2022

All The Presidents' Dreamers: Immigration Reform that Biden and Trump Can Agree On (and Why That Reform May be Elusive)

Victor C. Romero

ARTICLES

ALL THE PRESIDENTS' DREAMERS: IMMIGRATION REFORM THAT BIDEN AND TRUMP CAN AGREE ON (AND WHY THAT REFORM MAY BE ELUSIVE)

VICTOR C. ROMERO*

* Maureen B. Cavanaugh Distinguished Faculty Scholar & Professor of Law, Penn State Law-University Park. My thanks to Nicole Chanin, Hannah Ketring Brown, and their *Belmont Law Review* colleagues for their assistance during the virtual symposium, and to Maggie Hunt, Ally Hicks, Hallie Gillam, and their team for their good work on the piece. Thanks, as well, to Deans Hari Osofsky and Jim Houck for their generous support of all my work. Most important, my greatest thanks are reserved for Corie, Ryan, Julia, and Matthew, whose faith and love sustain me daily. In solidarity with minoritized folks, I have chosen to capitalize "Black" and "Brown" except when quoting others, although I appreciate this view has its detractors. *See, e.g.*, Jeffery Barg, *A year after decision to capitalize 'Black,' shades of gray remain for readers*, PHILA. INQUIRER (July 21, 2021), https://www.inquirer.com/opinion/capital-b-black-ap-style-language-20210721.html [https://perma.cc/V796-X2ZN].

INTRODUCTION

While a sizeable gulf exists between the Trump and Biden administrations' approaches to immigration, there is one policy area where these presidents would see eye-to-eye: a legal pathway for "Dreamers," longtime undocumented residents who initially came to the United States as children. Notwithstanding this exceptional example of bipartisanship, how the nation now moves forward to create such a pathway is a conundrum. The political divide that has stalled a two-decades-long search for a congressional solution has its roots in America's longstanding ambivalence about whether and how to provide basic opportunities to the least of its denizens.

This Article traces the current stalemate over the Dreamers to earlier disputes about desegregation and public school funding evident in a trio of landmark cases—*Brown v. Board of Education*, *San Antonio Independent School District v. Rodriguez*, and *Plyler v. Doe*—each of which highlights tensions underlying the Court's commitments to ensuring equal protection of the law to minoritized communities. Taking these cases together, three constitutional tensions emerge: the role of courts versus political entities (separation of powers), the role of federal versus state governments (federalism), and the expansive versus restrictive reading of fundamental equality norms (individual rights). While *Plyler v. Doe* is correctly celebrated for providing basic public education to migrant children,[1] subsequent developments have led to a wide-ranging debate over these persons' access to opportunities after high school, including affordable postsecondary education and gainful employment.

This Article then examines the different sides of this debate as exemplified in the various federal and state policies enacted to address the issues of education and employment *Plyler* did not answer, emphasizing the president's leadership role in framing the issues. With respect to Dreamers in particular, the Obama/Biden approach will be compared to and contrasted with Trump's policy perspective. Viewing these approaches from the lens of the three constitutional themes identified earlier—separation of powers, federalism, and individual rights—this Article argues that true legislative progress for the Dreamers continues to be an uphill battle because of the history lessons gleaned from *Brown* through *Plyler*.

* * *

1. *See Public Education for Immigrant Students: Understanding* Plyler v. Doe, AM. IMMIGR. COUNCIL (Oct. 24, 2016), https://www.americanimmigrationcouncil.org/research/plyler-v-doe-public-education-immigrant-students [https://perma.cc/GRV5-MGM5].

Joe Biden and Donald Trump. The popular narrative is that the current occupant of the Oval Office and his predecessor could not be further from each other in terms of style, temperament, and politics. In perhaps no policy arena is this philosophical distinction more pronounced than in the field of United States immigration policy.

When we think of Donald Trump and his views on immigration,[2] we think of the birther controversy he stoked around Barack Obama's citizenship (impugning Obama's qualifications for the presidency)[3], the Muslim travel ban,[4] the southern border wall,[5] the separation of parents and children,[6] and the restrictions on asylum,[7] to name a few. When we think of

---

2. According to longtime Republican operative and Trump confidante, Roger Stone, "Trump saw that he would have to move right to win the party's nomination, but this idea that Roger Stone or Sam Nunberg or Steve Bannon provided him with an agenda is just not true. Sam deserves a lot of credit for helping Trump frame some of the things he wanted to say in memorable ways, but it's all pure Trump. Trump is the one who sees immigration as an issue, who has been talking about trade imbalances and our NATO allies not paying their fair share all the way back to 1988. He formulates his own platform, and he road tests it. He knows where the applause lines are." ALLEN SALKIN & AARON SHORT, THE METHOD TO HIS MADNESS: DONALD TRUMP'S ASCENT AS TOLD BY THOSE WHO WERE HIRED, FIRED, INSPIRED—AND INAUGURATED 274 (2019). To be clear, the fact that I agree with Trump's gut reaction regarding the Dreamers does not suggest I agree with any more of his agenda. Indeed, his draconian immigration policies are likely to have unintended long-term consequences, especially for border states like California. *See, e.g.*, Molly O'Toole, *Trump's immigration changes will affect California long after he's gone*, L.A. TIMES (Oct. 18, 2020), https://www.latimes.com/politics/story/2020-10-15/stakes-for-california-election-immigration [https://perma.cc/UT2K-EKV9]. Elsewhere, I have critiqued parts of the Trump immigration agenda from a Christian perspective. *See* Victor C. Romero, Victor C. Romero, *Servant Leadership and Presidential Immigration Politics: Inspiration from the Foot-Washing Ritual*, 26 WASH. & LEE J. CIV. RTS. & SOC. JUST. 147 (2019).

3. *See, e.g.*, Adam Serwer, *Birtherism and Trump*, THE ATLANTIC (May 13, 2020), https://www.theatlantic.com/ideas/archive/2020/05/birtherism-and-trump/610978/ [https://perma.cc/UT2K-EKV9]. The U.S. Constitution requires that, among other qualifications, presidential candidates must be "natural born citizens." U.S. CONST., art. II, § 1, cl. 5 ("No Person except a *natural born Citizen*, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.") (emphasis added).

4. The Supreme Court upheld the third iteration of Trump's Muslim travel ban. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

5. Having prevailed in the Ninth Circuit, the Sierra Club's challenge to the funding of the border wall was appealed to the Supreme Court, but then vacated following Biden's decision to halt its construction. *See* Biden v. Sierra Club, 142 S. Ct. 56, 56 (2021) ("Judgment vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit with instructions to direct the District Court to vacate its judgments. The District Court should consider what further proceedings are necessary and appropriate in light of the changed circumstances in this case.").

6. Teo Armus, *The parents of 545 children separated at the border still haven't been found*, TEX. TRIB. (Oct. 21, 2020), https://www.texastribune.org/2020/10/21/donald-trump-immigration-parents-children-separated/ [https://perma.cc/78PC-GA62].

Joe Biden, we think of him, at the very least, undoing Trump's handiwork, including canning the Muslim travel ban and ending the family separation policy.[8]

Despite these differences, there is one policy area that Biden and Trump would likely agree on, regardless of the wide array of views within the Democratic and Republican parties on immigration: that America should see its way clear to providing lawful residence for those undocumented persons who came to the United States as children. President Biden's penchant for these so-called Dreamers is evident in the bill he sent to Congress on the very first day of his administration.[9] Because of pressure from among his restrictionist flank, including from former chief strategist Steve Bannon, Donald Trump's sympathy for the Dreamers is less well-known. As New York Times journalists Julie Hirschfeld Davis and Michael Shear reported, however:

> Trump had a blind spot, and it terrified Bannon. Trump had a weakness for the Dreamers, Bannon knew, and if he gave in to it, it could ruin him. Brought into the United States as

---

7. Peniel Ibe, *How Trump is Making it Harder for Asylum Seekers*, AFSC (Nov. 2, 2020), https://www.afsc.org/blogs/news-and-commentary/how-trump-making-it-harder-asylum-seekers [https://perma.cc/78PC-GA62].

8. *See, e.g.*, John Hudek & Christine Stenglein, *Biden's immigration reset*, BROOKINGS (Feb. 19, 2021), https://www.brookings.edu/blog/fixgov/2021/02/19/bidens-immigration-reset/ [https://perma.cc/6RVB-4SRZ] ("While everyone expected him to make a dramatic break from the hardline policies, inefficiently spent funds, and inhumane endeavors of his predecessor, Donald Trump, Mr. Biden is not just reversing Mr. Trump's policies, but the policies designed and/or administered by previous presidents."). Biden's immigration priorities are also evident in his May 2021 budget proposal for the Department of Homeland Security, which includes increasing care for migrants while eliminating funding for Trump's border wall. *See* Nick Miroff et al., *DHS Budget Would Slash Border-Wall Funding, Increase Care for Migrants*, WASH. POST (May 30, 2021), https://www.washingtonpost.com/national/trump-separated-families-payout-biden/2021/10/28/832bc50e-382a-11ec-9a5d-93a89c74e76d_story.html [https://perma.cc/NK3B-CBEV].

9. Biden's inauguration day proposal included pathways to lawful residence not just for the Dreamers, but for certain TPS (temporary protected status) holders and farmworkers. *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System*, THE WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/ [https://perma.cc/C64T-32XT]. Seung Min Kim & Marianna Sotomayor, *As House approves 'dreamers' bill, Biden pushes for support amid GOP resistance in Senate*, WASH. POST (Mar. 18, 2021), https://www.washingtonpost.com/politics/biden-immigration-dreamers-daca/2021/03/18/ebe53a16-87f0-11eb-8a8b-5cf82c3dffe4_story.html [https://perma.cc/RRA7-5AC3]. Biden has also shifted expenditures away from Trump's border wall toward immigrant care. Miroff et al., *supra* note 9. More generally, Biden's spending priorities have been geared toward correcting societal inequities. Greg Korte & Jacqueline Gu, *Biden Targets Racial, Social Inequities With Vast Spending Push*, BLOOMBERG (May 29, 2021), https://www.bloomberg.com/news/articles/2021-05-29/biden-targets-racial-social-inequities-with-vast-spending-push [https://perma.cc/M3JM-X78Q].

> children by their parents, this particular group of undocumented immigrants had tugged at Trump's heartstrings since he first found out they existed during his meeting with several of them at Trump Tower in 2013.[10]

Trump and Biden are not the only political rivals who can find common ground with respect to the Dreamers. Both George W. Bush and Barack Obama, Trump's and Biden's predecessors, also supported some form of permanent residence for the Dreamers.[11] Indeed, since 2001, Congress has seen numerous DREAM Act bills that have come and gone, often with bipartisan sponsorship.[12]

Fast forward to 2021. If, in today's polarized political climate, there might be widespread support for the Dreamers—indeed, if Trump and Biden could agree on such reform—why has it not happened? If every president from Bush the younger through Biden the elder has pushed for Dreamer documentation since the early 2000s, why hasn't this gotten done?

This Article contends that three seminal Supreme Court cases on so-called K-12 primary and secondary public education teach us about three constitutional tensions that underlie our reluctance to provide equal protection under the law to the most vulnerable populations in society.

We begin with an exploration of a Supreme Court case that everyone wants to believe in and affirm—a so-called "super precedent"[13]—*Brown v. Board of Education*,[14] which teaches us that, while, like the Fourteenth Amendment itself, the intentions of this unanimous Court were noble, the compromised language of its opinion and that of its namesake, *Brown II*, reveal a weaker commitment to true equal opportunity for all.[15]

---

10. JULIE HIRSCHFELD DAVIS & MICHAEL D. SHEAR, BORDER WARS: INSIDE TRUMP'S ASSAULT ON IMMIGRATION 156 (2019).

11. *See infra* Part III.C.

12. *See infra* notes 111–13 and accompanying text. The terms "DREAM Act" and "Dreamers" derive from the original name of the proposed act, the Development, Relief, and Education for Alien Minors Act of 2001. Development, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2001–02).

13. Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205 (2006) ("Super precedents are those constitutional decisions in which public institutions have heavily invested, repeatedly relied, and consistently supported over a significant period of time."); Marcia Coyle, *Hunting for 'super precedents' in U.S. Supreme Court confirmations*, CONST. CTR. (Oct. 20, 2020), https://constitutioncenter.org/blog/hunting-for-super-precedents-in-u.s-supreme-court-confirmations [https://perma.cc/LA3E-KBUF] (tracing the use of the term "super precedent" during Senate confirmation hearings for Supreme Court justice candidates, most recently Justice Coney Barrett).

14. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

15. Brown v. Bd. of Educ., 349 U.S. 294 (1955).

I. IN THE BEGINNING: BROWN V. BOARD OF EDUCATION AND SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ

Part I of this Article examines two hallmarks of the Supreme Court's Equal Protection Clause jurisprudence around our constitutional commitment to equal educational opportunities for all in the United States. In the first case, *Brown v. Board of Education*, the Supreme Court declared the Jim Crow doctrine of "separate but equal" unconstitutional in the context of public education.[16] In the second, *San Antonio Independent School District v. Rodriguez,* the Court upheld a state's public school funding scheme even though it perpetuated socioeconomic inequalities between rich and poor schoolchildren.[17]

This Part introduces three constitutional values—the separation of powers, federalism, and the protection of individual rights—and describes how these values are manifested in *Brown* and *Rodriguez*, highlighting tensions in our long-term commitment to providing equal public educational opportunities to all students.[18]

A. Brown v. Board of Education and the Constitutional Tensions Underlying this Unanimous Opinion.

1. The Brown *Backstory: Getting to Unanimity*

Brown v. Board of Education is familiar to every school-aged pupil in America, and trotted out by social studies teachers nationwide as a symbol of our democracy's commitment to equality for all, regardless of race.[19] The political and legal details are similarly familiar to most law students. Following a long campaign by the NAACP orchestrated by future Justice Thurgood Marshall in which Jim Crow segregation laws were successfully challenged at every turn,[20] the Supreme Court unanimously

16. *Brown*, 347 U.S. at 495.

17. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973).

18. *Id.* at 1; *Brown*, 347 U.S. at 483.

19. *See* Rick Allen, *Brown v. Board of Education: How Far Have We Come?*, ASCD (May 1, 2004), https://www.ascd.org/el/articles/brown-v.-board-of-education-how-far-have-we-come [https://perma.cc/DQM6-ZQR5].

20. Mark Tushnet has authored two comprehensive books on Marshall's constitutional career, both as a civil rights lawyer and as a jurist. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994) (authored as an attorney); MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991 (1997) (authored as a Justice); *see* JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (1998) (describing Marshall's desegregation strategy from conception to implementation); GARY M. LAVERGNE, HEMAN MARION SWEATT, THURGOOD MARSHALL, AND THE LONG ROAD TO JUSTICE (2010) (describing Marshall's involvement in the Texas law school desegregation dispute culminating in the Supreme Court's decision in *Sweatt v. Painter*).

struck down state laws that prevented children of different races from attending public schools together.[21]

As a political and legal matter, the unanimous *Brown* opinion almost did not happen, having originally been discussed in the context of both *Plessy v. Ferguson*'s[22] "separate but equal" doctrine and a constitutional and legislative history that appeared to permit segregation notwithstanding the Civil War Amendments.[23] At the initial oral argument in 1952, a majority of the Justices seemed skeptical that segregated schools were unconstitutional, led by Chief Justice Vinson, who expressed the following sentiments during the Justices' December 13th case conference:

> There is a body of law in back of us on separate but equal. . . . The same men were in Congress then who passed the Civil War Amendments. However you construe it, Congress did not pass a statute determining the issue and ordering *no* segregation . . . Harlan's dissent in *Plessy* is careful *not* to refer to schools.[24]

Indeed, Justice Douglas's notes indicate a five-to-four split in favor of upholding *Plessy* and school segregation.[25]

It took the death of Chief Justice Vinson—and the appointment of California Governor Earl Warren as his replacement—to swing the Court to unanimously rule segregated schools unconstitutional by 1954.[26] Following the case's 1953 re-argument, Chief Justice Warren shared the following thoughts with his brethren at conference:

> The more I read and hear and think, the more I come to conclude that the basis of the principle of segregation and separate but equal rests upon the basic premise that the Negro race is inferior. That is the only way to sustain *Plessy*—I don't see how it can be sustained on any other theory. . . . I don't see how we can continue in this day and age to set one group apart from the rest and say that they

21. *Brown*, 347 U.S. at 495.

22. 163 U.S. 537, 543 (1896).

23. *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 55 HARV. L. REV. 1, 58 (1955) (concluding that "section I of the fourteenth amendment, like section i of the Civil Rights Act of 1866, carried out the relatively narrow objectives of the Moderates, and hence, as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation.").

24. DEL DICKSON, ED., THE SUPREME COURT IN CONFERENCE (1940-1985) 646 (2001) (emphasis in original).

25. *Id.* at 660 ("In the original conference, there were only four who voted that segregation in the public schools was unconstitutional.").

26. The classic work examining the *Brown* decision is by historian Richard Kluger. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (Vintage rev. ed. 2004).

> are not entitled to *exactly the same* treatment as all others. To do so is contrary to [the Civil War Amendments].[27]

According to Justice Douglas, Chief Justice Warren took the laboring oar in drafting an opinion outlawing school segregation. Warren circulated drafts to try to persuade the doubters, as the Court collectively strived for unanimity, clarity, and concision, in anticipation of the resistance the opinion would face from segregationist elements.[28]

2. The Constitutional Tensions Underlying Brown I & II

The now-unified *Brown* Court worked assiduously to issue two separate opinions in consecutive years: one overruling *Plessy*'s doctrine of "separate but equal"[29] and—following further re-argument[30]—the other outlining a remedy for integrating currently segregated schools.[31] Taking both opinions together, one notices the constitutional tensions underlying the unanimity forged by compromise.

American law generally recognizes three core principles enshrined in its written constitution: the separation of powers among the national government's branches; the respect for federalism, the co-existence of both national and subnational governments; and the protection of individual rights.[32] As the primary interpreter of the Constitution,[33] the Court has

---

27. DICKSON, supra note 25, at 654 (emphasis in original). Jarring and offensive as they appear today, the Justices' terms for the different races have been left in their original form, for accuracy's sake.

28. *Id.* at 661 ("It was decided by a few of us (Black, Burton, and myself) who worked closely with Chief Justice Warren on the matter that these opinions should be short and concise and easily understood by everyone in the country. . . .").

29. Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

30. *Id.* at 495–96 ("Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question -- the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.").

31. Brown v. Bd. of Educ., 349 U.S. 294, 294 (1955).

32. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1-6 (5th ed. 2015) (describing the Constitution's functions as creating a national government of separate powers, dividing power between state and federal governments, and protecting individual liberties); *see also* Erwin Chemerinsky, *Giving Meaning to the Preamble*, CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/preamble-ic/interps/37#giving-meaning-to-the-preamble-by-erwin-chemerinsky [https://perma.cc/9WN3-B6E

recognized that tensions exist in adjudicating disputes in which these principles arise.[34] Leading constitutional law scholar Erwin Chemerinsky has eloquently noted that "[v]iewing the Constitution as a way of protecting long-term values from short-term passions poses a basic problem in constitutional interpretation. Interpretation is crucial to allow a document written for an eighteenth-century agrarian slave society to govern in the technological world of the twenty-first century."[35] In *Brown I & II*, we see all three principles, and their underlying tensions, at play.[36]

3. Separation of Powers

First, let's consider the separation of powers doctrine. Following the failure of the Articles of Confederation,[37] the Framers established a national government and separated its powers via the first three articles of the Constitution.[38] Wary of lodging political power in a single entity, the Founders described the distinct powers held by each of the three branches: the legislature or Congress in Article I, the executive or President in Article II, and the judiciary or Supreme Court in Article III.[39] Through its landmark decision in *Marbury v. Madison*, the Supreme Court conferred upon itself the power of judicial review over the political actions of the legislature and executive, securing its position as the final arbiter over the Constitution's meaning.[40] In sum, the nation's political branches—Congress and the

---

U] (last visited Dec. 23, 2021) ("The Preamble describes the core values that the Constitution exists to achieve: democratic government, effective governance, justice, freedom, and equality.").

33. Marbury v. Madison, 5 U.S. 137, 177 (1803) (noting that it is the Court's duty "to say what the law is.").

34. *See* Joel B. Grossman, *The 200th Anniversary of Marbury v. Madison: The Reasons We Should Still Care About the Decision, and The Lingering Questions It Left Behind*, FINDLAW (Feb. 24, 2021), https://supreme.findlaw.com/legal-commentary/the-200th-anniversary-of-marbury-v-madison.html [https://perma.cc/GL72-JV36].

35. CHEMERINSKY, *supra* note 33, at 8–9.

36. Brown v. Bd. of Educ., 347 U.S. 483, 483 (1954); *Brown,* 349 U.S. at 294.

37. *See, e.g.*, NCC Staff, *10 reasons why America's first constitution failed*, CONST. CTR. (Nov. 17, 2020) https://constitutioncenter.org/blog/10-reasons-why-americas-first-constitution-failed [https://perma.cc/Y2AN-ZPBT] ("The Articles formed a war-time confederation of states, with an extremely limited central government. The document made official some of the procedures used by the Congress to conduct business, but many of the delegates realized the Articles had limitations."); GEORGE WILLIAM VAN CLEVE, WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION 2 (2017) ("[T]he true heart of the controversy over the Confederation's collapse was whether Americans were willing to transfer sovereignty—tax and law enforcement powers—to a central government.").

38. U.S. CONST., art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1 (creating the legislative, executive, and judicial branches of the national government).

39. U.S. CONST., art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

40. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to

President—create and execute laws for the good of the American people, while the nation's judicial branch—the Supreme Court—ensures that such laws comply with the Constitution, but cannot itself create any law.

In *Brown I*, we see the tension between political lawmaking and judicial interpretation play out in the Justices' conference debates about how to correctly interpret the constitutional phrase "equal protection of the laws" as it applies to the question of segregated schools.[41] As constitutional interpreters, the Justices were interested in the original understanding of the Fourteenth Amendment to gauge whether the founding generation would have permitted segregation notwithstanding their commitment to equality following the end of the Civil War.[42] In his *Brown I* opinion, Chief Justice Warren noted that the historical source material was "inconclusive."[43]

> The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.[44]

As is true with any large group, there were different views on what equality for the newly-freed slaves meant. What is undisputed, however, is that, among several states and Washington, D.C.,[45] schools at the time of the Fourteenth Amendment's passage were legally segregated by race.[46] This inconvenient truth generated a robust debate among the Justices during

---

particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.").

41. *See History – Brown v. Board of Education Re-enactment*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/history-brown-v-board-education-re-enactment [https://perma.cc/46H7-HAUY] (last visited Dec. 23, 2021).

42. *Id.*

43. Brown v. Bd. of Educ., 347 U.S. 483, 488–89 (1954).

44. *Id.* at 489.

45. *Bolling v. Sharpe* was the companion case to *Brown I* that involved segregated schools in Washington, D.C. As in *Brown I*, the Court held these separate schools unconstitutional, relying on the Fifth Amendment's Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("In view of our decision [in *Brown* I] that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.").

46. *Desegregation and Busing: The Fourteenth Amendment*, FINDLAW (June 20, 2016), https://www.findlaw.com/education/discrimination-harassment-at-school/desegregation-and-busing-the-fourteenth-amendment.html [https://perma.cc/H82Q-BYXG].

the conferences as to the proper role of the judge versus that of the political branches.

To wit, because judges are supposed to interpret law and not create it, would ignoring the history of segregated schools during the passage of the Fourteenth Amendment mean that the Court was substituting its political judgment for that of the Framers who clearly thought segregated schools permissible? Justice Jackson argued:

> I would start with these cases as a lawyer would. I find nothing in the *text* that says [segregation] is *unconstitutional*. Nothing in the opinions of courts say that it is unconstitutional. Nothing in the history of the Fourteenth Amendment says that it is unconstitutional. There is nothing in the acts of Congress either way. On the basis of precedents, I would have to say that it *is* constitutional.[47]

Justice Frankfurter agreed. "As a pure matter of history, in 1867 the Fourteenth Amendment *did not* have as its purpose to abolish segregation.[48] The due process and equal protection clauses certainly did not abolish segregation when the Fourteenth Amendment was adopted."[49]

In these Justices' view, separation of powers required judges to function primarily as lawyers—that is, to examine the textual, historical, and precedential evidence before them, all of which pointed to the inescapable fact that maintaining segregated schools was a widespread practice at the time the Fourteenth Amendment was passed.[50] If changes were to be made to that educational policy decision, those were to be made by the political branch. Namely, Congress in the case of Washington, D.C., and state legislatures otherwise. That the Court relied, in part, on contemporaneous "psychological knowledge"[51] to support its conclusion that the harms caused by segregation was similarly controversial. Such evidence is typically weighed by legislatures as part of their policy-making function.[52]

Other Justices did not see their interpretive duty as bound solely to the historical record, instead viewing the Equal Protection Clause as setting forth a flexible standard that can be adapted to modern times.[53] As Justice Douglas implored his colleagues:

---

47. DICKSON, *supra* note 25, at 652 (emphasis in original).
48. *Id.* at 657.
49. *Id.*
50. *Id.* at 652, 657.
51. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954); *see also id.* at 494 n. 11 (citing various studies).
52. *See* CHEMERINSKY, *supra* note 33, at 738.
53. *See* DICKSON, *supra* note 25, at 658.

> History does shed a mixed light on [segregation]. In *this* day and age, race and color can't *now* be salient. Don't try to anticipate too much. We should recognize that adjustments will have to arise. This Court this Term is deciding its principles. It is a simple problem. Race and color cannot be a constitutional standard for segregating the schools.[54]

Justice Clark minimized the historical record by characterizing Congress's failure to abolish segregation as an unfortunate political reality given conditions in the South. "I can't well say Congress has ignored [desegregation]. They did not do it because southern congressmen could not do anything in the District of Columbia that would integrate the District of Columbia. People couldn't vote to integrate here and then return home to the South."[55] In these Justices' views, history was an informative, but not binding, tool and changed circumstances could warrant a changed interpretation of an open-ended constitutional text like the Equal Protection Clause.[56]

In the end, the separation of powers debate was resolved in favor of a broad reading of the Fourteenth Amendment keyed to the realities of 1954, not 1868. As the unanimous *Brown I* opinion concluded:

> We cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[57]

Noting that "education is perhaps the most important function of state and local governments,"[58] *Brown I* overruled *Plessy*, noting that "in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[59]

To achieve unanimity, Chief Justice Warren and his allies had to persuade the objectors that their separation of powers concerns had to be put aside, and that there was a valid constitutional basis for this ruling, notwithstanding the mixed history.[60] Although he acquiesced in this

54. *Id.* (emphasis in original).
55. *Id.* at 659.
56. *See id.* at 658–59.
57. Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954).
58. *Id.* at 493.
59. *Id.* at 495.
60. *See* DICKSON, *supra* note 25, at 658.

unanimous approach, Justice Jackson noted his unease: "The problem is to make a judicial basis for a congenial political conclusion. . . . As a political decision, I can go along with it—but with a protest that it is politics."[61]

One important lesson from the *Brown* debate is that, despite the unanimous opinion in favor of desegregation, the Justices had differing views on the separation of powers question.[62] Indeed, Justice Jackson appears to have gone along with the majority, notwithstanding his view that, as a constitutional matter, the Court's decision was a political one best left for legislatures, not one that the judiciary was fit to adjudicate given the lack of clear constitutional text and history outlawing segregation.[63]

4. Federalism

Next, turning to the principle of federalism. Given the tremendous growth of the federal government since the New Deal,[64] it is often difficult to imagine that the states' power was paramount at the Founding, with sub-federal governments the primary sources of positive law.[65] As such, those wary of the new Constitution were particularly concerned about overreaching federal power, expressed most emphatically during the ratification debates.[66] As Chemerinsky notes, "Antifederalists, who opposed the ratification, emphasized the powers of the new national government and its ability to relegate state governments to a secondary and relatively unimportant role."[67] Indeed, the Supreme Court has repeatedly invoked the Tenth Amendment as a textual source for the protection of states' rights against an increasingly large federal bureaucracy.[68]

In *Brown I*, the Court acknowledged that some school districts had begun working on equalizing facilities, curricula, and teacher salaries of the white and Black segregated schools, and in some cases, had achieved the same.[69] Accordingly, the Justices were aware that their decision to overturn

---

61. *Id.*

62. *See id.* at 657–58.

63. *See id.* at 658.

64. *See, e.g.*, IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME (2014); WILLIAM E. LEUCHTENBERG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL (2009); JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974 (Oxford Univ. Press rev. ed. 1997).

65. *See* CHEMERINSKY, *supra* note 33, at 9.

66. *Id.* at 11.

67. *Id.*

68. *See, e.g.*, New York v. United States, 505 U.S. 144, 188 (1992) (holding the "take title" provision of federal waste act unconstitutional on federalism grounds); *see also* Printz v. United States, 521 U.S. 898, 935 (1997) (striking interim provisions of federal Brady Act as usurping state power over local law enforcement officials); *see also* Reno v. Condon, 528 U.S. 141, 151 (2000) (upholding federal driver's protection act against Tenth Amendment challenge).

69. Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954) ("[T]here are findings below that the Negro and white schools involved have been equalized, or are being equalized, with

the doctrine of "separate but equal" had to be grounded in a theory that presupposed equal, but separate, facilities.[70] Such a moral decision—that segregated schools were inherently unequal—substituted the federal judiciary's view of morality for that of the states.

While the Court ultimately concluded such segregation stamped a badge of inferiority upon Blacks,[71] Justice Reed presented the Southern states' view in conference:

> Segregation is not done on a theory of racial inferiority, but on racial differences. It protects people against the mixing of races. The argument was not made that the Negro is an inferior race. . . . [O]n equal protection, they demonstrably have equal protection. [The states' commitment to segregation] is a police power that has been exercised. Its purpose has been to maintain a policy status.[72]

Under our federalist system, the argument goes, if states are in charge of enacting laws that reflect the health, safety, welfare, and morals of their communities,[73] the federal government—via an unelected federal judiciary, no less—should not be able to substitute its judgment for that of states.[74] As Justice Reed reminded his brethren, "States are authorized to

---

respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors."). While the Court also acknowledged the growing importance of public education since the Civil War, it should be noted that such growth was spurred on by state legislatures. *See, e.g.,* Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez *and Its Aftermath*, 94 VA. L. REV. 1963, 1965 (2008) ("At the founding, there were no state-wide systems of public schools, and, if there were schools at all, they were privately run or haphazardly organized at the local level. Sparked by the virtuous (and occasionally not-so-virtuous) leadership of Horace Mann and the 'Common Schools' movement he launched in Massachusetts, States in the mid-nineteenth century began to authorize their cities and counties to organize schools that would offer a free public education. To that end, they frequently amended their constitutions, requiring the legislature (in the words of many a state constitution) to create a 'thorough and efficient' system of public schools.").

70. *Brown*, 347 U.S. at 492 ("Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.").

71. *Id.* at 494.

72. DICKSON, *supra* note 25, at 656.

73. CHEMERINSKY, *supra* note 33, at 709 ("At the very least, the government has a legitimate purpose if it advances a traditional 'police' purpose: protecting safety, public health, or public morals.").

74. While few would question whether racially-segregated schools are constitutional today, my experience teaching Constitutional Law suggests that many understand the arguments for single-sex education, for instance, even if those tend to arise in private settings. *See, e.g.*, ROSEMARY SALOMONE, SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING 35 (2003) ("As I visited these three schools . . . I was struck by the orderly learning environment, the challenging academic program, the high expectations set for students, the consistently articulated and pervasive values and strict code of behavior, and the commitment and enthusiasm of the teachers. Obviously, all of these elements can be

make up their own minds on this question. . . . We must start with the idea that there is a large and reasonable body of opinion in various states that separation of the races is for the benefit of both."[75]

Given this perceived violation of federalism that the *Brown I* opinion might invoke, the Court aimed to reassure these disparate states of its commitment to respecting the local authority over educational policy[76] in its remedial opinion in *Brown II*.[77] In *Brown II*, the Court pragmatically realized that it might stem segregationist school districts' resistance to *Brown I* by placing these local governments in charge of implementing integration, albeit with federal court oversight.[78] Chief Justice Warren wrote:

> School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.[79]

In its remand order, the Court required the lower courts and school districts to facilitate desegregation with "all deliberate speed."[80] A pragmatic approach perhaps, but one that sent a mixed message, for the word "speed" suggests haste, whereas the term "deliberate" demands caution.[81] What is clear is that the lower courts were to retain jurisdiction and oversight, ensuring that whatever plans the school districts adopted sought to achieve the integration principles set forth in *Brown I*.[82]

---

replicated in a coeducational setting. But there is something else in all three [single-sex] schools is that almost intangible yet nonetheless powerful and definitive. There is a spontaneity, a synergy, an emotional security, and a sense of community that seem to flow out of shared experiences and common purposes as young women.").

75. DICKSON, *supra* note 25, at 649.

76. Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955) ("Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief.").

77. *Id.* at 249.

78. *See id.* at 299–300.

79. *Id.* at 299.

80. *Id.*

81. DICKSON, *supra* note 25, at 669 n. 92 (Dickson credits Richard Kluger, who apparently traces "all deliberate speed" to an 1893 poem by Francis Thompson).

82. *Brown,* 349 U.S. at 301 ("During this period of transition, the courts will retain jurisdiction of these cases.").

Notwithstanding the Justices' best efforts to convey unanimity via *Brown I & II*,[83] the Southern states' response to this perceived federal encroachment was uniformly negative.[84] As Chemerinsky has noted, "State legislatures adopted resolutions of 'nullification' and 'interposition' that declared that the Supreme Court's decisions were without effect. State officials attempted to obstruct desegregation in every imaginable way."[85]

Like the separation of powers issue, the federalism debate underlying the Court's unanimous decisions in *Brown I & II*[86] led not only to massive resistance from Southern states resentful of federal judicial interference in their constitutional police power over education, but also revealed fault lines in the Court's commitment to equal protection that we will see make subsequent contested five-to-four cases like *Rodriguez*[87] and *Plyler*[88] less surprising than one might have expected. Put differently, while *Brown* lives in our popular culture as a beacon of America's robust constitutional commitment to equal educational opportunities for all, the separation of powers and federalism debates that underlie the otherwise unanimous opinion reveal a Court less committed to educational equity than a cursory reading of *Brown*—and its modern mythical, super-precedent status—might suggest.[89]

5. Individual Rights

Finally, let's examine the debate about how *Brown* aimed best to protect individual rights.[90] That the Constitution was intended to protect individual rights is perhaps the best known of the three great principles, even though its textual foundations tend to be sought in the document's amendments, not its main articles.[91] Understandably then, *Brown* is best known for its moral conclusion that laws that require the separate education of children by race are inherently unequal, even if the facilities they attend could be made equal.[92] In today's culture, *Brown* is also known for an even broader proposition—racial segregation is unlawful and all so-called Jim Crow laws requiring the same are unconstitutional.[93]

---

83. *Id.* at 294; Brown v. Bd. of Educ., 347 U.S. 483, 483 (1954).

84. CHEMERINSKY, *supra* note 33, at 752.

85. *Id.* For more on the Southern states' massive resistance to *Brown I & II* and the Court's subsequent cases enforcing the same, see *id.* at 752–57.

86. *Brown,* 347 U.S. at 483; *Brown*, 349 U.S. at 294.

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

88. Plyler v. Doe, 457 U.S. 202 (1982).

89. *See* CHEMERINSKY, *supra* note 33, at 735–36.

90. *See generally Brown,* 347 U.S. at 486–96.

91. U.S. CONST., amends. I–X (the so-called "Bill of Rights"). For a comprehensive and creative account of the individual amendments and their interrelationship, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

92. CHEMERINSKY, *supra* note 33, at 736–37.

93. *See, e.g.*, *Jim Crow Laws*, EQUAL JUST. INITIATIVE (May 1, 2014), https://eji.org/news/history-racial-injustice-jim-crow-laws/ [https://perma.cc/83TQ-L8NS].

While few today would think Justice Reed's arguments are constitutionally valid,[94] there was a sizable body of law arguing that separating the races was good for both, and that segregation did not, by itself, render one race inferior to the other.[95] As Justice Brown argued in *Plessy v. Ferguson*:

> Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.[96]

Indeed, a short time after the *Brown* decision, Professor Herbert Wechsler concluded that all that the Justices achieved was to favor the associational rights of Blacks over that of whites.[97] Wechsler wrote:

> For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved.…But if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension, not unlike many others that involve the highest freedoms…? Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the

94. DICKSON, *supra* note 25, at 649, 656–57.

95. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

96. *Id.*

97. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

> opinion. To write it is for me the challenge of the school-segregation cases.[98]

In Wechsler's view, if the Court truly believed that it was possible to make the educational opportunities of Black and white children equal, then the only reason to prefer integration to segregation was to favor certain associational preferences, not to articulate neutral equality principles.[99] Put differently, *Brown* should be read as privileging the associational preferences of (Black) integrationists[100] over those of (white) segregationists.[101]

In response, Professor Charles Black argued that there is a much simpler way of understanding the individual rights principles at stake in *Brown*.[102] Contrary to Wechsler's assertions, the neutral principle is not associational freedom but racial equality.[103] Black wrote:

> The [F]ourteenth [A]mendment forbids inequality, forbids the disadvantaging of the Negro race by law. It was surely anticipated that the following of this directive would entail some disagreeableness for some white southerners. The disagreeableness might take many forms; the white man, for example, might dislike having a Negro neighbor in the exercise of the latter's equal right to own a home, or dislike serving on a jury with a Negro, or dislike having Negroes on the streets with him after ten o'clock. When the directive of equality cannot be followed without displeasing the white, then something that can be called a 'freedom' of the white must be impaired. If the fourteenth amendment commands equality, and if segregation violates equality, then the status of the reciprocal 'freedom' is automatically settled.[104]

Black believed that the associational freedoms of segregationists give way to those of integrationists not because of some arbitrary coin flip, but because the Fourteenth Amendment's Equal Protection Clause mandates

---

98. *Id.*

99. *See id.*

100. Note that not all Black people, then and now, preferred integration. Indeed, Professor Derrick Bell has argued that better schools for Black children should have received primary focus over integration. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 533 (1980) ("[E]ffective schools for blacks must be a primary goal rather than a secondary result of integration.").

101. *See id.* at 518–21; *see also* Wechsler, *supra* note 98, at 34.

102. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421 (1960).

103. *See id.* at 428–29.

104. *Id.* at 429.

that racial minorities be treated as equals under the law.[105] Maintaining segregated schools violates that neutral principle of racial equality and therefore cannot be sustained per *Brown*.[106]

The lesson from this debate—like those gleaned from the debates underlying separation of powers and federalism—is that smart people can divine individual rights principles that favor the Jim Crow segregationist as well as the progressive integrationist. Had the Court favored robust individuality or the freedom of Southern whites to segregate, then it could have upheld *Plessy* as consistent with constitutional principles. Thus, a segregationist vision of equal protection would have supported legislative majorities that ensured the equal, albeit separate, existence of the races on the neutral principle of free association.[107]

* * *

Notwithstanding *Brown*'s deserved stature in the canon of revered Supreme Court opinions, the constitutional tensions underlying the debates around separation of powers, federalism, and individual rights should give modern readers pause. While *Brown I* is breathtaking in its rhetoric and sweeping in its commitment to racial equality, *Brown II* is more measured, evidenced by its weak command that the states pursue integration with "all deliberate speed."[108] We will see these same debates come to a head in the *Rodriguez* school finance case, which exposes the Court's less-than-robust commitment to equal educational opportunity for poor minority children, a scant twenty years after *Brown* was decided.[109]

105. *Id.* at 428–29.

106. *See id.* at 426.

107. Again, this alternate reality may seem difficult to defend modernly, but recent studies suggest that, despite America's increasing racial diversity, residential segregation has increased over time. *See, e.g.*, Tracy Hadden Loh et al., *The Great Real Estate Reset—Separate and unequal: Persistent residential segregation is sustaining racial and economic injustice in the U.S.*, BROOKINGS (Dec. 16, 2020) https://www.brookings.edu/essay/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us/ [https://perma.cc/QJ4U-48RL] ("[W]hile our cities and regions are becoming far more racially and ethnically diverse, segregation has remained persistent.").

108. *Compare* Brown v. Bd of Educ., 349 U.S. 294, 301 (1955), *with* Brown v. Bd. of Educ., 347 U.S. 482, 495–96 (1954).

109. *See, e.g.*, Charles J. Ogletree, Jr., *The Legacy and Implications of* San Antonio Independent School District v. Rodriguez, 17 RICH. J.L. & PUB. INT. 515, 516 (2014) ("The Supreme Court's school desegregation case law has been a confusing maze of fits and starts. In 1954, a unanimous Court declared in Brown v. Board of Education that education 'must be made available to all on equal terms.' Yet, less than 20 years later, the Court found a Texas education financing plan that allowed for significant differences in funding between school districts to be constitutional.") (internal citations omitted).

B. San Antonio Independent School District v. Rodriguez

In *Rodriguez*, a group of lower-income, predominantly Mexican-American parents[110] brought suit against Texas, claiming that the state's school funding system violated the Equal Protection Clause.[111] Unlike the unanimous *Brown* opinion, Justice Powell's majority decision persuaded the bare minimum of four other Justices to sign on, signaling a retreat from the earlier precedent's robust protection of minority students' educational rights.[112] A former Southern school board member himself,[113] Justice Powell concluded that neither the plaintiffs' lack of wealth nor their desire for equal educational opportunity triggered the Court's strict review of Texas's financing scheme.[114]

While acknowledging that Texas's localized school district funding and control led to great disparities in the quality of schools between rich and poor communities, under the Equal Protection Clause, poverty was not a suspect class nor was education a fundamental right.[115] Accordingly, the majority deferred to Texas's funding scheme which, while imperfect, satisfied rational basis review.[116]

---

110. Despite the predominant racial composition of the plaintiff class, the Court ultimately concluded that there was no deliberate discrimination along racial lines in this case. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 57 (1973) ("Nor does it now appear that there is any more than a random chance that racial minorities are concentrated in property-poor districts.").

111. *Id.* at 4–6.

112. *Id.* at 1.

113. Joan Biskupic & Fred Barbash, *Retired Justice Lewis Powell Dies at 90*, WASH. POST (Aug. 26, 1998), https://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/powell082698.html [https://perma.cc/63KU-KUS2] ("Powell developed a deep friendship with Virginia Sen. Harry F. Byrd and served as chairman of the Richmond School Board from 1952 to 1961. Soon after he joined the school board, the Supreme Court issued its ruling in Brown v Board of Education, declaring segregated school systems unconstitutional. Virginia, like other southern states, operated a dual school system.").

114. *Rodriguez*, 411 U.S. at 28.

115. *Id.* at 18 ("[W]e find neither the suspect-classification not the fundamental-interest analysis persuasive.").

116. *Id.* at 40 ("[T]his is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights."). The Court's interpretive framework for its equal protection analysis emerged from the infamous footnote 4 of *Carolene Products*. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("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. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . .or national, . . . or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends

As in *Brown*, we see the three principles of separation of powers, federalism, and the protection of individual rights at play here, with emphasis on the last two.[117]

With respect to the separation of powers, *Rodriguez* differs from *Brown* in that the allegations were purely state-based.[118] Nonetheless, the concern over unelected judges intruding upon legislative educational policy decisions remains. Justice Powell recognized the danger of judges using their interpretive Article III powers to substitute their policy preferences for the reasoned judgments of policymakers.[119] He wrote:

> In its essential characteristics, the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution. We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities . . . .[120]

Reminiscent of Justice Jackson's admonition during the *Brown* Justices' conferences that lawyers interpret, not make, laws,[121] Justice Powell was careful that his views of school financing as a judge would not interfere with other views of school financing more properly made by a school board member or state legislator.[122] Horizontal separation of powers means that each government entity has its own specific function.[123] Citing its earlier decision in *Shapiro v. Thompson*, Justice Powell expressed his desire that the Court not become a "super-legislature."[124]

Closely related to this horizontal separation of powers is the vertical one, bounded by federalism—the idea that federal judges should not blithely interfere with state decisions, even where federal constitutional claims are raised.[125] As Justice Powell wrote:

> It must be remembered . . . that every claim arising under the Equal Protection Clause has implications for the

---

seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.")

117. *See generally Rodriguez*, 411 U.S. at 1, 4–6, 18, 28, 40.

118. Recall that *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown*, involved the segregated federal District of Columbia schools.

119. *Rodriguez*, 411 U.S. at 55.

120. *Id.*

121. *See generally* DICKSON, *supra* note 25.

122. *Rodriguez*, 411 U.S. at 55.

123. Richard Albert, *The Separation of Higher Powers*, 65 SMU L. REV. 3, 6 (2012).

124. *Rodriguez*, 411 U.S. at 31 (quoting Shapiro v. Thompson, 394 U.S. 618, 661 (1969)).

125. *See id.* at 44; *see also* Albert, *supra* note 124, at 6.

> relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While '(t)he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action,' it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.[126]

Perhaps because of his experience as a Richmond, Virginia school board member, Powell was particularly alert to the implications of the Court substituting its views for those of not just Texas, but of the other forty-nine states whose school financing systems have developed adequately, albeit imperfectly, without federal oversight.[127] Unless there was an overarching federal or constitutional reason to venture into the field of state school financing systems, the majority was unwilling to interfere.[128]

Perhaps even more important to the Court than the vertical and horizontal separation of powers concerns was the question of individual rights protected under the Equal Protection Clause.[129] It is to this question that the five-to-four *Rodriguez* split opinions devote the greatest amount of ink. On the majority's side, Justice Powell and his brethren were unmoved by neither claims of wealth discrimination nor the deprivation of a fundamental right to education.[130]

After reviewing three different ways in which wealth discrimination might manifest in this case, the majority concluded that, standing alone, poverty is not a suspect status.[131] For the majority, Justice Powell wrote:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to

126. *Rodriguez*, 411 U.S. at 44 (internal citation omitted).
127. *Id.* at 55.
128. *Id.* at 51.
129. *Id.* at 17.
130. *Id.* at 18.
131. *Id.* at 28.

> command extraordinary protection from the majoritarian political process.[132]

Put differently, unlike the Black schoolchildren in *Brown*, the Texas students' poverty "has not occasioned an absolute deprivation of the desired benefit."[133]

As to education as a fundamental right, Justice Powell, while affirming *Brown*, also noted that:

> Education . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.[134]

Because the majority held that wealth is not a suspect class and education is not a fundamental right, the Court was free to apply its most deferential standard of review to the Texas plan.[135] Justice Powell explained, "in sum, to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory."[136]

The four dissenters vehemently disagreed with the majority's conclusions, from the lack of importance given to educational opportunities to poor children to the failure to recognize the gross inequalities wrought by Texas's taxing regime.[137] Justice Marshall opined:

> [T]he majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels educational resources in accordance with the fortuity of the amount of taxable wealth within each district.[138]

---

132. *Id.*
133. *Id.* at 23.
134. *Id.* at 35.
135. *Id.* at 40.
136. *Id.* at 54–55.
137. *See id.* at 62–133.
138. *Id.* at 70–71.

Channeling *Brown*, Justice Marshall would have protected the right to education for underprivileged youth—whether poor or minority—[139] via a broad reading of equality under the law.[140]

Likewise, Justice White believed that the facts on the ground supported Marshall's conclusion:

> The difficulty with the Texas system, however, is that it provides a meaningful option to Alamo Heights and like school districts but almost none to Edgewood and those other districts with a low per-pupil real estate tax base. In these latter districts, no matter how desirous parents are of supporting their schools with greater revenues, it is impossible to do so through the use of the real estate property tax. In these districts, the Texas system utterly fails to extend a realistic choice to parents because the property tax, which is the only revenue-raising mechanism extended to school districts, is practically and legally unavailable.[141]

Note that the dissenters were one vote away from preserving *Brown*'s legacy.[142] Had one other majority Justice agreed with Marshall and White's analysis, states nationwide would have been required to do more to ensure localities provided disadvantaged children basic educational opportunities rather than leave unchecked glaring socioeconomic inequalities between rich and poor families.[143]

C. Lessons Learned—Constitutional and Political

After reviewing both cases, we learn that *Rodriguez* signaled a not entirely unpredictable departure from *Brown*. Much to the chagrin of the four *Rodriguez* dissenters, the bare, five-Justice majority appeared to beat a hasty retreat from the *Brown* Court's unanimous, robust protection of educational rights for the underprivileged less than twenty years prior.[144]

Yet, a closer look at the *Brown* opinion and its individual Justices' conference notes reveals a spirited debate about fundamental constitutional

---

139. Camille Walsh has argued that the Court should not have separated the two statuses of race and class, but rather should have understood their intersectional interplay as constitutionally significant. *See* Camille Walsh, *Erasing Race, Dismissing Class:* San Antonio Independent School District v. Rodriguez, 21 BERKELEY LA RAZA L.J. 133, 134 (2011) ("[B]y subsuming race under class by artificially separating the two identities, the Supreme Court negated both claims.").

140. *Rodriguez*, 411 U.S. at 71 (Marshall, J., dissenting).

141. *Id.* at 64–65 (White, J., dissenting).

142. *See id.* at 1.

143. *See id.* at 69 (White, J., dissenting).

144. *See generally id.* at 4–59.

principles involving the separation of powers, federalism, and individual rights' protections.[145] Viewed in this light—and knowing that a unanimous opinion in *Brown* was unlikely had Chief Justice Vinson not been replaced by Earl Warren—*Rodriguez* may be viewed as the triumph of the minority view implicit in the earlier *Brown* conference debates.[146] Mindful of its powerful role as constitutional arbiter, the Supreme Court is reluctant to substitute its policy views for those of legislative decision makers—whether federal or state—even if that means a severely diminished public education for a disadvantaged group.[147]

II. THE HIGH-WATER MARK: PLYLER V. DOE

About ten years after *Rodriguez*, the Court decided *Plyler v. Doe*, widely considered the high-water mark of undocumented persons' rights,[148] which, like *Brown,* struck down state efforts to deprive schoolchildren of a basic public education.[149] Originating in Texas like *Rodriguez*, *Plyler* involved a state law that barred undocumented children from attending primary and secondary public schools for free.[150] Like *Rodriguez*, *Plyler* resulted in a bare five-to-four majority decision; however this time, in favor of the students against the state.[151]

As a matter of equal protection, *Plyler* is a curious case because, like *Rodriguez*, the majority did not find the undocumented children to be a suspect class,[152] nor did it overturn *Rodriguez*'s holding that education is not a fundamental right.[153] Yet, Justice Brennan's majority opinion appears to apply a higher standard of review than Justice Powell's *Rodriguez*

145. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

146. *See id.* at 486; *Rodriguez*, 411 U.S. at 31.

147. *Rodriguez,* 411 U.S. at 3, 38.

148. MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND 8 (2012) ("To a large extent, *Plyler* may also be the apex of the Court's treatment of the undocumented, a concept that never truly existed until the 10th century."). In my view, Professor Olivas's book is the definitive study of the *Plyler* case.

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

150. *Id.* at 205 ("The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.").

151. DICKSON, *supra* note 25, at 763 ("William Brennan, writing on behalf of a 5-4 majority, struck down the state law.").

152. *Plyler*, 457 U.S. 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.'").

153. *Id*. at 221 ("Public education is not a 'right' granted to individuals by the Constitution.") (citation omitted).

opinion did,[154] prompting the four dissenters to wonder whether sufficient deference was accorded the state.[155]

So why did the *Plyler* Court hew more closely to *Brown* than *Rodriguez*,[156] arguably providing greater protection for undocumented children than for poor citizen children? Through our examination of the three constitutional themes of separation of powers, federalism, and individual rights protection, we will see how the Brennan majority likely saw the undocumented in *Plyler* as more like the Black schoolchildren in *Brown* than the disadvantaged San Antonio pupils in *Rodriguez*, fearing that Texas's exclusionary law would create a permanent underclass effectively deprived of a basic public education by the state.[157]

First, we consider the separation of powers concerns raised by the Justices in conference. Justice White, who had previously sided with the *Rodriguez* plaintiffs against Texas, thought that *Plyler* raised national concerns because of the undocumented children's alienage.[158] As such, Congress was the proper lawmaking authority to address any disadvantages they faced, not the Court.[159] White argued, "It's a national and not a state problem. The state has no obligation to do anything for illegals. Make Congress do it under Section Five of the Fourteenth Amendment."[160]

In contrast, Justice Stevens thought it proper for the Court to intervene, given the children's innocence and the federal government's laissez-faire attitude toward their undocumented presence.[161] Stevens opined, "These kids are not being deported, but will remain. What then is the treatment for these innocents? Judges as a whole would not attribute the fault of their parents (in migrating illegally) to them."[162] In Justices White's and Stevens's arguments, we see the separation of powers tension arise in the context of immigrants' rights.[163] When a problem arises concerning such migrants, these Justices differed on whether the proper decision maker should be Congress (as lawmaker) or the Court (as interpreter of constitutional equality).[164]

---

154. *Id.* at 224 (noting that Texas statute will not be deemed "rational unless it furthers some substantial goal of the State").

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

156. *See id.* at 203; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 3 (1973); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

157. *See Plyler,* 457 U.S. at 230; *Rodriguez,* 411 U.S. at 12; *Brown,* 347 U.S. at 487.

158. DICKSON, *supra* note 25, at 762.

159. *Id.*

160. *Id.*; U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). As was my approach to prior citations, while I personally object to the term "illegals," I have left the term in for accuracy's sake.

161. DICKSON, *supra* note 25, at 763.

162. *Id.*

163. *Id.* at 762–63.

164. *Id.*

Like horizontal separation of powers concerns, governmental division of authority plays out in a vertical sense in the Justices' arguments around federalism. Justice Rehnquist saw the issue as a state concern arising out of Texas's proximity to Mexico.[165] He asserted: "There are intractable problems in the Southwest. Wetbacks or not, the question is the validity of Texas's policy choice, however unwise. We are not talking only about five- or six-year-olds."[166]

Justice Powell offered the Equal Protection Clause as constitutional authority for the Court's federal intervention into a traditional state function.[167] He noted: "On equal protection, I would recognize that the classification is children and that they have no responsibility for being there. It is hard to think of a category more helpless than the children of illegal aliens."[168]

Justice Blackmun contended that preemption might be an alternative basis for asserting federal supremacy here. He argued: "These children are likely to remain. The statute is founded on alienage, not domicile. I can affirm [in the plaintiffs' favor] on preemption rather than equal protection. But I can go on either."[169]

Professor Michael Olivas has also made the case for federal preemption in *Plyler*, having written that "we do not want state or local school board policies that turn on federal immigration classifications."[170] The preemption alternative would have given states the option to regulate educational policy on grounds other than alienage—by domicile, say, as Justice Blackmun noted—thereby avoiding encroaching upon federal prerogatives.

In the end, however, it was an appeal to the protection of individual rights that perhaps made *Plyler* seem most like *Brown* for the five Justices in the majority.[171] A key to understanding the *Brown-Plyler* parallel comes from a close reading of Justice Powell's views, as he was the author of *Rodriguez* and could very well have sided with Texas as he did in that prior case.

At conference, while affirming his belief that education was not a fundamental right,[172] Powell nonetheless empathized with the plight of undocumented children, opining, "I don't think education is a fundamental right, but if some children get it I can't see how they can deny it to

---

165. *Id.* at 763.

166. *Id. Wetback,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/wetback [https://perma.cc/C33N-TA3R] (last visited Jan. 7, 2021) (the term "wetback" is "used as an insulting and contemptuous term for a Mexican who enters the U.S. illegally.").

167. DICKSON, *supra* note 25, at 762.

168. *Id.*

169. *Id.*

170. OLIVAS, *supra* note 149, at 27.

171. *Id.*

172. *See* DICKSON, *supra* note 25, at 762 ("I don't think that education is a fundamental right . . .").

others."[173] For Powell, Texas's substandard funding scheme disadvantaging poor students was categorically different from its decision to effectively[174] prohibit innocent undocumented children from attending altogether.[175] Such a bar made the *Plyler* case much more like *Brown* than *Rodriguez*.

Indeed, Justice Brennan highlighted this analogy in his majority opinion:

> In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. . . . What we said 28 years ago in *Brown v. Board of Education* . . . still holds true: "Today, education is perhaps the most important function of state and local governments. . . ."[176]

Furthering this theme, Justice Blackmun's concurrence highlighted the consequences of denying a basic education to an identifiable group of outsiders:[177]

> Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group, that group—through the State's action—will have been converted into a discrete underclass.[178]

Just as the unanimous *Brown* Court was concerned about relegating Black children to the status of permanent outsiders, so did the five-Justice majority in *Plyler* believe that the same fate would befall innocent

---

173. *Id.*

174. I have added the word "effectively" because the Texas statute did permit local authorities to charge undocumented students tuition to attend the public schools, which, while not the same as an outright bar, had the same effect. For instance, the largest Texas school district, Houston, would permit undocumented children to enroll at a tuition cost of one thousand dollars per child. *See* OLIVAS, *supra* note 149, at 10 (noting Houston's tuition rate for the undocumented).

175. *Id.* at 26–27.

176. Plyler v. Doe, 457 U.S. 202, 222–23 (1982).

177. *Id.* at 234 (Blackmun, J., concurring).

178. *Id.*

undocumented children whose status was a product of their parents' prior conduct, not theirs.[179]

In dissent, Chief Justice Burger minced no words in lambasting the majority for overplaying its hand to protect a sympathetic plaintiff, particularly where no suspect class or fundamental rights are at play.[180] Chief Justice Burger opined:

> [B]y patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases . . . . If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example.[181]

* * *

In reflecting upon *Brown*, *Rodriguez,* and *Plyler*, we see that both their outcomes and their underlying rationales are not as obvious as they might appear.[182] In thinking about the three constitutional principles at play in each case—the separation of powers, federalism, and the protection of individual rights—why are the debates underlying these constitutional questions so heated?

One might start by considering the views of two Justices as they grappled with *Brown*'s implications in *Rodriguez* and *Plyler*. Justice Powell, who penned *Rodriguez*[183] yet sided with the *Plyler* majority,[184] on the one hand, versus Justice White, who dissented in both *Rodriguez*[185] and *Plyler*.[186]

Powell saw *Plyler*'s undocumented children as proper heirs to the *Brown* legacy because, like the Black schoolchildren in *Brown*, they were effectively barred from a basic public education, whereas the poor *Rodriguez* plaintiffs were not.[187] Justice White, on the other hand, thought that the *Rodriguez* plaintiffs were effectively handicapped in the same manner as the *Brown* students because the former's poverty worked to disadvantage them much in the same way as the latter's race, whereas

179. *Id.* at 220.
180. *Id.* at 244 (Burger, C.J., dissenting).
181. *Id.*
182. *See id.*; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Brown v. Bd. of Educ., 347 U.S. 483 (1954).
183. *Rodriguez,* 411 U.S at 4.
184. *Plyler*, 457 U.S. at 205.
185. *Rodriguez,* 411 U.S at 63 (White, J., dissenting).
186. *Plyler*, 457 U.S. at 242 (White, J., dissenting).
187. *Id*. at 226; *Rodriguez,* 411 U.S at 18–19.

undocumented immigrant students' troubles were not the states' making or concern, but Congress's.[188]

Surely, both Justices Powell and White believed in the three constitutional tenets of separation of powers, federalism, and individual rights protection, but just as surely, both believed that their own particular application in each case was correct, transforming a unanimous, though itself politically and legally contested, opinion in *Brown* into a much closer call in *Rodriguez* and *Plyler*.[189] Put differently, despite its current super-precedent status, the unanimity behind *Brown* masked a highly-contested debate about the three constitutional principles that later came to the fore in the fractured opinions in *Rodriguez* and *Plyler*.

By reflecting upon Justices Powell's and White's disparate views along with the fierce debates underlying the proper roles of judge and Congress (separation of powers), of the federal government and the states (federalism), and of the Constitution as a source of explicit and implicit rights (individual rights protection), we come to appreciate the uncertainty in relying on this founding document as a source of educational equity when viewed through the lens of an even larger, more diverse group of Supreme Court Justices, each with their particular views on these foundational constitutional issues.

Indeed, this uncertainty suggests three lessons from *Brown, Rodriguez,* and *Plyler.*[190] First, the Equal Protection Clause is of limited value in ensuring a level playing field for all, even with respect to basic educational rights the government provides. Second, legislation is a more plausible vehicle for ensuring equality (which, for noncitizens, may mean Congressional action to ensure national uniformity). Third, as exemplified in the distinct approaches of Powell and White, the Justices' divergent views on the status of noncitizen children in American society suggest that—even if Trump and Biden might agree on the plight of the Dreamers—lawmakers in Congress may find it difficult to achieve common cause. We will see these three lessons at play as we examine post-*Plyler* legislative developments in the next Part.

III. PLYLER'S LEGACY: THE DREAMERS GO TO COLLEGE

Notwithstanding *Brown* and *Plyler*, the Court made no further promises to students—undocumented or citizen—beyond a free, basic K-12 public education. The *Rodriguez* Court's view on education—that it is not a fundamental or constitutionally-protected right—[191] has prevailed, creating

188. *Plyler*, 457 U.S. at 242 (White, J., dissenting); *Rodriguez,* 411 U.S at 64–65 (White, J., dissenting).

189. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); *Plyler*, 457 U.S. at 230; *Rodriguez,* 411 U.S. at 58.

190. *See Brown,* 347 U.S. 483; *Plyler*, 457 U.S. 202; *Rodriguez,* 411 U.S 1.

191. *Rodriguez,* 411 U.S at 3.

a gap for those wishing to pursue post-secondary schooling or employment. In the realm of post-secondary public funding, United States citizenship and lawful immigration status make a difference.[192]

United States citizen children and lawful residents enjoy post-secondary education and employment opportunities denied to the undocumented.[193] While they qualify for K-12 public education nationally under *Plyler*, undocumented children who desire a post-secondary education do not qualify for federal financial aid.[194] Similarly, undocumented children who want to work after high school are generally unauthorized to do so, and their would-be employers are subject to sanctions under federal law for providing such opportunities.[195]

I recall hearing about the frustration the *Plyler* K-12 ceiling on post-secondary access to education and employment has had on central Pennsylvania's undocumented youth from Carmen Medina. At the time, Medina served as the Executive Director of the Adams County Delinquency Prevention Program, a state-sponsored initiative designed to attend to the needs of school-age children in south central Pennsylvania.[196]

While perhaps best known as the site of the Battle of Gettysburg, Adams County is also an agricultural powerhouse, producing more apples and peaches than virtually any other area of the United States.[197] Because of its agrarian economy, Adams County is also home to a large number of Mexican farmworkers, many of whom came to this country without proper

---

192. For more on the difference that citizenship makes, I recommend Linda Bosniak's provocative work on the subject. *See* LINDA J. BOSNIAK, THE CITIZEN AND ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP (2006) (noting the ambivalence societies have toward noncitizens in their midst).

193. Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COMM. REG. 393, 393–96 (2002).

194. *Many non-U.S. citizens qualify for federal student aid*, FED. STUDENT AID, https://studentaid.gov/understand-aid/eligibility/requirements/non-us-citizens [https://perma.cc/29AX-BZPW] (last visited Dec. 19, 2021) (outlining categories of non-United States citizens eligible for federal financial aid, which excludes the undocumented). Even DACA recipients are ineligible for federal financial aid. *Financial Aid and Undocumented Students: Questions and Answers*, FED. STUDENT AID (Apr. 2021), https://studentaid.gov/sites/default/files/financial-aid-and-undocumented-students.pdf [https://perma.cc/P9MZ-FBKT] ("As an undocumented or DACA student, am I eligible for federal student aid? No. Undocumented students, including DACA students, are not eligible for federal student aid. However, you may be eligible for state or college financial aid, in addition to private scholarships.").

195. 8 U.S.C. § 1324(a) *et seq.* (2011) (provisions regarding the unlawful employment of noncitizens. This section was part of President Reagan's Immigration Reform and Control Act of 1986 (IRCA), whose primary goal was "to increase border security and establish penalties for employers who hired unauthorized immigrants."); Musaffar Chishti et al., *At Its 25th Anniversary, IRCA's Legacy Lives On,* MIGRATION POL'Y INITIATIVE (Nov. 16, 2011), https://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives [https://perma.cc/LFC8-VDWR].

196. The following narrative is a slightly reworded version of a story I first told in an earlier essay. Romero, *supra* note 193, at 393–96.

197. *Id.* at 393–94.

work or immigration papers, their young children in tow, in search of a better life.[198]

It is with these farmworkers' children that Medina's office was most concerned. Aside from providing these children with social, cultural, and educational support, Medina's office also strongly encouraged them to work hard at school so that they may maximize their opportunities after high school.[199] Over time, however, Medina had grown increasingly uncomfortable dispensing such advice. By her estimate, ninety-seven percent of these children were undocumented like their parents; therefore, these children were effectively barred from pursuing postsecondary education because of their undocumented status, their poverty, or both.

These two factors—undocumented status and poverty—work in tandem to preclude many undocumented children, like most in Adams County, from pursuing a college degree. This led Medina to comment sarcastically that all her program did was to help create a class of well-educated farmworkers.[200]

Unfortunately, Ms. Medina's story resonates nationwide. In a 2003 study, demographer Jeffrey Passel estimated that 65,000 undocumented students who have lived in the United States for at least five years graduate annually from American high schools.[201] The *Plyler* ceiling is a real one for tens of thousands of undocumented high school graduates who wish to work, study, and become productive contributors to the nation they call home, notwithstanding where they were originally born.

In this Part, we see how the federal and state governments have acted to both remedy these problems at times, while fighting to maintain the status quo at others. This inconsistency around the undocumented should come as no surprise, as it reflects American's historical ambivalence toward new immigrants, who have been less welcomed in some quarters, as the United States undergoes a dramatic demographic shift to a majority-minority nation.[202]

---

198. *Id.* at 394.

199. *Id.* at 394–95.

200. *Id.* at 396.

201. STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 1452 (7th ed. 2019).

202. *See, e.g.*, Douglas S. Massey, *The New Immigration and Ethnicity in the United States*, 21 POPULATION AND DEV. REV. 631, 632 (1995) ("According to demographic projections, Americans of European descent will become a minority in the United States sometime during the next century, and this projected shift has already occurred in some urban areas, notably Los Angeles and Miami. In other metropolitan areas, such as New York, Chicago, Houston, and San Diego, the transformation is well underway. This demographic reality suggests the real nature of the anti-immigrant reaction among non-Hispanic whites: a fear of cultural change and a deep-seated worry that European Americans will be displaced from their dominant position in American life.") (internal citation omitted).

A. Federalist Restrictionism under Clinton—IIRAIRA 505

This may come as unwelcome news to some progressives, but modern restrictions against state governments' ability to extend *Plyler*-like opportunities to undocumented college students in the form of in-state tuition were blocked by Congress under Democrat Bill Clinton's watch.[203] The primary vehicle for this restrictionist measure was Section 505a of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[204] The Act provides:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any post-secondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident. [205]

By its terms, this provision prohibits states from granting in-state college tuition benefits to undocumented students who reside in-state unless that benefit is extended to all citizen and lawfully permanent non-residents.[206] For a majority of states, this provision poses no problem, as most states deny undocumented students in-state resident status for college tuition purposes.[207] For a few immigrant-friendly states, however, creative work-arounds became necessary, as discussed in the next section.

B. Filling the Gaps: State Initiatives (and a Federal one, too!)

Because of IIRIRA Section 505's "residence" restriction, at least twenty states—and the District of Columbia—have extended *Plyler*'s promise to undocumented college students by basing in-state tuition eligibility on other factors instead.[208] As immigration law scholars Steve Legomsky and Dave Thronson have noted:

---

203. Heidi Timmerman, *Dare to Dream Act: Generation 1.5 Access to Affordable Postsecondary Education*, 39 W. ST. U. L. REV. 67, 69–70 (2011).

204. *Id.*

205. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1623(a) (2015). Groups such as Human Rights Watch have long lamented the Clinton Administration's anti-immigrant initiatives, including IIRIRA and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See US: 20 Years of Immigrant Abuses - Under 1996 Laws, Arbitrary Detention, Fast-Track Deportation, Family Separation*, HUM. RTS. WATCH. (Apr. 25, 2016), https://www.hrw.org/news/2016/04/25/us-20-years-immigrant-abuses# [https://perma.cc/J9L4-RF8N].

206. Timmerman, *supra* note 204, at 70.

207. LEGOMSKY & THRONSON, *supra* note 202, at 1452.

208. *Id.* at 1453.

> To conform with IIRIRA, these states, rather than base eligibility on 'residence,' require undocumented students to have attended a school in the state for a certain number of years, graduated from a high school in the state, and signed an affidavit pledging to apply for lawful permanent residence at the earliest opportunity.[209]

As a practical matter, the target beneficiary of such requirements remains the undocumented even while the federal residence bar remains in place.[210]

On the employment front, while states cannot thwart federal mandates penalizing unauthorized employment, they have the power to grant professional licenses as they see fit.[211] For instance, a number of states have recently permitted undocumented law students who pass the bar exam to be admitted as lawyers.[212] Similarly, Legomsky & Thronson note that California, Illinois, New Mexico, and Nevada "have passed laws allowing noncitizens to be eligible to apply for professional and occupational licenses."[213]

C. Obama/Biden v. Trump—The Presidents and the Dreamers

The drawback, of course, to all the state initiatives in the prior section is that none has had a national effect, leaving many undocumented students in limbo. One obvious solution, as Presidents Biden and Trump both recognized, would be for Congress to pass a law that provided permanent relief for the now-college-age *Plyler* beneficiaries, according legal status to innocents who consider the United States their home.[214] Such bill initially took shape as the Development, Relief, and Education for Alien Minors Act, known since then as the DREAM Act, and was first introduced during the Bush Administration in 2001.[215]

Given the close vote in *Plyler*, the debate in the states around in-state college tuition for the undocumented, and the divisive politics around undocumented migration more generally, it's perhaps no surprise that the DREAM Act has never passed.[216] Despite the lesson from *Brown, Rodriguez*, and *Plyler* that legislative reform—and federal law in

209. *Id*. (citation omitted).

210. *Id.*

211. *See, e.g.*, Bruce Goldman, *How Unauthorized Immigrants Are Fighting To Practice Law*, LAW 360 (Aug. 11, 2019), https://www.law360.com/articles/1186579/how-unauthorized-immigrants-are-fighting-to-practice-law [https://perma.cc/55YZ-C57C].

212. *Id.*

213. *Id.*

214. *Id.*

215. For a comprehensive study of the DREAM Act, I recommend Michael Olivas's recent work. *See* MICHAEL A. OLIVAS, PERCHANCE TO DREAM: A LEGAL AND POLITICAL HISTORY OF THE DREAM ACT AND DACA (2020).

216. *Id.* at 38. ("The federal stage has . . . been active following the introduction of the DREAM Act in 2001, but this is a tale of legislative failure.").

particular—would be the constitutional solution to undocumented children's claims, Congress has not found its way to passing even this rather modest corrective measure that was championed by every president since Bush.[217]

Encountering even more furious opposition to his legislative agenda than his predecessor,[218] President Obama famously provided DREAM-"lite" relief to some *Plyler* beneficiaries via his Deferred Action for Childhood Arrivals (DACA) program of 2012.[219] Recalling our constitutional law principles, it's important to note that, unlike Clinton's IIRIRA Section 505 restriction on in-state tuition for the undocumented or Bush's proposed DREAM Act, Obama's DACA was not a legislative product, but an administrative initiative.[220]

Styled as a form of "deferred action," DACA aimed to provide some prior *Plyler* beneficiaries who continued without status to have their deportations deferred while providing them opportunities to work and study.[221] This innovation kept open the chance for them to legalize should the opportunity present itself in the future.[222]

---

217. *Id.* at 46 (Professor Olivas is correct that, as a practical matter, even if the DREAM Act was to pass, it would affect individual undocumented students' immigration status only, not the myriad of state issues related to educational policy. Olivas notes, "[E]ven if legislation passed tomorrow, it would not affect the ability of states to grant resident tuition, to enable them to award state scholarships and grants, and to allow them to withhold enrollment." My point is not to suggest the DREAM Act as a cure-all, but to suggest that it levels the national playing field between those lawfully and unlawfully present.).

218. *See, e.g.*, Michael Grunwald, *The Victory of 'No': The GOP's unprecedented anti-Obama obstructionism was a remarkable success. And then it handed the party to Donald Trump*, POLITICO (Dec. 4, 2016) https://www.politico.com/magazine/story/2016/12/republican-party-obstructionism-victory-trump-214498/ [https://perma.cc/YAM7-ZA2Q] ("What has distinguished the opposition to Obama is not just the intensity—a GOP congressman shouting 'You lie!' during a presidential address, Senate Republican leader Mitch McConnell's admission that his top priority was limiting Obama to one term—but the consistency. Before Obama even took office, when official Washington was counseling cooperation and moderation for a party that seemed to be on a path to oblivion, Cantor and McConnell laid out their strategies of all-out opposition at private GOP meetings.").

219. For the latest guidance on DACA, see *Consideration of Deferred Action for Childhood Arrivals*, USCIS, https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca [https://perma.cc/X92P-PQXM] (last visited Dec. 19, 2021).

220. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1623(a) (2015); DREAM Act, S. 1291, 107th Cong. (1st Sess. 2001); Memorandum from Janet Napolitano, Sec'y of Dep't of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/XTP8-9B55].

221. *See generally Consideration of Deferred Action for Childhood Arrivals*, *supra* note 220.

222. *Consideration of Deferred Action for Childhood Arrivals*, *supra* note 220 ("On June 15, 2012, the secretary of Homeland Security announced that certain people who came to the United States as children and meet several guidelines may request consideration of deferred action for a period of two years, subject to renewal. They are also eligible for work

A discretionary form of relief, undocumented beneficiaries between the ages of fifteen and thirty qualified if they: (1) came to the United States before age 16; (2) continuously resided in the United States since June 15, 2007; (3) were then in school, had graduated from high school, had obtained a GED, or had been honorably discharged from the Armed Services; and (4) had not committed any of a specific list of crimes and posed no threat to national security or public safety.[223] As of March 2018, over 800,000 applicants have received DACA relief.[224]

Despite the program's relative success, both legal[225] and political attacks against the DACA program ensued.[226] Indeed, the more recent legal attacks stemmed from a sea-change in presidential politics. After President Trump succeeded President Obama, he proceeded to undo many of his predecessor's executive initiatives, including unraveling DACA.[227] Although many issues regarding DACA were litigated within the context of the Administrative Procedure Act,[228] shades of the three constitutional norms identified earlier seemed to lie just beneath the surface.

First, separation of powers concerns were raised regarding the scope of Obama's presidential power to authorize DACA. Some viewed DACA as a legislative act reserved for Congress (via the DREAM Act, say). Relatedly, for the Obama administration to decline prosecution would

---

authorization. Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time. Deferred action does not provide lawful status."); *see also* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015) (Professor Shoba Sivaprasad Wadhia is the nation's leading scholar on deferred action and DACA).

223. LEGOMSKY & THRONSON, *supra* note 202, at 807.

224. *Id.*

225. *See Litigation Related to Deferred Action for Childhood Arrivals (DACA)*, NAT'L IMMIGR. L. CTR. (Oct. 21, 2021), https://www.nilc.org/wp-content/uploads/2021/10/litigation-re-DACA-2021-10-21.pdf [https://perma.cc/6YPN-U6Q] (provides a periodically-updated review of all DACA-related litigation); Rachel Treisman & Vanessa Romo, *The Biden Administration Vows To Appeal A Federal Ruling Deeming DACA Unlawful*, NPR (July 17, 2021), https://www.npr.org/2021/07/16/987132269/federal-judge-rules-daca-unlawful-but-current-recipients-safe-for-now [https://perma.cc/23FB-CP3B] (federal district court issued a summary judgment order declaring DACA illegal when first adopted; that ruling is expected to be appealed to the Fifth Circuit).

226. *See, e.g.*, Molly Ball, *How Immigration Hardliners Are Forcing Trump's Hand on DACA*, THE ATLANTIC (Aug. 31, 2017), https://www.theatlantic.com/politics/archive/2017/08/how-immigration-hardliners-boxed-trump-in-on-daca/538623/ [https://perma.cc/3VE3-QRL9].

227. *See, e.g.*, Muzaffar Chishti and Jessica Bolter, *Trump Administration Rescinds DACA, Fueling Renewed Push in Congress and the Courts to Protect DREAMers*, MIGRATION POL'Y INST. (Sept. 15, 2017), https://www.migrationpolicy.org/article/trump-administration-rescinds-daca-fueling-renewed-push-congress-and-courts-protect-dreamers [https://perma.cc/E2GJ-Z5LT].

228. The most recent Supreme Court decision on DACA is *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1916 (2020), holding that DHS Acting Secretary violated the Administrative Procedure Act by failing to consider the consequences of prolonging DACA or accommodating certain recipients' reliance interests.

arguably violate the president's obligations under the Take Care Clause to ensure that federal immigration laws were faithfully executed.[229]

Second, as to federalism, states like Texas challenged a proposed DACA expansion and a similar program for undocumented parents—the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program—because of their adverse effects on state economies.[230] Specifically, Texas alleged that because it subsidized state driver's licenses, DAPA would lead to an increase in the number of previously undocumented Texas residents who would now be eligible for state-subsidized licenses.[231]

Third, DACA recipients alleged that Trump's rescission decision was based on anti-Latinx animus, citing the former President's pre-and post-election statements.[232]

With Joe Biden's inauguration, steps were taken to restore the DACA program to full strength on his very first day in office.[233] Indeed, in commemoration of DACA's signing day in 2012, Biden issued the following statement urging Congress to pass his comprehensive immigration reform bill, which includes relief for the Dreamers:

> Twenty years ago, Congress introduced the first version of the bipartisan Dream Act, led by Senator Durbin (D-IL) and former Republican Senator Hatch. And over the years, bipartisan coalitions of lawmakers championed this bill. The American public overwhelmingly supports this

229. *See, e.g.*, Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, The DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013).

230. Texas v. United States, 809 F.3d 134, 152–53 (5th Cir. 2015), *aff'd by an equally divided Supreme Court*, 136 U.S. 2271 (2016).

231. *Id.* at 155 ("If permitted to go into effect, DAPA would enable at least 500,000 illegal aliens in Texas to satisfy that requirement with proof of lawful presence or employment authorization. Texas subsidizes its licenses and would lose a minimum of $130.89 on each one it issued to a DAPA beneficiary.58 Even a modest estimate would put the loss at 'several million dollars.'"). The Fifth Circuit found that Texas had standing to proceed on this claim of economic injury and ultimately affirmed the lower court's injunction against DAPA and the proposed DACA expansion. *See id.* at 188 ("The district court did not err and most assuredly did not abuse its discretion. The order granting the preliminary injunction is AFFIRMED.").

232. *Id.* at 1916 ("[R]espondents contend that President Trump made critical statements about Latinos that evince discriminatory intent. But, even as interpreted by respondents, these statements—remote in time and made in unrelated contexts—do not qualify as 'contemporary statements' probative of the decision at issue."); *Regents of the Univ. of Cal.*, 140 S. Ct. at 1915–16 (the Court did not find President Trump's racist rhetoric sufficiently probative).

233. Memorandum on Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 2021 DAILY COMP. PRES. DOC. 64 (Jan. 20, 2021) ("The Secretary of Homeland Security, in consultation with the Attorney General, shall take all actions he deems appropriate, consistent with applicable law, to preserve and fortify DACA.").

> legislation. But time and time again, the Senate has failed to act. Only Congress can provide a permanent legislative fix to provide lasting stability for these young people and their families. My immigration bill, the U.S. Citizenship Act, creates a pathway to citizenship for undocumented individuals in our country, including Dreamers. In March, the House took a critical first step and passed the American Dream and Promise Act. Congress must find a way to pass these legislative solutions and I will continue to work towards passage of legislation protecting Dreamers and creating a path to citizenship for undocumented immigrants. These young people represent the best of America and we can't let them down.[234]

While it would be easy to mistake the Obama/Biden v. Trump DACA dispute as being about the Dreamers, we have learned from our study of *Brown, Rodriguez,* and *Plyler* to look a bit closer. Just as *Brown* was not about America's unequivocal commitment to public education for all despite the Court's unanimity, and *Plyler* was not about a robust commitment to undocumented students of all ages, neither has this recent brouhaha over DACA been primarily about immigrant rights.

As shown above, DACA, in particular, has been about separation of powers concerns, particularly around the role of the President versus that of the Congress in providing immigration relief to the *Plyler* plaintiffs' successors, the Dreamers. Just as *Rodriguez* reminds us that our constitution yields no fundamental right to an education nor heightened equal protection for poor students, presidents as diverse in their perspective as Biden and Trump can agree that Dreamers deserve to be recognized for their loyalty to America, and not stigmatized for their undocumented status, should give us hope.

Unfortunately, Biden and Trump are only two actors in this legal and political drama. The constitutional tensions underlying the *Brown*, *Rodriguez,* and *Plyler* cases remind us that providing educational and employment opportunities for young people in our midst will continue to be a political battle.

---

234. Statement by President Joseph R. Biden, Jr. on DACA Day, 2021 DAILY COMP. PRES. DOC. 511 (June 15, 2021). Most recently, the Democrats incorporated immigration reform as part of its $3.5 trillion social policy proposal; that plan was thwarted when the Senate parliamentarian ruled against its inclusion as part of the bill reconciliation process. *See, e.g.*, Luke Broadwater, *Democrats Dealt a Blow on Immigration Plans*, N.Y. TIMES, (Sept. 19, 2021), https://www.nytimes.com/2021/09/19/us/politics/immigration-citizenship.html [https://perma.cc/9ANK-3PTQ].

CONCLUSION

It is indeed a sad commentary on our politics when even modest proposals for Congressional action on bipartisan issues such as the DREAM Act continue to gain little purchase. However, the current divisions in our society are complex. In a recent op-ed for the *New York Times*, conservative columnist Ross Douthat argued that while many believe the current left-leaning national mood may be a backlash against Trumpism, the country was moving toward progressivism anyway.[235]

On the other hand, many Latinx and Asian American immigrant communities voted for Trump over Biden.[236] More generally, the ideological divide over issues like race and immigration, worse than even during the Hilary Clinton-Donald Trump presidential contest of 2016, [237] bodes ill for even the Dreamers whom Trump and Biden personally would support.

Setting aside the truism that even presidents as different as Trump and Biden relish exercising strong executive power to advance their policies,[238] the fact remains that our half-hearted constitutional commitment to a robust public education for all as evidenced in *Brown*, *Rodriguez*, and *Plyler* make passage of any Dream Act an uphill climb.

---

235. Ross Douthat, *Did Trump Make Everything Progressive?*, N.Y. TIMES (May 4, 2021), https://www.nytimes.com/2021/05/04/opinion/trump-progressives.html?action=click&module=Opinion&pgtype=Homepage [https://perma.cc/KDU7-DWC8] ("[The Trump] administration's mix of haplessness and menace was a great gift to progressivism, inspiring an anti-conservative reaction that extended through every walk of elite life, turning centrists into liberals and remaking liberalism into exactly the kind of progressive orthodoxy that conservatives most fear.").

236. Weiyi Cai and Ford Fessenden, *Immigrant Neighborhoods Shifted Red as the Country Chose Blue*, N.Y. TIMES (Dec. 20, 2020), https://www.nytimes.com/interactive/2020/12/20/us/politics/election-hispanics-asians-voting.html [https://perma.cc/MZG8-CHRB] ("Across the United States, many areas with large populations of Latinos and residents of Asian descent, including ones with the highest numbers of immigrants, had something in common this election: a surge in turnout and a shift to the right, often a sizable one."); *see also* Musa al-Gharbi, *The Trump vote is rising among Blacks and Hispanics, despite the conventional wisdom*, NBC NEWS (Nov. 2, 2020) https://www.nbcnews.com/think/opinion/trump-vote-rising-among-blacks-hispanics-despite-conventional-wisdom-ncna1245787 [https://perma.cc/KNV7-YYMW] ("[I]t may be an error to look at Trump to explain these patterns among voters of color, as they could just as much be a product of minorities' dissatisfaction with the Democratic Party.").

237. *Voters' Attitudes About Race and Gender Are Even More Divided Than in 2016*, PEW RSCH. CTR. (Sept. 10, 2020), https://www.pewresearch.org/politics/2020/09/10/voters-attitudes-about-race-and-gender-are-even-more-divided-than-in-2016/ [https://perma.cc/87D9-ZJUB] (noting that general division of voter attitudes is greater now than in 2016).

238. *See* Madeleine Carlisle, *Why Biden's Justice Department Is Backing Trump-Era Positions*, TIME (June 15, 2021) https://time.com/6073594/merrick-garland-trump/ [https://perma.cc/L6EE-P7P4] (quoting Barbara McQuade's view that Biden's Justice Department might protect Trump-era positions "[not] because they favor Trump, but because they favor strong executive power . . . .").

Whether such a belief be Sisyphean or Pollyannish, my hope is that over time, a majority of our people will recognize that it is in our best interests to ensure that all our children—whether Black, Brown, or white; citizen, immigrant, or undocumented; rich or poor—have post-secondary opportunities to work, study, and contribute to the greater good. Our constitutional commitment to equal protection should demand no less.