In 1975, the State of Texas adopted a statute that allowed local school districts to deny enrollment in their public schools to any children who were not “legally admitted” to the United States. Some school districts planned no measures to limit enrollment by undocumented students, while others moved to exclude them entirely. Still others planned to charge tuition. One such district, the Tyler Independent School District in the city of Tyler in eastern Texas, enrolled undocumented children free of charge for the first two years under the new law, but then decided in July 1977 to charge them an annual tuition of $1000. The Mexican-American Legal Defense and Educational Fund (MALDEF) sued the district, challenging its implementation of the state statute as unconstitutional. This lawsuit in Tyler was eventually consolidated with others against local school boards and Texas state agencies and officials. The consolidated cases

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** From “The Dry Salvages,” in *Four Quartets* 25 (New York 1943).

1 Texas Education Code § 21.031.

eventually reached the U.S. Supreme Court and prompted its decision, seven years after the original statute, in *Plyler v. Doe*.\(^3\)

As I write this in the spring of 2007, over 12 million noncitizens are in the United States without lawful immigration status, and the flow of undocumented immigrants approaches the number of immigrants who come legally to the United States. This essay is part of an effort to understand the ways in which Americans think and talk about undocumented immigration, about the reasons they disagree deeply at times, and about the reasons for both their ambivalence and their certainty in these discussions. This project also tries to suggest the outlines of a national consensus on the topic.

I begin with *Plyler* because the decision is more than just a decision of constitutional law. More generally, what is typically called “constitutional law” is more than a body of decisions that distinguish what is constitutional from what is not. Beyond this function, constitutional law crystallizes and reflects the public values—and the complex competition among those values—that permeate everyday discussions involving everyday people on topics of public significance. These values also guide legislators and government agency officials when they draft, debate, enact, and administer new laws. With these implications in mind, I examine constitutional law as a form of intellectual history that reflects ways of viewing immigration and immigrants—especially the immigrants who come to this country outside the law—and the role of education in the lives of immigrants, both unlawful and unlawful. In this crucial sense, *Plyler* provides a vantage point for surveying the conceptual and political terrain, and in turn for understanding the past twenty-five years and where we are headed next.

*Plyler as Constitutional Law, and More*

A quarter-century after the Supreme Court decided the case, *Plyler* occupies a curious

\(^3\) 457 U.S. 202 (1982).
place in the legal and public imagination. As a matter of constitutional law, it has been cited for
the proposition that children in the United States—regardless of their immigration law status—
have a right under the U.S. Constitution to an elementary and secondary education in public
schools. This constitutional core of the Court’s decision played a prominent role in litigation in
the mid-1990s that successfully challenged California’s Proposition 187, part of which would
have barred undocumented children from public schools. And proponents of federal legislation
that would accomplish the same result have expressly said that their goal is to abrogate the
holding in *Plyler*.5

How much of *Plyler* has stood the test of time? A constitutional lawyer might start her
answer by noting that Justice William Brennan wrote for a bare majority of five: himself and
Justices Marshall, Blackmun, Powell, and Stevens. Justice Brennan concluded that the Texas
statute was unconstitutional. His analysis seemed to require only that the statute have a “rational
basis,” which is the least demanding of the tests that courts apply when a statute is alleged to
violate equal protection of the laws. In the end, however, the Court blended both rational basis
and “intermediate scrutiny” phrasing when it concluded: “the discrimination contained in
§ 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.”6

Though this standard was considerably less demanding than the “compelling state interest”
requirement that marks the highest level of judicial scrutiny, the Court found that the statute
served no such substantial goal and that it was therefore unconstitutional. Brennan analyzed and

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5 This proposal, known as the Gallegly amendment after its sponsor Congressman Elton Gallegly (R-CA), was
bill (H.R. 4134), which passed the House 254–175 but did not come up for consideration in the Senate before the
104th Congress adjourned. See generally T. Alexander Aleinikoff, David A. Martin, and Hiroshi Motomura,
6 457 U.S. at 224. See also id. at 217 (requiring “substantial interest”); id. at 218 n.16 (characterizing its
analysis as “intermediate scrutiny”).
rejected three state objectives. The first was “to protect itself from an influx of illegal immigrants,” but he noted, among other things, that “[t]here is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy.” The second was that “undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education.” Brennan’s response: “the record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State.” Third and finally, Brennan rejected the argument offered by the state of Texas that “undocumented children are appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State.” His response: “the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States.” Thus emerged the holding: the U.S. Constitution safeguards access to public elementary and secondary education regardless of a child’s immigration law status.7

Chief Justice Burger dissented, joined by Justices White, Rehnquist, and O’Connor. Chief Justice Burger relied heavily on two propositions that the majority had no choice but to concede. First, the majority expressly disavowed any suggestion that unlawfully present noncitizens form a suspect class that would trigger the closest form of judicial scrutiny.8 The majority was equally clear that it would stand by its holding, nine years earlier in San Antonio Independent

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7 Id. at 228-30.
8 Id. at 219 n.19 (“We reject the claim that ‘illegal aliens’ are a ‘suspect class’”) (citing DeCanas v. Bica, 424 U.S. 351 (1976)). See also 457 U.S. at 220 (“of course, undocumented status is not irrelevant to any proper legislative goal.”); id. at 223.
School District v. Rodriguez,\(^9\) that education is not a fundamental right.\(^{10}\)

According to Chief Justice Burger, the two propositions should require the Court to uphold the Texas statute as long as it had a rational basis. He then reasoned: “it simply is not ‘irrational’ for a state to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the state and this country is illegal as it does to provide for persons lawfully present.”\(^{11}\) It didn’t matter if the statute was profoundly unwise legislative policy—which Burger seemed to concede for the sake of analysis.\(^{12}\)

Twenty-five years later, the Court’s membership has changed almost completely, and generally in ways that suggest a different outcome—or at least a different constitutional analysis—if the case were to arise for the first time today. Though the decision’s core constitutional guarantee of educational access remains intact, Justice Brennan’s reasoning came under trenchant criticism from the beginning as analytically flawed and result-oriented.\(^{13}\) As Chief Justice Burger observed: “the Court’s opinion rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in these particular cases.”\(^{14}\) Even the decision’s defenders have had to admit that its reasoning may have little application outside the context of public K-12 education. Michael Olivas recently wrote: “Plyler’s incontestably bold reasoning has not substantially influenced subsequent Supreme

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10 457 U.S. at 221. See also id. at 223. On this issue, Justice Marshall parted company with the majority. See id. at 230-31 (Marshall, J., concurring). See also Olivas, supra note 2, at 201 (explaining that in spite of Rodriguez, key individuals involved with Plyler from the MALDEF side viewed “Plyler as the Mexican American Brown v. Board of Education: a vehicle for consolidating attention to the various strands of social exclusions that kept Mexican-origin persons in subordinate status.”
11 457 U.S. at 250 (Burger, C.J., dissenting).
12 Id. at 242-54 (Burger, C.J., dissenting).
14 457 U.S. at 243 (Burger, C.J., dissenting).
Court immigration jurisprudence in the twenty-plus years since it was decided.”^{15} It was apparently the unique combination of education and children in *Plyler* that triggered a finding of constitutional rights.

But now I come back to the idea that constitutional law is more than mere constitutional law, for it crystallizes and reflects public values. If *Plyler* was result-oriented and therefore tenuous as constitutional doctrine, then that is precisely why *Plyler* elucidates current debates about undocumented immigration. In this broader sense, *Plyler* has enduring significance. *Plyler* incites discussion about whether its approach to undocumented immigration makes sense. With the disagreements and downright polarization that mark current debates, *Plyler* as a lens brings key immigration issues into focus and shows us why fundamental differences persist.

**THREE THEMES IN *PLYLER***

Three themes that were significant in *Plyler* have emerged in subsequent years as pivotal in policy debates about undocumented immigration and about immigration and immigrants in general. They are the approaches in *Plyler* to:

- unlawful status;
- the authority of states and cities; and
- the role of education in the integration of immigrants;

Viewed in broad policy perspective, these themes in *Plyler* match up with key issues in public debate about undocumented immigration.

**“Undocumented immigrants” or “illegal aliens”?**

One big area of disagreement in current debates is the significance of unlawful status. On one side are those who start—and end—their arguments with the fact that noncitizens are in the

^{15} Olivas, supra note 2, at 210-11.
United States illegally, as “illegal aliens.” At the other end of the spectrum are those who believe that unlawful status is a mere technicality, a lack of (legitimate) documents. From this latter perspective, noncitizens without lawful immigration status are just “undocumented.” 

_Plyler_ decidedly reflected the “undocumented immigrants” approach, for example by observing “there is no assurance that a child subject to deportation will ever be deported.” On closer inspection, however, this approach embraces two distinct points.

First was the Court’s suggestion that an unlawfully present noncitizen might not be unlawful after all: “An illegal entrant might be granted federal permission to continue to reside in this country, or even to be come a citizen.” Justice Brennan observed: “In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed.” He also cited possibilities that a noncitizen would acquire lawful status through marriage to a U.S. citizen or lawful permanent resident, or that Congress would adopt a legalization program. Brennan concluded that an apparently undocumented child may enjoy “an inchoate federal permission to remain.”

It turns out that Justice Brennan was largely correct as a matter of prediction. In 1986, the Immigration Reform and Control Act (IRCA) established a program that eventually legalized

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16 457 U.S. at 226.
17 Id. at 226.
18 For these points Justice Brennan cited the federal district court decision in the Tyler portion of the consolidated litigation: “Plaintiffs’ expert, Dr. Gilbert Cardenas, testified that “fifty to sixty per cent . . . of current legal alien workers were formerly illegal aliens.” A defense witness, Rolan Heston, District Director of the Houston District of the Immigration and Naturalization Service, testified that “undocumented children can and do live in the United States for years, and adjust their status through marriage to a citizen or permanent resident.” The court also took notice of congressional proposals to “legalize” the status of many unlawful entrants. Id. at 207 n.4 (citations omitted). See also id. at 236 (Blackmun, J., concurring); id. at 237 (Powell, J., concurring).
19 id. at 226.
several million undocumented immigrants. Through IRCA and other avenues, most of the plaintiff children in the Tyler case ultimately attained lawful U.S. immigration status. The increasing complexity of immigration law has made it even less certain whether a noncitizen will actually be adjudicated as unlawfully present and removable from the United States. David Martin has provided a full account of the wide zone between clearly unlawful and clearly lawful. He estimated that the number of noncitizens in these myriad “twilight statuses” is about one million as of 2006.

A second point in Plyler is related but distinct: that even noncitizens who seem clearly to be unlawfully in the United States are unlikely ever to be apprehended, adjudicated as immigration law violators, and actually removed from the United States. The reason is the nature of immigration law enforcement, in particular its chronic and intentional underenforcement in the broader historical context of the history of migration, especially across the southern border of the United States from Mexico. Justice Brennan observed that “despite the existence of these legal restrictions [on immigration], a substantial number of persons have succeeded in unlawfully entering the United States, and now live within various States, including the State of Texas.” And later in the decision: “Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial ‘shadow population’ of illegal migrants—numbering in the millions—within our borders.”

Today, even more than in 1982, the resources devoted to immigration law enforcement are

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23 457 U.S. at 205.
24 Id. at 218.
just a fraction of what would be needed to accomplish a major reduction in immigration law
violations. The deeper reality is that underenforcement of immigration law is at least a
knowing—if not intentional—aspect of federal policy now, just has it has been for over a
century.

Much of this de facto policy emerged in the American Southwest around the turn of the
twentieth century. As the Asian labor supply shrank with a series of restrictions on Asian
immigration,\footnote{The measures included the Page Act and the Chinese exclusion laws, Act of Mar. 3, 1875, ch. 141, §§ 1,5,
repealed by Act of Dec. 17, 1943, ch. 344, 57 Stat. 600, 600; the Gentlemen’s Agreement in 1907; the Asiatic barred
zone in 1917, Act of Feb. 5, 1917, ch. 29, 39 Stat. 874; and the National Origins Act in 1924, Act of May 26, 1924,
ch. 190, 43 Stat. 153. See generally Hiroshi Motomura, Americans in Waiting: The Lost Story of Immigration and
Citizenship in the United States 25-26 (Oxford Univ. Press 2006) (Page Act and Chinese exclusion laws); id. at 32
(Gentlemen’s Agreement); 125-29 (Asiatic barred zone); 126-34 (National Origins Act).} the U.S. economy turned to Mexican labor. The irrigation of new croplands and
the invention of the refrigerated railroad car enabled the growth of large-scale commercial
farming around the turn of the twentieth century. These developments spurred the search for
armies of low-wage workers to tend and harvest the fields. Farmers in the southwestern United
States began to rely heavily on Mexican laborers.

Of the Mexicans who were able to enter legally, many did so not as lawful immigrants, but
as commuters or temporary farmworkers. But many Mexican workers came outside the law.
Unlawful workers from Mexico offered the advantage that employers could exploit them when
they were in the United States and send them back to Mexico when they were no longer needed.
This economically driven fluctuation in patterns of immigration law enforcement against
Mexican immigrants, especially in the American Southwest, started a pattern of discretionary
enforcement and partial tolerance of unlawful immigration that continues today. This pattern
reflects tacit agreement among politically powerful groups, including U.S. employers who need
foreign workers, U.S. employees who need foreign co-workers for their companies to survive
and prosper, and the consumers who benefit from lower prices.

Even federal immigration statutes have features that reflect this de facto federal policy. For many years, no federal law made it unlawful to hire a noncitizen who lacked work authorization. In 1952, Congress made it a felony to “harbor” an alien unlawfully in the United States and expanded the Border Patrol’s enforcement authority. But at the insistence of southwestern growers and other agricultural interests, Congress added the so-called Texas Proviso, which defined harboring to not include employing an unauthorized worker.26 In 1986, IRCA introduced penalties for employers who knowingly hire or continue to hire unauthorized workers, but the scheme has been ineffective. The law requires employers only to see if identity and work authorization documents reasonably appear to be genuine. Any further probing, such as asking for more documents, exposes employers to liability for discrimination. Fake green cards and other false documents are readily available. As long as employers check documents and do the paperwork, their risk of liability is minimal. Too many powerful interests oppose any law that would stanch the flow of undocumented workers into jobs that employers could not fill with lawful workers at the wages offered.27

Because IRCA has been an ineffective strategy for enlisting the private sector to check immigration documents, immigration law enforcement against unauthorized work depends on

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workplace raids. Enforcement efforts fluctuate. The winter and spring of 2006-07 has seen an upsurge in worksite enforcement activity, but the preceding period was marked by a virtual absence of such activity. If history is any guide, worksite enforcement will decline when the political fallout becomes too intense. Strict immigration law enforcement can drag down the U.S. economy, block the reunification of families, and otherwise hurt broad segments of American society. Chronic but broadly accepted tolerance of illegal immigration prevails, even if enforcement puts on a strong public face.

All of this confirms that this passage from *Plyler* was both perceptive about the past and prescient about the future:

> the confluence of Government policies has resulted in “the existence of a large number of employed illegal aliens . . . whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state’s natural citizens and business organizations may wish to subject them.”

Based on this understanding of “unlawful” status, Justice Brennan refused to have the rights and status of children turn on whether they were illegal aliens.

*The states, immigration, and the meaning of citizenship*

A second major area of disagreement in current debates is the role of states and localities in matters concerning immigration and immigrants. Advocates of stronger enforcement argue that if the problem is aliens in the United States illegally, then it is a logical and wise step to enlist and deputize state and local government in immigration law enforcement efforts. As one

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28 457 U.S. at 219 n.18, quoting 458 F.Supp. at 585.
29 See 457 U.S. at 224 (rejecting the view, which Justice Brennan attributed to the State of Texas and to the dissenters, “that the undocumented status of these children *vel non* establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents.”
commentator put it recently, state and local law enforcement should be used as a “force multiplier.” This reemergence of state and localities reflects the essential regionalism of immigration policy, which is what prompts state and localities to devote precious resources to immigration law enforcement. This regionalism partly reflects differences in the size of the immigrant population (undocumented or in general) in different cities, states, and regions. It also reflects the rate of growth of these populations, which can affect public perceptions—and in turn politics—at least as strongly as the sheer number of immigrants.

In this nation’s first century, immigration law was almost entirely state law, as Gerald Neuman and later Aristide Zolberg have amply documented and analyzed. Many of these laws are not immediately recognizable as immigration laws because they regulated migration by citizens and foreigners alike. Some state laws barred criminals, or restricted the movement of free blacks, or quarantined anyone with a contagious disease. Other state laws limited migration of the poor, often reflecting the notion that indigence was evidence of personal failure. Some laws required shipmasters to post bonds to guarantee that their passengers would be financially self-sufficient after arrival. Other laws imposed a head tax on immigrants, paid into a welfare fund for any who became indigent.

The shift to federal immigration law starting around 1875 reflected several factors. The first was the Civil War, which established the primacy of the national government over the states and national over state citizenship, and ended slavery. The federal government could now regulate migration without having to deal with the intractable question of the movement of slaves and free blacks. Second, concerns about immigration from China prompted demands for

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diplomatic initiatives by the federal government. A third factor in shifting to federal immigration law was preemption, the complex process by which federal law can displace state law. Preemption occurred gradually. For example, the influx of Chinese immigrants into California in the mid-1800s led first to state laws that sought to restrict the flow and to make life miserable for them. After the Supreme Court struck down several state efforts to regulate immigration,\(^\text{32}\) the California congressional delegation turned its lobbying efforts to Washington, D.C., and ultimately to various laws that severely restricted Chinese immigration, notably the Page Act of 1875,\(^\text{33}\) the Chinese Exclusion Act of 1882,\(^\text{34}\) and later versions of Chinese exclusion laws.\(^\text{35}\) These laws in turn bolstered the conclusion that federal immigration regulation preempted any state activity.

Since the emergence of comprehensive, direct federal immigration regulation, the role for states and localities has been based on laws that govern the lives of noncitizens in various ways, and thus may be seen as indirect regulation of immigration. This is an accurate way to characterize the 1975 Texas statute that \textit{Plyler} struck down. Texas wasn’t trying to regulate immigration directly, but rather to limit the effects of undocumented immigration, or to deter undocumented immigration, or both.

One way to understand \textit{Plyler} is that by striking down the Texas statute, the Court adopted a strong, uncompromising view of federal supremacy that would not tolerate state efforts to limit...
the effects of undocumented immigration, or to deter undocumented immigration. This capsule, however, would overlook many complexities that are key to understanding what *Plyler* may say about state and local authority today.

The *Plyler* Court took care to cast its analysis as a matter of equal protection, not preemption of state law by federal law. Thus footnote 8: “Appellees in both cases continue to press the argument that § 21.031 is pre-empted by federal law and policy. In light of our disposition of the Fourteenth Amendment issue, we have no occasion to reach this claim.” In reaching this conclusion, however, the Court applied equal protection doctrine in a way that allowed the federal government to draw distinctions between citizens and noncitizens that states and localities could not. Following a similar analysis in an earlier decision regarding distinctions among noncitizens and between citizens and noncitizens, the Court relied heavily on the greater power of the federal government to classify by alienage as compared to states and localities.37

But how much greater is this federal power, and how much less the state and local power? The Court didn’t say, and this question has become much more pressing in the years since *Plyler*. By the time of the 1975 Texas statute challenged in *Plyler*, states and cities were starting to become more active in matters relating to immigration and immigrants. This trend intensified

36 457 U.S. at 210 n.8. Justice Brennan noted that the district court in the Tyler litigation had adopted preemption as an alternative rationale in addition to finding a violation of equal protection. “The District Court also concluded that the Texas statute violated the Supremacy Clause.” Id. at 208. Justice Brennan distinguished *DeCanas* “by emphasizing that the state bar on employment of illegal aliens involved in that case mirrored precisely the federal policy, of protecting the domestic labor market, underlying the immigration laws. The court discerned no express federal policy to bar illegal immigrants from education.” Id. at 208 n.5 (citing 458 F.Supp., at 590-92). The Fifth Circuit affirmed the Tyler district court on equal protection, but reversed its preemption holding. 628 F.2d 448, 458 (5th Cir. 1980). See 457 U.S. at 208 n.6. In the consolidated litigation from other school districts in Texas, the district court found that the Texas statute was not preempted. See id. at 209 n.7 (citing 501 F. Supp. 544, 584-96 (S.D. Tex. 1980)).

with the passage of California’s Proposition 187 in November 1994, part of which would have
denied public education to undocumented children in the same way that the Texas statute in
*Plyler* would have. Courts found that Proposition 187 was a state immigration law that
conflicted with the federal immigration power, and they accordingly blocked its implementation
except for its provisions introducing substantial new criminal penalties for manufacturing,
selling, and using false documents.

With the continued increase in state and local activity, these questions have become ever
more pressing. The range of state and local engagement is broad, regulating access, for
example, to higher education, housing, welfare benefits, health care, and driver licenses and
other state-issued documents. Moreover, a growing number of states and localities have
undertaken a related but distinct form of immigration-related activity: not independent efforts to
affect immigration indirectly by regulating the lives of immigrants, but rather accepting
delегations of federal authority to regulate immigration directly. Crucial here are memoranda of
understanding that essentially allow the federal government to deputize state and local law
enforcement officers to enforce federal immigration law.

With potential constitutional challenge to this broad variety of state and local laws and
policies, a core inquiry into the meaning of *Plyler* may focus on the *Plyler* Court’s treatment of
*DeCanas v. Bica*. *Plyler* was careful to distinguish rather than overrule *DeCanas*, a unanimous
decision of the Court, authored by Justice Brennan just six years before *Plyler*. *DeCanas*
rejected a constitutional challenge to a California statute that provided that “[n]o employer shall

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38 Noteworthy recent contributions to the scholarship on these questions include Clare Huntington, *The
Constitutional Dimension of Immigration Federalism*, — Vand. L. Rev. — (forthcoming 2007); Michael A. Olivas,
*Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, —
39 *Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g).*
40 *424 U.S. 351 (1976).*
knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.”

In Plyler, Brennan had to concede: “the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.”41 He found that the California law was consistent with federal immigration policy—reflecting “Congress’ intention to bar from employment all aliens except those possessing a grant of permission to work in this country.”42 Brennan distinguished the Texas statute in Plyler: “In contrast, there is no indication that the disability imposed by § 21.031 corresponds to any identifiable congressional policy.”43

An accurate reading of what Plyler says about state and local authority regarding immigration and immigrants must start by asking how the Texas statute in Plyler differed from the California statute in DeCanas. Why, for example, does depriving undocumented children of an education differ from depriving their parents of a job? Digging deeper, the contrast between Plyler and DeCanas shows how vague the distinctions can be between three degrees, or zones, of state and local involvement with immigration and immigrants.

In one zone, states and localities regulate immigrants directly and immigration indirectly through independent action. Plyler was such a case, and the Supreme Court struck down the Texas statute, though as I have mentioned it is hard to determine what precedential value Plyler has outside the context of education. In the second zone, states and localities regulate immigrants directly and immigration indirectly, but they do so in the shadow of—and in the service of—federal regulation. DeCanas fits in this category. In the third zone, states and localities regulate not only immigrants directly but also immigration directly by acting pursuant

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41 457 U.S. at 225.
42 Id. at 225. See also DeCanas, 424 U.S. at 356-63.
43 457 U.S. at 225.
to express delegations of federal authority. An example is immigration law enforcement pursuing to memoranda of understanding that deputize state and local law enforcement personnel to enforce federal immigration law. The distinctions between these three zones are elusive, but they are crucial to working out state and local role in these matters.

*Education and the integration of immigrants*

*Plyler* also addressed what has emerged as a third major area of contention in current debates. This is the integration of immigrants, including the more basic question whether integration of immigrants should play a role in law and policy. This issue arises, for example, in connection with current proposals that would give lawful immigration status to an expanded pool of noncitizen workers in the United States. Some of these proposals amount to a legalization (or perhaps an “amnesty”) program for undocumented immigrants already in the United States, while other proposals would permit a greater number of workers to come to this country lawfully. A key issue that has emerged in these proposals is whether they should include a “path to citizenship,” or whether instead it would be a better (or at least an acceptable) policy to confer lawful immigration status on new or current workers without allowing that status to mature in the normal course of events to U.S. citizenship if the noncitizen so chooses.

*Plyler* emphasized the importance of immigrant integration, with two main points: the role of education, and the prevention of permanent disadvantage in society. The link between these two points is clear from the Court’s reasoning. Though the *Plyler* Court acknowledged that education is not a “fundamental right” in the constitutional law sense—a right that triggers the highest form of judicial scrutiny—the holding that struck down the Texas statute clearly relied on the fact that the statute denied educational access. The Court explained the link between education and immigration: “it is doubtful that any child may reasonably be expected to succeed
in life if he is denied the opportunity of an education.”44 Similarly, Justice Brennan emphasized the importance of education in American society, both in “in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child.”45

Then, noting the “special constitutional sensitivity” of education and quoting from Brown v. Board of Education,46 the Court was troubled that the Texas statute would create a permanent underclass. As Justice Brennan put it, “The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.”47 Later in the opinion he noted: “This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.”48 Concurring separately, Justice Blackmun added that “classifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions.”49

44 Id. at 223.
45 Id. at 221 (citing Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Abington School District v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); Ambach v. Norwich, 441 U.S. 68, 76 (1979); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)). Quoting the federal district court in the Tyler litigation, Justice Brennan noted that “the illegal alien of today may well be the legal alien of tomorrow,” and that without an education, these undocumented children, “[a]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, . . . will become permanently locked into the lowest socio-economic class.” 457 U.S. at 207-08 (citing 458 F.Supp. 569, 577 (1978)).
46 347 U.S. 483, 493 (1954), quoted in Plyler, 457 U.S. at 222-23. See also id. at 226 (referring to “the area of special constitutional sensitivity presented by these cases”).
47 Id. at 213. See also id. at 217 n.14 (“Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish.”); id. at 221-22 (“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”); id. at 213 (exceptions from equal protection would “underline the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment”).
48 Id. at 234 (Blackmun, J., concurring).
49 Id.
This aspect of *Plyler* reflects the view that sound policy is not just a matter of formal immigration law status or of formal citizenship status. Rather, it is a matter of integration into American society, and indeed of a certain type of integration in which education plays a crucial role. Thus Justice Brennan wrote that education “is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”  

He continued: “By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”

The view of immigration and immigrants in *Plyler* that relied heavily on the importance of access to education was closely tied to the Court’s more general thinking about the position of noncitizens in the United States. Part of *Plyler* found—as a matter of constitutional law—that the U.S. Constitution affords some protections to noncitizens who are unlawfully present. According to Justice Brennan, the basis for their protection is their presence on U.S. territory: “Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”

These statements tried to define the scope of constitutional protections. But in thinking more generally about the position of noncitizens in American society, and building on the

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50 Id. at 223.
51 Id. at 223. See also id. at 222 n.20 (“the significance of education to our society is not limited to its political and cultural fruits. The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained.”).
52 Id. at 210 (citing Shaughnessy v. Mezei, 345 U.S. 206, 212, (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369, (1886); Mathews v. Diaz, 426 U.S. 67, 77 (1976)). See also 457 U.S. at 211 & n.10 (discussing United States v. Wong Kim Ark, 169 U.S. 649 (1898); 457 U.S. at 212 n.11 (discussing *Wong Wing*). See also 457 U.S. at 212 n.12 (noting referring to the “territorial theme” in Supreme Court decisions); id. at 215 (emphasizing the importance of an individual’s “presence within the State’s territorial perimeter”); id. at 214 (referring to the “guarantee of equal protection to all within a State's boundaries.”). See generally Motomura, Americans in Waiting, supra note 25, at 77-78.
Court’s territorial focus, the Court’s emphasis in Plyler on education and its role in preventing permanent disadvantage amounted to a strong endorsement of the view that immigration is a transition to citizenship.\footnote{See Motomura, Americans in Waiting, supra note 25, at 161. See also 457 U.S. at 225 (starting analysis of federal v. state power by noting: “The Constitution grants Congress the power to ‘establish an uniform Rule of Naturalization.’”) (citing U.S. Const. Art. I., § 8, cl. 4).}

**LINKING THE THREE THEMES: PLYLER AS ROADMAP**

The three themes in Plyler that I have discussed are themselves areas of fundamental policy differences, and each has attracted substantial, serious attention. But what has largely been absent from analysis and commentary is a thorough exploration of the complex relationships among the three themes. In my view, this exploration will reveal that each of these three themes can be fully understood and wisely addressed only in conjunction with one of the other two. Thus there is a close link between the meaning of unlawful status and the role of states and cities. And there is a close link between the meaning of unlawful status and the education and the integration of immigrants. Put differently, the three themes in Plyler reflect policy tectonics in two dimensions, and only if so understood can they form a helpful roadmap for understanding current and future debates about undocumented immigration.

*The question of authority*

The first connection is between two of the three Plyler themes: the meaning of unlawful status and the role of states and cities. This connection in turn raises the basic question of authority in immigration and citizenship. Implicated here are questions of discretion, delegation, and other aspects of how law and policy are actually made.

The meaning of the word “authority” in this setting is elusive. It begins with a focus on the original source of decisionmaking—whether immigration and citizenship are matters for federal or state government—but it quickly expands to include the question whether authority may be
delegated to states and localities even it may be a matter of federal authority in the first instance. But once we see the issue as a set of questions about authority, then our inquiry should expand to include the complex meaning of lawful status. For if some immigrants are in a gray area between the lawful and the unlawful as a matter of either law or practice, then the question arises: who is making the decisions that affect their lives so profoundly as to be the difference between long lives in the heart of an American community and quick apprehension and deportation?

To some extent, this is a matter of distinction among various sources of government authority, most obviously between the federal government and state and local government. But is also a matter of the privatization of immigration law. With the advent of employer sanctions in 1986, a significant amount of government authority has devolved to the private sector, most prominently to employers, who in effect have been deputized by the federal government to enforce immigration law. Employers can use this devolved power to control their work force in various ways, for example by inhibiting or blocking unionization of their workforce. But even without union organizing, the threat of immigration law enforcement at an employer’s instigation makes its workers’ lives precarious indeed. The rise of militia and vigilante groups to patrol the U.S-Mexico border represents another, related form of privatization of immigration law. And the more discretionary state and local enforcement becomes, the more it takes on some of the troubling characteristics of private enforcement. More generally, the delegation of authority to various government and private actors makes more likely the exercise of that authority in ways that deviate from the original purposes, raising the danger of racial or ethnic profiling, for example.
The nature of the problem

In addition to the question of authority, the three main themes in Plyler also prompt inquiry into the nature of the problem that undocumented immigration is thought to pose. This question straddles a different pair of the three Plyler themes: the meaning of unlawful status and the education and the integration of immigrants. The basic dimension to be explored is a spectrum from the pragmatic to the moral. Is undocumented immigration a pragmatic problem, susceptible to pragmatic arguments in support of any given policy position or interpretation of the law? Or undocumented immigration a moral problem, susceptible to moral arguments? Of course, this distinction is rarely clear-cut, but seeing the spectrum helps distinguish and understand the characterizations offered by commentators, and in turn to assess the arguments offered by advocates in legislative and other public debates and by lawyers in litigation.

By “pragmatic” problem I refer, for example, to the notion that undocumented immigration is inevitable and though it might be regulated, any efforts to control its fundamental dimensions is doomed to failure. This view of the problem would stay the same even if we assume that it is most accurate to think of the unlawfully present population as illegal aliens, as lawbreakers, and even as criminals. Even with this assumption, it may be most sensible to accept and regulate unlawful migration, for example by limiting enforcement efforts on the border(s) and in the interior of the United States, and instead expanding the number of noncitizens who are allowed to come to this country to work or to join family members already here.

By “moral” problem, I refer to characterizations of undocumented immigration that are based on the contrary assumption—that it is possible to control undocumented immigration, and that it is therefore only a matter of a choosing to do so, or not to. If undocumented immigration

54 The spectrum that I define here bears some similarities to the framework set out very helpfully in Linda S. Bosniak, Opposing Prop. 187: Undocumented Immigrants and the National Imagination, 28 Conn. L. Rev. 555 (1996), but there are some key differences that a later chapter will explain.
poses a moral problem, not a pragmatic one, then the range of arguments in policy debates is much broader, largely due to the range of views on the meaning of lawful status. As I have explained, *Plyler* seemed to endorse a view that characterized immigration law enforcement not only as very incomplete, but also as de facto federal policy to tolerate unlawful immigration to a degree that amounted to a direct invitation to come to this country outside the law, or at least tacit endorsement of the same invitation extended by the private sector.

From this view of undocumented immigration as a moral problem, a number of arguments naturally follow. Consider, for example, the relationship between criminal law and immigration law. It is the ambiguity of unlawful status that makes it seem wrong to treat immigration law violations as crimes. Moreover, it seems unjust to disadvantage children, who in this conceptual framework are not only the unintended victims of choices made by their parents, but also the policies adopted by the U.S. government. Justice Brennan thus wrote: “Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.”

To the extent that lawful status is ambiguous, these sorts of moral arguments directed toward a moral problem gain persuasive force. Moreover, these arguments based on assumptions about the meaning of unlawful status have implications for another *Plyler* theme: the role of education in the integration of immigrants. According to the view of unlawful status reflected in *Plyler*, undocumented immigrants are already part of the society and economy of the

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55 457 U.S. at 220. See also id. (“[the Texas statute] is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States.”); See Linda S. Bosniak, Membership, Equality, and the Difference That Alienage Makes, 69 N.Y.U. L. Rev. 1047, 1121-23 (1994) (observing that it mattered a great to the Court that the *Plyler* plaintiffs were children whose presence in the United States was involuntary). See also 457 U.S. at 226.
United States in ways that matter more than immigration law status. They are Americans in waiting just as much as lawful immigrants should be. Or so goes this side of the argument.

But moral arguments can be based on a very different view of lawful status—and then have different implications for education and the integration of immigrants. If undocumented immigrants are really illegal aliens, then strong enforcement is important to uphold the rule of law. Moreover, criminal penalties for immigration law violations are not only sensible, but even an essential part of sound immigration policy. Here, too, assumptions about the meaning of unlawful status have implications for education and the integration of immigrants. It becomes important to recognize that taking law enforcement seriously means keeping parents who are illegally in the United States from unilaterally imposing the costs of educating their children.\(^5\) Or so goes this other side of the argument.

In giving these examples, I am not saying that a particular policy position is inherently or necessarily located at a particular point on this spectrum from pragmatic problem to moral problem. Rather, I observe that anyone who advances any such position chooses—perhaps deliberately, perhaps not—to adopt a view on that spectrum, and then accordingly to make pragmatic arguments, moral arguments, or some blend of the two.

In fact, proponents of various proposals and positions typically blend arguments. The Development, Relief, and Education for Alien Minors (DREAM) Act is often presented with the plea that we concede to enforcement reality and the inevitability that undocumented children will continue to live in the United States. This is a pragmatic argument that is based on the view that undocumented immigration is a pragmatic problem. But supporters of the DREAM Act often make other arguments that also blend in what I am calling moral arguments based on a certain

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view of lawful status and the role of education in the integration of immigrants. *Plyler* itself cited an attorney general’s report that called the undocumented population “productive and law-abiding members of the community who had a “permanent attachment” to the United States, who are “unlikely to be displaced from our territory.” So phrased, the observation has persuasive force that is both moral and pragmatic.

Another position that can be supported by some blend of moral and pragmatic arguments is that the real solutions for immigration-related problems lie in international economic development, including trade and investment in bilateral or regional economic relationships. This can be supported by a pragmatic argument that international migration is an inevitable consequence of larger economic and demographic forces. But this pragmatic argument has a moral dimension as well.

### Considering the Future and the Past

What we find by looking back at *Plyler*, then, are three themes—whether we agree or disagree with the Supreme Court’s approach—that can guide our thinking about the modern versions of those themes. Moreover, different pairings of these three themes raise two deeper issues concerning the nature of authority and the nature of the problem in debates about undocumented immigration. Guided by this roadmap, we can understand better not only the past twenty-five years, but also where we are headed next.

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57 457 U.S. at 218 n.17.
58 Further examples of positions that pose this choice are those based on the fact that many families include individuals with a variety of immigration statuses (including U.S. citizens), or on the related fact that immigration law decisions typically affect U.S. citizens in other ways.