

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[37] *Brown*, 347 U.S. at 493.

[38] Additional Brief of AFT, *supra* note 36, at 6–10.

[39] *Id.*

[40] *Id.* Likewise, political commentators and philosophers have linked education to democratic facilitation. For Alexis de Tocqueville, "America's defining emphasis" was equality in participation achieved through a "web of voluntary associations that formed an active and vibrant civil society." Schacter, *supra* note 17, at 747. Similarly, John Dewey argued that education provides the opportunity to emphasize problem-solving, thinking skills, and other knowledge necessary for democratic decision-making, and that as such it provided the capabilities for the most essential parts of democracy, which come before voting: thinking, discussion, and debate. *See generally* JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1927).

[41] *Brown*, 347 U.S. at 486, 495.

[42] *Id*. at 493.

[43] San Antonio Indep. Sch. Dist. v. Rodriguez*,* 411 U.S. 1, 30 (1973) (emphasis added).

holding in *Plyler* is that adherence to the doctrinal frameworks governing heightened judicial review failed to capture the ways that denying educational opportunity to undocumented children would undermine representational legitimacy under both of Ely's criteria.

II. *PLYLER* AND THE DISCOURSES OF DEMOCRACY

Plyler can be viewed as a decision motivated not by the extant doctrinal frameworks with its rigid conceptions of "suspect classes" and "fundamental rights," but instead by the broader concerns underlying Ely's view that judicial review can be necessary for democratic legitimation. It is also helpful in understanding the rationale for critiques of judicial review, including through the views of young lawyers who subsequently led the Supreme Court for nearly four decades.

A. Plyler*'s Horizontal Vision of Democracy*

The *Plyler* Court subjected Texas' denial of education to undocumented children to a heightened level of judicial scrutiny and ultimately struck it down, finding no "substantial" governmental interest to support the state's denial of educational opportunity.[44] However, the justification for this heightened scrutiny has long been questioned by supporters and opponents of the outcome, partly because it fails to rely on the existing doctrinal frameworks for granting heightened scrutiny. A closer look at the decision evidences a concern not with "abstract" doctrine but with ensuring a more rigorous review of governmental actions that may fundamentally undermine the possibility of democratic legitimacy.[45]

As in *Brown*, the undocumented children denied educational opportunities in *Plyler* were "systematically disadvantag[ed]" by societal prejudice.[46] The *Plyler* children, as undocumented immigrants, were regulated to a *de jure* subordinate status and barred from directly participating in the formal channels of the

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[44] Plyler v. Doe, 457 U.S. 202, 223–24 (1982). The Supreme Court more recently reiterated this understanding of "education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." Grutter v. Bollinger, 539 U.S. 306, 331 (2003) (quoting *Plyler*, 457 U.S. at 221); *see also Rodriguez,* 411 U.S. at 30.

[45] *Plyler*, 457 U.S. at 223.

[46] ELY, DEMOCRACY AND DISTRUST, *supra* note 1, at 103.

political process.[47] These children generally were racialized to be synonymous with Latinos, who had been subjected to *de jure* and *de facto* discrimination.[48] Yet the *Plyler* court did not find that the undocumented children were a "suspect class because their presence in this country in violation of federal law [was] not a 'constitutional irrelevancy.' "[49] Nor did it base the application of heightened scrutiny on finding that education is a "fundamental right." Between *Brown* and *Plyler,* the Court in *San Antonio Independent School District v. Rodriguez* upheld a funding scheme that resulted in a disparate allocation of school resources between wealthy and poor school districts. [50] There, Justice Powell, writing for the Court, held that students residing in low-income school districts were not a suspect class as a result of their financial status, and that education was not a fundamental right.[51] In reaching the latter holding, the Court examined arguments about the link between education and democratic access.[52] It acknowledged that lack of education can inhibit the ability of individuals to engage in the public sphere and that the "democratic ideal . . . depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed."[53] However, the Court found that:

> Whatever merit [those] argument[s] might have if a State's financing system *occasioned an absolute denial of educational opportunities* to any of its children, that argument provides no basis for finding an interference with fundamental rights where

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[47] *Plyler*, 457 U.S. at 218–19, 223.

[48] *Id.* at 207–08 ("[T]hese undocumented children, '[a]lready disadvantaged as a result of . . . undeniable racial prejudices' " (alteration in original) (quoting Doe v. Plyler, 458 F. Supp. 569, 577 (E.D. Tex. 1978)); *see, e.g.*, Hernandez v. Texas, 347 U.S. 475, 482 (1954) (striking down Texas' systematic exclusion of Mexican American jurors). For a discussion of the role of the *Hernandez* litigation in the development of the Mexican-American civil rights movement, see MICHAEL A. OLIVAS, "COLORED MEN" AND "HOMBRES AQUÍ": *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING 56–57 (2006).

[49] *Plyler*, 457 U.S. at 223. For a discussion of the case law on according heightened scrutiny on the basis of systemic bias, see Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1403 (2011) ("[T]he Supreme Court's current case law generally asks groups seeking heightened scrutiny to show past discrimination, political powerlessness, common use of a stereotype or trait unrelated to merit, and, perhaps, immutability.").

[50] San Antonio Indep. Sch. Dist. v. Rodriguez*,* 411 U.S. 1, 54–55 (1973).

[51] *Id.* at 35, 40.

[52] *Id.* at 35, 37.

[53] *Id.* at 36.

> only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.[54]

In dissent, Justice Marshall rejected the Court's rigid application of existing doctrinal frameworks.[55] Instead, he linked the problem faced by the low-income districts to an argument about adequate recourse to the political process to correct the disparate treatment:

> The disability of the disadvantaged class in this case extends as well into the political processes upon which we ordinarily rely as adequate for the protection and promotion of all interests. [Any legislative solution] must be sought in the face of inevitable opposition from significantly advantaged districts that have a strong vested interest in the preservation of the status quo . . . .[56]

While *Rodriguez* punted the question, *Plyler* confronted the Court with the scenario in which a class of children would have been excluded from education. Rather than address this question directly, the Court cited *Rodriguez* for the proposition that "[p]ublic education is not a 'right' granted to individuals by the Constitution."[57] Thus, the Court held that neither established doctrinal basis for heightened judicial scrutiny applied to Texas' denial of education for undocumented children denied an education.[58]

For this reason, *Plyler* is often critiqued for not fitting neatly within the existing doctrinal framework. For example, shortly after *Plyler* was decided, Mark Tushnet argued that the decision "jams together doctrines that other cases carefully held apart"

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[54] *Id.* at 37 (emphasis added).

[55] *See id.* at 98 (Marshall, J., dissenting).

[56] *Id.* at 123 (Marshall, J., dissenting) (directly linking opposition by wealthier districts to the legislature's reallocation of state resources to the problem faced in the reapportionment cases).

[57] Plyler v. Doe, 457 U.S. 202, 221 (1982); *see also id.* at 231 (Marshall, J., concurring) (reiterating his "view that a class-based denial of public education is utterly incompatible with the Equal Protection Clause of the Fourteenth Amendment").

[58] *Id.* at 223 ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population.").

and that it "cannot be taken seriously as a piece of legal analysis."[59] Several commentators have suggested that the *Plyler* Court's opinion can better be understood as a reflection of Justice Brennan's ability to create a coalition to achieve a majority rather than a coherent doctrinal vision.[60]

One way to read what the Court did in *Plyler* is that it was an attempt to maintain fidelity to what it saw as its role in using judicial review as a check on instances when there is a failure of the political process. The Court explicitly rejected posing the question of the legitimacy of Texas' law in "abstract" terms of "whether [the law] discriminates against a suspect class, or whether education is a fundamental right."[61] In a separate concurrence, Justice Marshall argued that the facts of *Plyler*:

> [D]emonstrate the wisdom of rejecting a rigidified approach to equal protection analysis, and of employing an approach that allows for varying levels of scrutiny depending upon "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[62]

Justice Marshall's formulation of how to determine the level of judicial review closely tracks an Ely-like concern, especially where "the constitutional and societal importance of the interest" relates to openness of political channels, rather than a rigid doctrinal definition of previously identified suspect categories or "fundamental" interests.[63] Moreover, looking at how the Court ultimately justified heightened judicial scrutiny, a concern with the targeting of a politically powerless minority and the creation

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[59] Mark Tushnet, *The Optimist's Tale*, 132 U. PA. L. REV. 1257, 1263 (1984) (reviewing THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi, ed., 1983)); Black, *Constitutional Compromise*, *supra* note 33, at 740 n.14 (arguing *Rodriguez* and *Plyler* "are difficult to reconcile, but through a strained application of rational basis review, the *Plyler* Court struck down the statute anyway"); Black, *Freedom, Democracy*, *supra* note 33, at 1064 n.225 (arguing *Plyler* "offer[s] no clear doctrinal basis for [its] outcome"). For a broad discussion on the legal literature critiquing the result, see OLIVAS, NO UNDOCUMENTED CHILD, *supra* note 8, at 26–30.

[60] Tushnet, *supra* note 59, at 1263; James C. Rutten, *Elasticity in Constitutional Standards of Review:* Adarand Constructors, Inc. v. Pena *and Continuing Uncertainty in the Supreme Court's Equal Protection Jurisprudence*, 70 S. CAL. L. REV. 591, 598 n.26 (1997). For a general discussion of the coalition building used by Justice Brennan during the *Plyler* deliberations, see OLIVAS, NO UNDOCUMENTED CHILD, *supra* note 8, at 20–21.

[61] *Plyler*, 457 U.S. at 223.

[62] *Id.* at 231 (Marshall, J., concurring) (citations omitted).

[63] *Id.* at 230–31 (Marshall, J., concurring) (citations omitted).

of a permanent caste, disempowered from engaging with the political process emerges.

The Court looked to the fact that the Texas statute "imposes a lifetime hardship on a *discrete class* of children not accountable for their disabling status."[64] This 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."[65] The Court acknowledged that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation" because of "the importance of education in maintaining our basic institutions" and "the public schools as a most vital civic institution for the preservation of a democratic system of government."[66] It saw the denial of educational opportunity for undocumented children as potentially distinguishing these children as a "permanent caste" marked by the "stigma of illiteracy" and "den[ied] . . . the ability to live within the structure of our civic institutions."[67] Here, the Court recognized that the robust channels for political engagement and change require more than the ability to exercise a vote or an equally weighted vote.[68] It also includes, at a minimum, access to education to allow individuals to gain the skills to operate within a democratic polity such that they are not functionally locked out of the ability to enact change in the political process.[69] In doing so, its overriding of majoritarian discrimination demonstrated a commitment to facilitating the "horizontal" aspects of democracy.

B. Rehnquist and Roberts's Minimalist Conception of Democracy

Opposition to the holdings in *Brown* and *Plyler* has been justified by an assertion that the decisions violated the judiciary's proper role in a democracy. This position was articulated in memoranda authored by two young lawyers who

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[64] *Id.* at 223 (emphasis added).
[65] *Id.*
[66] *Id.* at 221 (citations omitted).
[67] *Id.* at 218–19, 223.
[68] *Id.* at 223–24.
[69] *Id.*

would influence and control the Supreme Court for around fifty years.[70]

Before his tenure as Chief Justice, William Rehnquist served as a law clerk to Justice Robert Jackson during the Court's consideration of *Brown*.[71] In his duties as a clerk, Rehnquist wrote a now-infamous memorandum entitled "A Random Thought on the Segregation Cases."[72] There, Rehnquist encouraged Justice Jackson to rule against the *Brown* plaintiffs and uphold the "separate but equal" doctrine established in *Plessy v. Ferguson*.[73] Rehnquist's memo began by arguing that "where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in extreme cases."[74] He argued that courts lacked the power to overcome majoritarian will and that any attempt would be "sloughed off, and crept silently to rest."[75] However, Rehnquist's argument was not limited to his assertions about the capacity of the Court. He went on to argue that "*Plessy v. Ferguson* was right and should be re-affirmed" and that *Brown*'s overturning the decision would be a supplanting of constitutional mandates with the Court's own social theory, repeating the Court's mistake in *Lochner* and its progeny.[76]

As a Supreme Court Justice, Rehnquist would later sign on to Chief Justice Burger's dissent in *Plyler*.[77] There, the dissent criticized the majority for failing to follow the limits of the Constitution and unjustifiably acting to correct "what it perceives to be the failings of the political processes, . . . depriv[ing] those

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[70] *See* Memorandum from William H. Rehnquist to Justice Robert H. Jackson, *supra* note 7; Memorandum from Carolyn B. Kuhl & John Roberts to William F. Smith, *supra* note 7.

[71] Rehnquist clerked for Justice Jackson from February 1952 to June 1953, overlapping with the Court's consideration of *Brown*. U.S. CONGRESS, WILLIAM H. REHNQUIST CHIEF JUSTICE OF THE UNITED STATES: MEMORIAL TRIBUTES IN THE CONGRESS OF THE UNITED STATES, S. DOC. NO. 109-7, at ix (2006).

[72] Memorandum from William H. Rehnquist to Justice Robert H. Jackson, *supra* note 7.

[73] *Id.* at 325.

[74] *Id.* at 324–25.

[75] *Id.* at 325.

[76] *Id.* at 325, 324 (referencing Justice Holmes's dissent in *Lochner v. New York*, in which he stated "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics," 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), and then citing Adkins v. Child.'s Hosp., 261 U.S. 525 (1923); Hammer v. Dagenhart, 247 U.S. 251 (1918); Tyson & Bro.-United Theatre Ticket Offs. v. Banton, 273 U.S. 418 (1927); Ribnik v. McBride, 277 U.S. 350 (1928)).

[77] Plyler v. Doe, 457 U.S. 202, 242 (1982).

processes of an opportunity to function."[78] Burger's dissent argued that this would incentivize continued legislative inaction and allow "the political branches to pass their problems to the Judiciary."[79]

Future Chief Justice John Roberts clerked for then-Justice Rehnquist, his tenure overlapping with the briefing in *Plyler*.[80] While it is currently uncertain what counsel, if any, he provided for Rehnquist there, we do know some of his contemporaneous views about the *Plyler* decision. Shortly after his clerkship ended, Roberts joined Attorney General William Smith's Department of Justice.[81] There, he would co-author a memo criticizing the Solicitor General's office for failing to support Texas by arguing that the Court should practice "judicial restraint."[82] Roberts argued that, had they done so, they might have won Justice Powell's vote and secured a majority for Texas' position.[83] For Roberts, the *Plyler* decision represented an instance where the Smith Justice Department should have implemented its "litigation program to encourage judicial restraint."[84] This notion of judicial restraint was influenced by the work of scholars, judges, and Smith's successor, Edwin Meese, who stood in opposition to "[j]udicial activism," which

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[78] *Id.* at 253–54 (Burger, C.J., dissenting).

[79] *Id*. at 254 (Burger, C.J., dissenting).

[80] Chief Justice Roberts clerked for then-Justice Rehnquist from July 1980 through August 1981, during which time seven briefs were filed with the Court in *Plyler v. Doe*; *see* Docket at 1, *Plyler*, 457 U.S. 202 (No. 80-1538-AFX), *microformed on* NAID No. 82696260 (Nat'l Archives); *Current Members*, SUP. CT., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/Z7RR-C74H] (last visited Mar. 12, 2023); Ari Berman, *Inside John Roberts' Decades-Long Crusade Against the Voting Rights Act*, POLITICO (Aug. 10, 2015), https://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222/ [https://perma.cc/6K4E-5WV3].

[81] David D. Kirkpatrick, *Two Legal Careers That Diverged May Intertwine Again*, N.Y. TIMES (Jan. 9, 2006), https://www.nytimes.com/2006/01/09/politics/politicsspecial1/two-legal-careers-that-diverged-may-intertwine.html.

[82] Memorandum from Carolyn B. Kuhl & John Roberts to William F. Smith, *supra* note 7, at 1–2; Linda Greenhouse, *An Old Supreme Court Dream*, N.Y. TIMES (Sept. 14, 2017), https://www.nytimes.com/2017/09/14/opinion/supreme-court-immigration.html.

[83] Memorandum from Carolyn B. Kuhl & John Roberts to William F. Smith, *supra* note 7, at 2. As Michael Olivas details, later scholarship demonstrates that Roberts was incorrect in his assessment, and that Justice Powell was firmly in support of the outcome in *Plyler* from the start. OLIVAS, NO UNDOCUMENTED CHILD, *supra* note 8, at 95–96.

[84] Greenhouse, *supra* note 82.

Meese defined as those "acts of the judiciary . . . that close off questions that should remain open in a democracy."[85]

In both cases, Roberts' and Rehnquist's views of democratic legitimacy require a minimal role for courts in overriding majoritarian decision-making. While their views did not win the day in *Brown* or *Plyler*, as Chief Justices, their constitutional visions have heavily influenced, if not dominated, the Court for nearly four decades.

III. *PLYLER* AS AN EMPIRICAL CASE STUDY IN THE ROLE OF JUDICIAL REVIEW IN DEMOCRACY

The *Plyler* majority and dissent can be read as making two opposed normative claims about the implications of the ruling for democratic facilitation. The former argues that it is opening potentially blocked channels by ensuring undocumented students are not rendered a permanent underclass and hindered in their ability to engage civically and politically.[86] The latter insists that judicial review not only thwarted the people's will but risks enervating the political process.[87] I argue that the legitimacy of the *Plyler* Court's application of a hightened form of scrutiny turns less on whether it hewed to formalistic doctinal frameworks, and more to whether application of this scrutiny faciliates or undermines democratic legitimacy.[88] In the forty years since *Plyler,* we have historical evidence to help inform which vision of democratic facilitation proved correct.

Michael Olivas work provides the ideal starting point for this investigation. He was a leading scholar in areas of legal, political, and social fights over immigration reform and undocumented student access. His work details the post-*Plyler* evolution of federal immigration reform, from the Immigration Reform and Control Act of 1986, which established a comprehensive field of federal regulation related to the

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[85] Edwin Meese III, U.S. Att'y Gen., Address at the Joseph Story Awards Banquet, 3–4 (Mar. 24, 1988) (available at *Speeches of Attorney General Edwin Meese, III*, DEP'T OF JUST., https://www.justice.gov/ag/speeches-attorney-general-edwin-meese-iii [https://perma.cc/XX4H-7VP3] (Apr. 22, 2021)).

[86] Plyler v. Doe, 457 U.S. 202, 223–24 (1982).

[87] *Id.* at 253–54 (Burger, C.J., dissenting).

[88] In this sense, I am arguing that the Equal Protection Clause should remain as a proper and primary grounding for the educational rights of undocumented children. For a recent analysis of other possible basis for protecting the educational rights of undocumented students, see Rachel F. Moran, *Personhood, Property, and Public Education: The Case of* Plyler v. Doe, 123 COLUM. L. REV. 1271 (2023).

employment of undocumented immigrants,[89] to the changes immigration and public benefits law brought about in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA").[90] In IIRIRA, Congress considered and ultimately rejected a provision that would have allowed states to deny undocumented children access to public K-12 education, and in PRWORA, Congress explicitly declined to interfere with the rights gaurunteed by *Plyler*.[91] Olivas chronicled the extensive legislative fights over the various versions of the "DREAM Act" that attempted to provide a path to citizenship for many undocumented students who were able to go to school as a result of *Plyler*.[92] In the wake of the failure of those legislative efforts, he would chronicle the emergence of Executive Branch action in the form of the Deferred Action for Childhood Arrivals ("DACA") Program, the effect that program had on former *Plyler* students, and the legal and political challenges to that program.[93]

He would go on to detail the myriad ways that states and localities responded to *Plyler*. In 1994, the Republican Governor of California, Pete Wilson, attempted to build a political career by championing Proposition 187, which would have barred undocumented children from public schools had it not been

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[89] *See generally* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; Daniel E. Lungren, *The Immigration Reform and Control Act of 1986*, 24 SAN DIEGO L. REV. 277, 291 (1987).

[90] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 501–594, 110 Stat. 3009-546, 3009-670 to 3009-688; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, §§ 400–451, 110 Stat. 2105, 2260–77.

[91] MICHAEL A. OLIVAS, PERCHANCE TO DREAM: A LEGAL AND POLITICAL HISTORY OF THE DREAM ACT AND DACA 10, 22–23 (2020) [hereinafter OLIVAS, PERCHANCE TO DREAM] (discussing the legislative history of IIRIRA); *see also* 8 U.S.C. § 1643 (a)(2) ("Nothing in this chapter may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under Plyler v. Doe (457 U.S. 202)(1982).").

[92] 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 (2009).

[93] *See generally* OLIVAS, PERCHANCE TO DREAM, *supra* note 91; Memorandum from Janet Napolitano, Sec'y 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 (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/PR56-T2ND] (outlining the DACA Program and its enforcement under the Obama administration).

enjoined as a violation of *Plyler*.[94] After the IIRIRA and PRWORA placed new requirements on states' abilities to provide benefits to undocumented persons, Professor Olivas would document and influence the emergence of state legislation that allowed former *Plyler* students to access in-state tuition and state-based financial aid, enabling them to build on their primary education and go to college. [95] Some of his most recent work chronicles how states have taken similar actions to open up access to professional licenses for undocumented persons.[96]

Professor Olivas was a scholar of these issues, but for anyone who knew his work, it was evident he did not see his role as an academic as limiting him to an ivory tower. Whether you agree with his analysis or not, one thing that is undeniable from the body of his work is that the Court's searching judicial review in *Plyler* did not lead to the political bodies declining to engage with the contentious and controversial issues central to the decision. The subsequent decades have seen massive changes to federal immigration law, prompting numerous responses from Congress, the Executive Branch, and state legislatures.

Since *Plyler*, *substantial* political engagement by undocumented students has begun to reshape the political landscape. Proposition 187 mobilized California Latinos, and within a decade, the state went from closing their schoolhouse doors to undocumented children to passing laws like AB 540, expanding college access to many former *Plyler* students.[97] Many

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[94] Bill Stall & Cathleen Decker, *Wilson and Prop. 187 Win: Senate Race Close; GOP Controls Congress: Governor: Trailing a Year Ago, Incumbent Rides a Tide of Voter Frustration to a Dramatic Comeback. The Victory Thrust Him into the Ranks of Contenders for the White House*, L.A. TIMES (Nov. 9, 1994), https://www.latimes.com/archives/la-xpm-1994-11-09-mn-60569-story.html [https://perma.cc/6QHB-JYTM]; *see* Proposition 187: Illegal Aliens, Ineligibility for Public Services, Verification and Reporting (Cal. 1994), *invalidated by* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995).

[95] OLIVAS, NO UNDOCUMENTED CHILD, *supra* note 8, at 66–67.

[96] *See*, *e.g.*, Michael A. Olivas, *Within You Without You: Undocumented Lawyers, DACA, and Occupational Licensing*, 52 VAL. U. L. REV. 65, 66 (2017).

[97] Gustavo Arellano, *Prop. 187 Forced a Generation to Put Fear Aside and Fight. It Transformed California, and Me*, L.A. TIMES (Oct. 29, 2019, 3:00 AM), https://www.latimes.com/california/story/2019-10-29/proposition-187-california-pete-wilson-essay [https://perma.cc/438X-YJUQ]; Rebecca Trounson, *UC Tuition Break OKd for Some Immigrants Education*, L.A. TIMES (Jan. 18, 2002), https://www.latimes.com/archives/la-xpm-2002-jan-18-me-23392-story.html [https://perma.cc/36UX-JFTG]; CAL. EDUC. CODE § 68130.5 (West 2022) (commonly known as AB 540, the statute expanded in-state tuition to undocumented California residents).

of these same students organized and presented legislative testimony to achieve the passage of these bills.

Former undocumented students have shaped national policy as well as state political landscapes. In the intervening years, many formerly undocumented students were able to become citizens, while others were not. Undeterred, *Plyler* students went to college as a result of AB 540 and went on to push the Obama Administration into establishing the DACA program. The use of anti-immigrant and anti-Latino policies to build political careers backfired in California, and the Republican Party essentially became a non-factor in state politics.[98] In Arizona, Latino youth mobilized against attacks on their community, helped elect a Democratic Senator, and in 2020 swung the state's vote to the Democratic presidential candidate.[99]

The efforts to deny education to undocumented students did not end with *Plyler*. Still, *these* battles reveal that the *Plyler* majority's vision of democratic facilitation and representation reinforcement has come to pass. What resulted is robust dialect between the courts, federal and state legislatures, and civil society about the rights of undocumented youth.

CONCLUSION

Given the current Supreme Court's professed fidelity to originalism as the legitimate interpretive method, it remains to be seen whether there is jurisprudential traction for methods that seek to employ robust judicial review on the basis that it can be representation reinforcing.[100] However, failing to engage in such searching review of any effort to deny education access ignores nearly seven decades of judicial recognition of the role of education in democracy. It would also fail to take seriously the post-*Plyler* evidence that such judicial review has not undermined legislative or other democratic engagement on this issue.

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[98] Alex Nowrasteh, *Proposition 187 Turned California Blue*, CATO (July 20, 2016, 3:13 PM), https://www.cato.org/blog/proposition-187-turned-california-blue [https://perma.cc/82XC-UK38].

[99] Dianna M. Náñez, *How Did Latino Voters Shift Arizona Toward Biden? Their Voices Prove There's Not One Answer*, AZCENTRAL (Nov. 22, 2020), https://www.azcentral.com/story/news/politics/elections/2020/11/22/much-has-been-said-national-pundits-and-partisans-latino-vote-and-latino-voter-but-little-has-been-s/6319351002/ [https://perma.cc/BD2Z-UB3Q].

[100] *See* Ely, *Representation-Reinforcing*, *supra* note 30, at 486–87.

Failure to recognize that educational access serves a participation-enhancing function would be particularly ironic given that, in the public sphere, both pro- and anti-immigrant forces view educational access as central to democratic engagement. *Plyler* and its protections have allowed generations to claim an alternate vision of America: one more diverse, inclusive, and equal. In contrast to *Plyler's* positive vision of democratic inclusion is the troubling rise of the racist and xenophobic " 'great replacement' theory" myth, which has become a rallying cry for conservative politicians and mass murderers who target communities of color.[101] Both sides understand that universal access to education will open avenues to civic inclusion and give these undocumented immigrants, who are overwhelmingly not white, a greater claim to belonging and a greater claim to our multi-racial democracy.

[101] Nicholas Confessore & Karen Yourish, *A Fringe Conspiracy Theory, Fostered Online, Is Refashioned by the G.O.P.*, N.Y. TIMES (May 15, 2022), https://www.nytimes.com/2022/05/15/us/replacement-theory-shooting-tucker-carlson.html; Cameron Joseph, *Racist 'Replacement Theory' Is Bleeding Into GOP Senate Campaigns*, VICE (May 10, 2022, 10:36 AM), https://www.vice.com/en/article/n7nxmk/gop-great-replacement-theory [https://perma.cc/6GU4-XYJ2]; Heidi Pérez-Moreno & James Barragán, *Critics Denounce Greg Abbott and Dan Patrick's "Invasion" Rhetoric on Immigration, Saying It Will Incite Violence*, TEX. TRIB. (June 17, 2021, 1:00 PM), https://www.texastribune.org/2021/06/17/greg-abbott-dan-patrick-el-paso-invasion-immigration/ [https://perma.cc/8LF3-VBWZ].