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PLYLER V. DOE:
THE EDUCATION OF UNDOCUMENTED ALIEN SCHOOLCHILDREN
IN TEXAS, 1975-1982

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PLYLER V. DOE:
THE EDUCATION OF UNDOCUMENTED ALIEN SCHOOLCHILDREN
IN TEXAS, 1975-1982

A Dissertation Presented to the Graduate Faculty of the
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When a Texas statute denied a free public education to those who were not citizens or legal residents of the United States, four Mexican-American families challenged the constitutionality of that statute. The Supreme Court ruled in their favor, confirming that the Equal Protection Clause protects everyone regardless of immigration status.

This dissertation analyzes the Plyler v. Doe litigation in the federal district courts in Tyler and Houston, in the 5th Circuit Court of Appeals, and the U.S. Supreme Court, and argues that some heretofore little understood aspects of the final ruling have important ramifications for the rights of undocumented immigrants today.
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This is dedicated to my children, Sara, Nelly, and Ximena.
INTRODUCTION

By the middle of the 1970s, parts of Texas along the border with Mexico were receiving an influx of migrants, some arriving legally and others illegally, so large that the state would later characterize it as an “invasion.”¹ Lionel Castillo, Commissioner of the Immigration and Naturalization Service, would call this “perhaps the … largest influx of immigrants in the history of the United States.”² In 1975 Leonard F. Chapman, Jr., the INS Commissioner under President Ford, called illegal immigration “one of the great problems our country is facing today.” Chapman claimed that these migrants hurt the United States by taking a million jobs or more from American citizens,” by sending money out of the country “to families back home,” and by using social services such as “schools, welfare, and medical care.”³

In 1975, after superintendents in school districts along the border complained that they were seeing a huge influx of students from Mexico and that they were running out of space, Jim Bob Hensley of the Texas Education Agency’s Region I Service Center in Edinburg started a fifteen month research project on the impact of immigrant students from Mexico upon border

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³ Speech by Leonard F. Chapman, Jr., Commissioner, Immigration and Naturalization Service, March 21, 1975, Richard D. Parsons Files, Box 9, Gerald R. Ford Presidential Library.
school districts. Hensley studied the impact of immigrant students on funding for personnel and building construction, focusing on fifteen Texas counties along the border with Mexico. Hensley did not specifically distinguish unauthorized from authorized immigrants, but found that ten percent of the children in the sixty-one school districts in those counties had Mexican birth certificates, about five times more than the statewide average of Mexican-born students. Hensley found that many of these students were “especially overaged” and that 82 percent of them were poor enough to qualify for the free lunch program. In addition, Hensley found that in many of the school districts the facilities were “atrocious.” He found that over half the classrooms in the Brownsville Independent School District were in portable buildings, meaning that the student population had grown faster than the district could construct new buildings to accommodate. In addition to construction problems, the influx of students stressed an area of Texas that already suffered from a chronic teacher shortage. In Hensley’s opinion, the influx of immigrant students caused a dilution of the resources available to those students who were American students.⁴

This pressure seems to have led directly to the amendment to Texas Education Code §21.031 that sparked the *Plyler v. Doe* case.⁵ In the spring of 1975, the Eagle Pass Independent School District enacted a policy prohibiting undocumented aliens from enrolling in its schools. Eagle Pass is in South Texas along the Rio Grande, across the river from Piedras Negras in Mexico. Ninety-five percent of its school attendees were Mexican American.⁶ On April 18,

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1975, in response to a query from M. L. Brockette, the Commissioner of Education for the Texas Education Agency, Texas Attorney General John L. Hill issued an opinion on the legality of the exclusion of unauthorized aliens from the public schools. First, Hill suggested that the evidence indicated that “the Legislature of this State intended that an opportunity for instruction in the public schools of this State should be afforded the youth of Texas, and the advantages of attending a public school should be extended to all children regardless of their nationality or color, whether citizen or alien….” Furthermore, Hill suggested that the rights of “illegal aliens” to a free public education were protected by federal law and the Fourteenth Amendment to the U.S. Constitution. \(^7\) The federal statute to which he referred said, “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.\(^8\)

Less than a month after Texas Attorney General’s opinion, a Brownsville legislator, State Representative Ruben Torres, introduced what would become Section 21.031 of the Texas Education Code. Torres’s resolution accompanying the amendment said, “As the number of illegal aliens in Texas continues to increase, many financially troubled districts find it difficult to provide educational services for alien children without adversely affecting the overall quality of

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\(^8\) 42 U.S. Code § 1981.
such services.” Section 21.031 provided that U.S. citizens and legally admitted aliens over the age of five and under the age of 21 on the first day of September of any scholastic year would be entitled to the benefits of the Available School Fund and would be permitted to attend, free of tuition, the public schools in the district in which they resided.  

The key to the section’s importance was in what it didn’t say. While “citizens” and “legally admitted aliens” were “entitled to the benefits of the Available School Fund,” persons who were not legally admitted aliens or citizens – undocumented aliens – were not entitled to those benefits, meaning that the Texas Education Agency would no longer reimburse school districts for their education. Nor were undocumented aliens among those who “shall be permitted to attend the public free schools of the district in which he resides…” The meaning of section 21.031 was that Texas public schools would no longer be required to admit children who were illegally present in the state. If the school districts did allow them to attend school they would not be reimbursed for those children by the state’s school fund, and they were free to charge those students a tuition fee to make up for the lost revenue. In other words, the fact that these school-aged children were no longer “entitled” to attend Texas public schools free of tuition did not mean that they were prohibited from doing so, but rather that individual school districts could admit them or not as they chose, with the understanding that they would no longer be reimbursed for the cost of educating children who were neither citizens nor legally admitted aliens.

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For two years the Tyler Independent School District ignored the new law. Tyler had very few undocumented aliens enrolled in its schools anyway. Then, shortly before the 1977 school year, the school board voted to charge a $1000 tuition to any students who could not document that they were U.S. citizens, legal residents, or in the process of becoming legal residents. 11 The district later claimed it enacted the new policy out of fear that it would become a haven for undocumented students. Superintendent James Plyler explained, “We weren’t rich enough that we could enroll youngsters that the state would not reimburse for everyday attendance.” 12

In Tyler, four families approached a worker at a local Catholic church for help. He contacted the Mexican American Legal Defense Fund, where attorney Peter Roos had been looking for a good case for MALDEF to challenge the law. Roos came to Tyler, and the families filed suit. The four families consisted of seven parents and their sixteen children. The families had lived in the United States as few as three and as many as thirteen years, and each family included at least one child who had been born in the United States and was therefore an American citizen. 13 All but two of the children had attended Tyler I.S.D. schools the previous year. 14

At a 6:00 a.m. hearing on a Sunday morning, Judge William Wayne Justice issued a preliminary injunction ordering the school district to admit the children to school. At Peter Roos’s request, Lionel Castillo, the first Mexican American Commissioner of the Immigration and Naturalization Service, halted immigration raids around the Tyler area in order to assuage

11 Id., at 572.


14 Id., at 576.
the plaintiffs’ fears of being deported. A three-day hearing was held in December, and the following September Judge Justice ruled against the Tyler I.S.D. In his ruling, Judge Justice declared that the state’s 1975 law and the Tyler I.S.D.’s implementation of that law were unconstitutional on two grounds: first, they violated the 14th Amendment’s guarantee of equal protection under the law; second, they violated the Constitution’s Supremacy Clause. Since section 21.031 of the Texas Education Code and Tyler I.S.D. policy both violated the Fourteenth Amendment and were preempted by federal legislation, Judge Justice enjoined the school district from denying a free public education to any “undocumented Mexican aliens.”

The Fifth Circuit Court of Appeals agreed with the District Court regarding the Fourteenth Amendment, but disagreed about the Supremacy Clause, finding no evidence of a Congressional policy to education the undocumented children of illegal aliens. In 1982, the U.S. Supreme Court upheld the Fifth Circuit, 5-4. Justice William Brennan delivered the opinion of the Court, joined by Justices Blackmun, Powell, Stevens, and Marshall. Chief Justice Burger wrote a dissenting opinion, joined by Justices White, Rehnquist, and O’Connor.

This dissertation will analyze Plyler v. Doe by focusing primarily on the arguments and decisions made in four different federal courts over a five-year period of federal litigation, 1977-1982. By focusing closely on several different federal judges and their deliberations on the case, the dissertation will highlight the contingency of the final decision. Although each of the five changes studied – William Wayne Justice, Woodrow Seals, Frank Johnson, William Brennan,
and Lewis Powell – agreed that Section 21.031 was unconstitutional, there were sometimes subtle but always important differences in how each of them approached the case. Judge William Wayne Justice, on the Tyler district court, approached the case through a judicial philosophy that made him one of the most polarizing figures on the federal bench in the 1970s, earning him fulsome praise from his colleagues and admirers and contempt from many of his fellow Texans.¹⁹ Judge Woodrow Seals, the federal district court judge in Houston, was not nearly as well-known as his colleague Judge Justice, but had an impact on the case that was arguably just as important. Judge Seals, whose contribution to the history of Plyler has been almost completely ignored, decided a consolidated case comprising challenges to Section 21.031 that had been filed in district courts around the state. Judge Frank Minis Johnson, who wrote the opinion upholding Judge Justice’s ruling for the United States Fifth Circuit Court of Appeals, was an even more famous and controversial figure than Justice was, owing to several major civil rights decisions he had made as a district court judge in Alabama in the 1950s and 1960s.²⁰ Like Seals, Johnson has been almost entirely ignored in studies of Plyler v. Doe, and yet his opinion was perhaps the most interesting of all. First, Johnson overruled Judge Justice on one key point – Justice’s ruling that Section 21.031 was preempted by federal law. Second, Justice was the only one of the five judges who seems to have truly wrestled with the decision, first expressing an inclination to overturn Judge Justice (and uphold the law) and then changing his mind and voting instead to uphold the lower court. Had Johnson decided the case differently, there is no certainty that the Supreme Court would even have heard the case, much less that it would have struck down the Texas law. Most importantly, this dissertation will show that the U.S. Supreme Court’s final


decision in *Plyler* was very much the product of two minds, William Brennan’s and Lewis Powell’s, and that the compromises the two of them made in producing Brennan’s majority opinion had profound consequences for the meaning and the legacy of the decision.

Another argument that this dissertation will make is that much of the public support for the denial of a free public education to immigrants resulted from two widespread perceptions of the issue. The first perception was that unauthorized immigrations were lawbreakers. Letter after letter to the judges who decided these cases, especially judges Justice and Seals, expressed consternation that “criminals” should be rewarded rather than punished for their crimes. Another perception was that unauthorized immigrants did not pay taxes, and thus were taking public benefits from American citizens that they had not paid for and did not deserve. The second perception was easily refuted in testimony in the federal district courts in Houston and Tyler, but was nevertheless frequently expressed. Both of these perceptions arguably contributed to public support for immigration reforms and welfare reforms passed by Congress and signed by President Clinton in 1996 that, in the eyes of supporters, cracked down on the criminal behavior and welfare abuse of unauthorized immigrants.\(^{21}\)

CHAPTER 1

PLYLER V. DOE AND WILLIAM WAYNE JUSTICE, “THE REAL GOVERNOR OF TEXAS”

The Judge

“Judge Justice sat in Tyler,” wrote Peter Roos in his memoirs, explaining how it came to pass that the Mexican American Legal Defense and Education Fund (MALDEF) fought one of its most important and well-known cases in a small city in East Texas. By the early 1970s, Judge William Wayne Justice’s reputation as an activist judge was well known, and it was an important factor in MALDEF’s decision to challenge Texas Education Code §21.031 in Tyler.¹

In 1978, the same year that Justice decided Plyler v. Doe, Texas Monthly called Justice “the real governor of Texas.” William Wayne Justice was preeminent among the twenty-two federal judges in Texas, all of whom “make far more decisions that touch people’s lives and influence the course of events than Dolph Briscoe, John Hill, or a score of legislators. They decided where and with whom your children go to school, who you can vote for and how much weight your vote will have, and many less cosmic but nevertheless vital public issues….”² Three


² Paul Burka, “The Real Governor of Texas,” Texas Monthly, June 1978, Box 1, Folder 2, The Fifth U.S. District Courts, Texas Eastern Division Collection, The University Archives and Special Collections Department, Robert R. Muntz Library, The University of Texas at Tyler.
years later, Newsweek said that “ounce for ounce the greatest clout in Texas may belong” to William Wayne Justice, who was “singlehandedly legislating social change.”³

William Wayne Justice was confirmed by the U.S. Senate to become the United States District Court Judge for the Eastern District of Texas on June 6, 1968,⁴ and he took office on June 29.⁵ After his appointment, when a group of lawyers in the Civil Rights Division of the Department of Justice debated what kind of judge Justice would be, the head of the division had a hunch. “I know this man,” he said, “and I have a feeling that if we give him the right case on school integration, he’ll go with us in a big way.”⁶ Almost immediately upon taking the bench, Justice was viewed by detractors and admirers alike as an “activist” judge who did not shy away from controversial opinions. A series of cases built that reputation, and earned the attention of organizations like MALDEF.

*United States v. Texas* began in 1968, and at first concerned only a few school districts in rural East Texas. It would lead to, in the words of Judge Justice’s biographer, Frank Kemerer, “the most extensive school desegregation order on record, covering the entire state of Texas,” and would remain in effect for several decades.⁷ The case began when HEW, the United States

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⁶ Paul Burka, “The Real Governor of Texas,” *Texas Monthly*, June 1978, Box 1, Folder 2, The Fifth U.S. District Courts, Texas Eastern Division Collection, The University Archives and Special Collections Department, Robert R. Muntz Library, The University of Texas at Tyler.

Department of Health, Education, and Welfare, discovered and alerted the Department of Justice to the fact that small rural school districts were routinely transferring white students out of “black” districts and into neighboring “white” ones, creating de facto racially segregated districts. The Department of Justice investigated and found the practice common in many independent school districts around the state. Hoping for a broad order that would hold the Texas Education Agency (TEA) responsible for ending the practice, the DOJ filed suit in Marshall, Texas, where it could be assured of a hearing before William Wayne Justice. As expected, Judge Justice issued Civil Order 5281, prohibiting student transfers across district lines anywhere in the state of Texas where such transfers would increase racial segregation by more than one percent in either the sending or receiving district. He further ordered the TEA to investigate any school district in which there was a school where two-thirds or more of the student body was either black or Mexican American. The order was modified but largely upheld by the Fifth Circuit Court of Appeals, which stripped Judge Justice of jurisdiction over school districts in federal jurisdictions where desegregation cases had been filed, but left him in charge of about one thousand school districts and about two-thirds of the students in public schools in Texas.\(^8\) Texas argued that the order violated the Constitution by giving the Texas Education Agency powers to suspend accreditation and reduce funding to noncompliant school districts, but the 5\(^{th}\) Circuit disagreed and the Supreme Court declined to hear the case.\(^9\)

In 1970, Judge Justice ordered the local community college, Tyler Junior College, to accept male students with long hair. Three male students petitioned the court in August of that

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\(^8\) Frank Kemerer, Sixth Annual Clements Lecture, Texas A&M University, March 6, 2002, Box 164, Folder 7, William Wayne Justice, Tarlton Law Library, University of Texas at Austin.

year, claiming that their attempts to enroll in the college had been refused because they had long hair. They were each ordered to leave the campus, and given copies of the school’s dress code, which among other things prohibited hair long enough to cover their eyebrows or reach their collars.\textsuperscript{10} A crowd attended the hearing three days later, where one of the plaintiffs claimed, “I believe it is my right as an individual to wear my hair as it is now.”\textsuperscript{11} School officials disagreed, and argued that the hair policy was essential to maintaining discipline on the campus.\textsuperscript{12} Judge Justice wasted no time in finding for the plaintiffs. “This court believes that the right of a plaintiff… to wear a hairstyle to his choosing is a constitutional right guaranteed by the equal protection of [sic] due process clauses of the 14\textsuperscript{th} Amendment to the United States and enforceable under the provisions of the Civil Rights Act…” The policy was an “unreasonable classification in violation of the equal protection clause of the 14\textsuperscript{th} Amendment.”\textsuperscript{13}

In July 1970, Justice ordered the Tyler Independent School District to implement a desegregation plan devised by the Department of Justice and the Department of Housing, Education, and Welfare (HEW). The order closed the city’s all-black high school, prohibited TISD from allowing student transfers from school to school or out of the district unless those transfers further desegregated the schools, mandated nondiscrimination practices in hiring,
promoting, and other employment practices. The order would remain in effect for over five
decades, requiring federal oversight of the school district.  

In 1971, about two hundred black students walked out of John Tyler High School in a
protest over cheerleader elections in which the ballot separated black and white candidates and
the students were instructed to select two black and four white candidates. Judge Justice noted
that “this type of election insured black representation on the cheerleading squad,” but it
“reemphasized the dichotomy between the former Scott students [students from the all-black
high school, Emmett Scott, which had been closed pursuant to Judge Justice’s order] and the
‘Tyler’ students and increased the already existing tensions arising out of this dichotomy…”
Justice ordered that the school hold another election to choose one black and one white
additional cheerleader, bringing the ration of cheerleaders more closely in line to the ration of the
two races on the John Tyler campus. In addition, Judge Justice barred the school district from
suspending any of the students who had left campus, even those who had been accused of
starting fires in trash cans and lockers and defacing school property during the protest.

In the late 1960s Alicia Morales, a young girl from El Paso, the daughter of an alcoholic,
unemployed father, was sent to a juvenile detention center without a hearing. Her father had

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15 Memorandum Opinion and Order, Civil Action No. 5176, United States v. Tyler Independent School District, July 9, 1971, Box 110, Folder 5, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.


become enraged when she asked to be allowed to keep eight dollars of the money she earned working after school and on weekends rather than the mere five dollars that her father normally allowed. He beat her, then sent her to a juvenile correctional center. She spent nearly four years in a center for juveniles in Gainesville before Steve Bercu, a public interest lawyer in El Paso, took an interest in her case and others like it. Bercu discovered dozens of cases like Morales’ and filed suit in state court, but when he arrived in Gainesville to interview his clients state officials refused to let him meet with the children. Bercu got an injunction from Judge Justice allowing him to meet with his clients, who told him horrifying stories not just of detention without due process, but of physical abuse at the hands of officials and bullying and rape at the hands of other inmates. Bercu filed suit in Justice’s court alleging systematic abuse of the children’s due process rights as well as cruel and unusual punishment.\(^{18}\) Judge Justice overhauled the juvenile correctional system, mandating that students’ due process rights be respected and that the state provide lawyers for them, and even ordered that two of the worst institutions be closed.\(^{19}\)

Justice’s early opinions made him a reviled figure in conservative Tyler, Texas. As Debra Magee, who graduated from one of the city’s high schools in the early 1970s, remembered, “An infectious hatred for him prevailed throughout the community. Fathers, teachers and community leaders blamed Judge Justice for the race riots and total chaos that was precipitated by the desegregation of the Tyler Independent School District.” At the time, she shared the community’s feelings, but after working for Justice as a secretary she saw things differently: “In retrospect, it is apparent that the fathers, teachers, and community leaders were guilty of creating

\(^{18}\) Newspaper clipping, David Maraniss, “Justice, Texas Style,” Feb. 28, 1987, Box 61, Folder 24, Sarah McClendon Papers, The University Archives and Special Collections Department, Robert R. Muntz Library, The University of Texas at Tyler.

the adverse conditions. Rather than assuming their responsibility to make the changes mandated by the United States Supreme Court, they placed the blame on Judge Justice.”

It wasn’t just the people of Tyler who disliked Judge Justice, but politicians and political pundits throughout the state. Justice himself liked to tell audiences about the Texas legislature’s reaction to his Morales decision—amidst angry recriminations that he was meddling in the legislature’s prerogative and coddling criminals, the Texas House of Representatives voted to place a new juvenile detention center next-door to Justice’s home in Tyler.

Politicians in Texas mostly reacted to Justice’s rulings with outrage. Mark White, a Democrat and the Texas Attorney General throughout the Plyler case’s journey through the federal courts, said of Justice, “Instead of curing problems, he creates problems.” He especially disliked Justice’s sweeping remedial orders—“perceiving a failure by the state,” he thought that Justice responded by “prescribing a remedy which far exceeds the legal deficiency.” Governor Clements complained, “He’s trying to legislate through the judicial system.”

One powerful Texas politician who liked Justice was Bob Bullock, who was Comptroller of Public Accounts in the 1970s and 1980s and Lieutenant Governor in the 1990s. Bullock wrote to Justice twice to praise him for the Ruiz decision. In 1980, Bullock said, “I want you to know how much I admire you and the courage you showed in the Ruiz decision. The decision was long overdue, but I know that did not make it any easier. The total community of Texas will be the long-range benefactor of your decision and I believe that ultimately the people of this state will

20 Newspaper clipping, “Staff Finds Judge Justice Compassionate,” undated, Box 157, Folder 9, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.


recognize your contribution to that. I appreciate the strength of your character.”  

Five years later, after Texas and the plaintiffs reached an agreement to settle the case, Bullock wrote to Justice again. “I want you to know there is one state official on your side—that’s me. The efforts you have made to straighten out the Texas Board of Corrections is commendable and it is something that we state officials should have done ourselves a long time ago. I think you are the best damn judge in Texas and if I can ever help you in any way just let me know.”

William Wayne Justice may have been unloved in his own city and state, but by the early 1970s many lawyers like Peter Roos admired him, recognized his affinity for progressive causes and his proclivity for sweeping remedies, and sought out his court in a practice known as “forum shopping.” Even though there were four federal districts in Texas and almost two dozen judges in those courts, astute attorneys could pick the judge they wanted. In *Morales v. Turman*, only one of the institutions involved in the litigation was in Justice’s Eastern Division and the others were in the Western Division, but that was enough. In a redistricting case in the early 1970s, attorneys avoided filing their lawsuit in Dallas or San Antonio, where the actual patterns of abuse were more striking, and instead sought grounds for their lawsuit in Marshall, Texas, where Judge Justice presided. “The whole outcome turned on forum-shopping,” one of the lawyers said.


25 Paul Burka, “The Real Governor of Texas,” *Texas Monthly*, June 1978, Box 1, Folder 2, The Fifth U.S. District Courts, Texas Eastern Division Collection, The University Archives and Special Collections Department, Robert R. Muntz Library, The University of Texas at Tyler.
Peter Roos was fond of saying, “There were two judges in Tyler. You got Justice, or no justice.” The whole outcome of an important trial like Plyler v. Doe could depend on which federal judge heard the case. By managing to get the first federal court challenge to Section 21.031 heard in Judge Justice’s court, MALDEF must have felt that it had significantly improved its odds of success.

The Trial

On September 9, 1977, at six a.m. on a Friday morning, the plaintiffs, the defendants, and their lawyers met in Judge Justice’s courtroom for an oral hearing on the plaintiffs’ motion for preliminary injunction. For the Mexican American families, this would be their only direct participation in the case. After giving their testimony that morning, the next five years of federal court battles were fought for and against them by attorneys.

The first to testify was identified only as “H. Loe.” Loe testified that he was the father of eight children. Four of those children had attended Tyler schools until this year, and another had attended a Head Start program that summer, while the others were still too young for school. Only one of his children, a three-month-old baby identified in the record as “M. Loe,” was a United States citizen. “H. Loe” admitted that he and his other seven children were in the country illegally. “H. Loe” had come to Tyler in 1974. He was employed, and social security and other

taxes were withheld from his paychecks. He had also bought a car in Tyler, and showed proof that he had registered it with the county tax assessor-collector.29

“J. Doe” was the next to testify. Mr. Doe had six children. Five of them were of school age, with the oldest being thirteen and the youngest child three. Only the youngest child was an American citizen. The other five children had attended Tyler schools the previous year. “J. Doe” rented a home for fifty dollars a month, and earned about one hundred thirty or one hundred forty dollars a week. He admitted to being in the United States unlawfully, and said that he had lived in Tyler since 1968. He had a social security card, which he had received when he first arrived in Tyler. He had purchased a home and a car, and showed proof that his employer withheld his social security taxes and that he had filed income tax returns from 1969 to 1976.30

“F. Boe” had lived in Tyler since 1964. She had six children, three of whom had attended Tyler schools the previous year. One child, her oldest, had already dropped out of school, and the two youngest, who were the only American citizens in the family, were not yet old enough for school. “F. Boe” admitted that she was living in the United States unlawfully.31

The last parent to testify was identified as “J. Roe.” Roe testified that he was in the United States illegally, and that only the youngest of his five children was an American citizen. Three of his children were old enough to attend school. He had a social security number, and testified that he paid income and social security taxes, and that he had purchased a car in Tyler and paid for the title and registration. “J. Roe” had lived in Tyler since 1968 or 1969.32


31 Ibid, 13-16.

32 Ibid, 16-20.
The rest of the hearing was taken up with the testimony of expert witnesses. The first was William J. Chambers, director of the Dallas District of the United States Immigration and Naturalization Service. Chambers’ district included twenty counties in the northern part of Texas and all of Oklahoma. Chambers had twenty-seven years of experience with INS. He estimated that there were two hundred thirty-five thousand undocumented aliens in his district, and explained that his office did not have the manpower to locate and remove so many people. Chambers was asked several questions about the process by which a citizen could petition for citizenship for his parents and siblings. He explained that upon reaching the age of twenty-one, a “citizen child” could petition for his or her parents to receive citizenship as well. Although 1975 amendments to immigration law set the number of visas available for all of the Western Hemisphere at 20,000, visas petitioned by citizens for family members fell “outside of any numerical limitations,” according to Chambers. Chambers said that if the citizen petitioned for family members who were eligible—if it was “a bona fide application”—then the petition would be approved. If the family member was an undocumented alien, the person might be able to have his or her status changed while remaining in the United States, or might have to leave the country temporarily while the status was being changed. Mr. Chambers explained that, while ordinarily illegal employment would preclude someone from having his or her immigration status adjusted, “illegal employment does not affect an immediate relative.”

Judge Justice seemed particularly interested in Mr. Chambers’ testimony, following up with his own questions. He asked about President Carter’s proposed immigration reforms, announced just weeks earlier, and Chambers explained that, if put into effect, the reforms would grant permanent residence to those undocumented aliens who had resided in the country since

33 Ibid, 21-34.
1970. Those who had entered the country more recently would be given temporary residence, a new category, which would be valid for five years.34

Jim Plyler, the Tyler superintendent, testified that the school board adopted the policy of charging tuition to undocumented children at its July 21 board meeting. The district decided upon the $1000 figure by dividing its general operating budget by the overall number of students in the district, arriving at a “cost per student per year” of about $1000. Plyler also testified that the school district had not reduced its staff as a result of the exclusion of the undocumented children. He explained that about eighty percent of the district’s expenses were for teacher salaries. About thirty percent of the district’s money came from local sources, about sixty-five percent from the state, and the remaining funding came from the federal government. When asked for his opinion on why the district had adopted the policy in dispute, Plyler explained that “when this law went into effect, 21,031, [Section 21.031] in 1975, there were very few illegal alien children in the district. There were a few, and I guess I was soft-hearted and concerned about the kids, not wanting to penalize them for something the parents had done, so we did not implement the law in ’75-’76 or ’76-’77, but then the numbers began to increase considerably, and as a result of that, it did begin to cause some problems in overcrowded facilities, so it was in my opinion that we must implement the law to prevent Tyler being a haven for families moving into the district to get an education.” When Mr. Plyler was asked whether or not any undocumented aliens were able to pay the tuition, he claimed not to know, whereupon the school district’s attorney, Hardy, told the court that there were in fact two students attending school whose parents had paid the tuition.35

34 Ibid, 34-37.
Milam Joseph, a Catholic priest and the pastor of the Immaculate Conception Parish, which included the Catholic elementary and secondary schools in Tyler, testified that his schools were operating at nearly-full capacity and could only afford to take a handful of extra students. The tuition at the Catholic elementary school was only fifty dollars a month, and only twenty-five dollars a month for siblings (a second child, third child, etc.), meaning that the tuition charged by the Tyler Independent school district was actually quite a bit higher than what the local Catholic school charged.\(^{36}\)

After the testimony concluded, Tyler attorney Cardwell argued that Section 21.031 was not preempted by federal law, citing a California case, *DeCanas v. Bica*. She suggested that education was “not a federal concern, and it never has been.” Ms. Cardwell argued that the Texas, and the Tyler ISD in particular, faced “a choice between providing good education for some or substandard education for all.” If Texas allowed undocumented aliens to attend its schools for free, “it would inundate our school system to a point that we would be providing ineffective education for our citizens and legally admitted aliens.”\(^{37}\)

Three days later, William Wayne Justice issued a temporary injunction ordering the Tyler Independent School District to admit undocumented alien children to its schools without charging tuition.\(^{38}\) The decision was handed down on a Friday, and superintendent Jim Plyler

\(^{36}\) Ibid, 48-50.

\(^{37}\) Ibid, 54-57.

said the children could begin school Monday morning.\textsuperscript{39} Meanwhile, some school districts, like Fort Worth ISD and Dallas ISD, continued to refuse to let undocumented alien children enroll.\textsuperscript{40}

Three months later, the parties met again in Judge Justice’s courtroom for the trial on the merits.\textsuperscript{41} On December 12 and 16, the court heard arguments and testimony. The first witness was Dr. Gilbert Cardenas, a sociology professor at the University of Texas, who gave an overview of American immigration policy with regards to Mexican workers.\textsuperscript{42} He explained how Mexicans had been considered desirable as workers but not as settlers, particularly in Texas where there were concerns “about the homogeneity of the native stock.” After summarizing the “cyclical pattern” of importing and deporting Mexican workers, Cardenas concluded: “Now, what this tells us is that there have been many interests, employer interests, and interest within the United States government and within the state governments in utilizing Mexican workers. Yet, there has not been a corresponding interest in providing Mexican workers the same opportunities that the immigrant workers had from Europe to remain and settle in the country….” While doing field work in 1969-1970 among Mexican workers in the United States, Dr. Cardenas discovered that “fifty or sixty percent of the sample had previous residence in the United States prior to legal admission”—in other words, over half of the workers he worked with had previously been illegal aliens. Dr. Cardenas was asked “whether or not a significant portion of the undocumented Mexican alien population avails itself of the social services available in the United States,” and he discussed three studies that each indicated that Mexican undocumented


\textsuperscript{40} “TEA attorney says guides hazy on free school for illegal aliens,” \textit{The Dallas Morning News}, Sept. 13, 1977, p. 7A.


aliens were unlikely to use social services such as legal services, health clinics, etc. Partly, this was a result of fear of being identified as undocumented aliens, and partly because there was no similar welfare tradition in Mexico.43

When asked about what motivated Mexican workers to come to the United States, Dr. Cardenas took the opportunity to explain that he blamed the United States for illegal immigration from Mexico. The American government, he said, had “created a dependency situation where workers now are dependent upon employment in the United States for their livelihood…. [H]ad it not been in our interest to utilize Mexican workers, we would not have the same problem that we do today regarding the undocumented worker. In effect, I argue that the decisions made in Washington are more important in explaining the migration and status of Mexican workers in the United States today than the decisions made in Mexico City…. ”44

Marion Houston, the author of a 1975 study of undocumented aliens, testified that two experts from H.E.W. and the Social Security Administration used a 1973 current population survey to estimate that in April of that year there were 3.9 million undocumented aliens in the United States. Houston’s own work suggested that over ninety percent of Mexican undocumented aliens were males, with an average age of 28.5 years. The majority were unmarried and had no children. However, she also said that Mexican undocumented aliens had “a very high dependency ratio at home,” meaning that the average Mexican working illegally in America supported 5.4 dependents at home. Houston found that the average Mexican undocumented alien earned about two-thirds what an American citizen doing the same work earned, but worked 8.6 hours more per week. Over seventy-five percent had social security taxes

44 Record of Proceedings, p. 23-45.
withheld from their wages, and almost a third filed federal tax returns. Houston guessed that there might be 2.7 million undocumented aliens in the United States, and that one-fourth of them might be in Texas, or an estimated six hundred seventy-five thousand. After ascertaining that fewer than half of the Mexican undocumented aliens in Houston’s study had children, Judge Justice asked her whether or not more people would bring their children with them to the United States if they knew that there were more opportunities available for them, and Houston agree that if “the United States offered education to illegal children,” more undocumented aliens would bring their children to the United States with them.\textsuperscript{45}

The plaintiffs’ next witness was an economist at the University of Texas at Dallas, Dr. Robert Firestine. Peter Roos, the plaintiffs’ attorney, asked if per-pupil expenditures were calculated at an average of $1000, did that mean that excluding a student would save the schools $1000? The answer, of course, was no. A small reduction in student enrollment would reduce school expenditures by much, much less than one thousand dollars per child. Dr. Firestone explained that a small reduction in student enrollment did not result in a corresponding decline in school expenditures because a significant portion of a school district budget was in fixed costs, such as building maintenance and administration overhead, that did not vary in response to minor fluctuations in enrollment. The only way to see a corresponding reduction in expenditures would be to eliminate “twenty to thirty students at one given time and in a specific grade” and at a specific school. Roos went on to ask if it was “possible that the school district would lose state funds if it excluded a student from school,” and Firestine agreed that it was, because the district would lose the distributions from the state’s Foundation Program that were based on a district’s average daily attendance. A loss in student enrollment could also negatively affect a poorer...
school district’s qualification for what Firestine called “equalization aid,” money distributed to poorer school districts to compensate for their lower property values. The implication of all of this was that Section 21.031 could harm, rather than help, poorer school districts. When asked by the defendant’s lawyer how this would apply to a larger school district like Houston, where the number of undocumented alien students numbered in the thousands, Dr. Firestine claimed to have insufficient knowledge of that school district to answer the question. He admitted that “there would be some additional cost” if you had to “have additional capital expenditures” in order to accommodate the extra students, and couldn’t say whether it would make any difference if all five thousand of the undocumented children needed bilingual education.  

Dr. Jose Cardenas was the next witness for the plaintiffs. Dr. Cardenas was a veteran of the Texas public education system who had left his job as superintendent of the Edgewood school district in San Antonio in 1973 to start the Inter-cultural Development Research Association, an advocacy organization that pushed for equitable school funding, bilingual education, desegregation, and other policies. He had been active in political causes since his college days, when he was president of the Laredo Club at the University of Texas at Austin in the late 1940s and early 1950s and worked with Dr. Hector Garcia to establish chapters of the American G.I. Forum in small towns in central Texas. As a policy advocate in the 1970s, Dr. Cardenas testified frequently in Judge Justice’s court and in other courts, arguing on behalf of including undocumented aliens in the schools, and adopting expansive bilingual programs.  

46 Record of Proceedings, p. 90-111.  
48 Oral History Interview with José Cardenas, December 10, 1997, by José Angel Gutierrez. CMAS No. 69. Tejano Voices, Center for Mexican American Studies, University of Texas at Arlington.
Dr. José Cardenas testified that undocumented school frequently required bilingual education, similar to other children who had immigrated from Mexico or other non-English-speaking countries legally. Dr. Cardenas said that most school districts in Texas did not have adequate bilingual education programs, but that if they did have adequate programs the addition of undocumented children, in addition to the legal immigrants already in such programs, ought to cause no additional problems. He also noted that there were several federal programs that provided funding for bilingual education. Apart from the need for bilingual education, Dr. Cardenas doubted that undocumented alien children had unique educational needs. In fact, he said, “It has been our experience that in the education of alien children they tend to perform at levels much higher than American-born minority children.”

With twenty-seven years of experience as an educator, Dr. Cardenas offered his opinion on the consequences of denying an education to a child:

I think that the exclusion of a child from education locks the child into a life of poverty. Very frequently the unavailability of upward mobility leads to frustration. In some cases it leads even to socially undesirable behavior. I think that a person that does not have an education in the highly technological era in which we live would be at a disadvantage in competing for employment and would tend to be unemployed or underemployed. I think that they would have a hard time achieving upward mobility. In general, it would be a very detrimental and unsatisfactory life for an individual.

Peter Roos, questioning Jim Plyler, asked if it wasn’t true that the school district would get additional funds from the state if it had additional “A.D.A.” or average daily attendance. Plyler admitted that this was true. Plyler also admitted that, even though the number of native Spanish speakers in the district was not yet high enough to trigger the state law’s mandate for

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50 Record of Proceedings, p. 128-129.
bilingual education, the school district already offered bilingual education to some students through a Title I funding program.\textsuperscript{51}

Rolland Heston, District Director of the Houston District of the Immigration and Naturalization Service, testified that his office estimated in March 1976 that there were between 4,120 and 5,626 undocumented school-age children within the Houston Independent School District.\textsuperscript{52} As to how the agency arrived at the larger of the two estimates, Heston explained:

Over the past years, I would say fifteen or twenty years, the Immigration Service has estimated that they locate or apprehend one out of four or five aliens. That was standard. Over the last two or three years it has become quite apparent that the undocumented alien is not in the rural areas in the numbers that they used to be. They are in the cities, the metropolitan areas, and we estimate that we only apprehend or locate one out of every ten undocumented aliens, so we multiplied 18,750 reported undocumented aliens by ten, and we come up with 187,750 undocumented aliens residing within the Houston Independent School District boundaries.\textsuperscript{53}

Heston said that the agency apprehended about “448 undocumented aliens a month.” The aliens were usually apprehended in employment areas. About 25 of those apprehended were women or children, and about “15 of the women and children were children of school age.” Since 15 of 448 is about three percent, the agency estimated that three percent of the 187,750 undocumented aliens in the Houston ISD boundaries, or 5,626, were children of school age. On cross-examination, Heston admitted that by focusing on employment for immigration checks the agency was more likely to find individual men than families. He also admitted that the agency might only apprehend one out of twenty undocumented aliens, rather than one out of ten.\textsuperscript{54}

\textsuperscript{51} Record of Proceedings, p. 154-155.

\textsuperscript{52} Record of Proceedings, p. 193-201.

\textsuperscript{53} Record of Proceedings, p. 201.

\textsuperscript{54} Record of Proceedings, p. 201-209.
Dr. Jim Bob Hensley was defense witness. Hensley worked for the Texas Education Agency’s Region VIII Education Service Center in Mount Pleasant, and had spent several years as a professor and researcher in the Rio Grande Valley. Just two years earlier, Henley had spent fifteen months researching “the impact of immigrant alien students from Mexico upon border school districts.” He studied sixty-one school districts in thirteen counties along the Texas-Mexico border, where ten percent of the students were from Mexico. He found that the presence of these children caused severe problems for the districts, especially the children who arrived past third grade. The school districts did not have the personnel or the ability to deal with so many older students who could not speak English. Superintendents also told him that the recent arrivals from Mexico were overcrowding the schools. Because funding to construct school buildings was financed by local taxpayers, districts along the border were overwhelmed. Dr. Hensley concluded that an influx of undocumented students would impact education quality in the border districts, and that repeal of Section 21.031 would attract more undocumented children to schools in that region.\(^5^5\)

At the judge’s invitation, the United States had moved at the beginning of the trial to participate as amicus curiae ("friend of the court") with the full rights of a party to the dispute. At the end of the trial, Judge Justice asked the United States to submit a brief explaining the government’s position on the case. The “Post-Trial Brief of the United States” was submitted to the court in February 1978. In its brief, the United States considered the following constitutional questions: whether Section 21.031, of the Texas Education Code, and the Tyler I.S.D. policy implementing the statute, violated the Equal Protection Clause of the Fourteenth Amendment; whether the statute and the Tyler policy violated the Supremacy Clause of the Constitution by

interfering with efforts to regulate immigration and naturalization; and whether the statute and the policy violated the Supremacy Clause by conflicting with treaties of the United States.  

First, the United States argued that the plaintiffs were protected by the Equal Protection Clause. The Supreme Court had never explicitly ruled on that issue, but it had said that legal aliens were protected by the Fourteenth Amendment’s Due Process and Equal Protection Clauses. According to the U.S. brief, the “plain meaning of the language of the Equal Protection Clause” implied that it protected illegal aliens as well. The brief then suggested that the Texas statute and the Tyler policy should be subjected to “a more searching inquiry than the rational basis test,” because undocumented aliens exhibited all of the characteristics of classes of people to whom the Supreme Court had already extended special protection—they had been subjected to a history of unequal treatment, and they were politically powerless. The Supreme Court had repeatedly said that when a distinct class of people had been historically mistreated and was not capable of defending itself through the normal legislative process because it was unable to vote or too small to hope to elect representatives who could defend it, the Court would scrutinize more carefully any legislation that seemed to target this class. In addition to being undocumented aliens, the plaintiffs were children, and “the Supreme Court has recognized in its cases dealing with illegitimate children, that a fundamental concept of our system is freedom from punishment in the absence of personal responsibility.” The United States suggested that the proper standard for review was one which attempted to determine whether the state’s interest or objective was legitimate and substantial and whether the statute and policy was precisely and necessarily drawn to accomplish that objective. The United States concluded that Section 21.031 and the Tyler policy of charging tuition were not precisely tailored to accomplish a compelling state goal—the

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statute and policy were not likely to cut education costs or to improve the quality of education for citizens and legal aliens. The United States did not conclude that Section 21.031 violated the Supremacy Clause by interfering with federal immigration policy. Quoting a 1963 Supreme Court decision, the U.S. argued that federal regulation “should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained.” Nor did Section 21.031 conflict with U.S. treaties. Although the statute did appear to conflict with 1970 Protocol of Buenos Aires, which recognized a “right of education,” the U.S. pointed out that a treaty “does not automatically supersede local laws which are inconsistent with it unless the treaty provisions are self-executing.” When the Senate consented to the Treaty, it stipulated that “none of its provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states….”

The Decision

On September 14, 1978, Judge William Wayne Justice declared that Section 21.031 of the Texas Education Code and Tyler I.S.D.’s implementation of that law were unconstitutional on two grounds: they violated the 14th amendment’s guarantee of equal protection under the law, and they violated the Constitution’s Supremacy Clause. Tyler school officials quickly indicated their desire to appeal the case to the Fifth Circuit Court of Appeals.

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57 Post-Trial Brief of the United States, p.17-32.
First, the federal district court judge analyzed the 14th Amendment argument. He noted that the U.S. Supreme Court had suggested in a recent case that illegal aliens were entitled to the 14th Amendment’s guarantee of due process rights, and argued that nothing in the structure or logic of the 14th Amendment suggested that the right to equal protection of the laws was any different. The two guarantees are contained in the same sentence: “No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”\(^{60}\)

The equal protection guarantee is narrowed by the phrase “within its jurisdiction,” suggesting that at least some people who are entitled to the 14th Amendment’s due process protections may be denied the equal protection of the laws. At the hearing and in their briefs, the Tyler I.S.D. and the State of Texas argued that the phrase “within its jurisdiction” excluded illegal immigrants, but Judge Justice rejected that argument, saying, “People who have entered the United States, by whatever means, are ‘within its jurisdiction’ in that they are within the territory of the United States and subject to its laws.”\(^{61}\)

Next, Judge Justice addressed the question of what standard of scrutiny to use in determining whether or not the 14th Amendment had been violated. The two standards of review at the time were the “rational basis test” and “strict scrutiny.” The rational basis test was employed in most instances where a law discriminated against a group of people. As the Supreme Court explained, “cities, states and Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation

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\(^{61}\) Ibid.
fairly related to the object of regulation.” 62 In effect, the court simply asked whether the discrimination in the challenged statute or policy was rational or irrational. Unless the law was irrational, meaning that the selection of the discriminated group was arbitrary and bore no relation whatsoever to any legitimate purpose that the state could have, then the law would be upheld. Under this standard, most challenged laws would be upheld. As Judge Justice noted, the rational basis test is “a guarantee only that unreasonable, arbitrary lines will not be drawn.” 63

In some circumstances the court will subject a challenged law to the much tougher “strict scrutiny” standard. This test is used when a law threatens a fundamental right or when it targets a “suspect classification.” 64 If the strict scrutiny standard is applied, the law will only be upheld if its passes two tests. First, the law must further a compelling government interest. Second, the law must be narrowly or precisely tailored to that interest.

The Supreme Court had never classified education as a fundamental right, nor had it ever held that illegal immigrants, as opposed to legal immigrants, were a suspect class. Accordingly, Judge Justice was constrained to use the rational basis test to evaluate the constitutionality of Section 21.031. Knowing that the most laws easily survive the rational basis test, Judge Justice argued that strict scrutiny was the proper standard. First, he argued that the children in Plyler were being absolutely denied an education, and that this total denial made their education a fundamental right. 65 Second, he argued that the law “constitutes discrimination on the basis of wealth,” because “wealthy undocumented children are able to attend school despite the Tyler

64 Ibid.
65 Ibid.
I.S.D. policy – two such children are actually doing so – while poor undocumented children are excluded.”  

Further, the fact that the law targeted children should trigger more exacting scrutiny. In a recent Supreme Court case striking down a law that disfavored illegitimate children, Justice Powell had said punishing the child for the parents’ behavior was “illogical and unjust” and “contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.” Justice admitted that the children in Plyler “are of course legally culpable and subject to deportation,” but argued that “they can hardly be held morally responsible for their presence here. Many of them were hardly more than infants when they arrived in the United States, nor did they participate in their parents’ decision to emigrate; consequently they deserve no additional burdens or penalties.” The plaintiffs had also argued that illegal immigrants should be considered as a suspect class, because they were “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 command extraordinary protection from the majoritarian political process.” Justice admitted that no Supreme Court case directly supported his contention that strict scrutiny was the appropriate level of review. Luckily, it was not necessary for him to use strict scrutiny, since neither Texas nor the Tyler Independent School District had “demonstrated a rational basis for the state law or the local school policy.”

Texas and Tyler I.S.D. had argued that Section 21.031 and Tyler I.S.D.’s policy would save the state and school district money. Justice rejected that argument. “It is not sufficient justification that a law saves money.” He referred to a 1973 Supreme Court case, in which the

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66 Ibid, at 582.
67 Ibid.
68 Ibid, at 583.
69 Ibid, at 586.
Court struck down a section of the Food Stamp Act that barred households that contained an individual not related to any other member of the household. That section of the Act had been meant to prevent “‘hippies’ and ‘hippy communes’ from participating in the food stamp program,” but the Supreme Court held that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” 70

Likewise, Justice rejected the argument that “the legislature has determined that [educational] funds are to be used to educate the United States’ citizens and the legally admitted aliens who reside in Texas.” He noted that this was not really an argument, but merely a restatement of the law itself. The Supreme Court had rejected the year before the “assertion that discrimination may be justified by a desire to discriminate.” 71

Nor did the mere “illegality of a child’s presence in the United States, in itself, provide a rational justification for differential treatment by the state.” The fact that Congress had created a category of people deemed “illegal immigrants” was not sufficient justification for the state’s discrimination against them unless that discrimination was somehow rationally related to the reason that Congress had created the category. In a 1948 case from California, the Supreme Court had explained that “if a state wishes to borrow a federal classification, it must seek to rationalize the adopted distinction in the new setting. Is the distinction a reasonable one for the purposes for which the state desires to use it? To that question it is no answer that the distinction was taken from a federal statute.” 72

70 Ibid, at 587.
71 Ibid, at p. 582.
72 Ibid, at p. 588.
Nor was it sufficient to point out that the federal government denied benefits to illegal aliens. Texas relied on a 1976 Supreme Court case, *Matthews v. Diaz*, 426 U.S. 67, in which the Court upheld a Congressional decision to condition an alien’s eligibility for federal medical insurance upon continuous residence in the country and admission for permanent residence. In that case, the Court had denied that “…the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests.” The distinction was that *Matthews* involved a federal benefit, why *Plyler* was a state matter. Congress, “as an aspect of its broad power over immigration and naturalization,” had powers over aliens that states did not share.\(^73\)

States could justifiably use the federal category for their own discriminatory purposes for two reasons. First, the discrimination might further the purposes for which the federal category was created. Second, discrimination might be permissible if the state was attempting to deal with problems “generated by an alien’s illegal status, rather than merely his presence.”\(^74\)

If the state and federal interests were concurrent, the discrimination might be valid. For example, Justice argued that in *DeCanas v. Bica*, in which the Supreme Court upheld a California statute that punished those who hired illegal immigrants, the state and federal interests had been congruent. California adopted the federal category, and discriminated against the people in that category, but in a way consistent with the purposes of the federal immigration laws. “A state law prohibiting employment of illegal aliens may be entirely consistent with the

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\(^73\) Ibid.

\(^74\) Ibid.
federal scheme…,” Justice said. “By contrast, the Texas statute at issue in the instant case

is neither intended to, nor does it in fact, implement any express or apparent federal objective.”

However, Texas’s section 21.031 did “not purport to serve any federal purposes.” The law did not inhibit people from entering the country illegally, nor did it protect the legal American labor force. Section 21.031 singled out undocumented alien children for denial of free public education, but Texas could not identify anything unique about that class to justify the exclusion. “On the contrary, all of the arguments advanced by the state to justify its decision to exclude illegal aliens, as opposed to any other group, are either underinclusive or overinclusive, so as to belie any truly rational connection between the ends sought and the means employed.”

Judge Justice considered possible rationalizations for the exclusion of illegal immigrants, and rejected each one. Illegal immigrants paid property and consumer taxes, and were likely to pay Social Security taxes as well, eliminating the argument that a lack of contribution to the tax basis justified their treatment as a distinct group.

Texas defended Section 21.031 as a measure to counteract overcrowding in school districts along the Mexican border. Judge Justice noted that “none tried to dispute” the argument that “Mexican emigration into the United States has caused grave overcrowding in the border school districts … compounded by the poverty of the parents of the Mexican children and their special needs (bilingual education, free lunch, free breakfast, and free clothing).” However, excluding the undocumented children from those schools was irrational because they were “basically indistinguishable” from their legally resident or U.S. born Mexican American peers.

75 Ibid, at 585.

76 Ibid, at 589.

77 Ibid, at 589.
the majority of whom were also poor and in need of bilingual education. Justice argued that given the problems plaguing school districts on the border, “the rational approach” would be to exclude all of the poor, non-English speaking children, regardless of their legal status. The obvious unconstitutionality of that approach induced Texas to “shave off a little around the edges, barring the undocumented alien children despite the fact that they are no different for education purposes from a large proportion of legally resident alien children.” Justice considered this arbitrary and “strikingly ineffectual.” He suggested that the real problem facing Texas was not undocumented children but a “method of financing public education” that “has apparently begun to strain at the seams.” Though he refrained from saying “how the State of Texas might readjust its public school financing scheme,” he clearly thought that a readjustment was in order. Meanwhile, he would not allow Texas to “make scapegoats of a defenseless group.”

Having determined that Texas had no rational basis for selecting illegal immigrants to exclude from its public schools, Judge Justice moved on to the preemption argument. The Supreme Court had just spoken in *DeCanas v. Bica*, a California case in which a state law prohibiting California businesses from employing illegal aliens unless legally authorized workers were unavailable had been upheld. The Supreme Court had declared that “not every state enactment dealing with aliens is preempted as a regulation of immigration,” and the test was whether or not Congress had intended to “occupy the field” and preclude state legislation, as well as whether or not the state’s “statute burdened or conflicted with any federal laws or treaties.” Statutes will be preempted by federal law “to the extent necessary to protect the achievement of

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78 Ibid, at 590.

79 Ibid, at 591.
the aims of” the federal legislation. Since the Supreme Court in DeCanas found that the California statute mirrored rather than hindered federal legislation, the law was upheld.

The Texas statute, however, was inconsistent with and an obstacle to Congress’s policy on immigration, as well as its policies on education. Justice claimed that Congress had determined that there be “two primary principles” used to select potential immigrants: “family unification and protection of the domestic labor market.” Forty percent of I.N.S. resources were directed at the border, suggesting that the federal government’s foremost strategy for dealing with illegal immigrants was to prevent initial entry. Once an illegal immigrant had crossed the border, the primary place of detection was at a place of employment. Once detected, most immigrants were “told to leave voluntarily.” He concluded that the “federal government’s method is to turn the illegal alien back at the border and destroy his main incentive for coming, rather than to let him enter and establish roots, and then treat him as if he were a second-class citizen.” Justice found “no indication that Congress in any way intended to impose on illegal entrants the kind of penalty devised by defendants here.

Justice noted that federal law prohibited denying an educational opportunity to non-English speaking children, and nothing in federal education statutes suggested a Congressional intent to distinguish between documented and undocumented children. Congress appeared “to have little interest in employing punitive measures,” and nothing “in the Immigration and Nationality Act indicates that additional burdens on illegal immigrants are to be imposed at the whim of the various states.” Even if the children in Plyler were to acquire legal residency or

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80 Ibid, at 591.
81 Ibid, at 592.
82 Ibid.
citizenship, the negative consequences of Section 21.031 would continue to haunt them, as their lack of education would relegate them to the lowest-paying jobs. This was a “particularly harsh … penalty for the state to impose for commission of a federal misdemeanor…”

Having concluded that section 21.031 of the Texas Education Code and Tyler I.S.D. policy adopted pursuant to that section violated both the Fourteenth Amendment and were preempted by federal legislation, Judge Justice enjoined the school district from denying a free public education to “undocumented Mexican aliens.”

**Plyler v. Doe and William Wayne Justice’s Judicial Philosophy**

What was William Wayne Justice’s judicial philosophy, and how did it affect his ruling in *Plyler v. Doe*? As a judge, Justice openly advocated interpreting the Constitution in a way consistent with his political opinions – looking out for the “little ‘un against the big ‘un.” He insisted that a judge’s personal values where more important than his theories of interpretation, and derided efforts to “curtail the judge’s discretion and compel them to decide cases without resort to personal values.”

Judge Justice thought all judges, “whether conservative, moderate, or liberal,” actually decided cases according to their personal values, and offered his own experience in the Plyler case as an example. First, Justice said that what judges actually do when deciding a case is “evaluate any perceived equities in the underlying situation; then, they seek to render judgment

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83 Ibid, at 593.

84 Ibid, at 594.

85 William Wayne Justice, “Putting the Judge Back in Judging,” Box 168, Folder 9, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.
in accordance with what they personally comprehend with respect to those equities.” Only then, after having reached a preliminary decision based on the perception of the “equities” of the case, do “judges begin to seriously consider the relevant constitutional law and precedents in order to insure that their personal inclinations do not contravene either.”

In *Plyler*, the plaintiffs “came from impoverished families who worked at menial jobs” and were “pathetically hopeful that their children could get the same rights to free public education that other children did.” The school district and the overwhelming majority of its patrons, on the other hand, held the “unregenerate view that the district should not be responsible for the education of the children of ‘illegal aliens.’” Justice’s language makes his preferred outcome clear. On one side are the “impoverished” and “pathetically hopeful,” and on the other are the “unregenerate.” Justice even went so far as to put “illegal aliens” in scare quotes, to communicate his disdain for the category at the heart of the lawsuit.

After determining “how devastating” the Section 21.031 policy would be for undocumented children, and that “the majority of these deprived children would likely obtain legalized status at some point, the lasting effect of the Texas statute would be the creation of a permanently disadvantaged underclass.” Justice concluded that “the unequal treatment of these children denied them equal protection by any common sense interpretation of what those words mean.” He also said that he was “concerned” that the “policy was motivated by racial animus towards Latinos, rather than a sincere concern about the influx of undocumented aliens.”

Most important for understanding Judge Justice’s reasoning and his decision to strike down the policy was his statement, “It was self-evident to me that it was in the best interest of

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86 Ibid.
87 Ibid.
88 Ibid.
neither the children nor the state of Texas.” Justice based this conclusion on his finding of “no evidence” that illegal aliens drained state resources, pointing out that they paid sales and property taxes, at least indirectly, and that many also paid Social Security taxes. Justice determined that because “the relatively few undocumented aliens with families who migrated to Texas did so for economic reasons, and not to obtain a free education for their children,” it therefore followed that “denying education benefits to these children would neither deter future immigration or encourage immigrants to return to their countries of origin.” Judge Justice described his approach as similar to one advocated by legal scholar Robin West, who argued that judges should determine “whether the community’s true interest will be promoted by respecting its initially stated preference, or whether some unchosen alternative would be more conducive to the community’s true interest.”

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The Public Reaction

There was a consistent theme in the angry letters sent to Judge Justice, whether the letters were prompted by the 1978 Plyler decision or other controversial rulings that he made. In each of these cases, the angriest letters expressed view that Justice was favoring lawbreakers at the expense of the law-abiding, and in doing so he was threatening to undermine the moral foundations of the society. After Justice’s decision in 1978, he received a letter from Virgil Neugebauer in El Paso, who demanded, “…I would like to know your definition of ILLEGAL. Do we have two meanings?”

90 E.P.Norton, writing to Justice from Houston, asked for his

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89 Ibid.

interpretation of the word “illegal.” She said that her interpretation of “illegal” was “unlawful,” and that the “only action necessary is instant deportation.…” She found it ironic that “U.S. officials are seeking illegal aliens yet we hear we have to pay for the education of the children of illegal aliens.”  

Robert Townsend expressed the consternation that benefits that should be reserved for citizens would be given to undocumented immigrants, claiming that “illegal aliens are not entitled to the rights and privileges afforded United States or Texas citizens under their respective Constitutions.” In 1978, John W. Fanning scrawled these comments around a photocopy of a newspaper article about the decision: “Our laws are for the protection of our citizens, not aliens,” he wrote, and “These families should be deported. By what right do these illegal aliens have being over here in the 1st place?”

Letters complaining about other decisions evoked similar themes. In response to the Ruiz decision, one writer told Justice, “Your feelings for criminals and their victims are well known” and called him “the most despised creature in Texas.” Richard Hammel wrote, “But it seems you deem it important to provide unearned housing, food, and recreation to people who have violated the law… Or possibly you no longer believe we should have a law abiding society…” James Bacon suggested that it was “time for someone to take an interest in the innocent, protect them, deal with criminals as criminals.…” Another letter complained that Justice wanted to

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92 Letter from John W. Fanning, undated, Box 9, Folder 5, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.
93 Letter from Wm. Barnes to William Wayne Justice, Nov. 1, 1987, Box 8, Folder 2, Box 8, Folder 2, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.
94 Letter from Richard Hammel to William Wayne Justice, Nov. 1, 1987, Box 8, Folder 2, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.
95 Letter from James M. Bacon to William Wayne Justice, undated, Box 8, Folder 2, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.
turn “hard time” into “vacation time,” and said prison “should be a tasteless meal that would discourage return for seconds.” 96 Vicki Green told the judge that one of the inmates his decision benefited had murdered a family member of hers. “The plight of those harmed,” she suggested, “should be given more consideration in deciding what is best for society.” 97 The foreman of a grand jury in San Antonio told Justice, “Criminals in Bexar County no longer fear being punished for their crimes,” and pleaded with the judge to “be realistic in his zeal to correct the so-called prison problem in Texas.” 98

When Judge Justice overturned the Tyler Junior College policy of requiring that male students have short hair, locals saw in the decision a threat to authority, social norms, and the rule of law. One Tylerite wrote to the school president to convey his support: “I hope you and your college are very successful in overcoming the ruling given by Judge William W. Justice. It is very unfortunate that we can no longer have law and order in America due to the rulings of Federal Judges and the Supreme Court. We are supposed to have a Democracy where the majority rules but that no longer is true in this country…. ” 99 Mrs. R. R. Morrison asked, “If the courts of our land don’t uphold authority, who will? Certainly not these young people (future citizens) in whose favor you have decided. If our children are going to enjoy the benefits of free education, they must accept the responsibilities that go along with it. What authority do you


97 Letter from Vicki Green to William Wayne Justice, Box 8, Folder 2, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.

98 Letter from William B. Johnson to William Wayne Justice, Feb. 29, 1988, Box 8, Folder 6, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.

99 Letter from E.E. Biscamp to Mr. Ira Holdebrand, Sept. 11, 1970, Box 8, Folder 7, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.
expect this school system and its teachers to have hence forth? The pupils of this school can get by with anything now – and I’m sure the courts will decide in their favor. To me, our institutions must be respected! And our schools must be able to set rules and enforce them. If a child accepts the benefits of the school, he must also accept its rules.”

Mrs. A. B. Lansdale, the mother of the plaintiff in *Lansdale v. Tyler Junior College*, agreed with the school and wrote to Justice to complain that he and attorney Bill Kugle had manipulated and used her son for their own liberal, policy-setting purposes. “He was too young” to know what he was doing, she suggested. “He needed rules and discipline at college.” Mrs. Lansdale went so far as to blame the judge for subsequent disciplinary and psychological problems her son experienced: “You may mean well but you helped destroy my son.”

After Judge Justice ordered Tyler ISD to allow black students to return to school without punishment after a protest in which wastebaskets and lockers were set on fire, a mother of one John Tyler High student asked, “Where do we go to now for discipline and order in our schools, since the school board and principal apparently have no authority under your orders.”

From New Mexico came a letter bemoaning Justice’s decision and the “lack of respect for the law today….”

Much of the general public seems to have been outraged by Justice’s opinion in *Plyler v. Doe*, but many newspapers supported the decision. The Dallas Times Herald wrote, ““We

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100 Letter from Mrs. R. R. Morrison, Jr., to William Wayne Justice, Sept. 17, 1970, Box 8, Folder 7, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.
101 Letter from Mrs. A. B. Lansdale to William Wayne Justice, undated, Box 8, Folder 9, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.
102 Letter from Mrs. R. C. Kromer to William Wayne Justice, April 5, 1971, Box 8, Folder 7, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.
103 Unsigned letter to William Wayne Justice, April 22, 1971, Box 8, Folder 7, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.
believe the law should be repealed in the next session of the legislature. Besides its questionable federal constitutionality, it is a bad, shortsighted law.” The editorial reminded readers that it had earlier written, “Barring children from the public schools is no solution to the illegal alien problem. It is, in fact, no solution to any problem.” Now, the Herald wrote, “It should be the duty of the state to provide education for all children residing within the state.” Illegal alien children “are members of our society now and possibly in the future will become citizens of our state and nation.” Furthermore, a policy that punished children for the misdeeds of their parents “should bother the moral and spiritual conscience of this great state and nation….”

The Austin American Statesman applauded Justice’s decision. It reminded readers that undocumented aliens did pay taxes, undercutting a popular argument for denying them public services, and argued that Judge Justice had “reached a logical conclusion.” The Statesman thought it made good moral and political sense to provide a public education to the children: “The local school districts can handle the ‘problem’ children, and should, for the children don’t have much choice. They are where their parents are, and deserve an education free of a monetary handicap. Besides, education of illegal aliens’ children can be looked on as an investment and an indirect means of ending the alien problem.”

Not all newspaper editorials were positive. The editor of the The Clarksville Times asked,

Now, my friends, aren’t we all going a bit too far in this passion for an equal shake for everybody?
Granted, we all subscribe to the Pledge to the Flag, which clearly specified that this nation has “liberty and justice for all.”

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But we always thought this was an American Flag and that this justice is primarily for those who are citizens of this great nation and who by their citizenship accept the duties and responsibilities that such entails. Like paying school taxes, for one thing… We want, we hope for, we would urge with all our persuasion that these young children of alien parents receive the best possible education in a modern school with competent teachers.¹⁰⁶

Plyler and Judge Justice’s Legacy

During the years that the Plyler case was litigated in federal courts, 1977-1982, Judge Justice reached his peak level of influence over the legal and political landscape of Texas. Two more cases were working their way through his court even as he considered the arguments and evidence in Plyler. When he issued his opinions and orders in these cases, he caused at least as much outrage as he did with Plyler, and arguably impacted Texas politics even more. A brief overview of those cases and comparison with the Plyler ruling is instructive.

Ruiz v. Estelle began with a petition in 1972 by David Ruiz, an inmate in the Texas Department of Corrections, that alleged that the conditions of his imprisonment violated his constitutional rights.¹⁰⁷ The trial itself began several years later, after years of discovery and legal maneuvering. The trial lasted 159 days. Three hundred forty-nine witnesses were heard and over fifteen hundred exhibits were entered as evidence.¹⁰⁸ Judge Justice summarized his conclusions in Ruiz in a speech several years later. “I made detailed findings of severe

¹⁰⁶ “Enough is Enough!” The Clarksville Times (Clarksville, Tex.), Vol. 1, No. 70, Ed. 1, Sept. 21, 1978, p. 4.
overcrowding, inadequate security, widespread brutality by guards and also by inmates authorized to enforce discipline, lack of health care, arbitrary and harsh discipline, and obstruction of access to the courts.” Judge Justice issued a sweeping opinion, declaring unconstitutional almost every aspect of how the Texas Department of Corrections treated prisoners. When the case was finally settled, it had cost the state of Texas $150 million, and some thought it might cost a billion dollars to comply with Justice’s order in the future.

Judge Justice played an unusually active role in the *Ruiz* trial. Justice literally put the case together. As a U.S. Attorney for the Eastern Division in the 1960s, he had seen many *pro se* (without a lawyer) petitions by prisoners die in court because the prisoners lacked knowledge of the law. When as a judge he began receiving such petitions, he consolidated them and sought out an experienced attorney to represent the prisoners. Justice then sought the advice of another federal judge, Frank M. Johnson, on how to get the Department of Justice involved. Judge Johnson gave Justice a copy of an order that Johnson had issued compelling the DOJ to appear as amicus curiae (“friend of the court”) in an Alabama prison case. Justice then gave the same order in *Ruiz v. Estelle*, asking the Department of Justice to file a brief in the case and giving it “all the discovery powers of a party to the litigation.” Texas objected to Justice’s order involving the U.S. Department of Justice, but the 5th Circuit upheld the order and the Supreme Court declined to hear the case, over a “blistering opinion” from Justice Rehnquist that questioned Justice’s

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110 Newspaper clipping, Dennis Holder, “High Noon for Texas Prisons,” undated, Box 184, Folder 10, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.

authority to take such action. Judge Justice made no apologies for his active role. “It was not my business to be an advocate,” he said. “But it was, I thought and think, emphatically my business to find an advocate, because without one the truth was not to be had.”

In 1975, the League of United Latin American Citizens (LULAC) and the American G.I. Forum, with the support of MALDEF, the NAACP, and others, filed a motion in United States v. Texas that would become known as United States v. Texas (Bilingual). The plaintiffs argued that Texas was violating the civil rights and constitutional rights of Mexican Americans by not providing bilingual education to all those who qualified for it. Texas and LULAC agreed on the past history of intentional discrimination against Mexican Americans by the state, and even agreed that bilingual education was a proper remedy for that discrimination, but disagreed about the extent and implementation of that remedy. Texas argued that its 1973 law creating a bilingual education law providing for bilingual instruction in kindergarten through grade three was sufficient, while the plaintiffs wanted the state to provide for bilingual education through grade 12. On January 12, 1981, Judge Justice ruled for the plaintiffs. He ordered the state to offer bilingual instruction for every child who qualified for it, from kindergarten through twelfth grade, and gave the state until March 2 to comply with his order. The state appealed, but at the same time rewrote its bilingual education laws and greatly expanded the program (but not all the way through high school, as Justice had ordered). Governor Clements complained that the federal judiciary was intruding into a historically state sphere and imposing its own expensive

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policies.\(^{115}\) The Fifth Circuit agreed, concluding that the new Texas bilingual program should be given a chance to work and that Judge Justice had abused his judicial discretion by intruding into a matter of educational policy. The appellate court pointed out that the question of how best to teach a language was a “pedagogic” question, not a judicial one, and federal courts had no “special competence” to answer it.\(^{116}\)

The *Plyler* decision stands out from among Judge Justice’s other well-known rulings such as *Ruiz, U.S. v. Texas (Bilingual)* and *Morales*. For one thing, it was his only ruling to be scrutinized and upheld by the Supreme Court. Another factor was that, almost alone among his most famous cases, there was a finality to *Plyler* that eluded some of Justice’s other infamous rulings. In *Plyler*, Justice issued a simple order, and once his order was upheld by the Supreme Court, the trial was over for good. *Ruiz, U.S. v. Texas, Morales*, and others, however, lasted for decades, sometimes outliving the judge himself and many of the litigants. The ruling was also qualitatively different from many others. Compared to his rulings in *Ruiz, Morales*, and *United States v. Texas*, for example, it was very simple. There is no extensive remedial order, no reworking of the state’s pedagogical approach to children, and no point-by-point list of prohibitions and mandates. According to Justice’s biographer, Frank Kemerer, *Plyler* was Justice at his best. “No detailed remedial order was necessary. Just provide schooling to these children.”\(^{117}\) Judge Justice also cited the case as his favorite, perhaps for the same reasons.\(^{118}\)

\(^{115}\) Frank Kemerer, Sixth Annual Clements Lecture, Texas A&M University, March 6, 2002, Box 164, Folder 7, William Wayne Justice Papers, Tarlton Law Library, University of Texas at Austin.


\(^{117}\) Frank Kemerer, Sixth Annual Clements Lecture, Texas A&M University, March 6, 2002, Box 164, Folder 7, William Wayne Justice Papers, Tarlton Law Library, The University of Texas at Austin.

\(^{118}\) “Judge was champion of downtrodden,” Dallas Morning News, October 15, 2009, p. 1, 8.
CHAPTER 2
THE ALIEN CHILDREN EDUCATION LITIGATION IN HOUSTON

The court battles in Texas over the section 21.031 of the Texas Education Code did not end with Judge William Wayne Justice’s decision. In fact, his decision was just the beginning of a long, complicated pattern of litigation in federal courts throughout Texas, as well as one case tried in Texas state court, culminating in the decisions by the Fifth Circuit Court of Appeals in 1980 and the U.S. Supreme Court in 1982. The complexity and importance of these other federal court trials, especially the one in Judge Woodrow Seals’ court in Houston in the Southern Division of Texas, has been forgotten in the last four decades of Plyler scholarship, which almost invariably focuses only on Judge Justice’s court in Tyler and on the U.S. Supreme Court four years later. Studying the litigation in 1980 in Judge Seals’ court allows us to see new aspects of the struggle over the education of undocumented children in Texas. First, the struggle unfolded in the context of a heated public debate over the problem of undocumented immigrants, and the legal battles over section 21.031 were just one part of that larger struggle. Second, the Houston litigation provides certain insights into the meaning that the cases had for Mexican American activists and attorneys, insights not as readily apparent in the litigation in Tyler, a much smaller city with no previous history of Mexican American civil rights activism. Third, the religiosity of Judge Seals exemplifies an interesting aspect of the public debate over section 21.031 in particular and illegal immigration in general, which is that many of the supporters of the undocumented children were openly motivated by their religious faiths. Fourth, the plaintiffs in Houston appealed strongly to international law to make their case; Judge Seals found their
argument unpersuasive, but this was an aspect of the Houston litigation that didn’t arise in Tyler and wasn’t repeated in the U.S. Supreme Court.

The Public Debate Over Illegal Immigration in the Late 1970s

According to former INS Commissioner Lionel Castillo, America in the 1970s was witnessing “perhaps the second largest influx of immigrants, legal immigrants in the history of the country and, depending on what is done about the undocumented, we could very well be witnessing the largest influx of immigrants in the history of the United States.” Although about 90% of the government’s Border Patrol Officers were on the southern border at this time, there were far too few of them to have much of an impact on the flow of migrants. Castillo said there were about 250 officers available for patrolling a 2,000 mile border, and with so few officers “you cannot seriously discuss full enforcement of the immigration laws.” ¹ In testimony in the Plyler case in the fall of 1977, immigration expert Gilbert Cardenas remarked that he had recently visited the U.S. Border Patrol office in El Paso and been astonished at the volume of traffic across the border. Just outside the city he saw “people walking across the border, walking across the river, which is only about eight feet wide and very shallow, coming in and hitchhiking to work. We saw on one occasion up to twelve persons walking with virtually no efforts to apprehend them, no border patrolmen in the area.” ²

In Brownsville, where 25,000 Mexicans crossed the border every day to work on the U.S. side, about one-third of the city’s public school students were Mexicans who lived in Matamoros

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and crossed the border to attend Brownsville’s schools. This pressure seems to have led directly to the amendment to Texas Education Code §21.031 that sparked the Plyler case. State Representative Ruben Torres, from Brownsville, the sponsor of the amendment to Texas Education Code §21.031, explained in an accompanying resolution that the rising number of unauthorized alien schoolchildren was putting a strain on school districts. A few years later, Raul Besteiro, the Brownsville Superintendent throughout the Plyler litigation, explained the financial stress that his district was under, pointing out the reliance on dilapidated temporary or portable buildings as classrooms because they couldn’t keep up with the rapid influx of new students that necessitated adding “a new elementary classroom nearly every 10 days.” The pressure on local finances led even Mexican American superintendents along the border to choose to exclude undocumented students under §21.031. Peter Roos, the MALDEF attorney who tried Plyler at the district court in Tyler and at the U.S. Supreme Court, recalled years later that José Cárdenas, one of the expert witnesses in Plyler, asked him to meet with Hispanic superintendents in the Rio Grande Valley to try to persuade them to admit undocumented students, but his efforts failed. “The issue was that there had been a substantial influx of recent immigrants from neighboring Mexican states,” Roos said, “and there was no room to house these students.”

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4 Law review article, “Notes: Constitutional Law—A State Statute Which Denies an Education to Undocumented Aliens is Unconstitutional,” 14. Tex. Int’l. L.J. 289 (1979), Box 12, Folder 31, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.


Raul Besteiro, Superintendent of the Brownsville Independent School District, may have been one of the Valley superintendents that Roos tried unsuccessfully to persuade. Besteiro grew up in Brownsville and traced his roots in the city to the town’s founding in the nineteenth century. He attested to the integration of the Brownsville and Matamoros communities, “connected by two international bridges” where “people come back and forth all day long,” said that he had friends and family on the Mexican side of the river, and expressed sympathy for the Mexican families. “You can’t blame them,” he said, “I never blame people for coming over because it is a much better life for them.” Nevertheless, he claimed that the people of Brownsville refused to consider a bond issue to pay for new buildings for their overcrowded district, and he heard people say, “Why should we have bond issues to build schools for children from Mexico?”7

Over the course of the 1970s, the American public came to believe that illegal immigration was a problem that needed to be addressed. During the Ford Administration, the Immigration and Naturalization Service commissioned a Gallup poll on public attitudes about illegal immigration. According to Gallup, 74% of respondents (out of 1,549 adults interviewed) said that the “illegal alien” problem was either “somewhat serious” or “very serious,” and 87% said that undocumented workers taking American jobs was either “somewhat of a serious problem” or a “serious problem.” For those respondents of “Latin American ethnic origin,” the percentage was 88%. Fifty-four percent of respondents agreed that undocumented immigrants

depressing U.S. wages was a “serious problem,” with the percentage rising to 61% among Latin American respondents. (Only 58 of the over 1500 interviewees were “Latin American.”)  

In 1977, the Carter administration began developing a proposal for legislation to address illegal immigration, focusing on closing the border, implementing employer sanctions, and offering amnesty to unauthorized aliens. A task force comprised of Cabinet Secretaries and White House staff members met multiple times over several months to prepare a report for the president, who had called the issue of undocumented aliens one of the most difficult that his administration faced. The task force recommended to the president that he push for: stricter enforcement of the Fair Labor Standards Act to discourage the hiring of undocumented workers; a prohibition against the employment of unauthorized aliens, with penalties for employers who are repeat offenders that engage in a “pattern or practice” of violating the law (a standard borrowed from civil rights law, which sought to punish those who “engaged in regular, well-established activity, rather than inadvertent or occasional action”); a substantial increase and reorganization of border enforcement resources; and an “adjustment of status” component by which those undocumented aliens who were in the country before January 1, 1977, could come forward, register with the Immigration and Naturalization Service, and be granted a permanent non-deportable status. The task force recommended that President Carter oppose “a massive, new temporary worker program.”

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8 Box 9, Folder “Illegal Aliens – Domestic Council Committee, (3)”, Richard D. Parsons Files, Gerald R. Ford Presidential Library.


On August 4, 1977, just one month before the *Plyler* case began, President Jimmy Carter asked Congress to take action regarding the undocumented alien problem. Carter’s proposal was that Congress authorize increased spending on border control measures and impose penalties on the employers who hired undocumented aliens, while offering a two-tiered legalization program to undocumented aliens: permanent legal status to those who had lived continuously in the United States since January 1, 1970, and temporary legal status to those who had lived in the country between that date and January 1, 1977. Those who had entered the country more recently would still be eligible for deportation. Mexican American politicians immediately voiced their displeasure with the proposal. Congressional Representative Edward Roybal said that the employment sanctions would lead to discrimination. “Anybody who looks Hispanic is going to have to prove they’re an American citizen.” He also objected to the temporary legalization of those who had arrived between 1970 and 1977, arguing that without some promise of a pathway towards permanent residency or citizenship the plan would create “a sub-class of people.”

The October 15, 1977, edition of the “Texas RAZA UNIDA Newsletter” urged members to attend the National CHICANO/LATINO IMMIGRATION CONFERENCE in San Antonio on October 28-30 in order to protest against Carter’s proposal, calling it a “critical issue of human rights for the undocumented worker.” The form contained “A Call For Action” written by conference organizer José Angel Gutiérrez, which said that “human rights and equality for all people” were at stake. President Carter’s proposal and the surrounding debate about undocumented aliens a “crisis for all Spanish surnamed persons. The very same man our Raza

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supported for the Presidency, now seeks to deport us. The Carter administration is designing a new immigration policy. We are the main targets.”\textsuperscript{12}

On October 28-30, 1977, just as the battle over undocumented immigrants in public schools was underway in Tyler, Texas, between 1,500 and 2,000 Mexican Americans gathered in San Antonio to protest against President Jimmy Carter’s proposals regarding undocumented immigrants. The many speakers at the event included politicians and activists, including José Angel Gutiérrez, who organized the conference; Sister Maria Barrón, a Catholic nun; Edwin Morga, the national director of LULAC; and Rubén Bonilla, the Texas state director of LULAC; and Vilma Martínez, director of the Mexican American Legal Defense and Education Fund (MALDEF). Martínez argued that the employer sanctions in Carter’s proposal would lead to discrimination against Mexican Americans, and that anything short of unconditional amnesty would relegate undocumented immigrants to a “nether world,” creating a “nondeportable subclass of workers” that sounded “strangely like another peculiar institution, slavery.” On the conference’s last day, 500 of its delegates voted to send resolutions to Washington, D.C., demanding that “all immigrants now living in the United States be granted ‘full and unconditional amnesty.’”\textsuperscript{13}

As the debate over Carter’s proposals began, some activists expressed special vitriol for the new Immigration and Naturalization Service Commissioner, Leonel Castillo, repeatedly suggesting in flyers, speeches, and debates that he had sold out his people. “Which Side Are You On? En Que Lado Estas?” asked the Committee on Chicano Rights, headed by Herman Baca,\textsuperscript{12} Raza Unida Party Newsletter, October 15, 1977. Arcenio A. Garcia Papers, University of Texas at San Antonio Libraries, MS 96, Box 1, Folder 16.\textsuperscript{13} National Chicano/Latino Conference on Immigration and Public Policy, San Antonio, Texas. 1976-1977. Herman Baca Papers. MSS 0649. Special Collections & Archives, UC San Diego.
and showing several well-known Mexican American leaders such as Cesar Chavez, Bert Corona, Corky Gonzales, Bishop Patricio Flores, Vilma Martinez, and Ed Morga, the president of LULAC, all on the side marked “Against the Plan.” Only one person, Leonel Castillo, was “For the Plan,” and below his picture was written, “Salary: $50,000.”

At the Chicano immigration conference in San Antonio in 1977, José Angle Gutiérrez joked, “They promised our people that if we voted well we would be given a reward, and we were given a gigantic reward, a snitch, a chief of la migra.” Several days after the conference, José Angel Gutiérrez hinted that Castillo was a “vendido” (sellout) in a televised debate with the INS Commissioner for the Dallas Public Broadcasting Service, telling him, “And not one single Chicano organization or individual, nor Latin organization nationwide, is in favor of this plan except one man, Mr. Castillo, and he gets paid for that.”

In April, 1978, a Chicano publication mocked the INS Commissioner as Leonel “Coyote” Castillo, calling him a tragic figure who “hunted down his own people” and was more concerned “with his own personal advancement rather than the welfare of his people.” In an interview two decades later, Castillo claimed that he had hesitated to take the INS position when it was offered to him, fearful that “it would be a disastrous move politically,” and experience proved his fears correct.

Even Cesar Chavez, a fierce critic of undocumented immigrants, publically rejected the Carter proposals. The United Farm Workers, now a part of the AFL-CIO, issued “Resolution


17 Interview with Lionel Castillo, by José Angel Gutiérrez, June 28, 1996. Tejano Voices, University of Texas at Arlington Special Collections.
resolving that “this organization oppose the immigration reform measure offered by the Carter Administration,” and “that this Union continue its opposition to legislation making it illegal for employers to hire undocumented aliens as such employer sanctions will prompt wholesale discrimination in employment against all workers who have dark skins and speak other languages than English, whether they be undocumented, resident aliens, or citizens…”18

Ruben Bonilla, president of the Texas chapter of LULAC, told a congressional hearing in May 1978 that the “United States cannot afford to continue to treat the Mexican aliens as a subclass or subculture.” Bonilla said that S. 2252 was “not consistent with the President’s well-known human rights policy,” opposed employer sanctions on the grounds that it would result in discrimination based “on pigmentation and English-speaking ability,” opposed any new version of the bracero program, and said that the United States should provide economic assistance, a “Marshall Plan of economic development,” for South Texas and for Mexico.19

Vilma Martinez also testified on behalf of MALDEF before Congress in 1978, explaining the organization’s belief that employer sanctions would lead to discrimination against Mexican Americans, that a temporary worker permit would “institutionalize a subclass of alien laborers,” and disputing the idea that the presence of “undocumented persons” in the United States was harmful. The evidence, MALDEF believed, “clearly suggests that most undocumented workers appear to be taking jobs that Americans do not want.”20 Martinez argued that not enough was known about the problem of illegal immigration to justify legislation, suggesting that “there


exists no factual basis to support the need for, or propriety of” the legislation being considered, and claimed that it was “founded on nothing more than popular assumptions that are void of factual support.” She stated her organization’s opposition to Carter’s proposals, especially the proposed employer sanctions and the five-year temporary worker permit. 21

The Select Commission on Immigration and Refugee Policy (SCIRP) was established on Oct. 5, 1978, “to study and evaluate … existing laws, policies, and procedures governing the admission of immigrants and refugees.” In 1979, National LULAC president Ruben Bonilla Jr. testified at a regional hearing of SCIRP, telling the Commission that he objected to the term “illegal alien,” preferring to use “undocumented people.” He described the common criticisms of undocumented immigrants, such as that they did not pay taxes and caused unemployment, as “racial hysteria,” and criticized the idea of targeting employers to end undocumented immigration. “[W]e must recognize what business raids do for the employability of Hispanics in this country. Prudent business practices would discourage employment of Hispanics, especially in supervisory capacities, knowing that at anytime, without warning, your labor force would be wiped out by an I.N.S. raid. I make no illusion or speculation on this matter, for I recognize that many Americans make no distinction between Mexican nationals and Hispanic-Americans.” 23

In this climate, with legal battles underway inside courtrooms over the education of undocumented children and political battles outside the courtroom over employer sanctions and


the legalization of undocumented workers, Texas politicians from both parties tried to court Mexican American voters and organizations. For example, in 1977 Texas Attorney General John L. Hill decided to challenge incumbent Dolph Briscoe for the Democratic Party’s nomination for governor in 1978. Hill’s campaign records attest to the growing importance of the Mexican American vote in the 1970s and to the realization among Anglo politicians that that vote must be recognized, respected, and courted.

Attorney General John Hill officially kicked off his campaign at the Laguna Ballroom on the west side of San Antonio, saying he chose the location because its Edgewood school district symbolized “the present governor’s failure to deal with the problems of public education in Texas.” After speaking to over one thousands supporters, including members of the Texas State Teachers Association, Hill was accompanied by a large crowd as he went door-to-door along the predominately Mexican-American Spear Street.

In early 1977, Hill spoke in Laredo during the city’s annual celebration of George Washington’s birthday. Writing Hill afterwards, José Gutiérrez wrote to Hill on February 28, 1977, to express his pleasure at having met Hill in Laredo at the annual Washington’s Birthday Celebration. Gutiérrez asked Hill to address “several pressing problems in South Texas” in his gubernatorial campaign, listing five: 1) assistance to businesses affected by the recent peso devaluation; 2) jobs in state government and state agencies for Mexican Americans; 3) positions on the boards of regents of Texas’s university systems; 4) legislation to require oil companies in South Texas to use local labor; and 5) alleviation of the lack of healthcare providers in South

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24 Letter from John L. Hill to “Dear Friend,” September 17, 1977, Box 4, Folder 253-4-11, John Hill Campaign Office Records, University of Texas at Arlington Special Collections.

25 Newspaper clipping, Vicky Waddy, “1,000 Attend Hill Rally On City’s West Side,” San Antonio Light, January 2, 1978, Box 5, Folder 253-5-7, John Hill Campaign Office Records, University of Texas at Arlington Special Collections.
Texas by helping more qualified Mexican Americans enter the medical profession. Gutiérrez warned that “the Democratic party in South Texas will not endorse the candidacy of any person who fails to make serious commitments to these issues,” and suggested that the Democratic Party’s took Mexican Americans for granted. “South Texans of Mexican descent have long supported and worked diligently for the Democratic party as was demonstrated at the last presidential election. South Texas gave President Carter an overwhelming margin of victory. However, we have yet to realize the fruits of many years of political labor.”

In 1977, LULAC state director Ruben Bonilla announced the creation of task forces to address injustices in the Texas criminal justice system. “During the past 120 days in West Texas alone, four Mexican-Americans have died in questionable circumstances while under police custody,” he said. “The record of the state courts, as shown in the Morales and Torres cases, shows that Mexican-Americans cannot expect justice for these deaths from the state.” In the former case, Castroville police chief Frank Hayes was convicted of aggravated assault and sentenced to 10 years in prison by a state court after the killing of Richard Morales in 1975, but then given a life sentence in federal court for violating Morales’ civil rights. In the Torres case, two Houston police officers were given one-year suspended sentences for causing the drowning death of Jose Campos Torres in 1977. Both cases involved suspects who were already in custody before they died. The federal government stepped in to prosecute the officers, but Bonilla thought that wasn’t enough. “But we need tougher civil rights legislation in Texas so we can get justice here, not from the federal government.”

26 Letter from José Gutiérrez to John Hill, February 28, 1977, Box 3, Folder 253-3-12, John Hill Campaign Office Records, University of Texas at Arlington Special Collections.

27 Undated newspaper clipping, David McLemore, “LULAC forming task forces,” Box 5, Folder 253-5-7, John Hill Campaign Office Records, University of Texas at Arlington Special Collections.
In December 1977, speaking at an annual Attorney General’s conference on law enforcement, Attorney General and gubernatorial candidate John Hill agreed with LULAC when he discussed the Morales and Torres cases and police abuse towards minorities, calling the incidents examples of “blatant injustice” and pointing out that no one should “fear that his life is in jeopardy if he is under arrest.” He said, “Texans of every race, cultural background and economic level are entitled to due process of law.” Hill said that Texas should change its “official oppression” law from a misdemeanor to a felony, but also recommended higher pay and more training for Texas police officers. 28 For his efforts, Hill was awarded with “an unofficial endorsement” from the League of United Latin American Citizens (LULAC), despite the organizations officially non-partisan nature. 29

Republic Senator John Tower was also well aware of the importance of the Mexican American vote. In his successful 1961 campaign for the Senate, in which he became the first Republican Senator from Texas in almost one hundred years, Tower invested in Spanish-language advertisements on Spanish radio stations in Austin, El Paso, Brownsville, Corpus Christi, Edinburg, Laredo, and other cities in South Texas. 30 In his reelection campaign in 1978, Tower courted voters at the American G. I. Forum’s convention and purchased an ad in the event’s brochure. 31 Speaking at the state LULAC convention in May 1978, Tower praised the


30 “Tower Spanish Schedule,” Box 438, Folder 14, Senator John G. Tower Papers, Southwestern University Special Collections.

organization’s commitment to reforming the criminal justice system, and agreed that the Torres case was upsetting. “I think I know how outraged you are about what happened in Houston,” he said. “It upsets me, too, I am just glad the Justice Department is taking some action to appeal the sentences.”32 Sometimes the Tower campaign’s efforts veered into the unintentionally comical, as when it commissioned a corrido (in Spanish) about the candidate: “Voy a cantar un corrido / que ha nacido de mi mente / del Senador John Tower / querido por mucha gente. Vuelven a religir / a este hombre competente.” (“I’m going to sing a corrido/ that springs from my mind/ about Senator John Tower/ loved by many people. Reelect again/ this competent man.”33

That Texas politicians were well aware of the clout of Hispanic voters and Hispanic organizations is indicated by a statement Senator Tower offered at the congressional hearings in May 1978 on Presidents Carter’s proposed immigration reforms. Not surprisingly, Tower was opposed to employer sanctions, but he worded his opposition in language sympathetic to the concerns of the Hispanic activists who also opposed such sanctions. Tower pointed to the Mexican-American community’s “struggle to bring itself into the economic mainstream,” suggested that much progress had been made over the last several years, and pointed out that illegal immigration’s economic impact was probably greatest on Mexican Americans, who were most likely to lose jobs to competition with undocumented immigrants, Nevertheless, he suggested that employer sanctions would create worse problems for Mexican Americans:

…[T]he administration proposes enactment of a law that has one very clear and unmistakable purpose, and that is to prevent illegal aliens who are also Hispanic in appearance from being employed in this country.


33 “El Corrido de John Tower,” Box 547, Folder 11, Senator John G. Tower Papers, Southwestern University Special Collections.
Enactment of such a law would immediately reduce for millions of Hispanic-Americans the true meaning and value of citizenship. In my State, enactment of such a law would dramatically end and even rollback the exciting and growing partnership that has developed during the last decade between Texans of all racial and ethnic backgrounds.34

The Multi-District Litigation Between “Plyler” and “In Re: Alien Children”

As the fate of undocumented immigrants was debated in Washington and throughout the country, scores of undocumented alien schoolchildren in Texas continued their fight against Section 21.031 of the Texas Education Code. Judge Justice’s ruling in 1978 did not settle the issue for other federal divisions in Texas. Although he found the Texas statute unconstitutional, his order was limited to the Tyler Independent School District, leaving open the possibility that other federal judges, or even state judges, would see it differently. Therefore, throughout 1978 and 1979 school districts across Texas continued to turn away undocumented students, and a multitude of cases arose challenging the constitutionality of the statute.

One such case had already been argued and won by Texas, when a state court upheld the statute and the Texas Supreme Court declined to hear an appeal, saying only that it found no reversible error in the opinion below. In Hernandez v. Houston Independent School District, the state court said, “No one would argue that the state is constitutionally obligated to provide a tuition-free education to foreign children living abroad. The fact that a child leaves his country and covertly enters the state without complying with the immigration laws, should not somehow create a state responsibility to provide him with a free education. The child should have no greater rights to a free education, due to his unlawful presence, than those rights he would have

had if he had not come to this country.” 35 The court employed the rational basis test, used when the statute is alleged to discriminate against a group that is not a protected class (a racial minority, religious minority, etc.) and does not deprive that group of a fundamental right, such as the right to vote. The court decided that the Texas state bore “a rational relationship to a legitimate state purpose,” and that the court could not supplant the state’s view with its own view of what constituted “wise economic or social policy.”36

With state courts and the federal court in Tyler disagreeing on the statute’s constitutionality, plaintiffs continued to challenge the law in federal courts across Texas. Lawsuits were filed in seventeen school districts across the state challenging the constitutionality of section 21.031. Some of those districts, like Houston ISD, admitted students whose parents paid a tuition fee, while others excluded the children altogether. Some of those children attended schools that were set up for them by churches and community organizations. 37

In September 1978, in Goose Creek Independent School District, four children—Elvia, Miguel, Javier, and Jorge Mendoza, sued through their mother, Rebecca Mendoza, asking for injunctive relief that they might attend the public schools tuition-free.38 Margarita, Esther, and Vicente Cortes sued Spring Branch I.S.D. a year later, in September 1979. 39 On August 27, 1979, a trial began in the United States District Court in Dallas, part of the Northern District of

37 Undated newspaper clipping, “Houston testing illegal alien law,” Box 13, Folder 2, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
Texas, regarding the constitutionality of the Dallas Independent School District’s decision to prohibit the enrollment of undocumented alien children.\textsuperscript{40}

In the Houston federal court, Maria Cardenas sued the Pasadena Independent School District on behalf of her daughter, Sandra Patricia Cardenas, and Catalina Arguelles sued on behalf of her daughter, Rocio Arguelles. The two girls had been refused permission to enroll in Pasadena schools in accordance with a district policy implementing Section 21.031 of the Texas Education Code.\textsuperscript{41} Rocio Arguelles was forced to withdraw from school on September 18, 1979, because she could not prove that she was a citizen or a legal resident. Rocio’s parents were both lawful permanent residents in the process of applying for citizenship, and she had three younger siblings who were all U.S. citizens and continued to attend the elementary school that she was removed from. Rocio had received excellent grades when allowed to attend school in previous years, and one of her teachers submitted an affidavit attesting to Rocio’s character and attitude towards school. There was every indication that the Arguelles family would be in Pasadena for years to come—Rocio’s parents were purchasing a home in the district.\textsuperscript{42}

Mayra Aracely Martinez sued Billy Reagan, Superintendent of the Houston Independent School District, when she was forced to stop attending school because she could not afford the required tuition of $135 per month. Martinez had crossed the border legally in 1973 with her

\textsuperscript{40} Testimony of A. Boe, Boe v. Wright, Civil Action No. CA 3-79-0440, U.S. District Court, Northern District of Texas, Box 13, Folder 22, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

\textsuperscript{41} “Motion to Consolidate,” Sandra Patricia Cardenas v. Dr. Lee Myers, Superintendent of the Pasadena Independent School District, Civil Action No. H-78-1862, and Rocio Arguelles v. Dr. Lee Myers, Superintendent of the Pasadena Independent School District, Civil Action No. H-79-2071, Box 13, Folder 13, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

\textsuperscript{42} Letter from Isaias D. Torres to Dr. Lee Meyers, Superintendent, Pasadena Independent School District, Sept. 20, 1970, and Request before the Pasadena Independent School District Board of Trustees to Reinstate Rocio Arguelles to J.D. Parks Elementary School, Oct. 3, 1979, Box 14, Folder 11, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
mother, using a three-day border crossing card. Through her lawyers, Martinez claimed that although she was undocumented, she was “here in the U.S. under color of law.” By this, her lawyers seem to have meant that a proper determination of her immigration status could only be made (and had not been made) by federal immigration authorities. “By making a determination of plaintiff’s immigration status in contravention of 8 U.S.C. Section 1103, defendants deny to the plaintiff the procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution. The school districts are not procedurally equipped to apply the immigration laws.”

In 1979, despite Judge Justice’s ruling in Plyler the year before, some school districts in East Texas turned away undocumented children. Como Pickton Independent School District refused to allow two children, “C. Roe” and “D. Roe,” to enroll in classes in August. In December, Chapel Hill Independent School District was sued by “A. Poe,” representing two undocumented schoolchildren, and “D. Poe,” representing three children. The children had been expelled from the public schools in accordance with Section 21.031. In Longview, parents of undocumented children sued when “P. Doe” and “O. Loe” were expelled from their school for the same reason.


44 “Affidavit in Support of Motion For Temporary Restraining Order,” Civil Action No. P-79-CA, Roe vs. Como Pickton Independent School District, Box 13, Folder 12, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

45 “Affidavit in Support of Motion For Temporary Restraining Order,” Civil Action No. TY-79-449-CA, Poe, vs. Chapel Hill Independent School District, Box 13, Folder 10, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

46 “Plaintiffs’ Request For Admission,” Civil Action No. TY-79-351-CA, Doe vs. Bill K. Ford, Superintendent of the Longview Independent School District, Box 13, Folder 10, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
Texas, a defendant in each of the lawsuits, asked the Judicial Panel on Multidistrict Litigation, a panel of judges from the Fifth Circuit, to consolidate the cases so that the state would not have to relitigate the same issues in multiple courts. On November 16, 1979, the Judicial Panel on Multidistrict Litigation issued an “Opinion and Order” regarding seven cases pending in the Southern District, Western District, and Northern District of Texas. Each of the cases challenged the constitutionality of Section 21.031 of the Texas Education Code. The Panel found that the plaintiffs’ claims against Texas in each of these actions involved “common questions of fact” and could be consolidated in the Southern Division of Texas in order to “promote the just and efficient conduct of the litigation.” Therefore, in order to avoid duplication in discovery and pretrial rulings, and to address the questions of whether the 14th Amendment applies to illegal aliens and whether there was a rational basis for the Texas statute, the Panel ordered that the claims against Texas be separated from the claims against individual school districts and transferred to Southern District of Texas and assigned to Judge Woodrow Seals. Seals was chosen partly because Houston was considered a convenient location for all parties, and partly because four of the cases were already pending in his court.47

Several new lawsuits were filed in November and December 1979, even as the Panel on Multidistrict Litigation was ordering the cases transferred to Judge Seals’ court in the Southern Division. M. Doe, et al. v. Richard LoDestro, et al., was in Judge Fisher’s court in the Eastern Division. Three cases were filed in Judge Justice’s court in the Eastern Division: V. Doe, et al. v. Bill K. Ford, et al., S. Roe, et al. v. Dr. James G. Horn, et al., and A. Roe, et al. v. Como Pickton

47 “Opinion and Order,” Docket No. 398, Before the Judicial Panel on Multidistrict Litigation, Box 13, Folder 18, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
Independent School District, et al.\(^{48}\) On December 17, 1979, the Judicial Panel on Multidistrict Litigation issued a Conditional Transfer Order transferring these new cases to Judge Seals, as well.\(^{49}\)

Judge Seals directed the parties to appear before his court in Houston on December 20, 1979, at which point various issues would be considered, including the abatement (temporary cessation) of cases against individual school districts while the common constitutional questions were addressed in the Houston court and the transfer of “tag-along cases,” or cases challenging Section 21.031 that were continuing to be filed against the state in federal districts.\(^{50}\)

The Trial

The Houston trial was different from the Tyler trial two years earlier. Judge Justice’s ruling had arguably applied only to the Tyler Independent School District, which had only about thirty-five undocumented alien schoolchildren at the time. The consolidated case in Seals’ court involved seventeen separate school districts and thousands of undocumented alien children. Houston hoped for a better result in their case. Giving them some hope, the Texas Supreme Court had upheld their policy just a few months earlier.\(^{51}\)

\(^{48}\) Letter from Patricia D. Howard, Clerk of the Panel, to V. Bailey Thomas, Clerk, United States District Court, Box 8, Folder marked “MDL-398 # 1,” Record Group 21: Records of District Courts of the United States, 1685-2009, National Archives at Fort Worth, Texas.

\(^{49}\) “Proceedings,” MDL-398, Box 8, Folder marked “MDL-398 # 1,” Record Group 21: Records of District Courts of the United States, 1685-2009, National Archives at Fort Worth, Texas.

\(^{50}\) “Notice of Setting,” Re: Alien School Cases, MDL #398, Box 13, Folder 18, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

\(^{51}\) Newspaper clipping, Rad Sallee, “Supreme Court ruling puts end to 7 years of Texas court battles,” Houston Chronicle, June 16, 1982, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
There were many important differences between the Tyler trial and the later Houston one. One difference was the setting. Tyler in the 1970s still had a very small Hispanic population, and it had no activist organizations or Mexican American politicians. Houston was quite different. It had a large, well-established Mexican American community that was well-organized and politically active. There were many well-known Mexican American activists and politicians in Houston—community leaders that could rally the public around a cause such as the plight of undocumented alien children. One example of such a person was John Castillo, a city councilman in the 1990s whose parents moved to the Second Ward area of Houston in the 1930s. Castillo, born in Houston in 1938, became politically active in the 1960s, beginning with the Viva Kennedy campaign of 1960. He knew local Mexican American politicians and activists like Lauro Cruz and Lionel Castillo. Lionel Castillo, who was director of the Immigration and Naturalization Service in the Carter administration, played a key role in a battle between Mexican Americans and the Houston Independent School District in the late 1960s. Houston, under a court order to desegregate, wanted to bus Mexican Americans to predominately African American schools and vice versa while leaving predominately Anglo schools alone. “So,” Castillo recalled, “that didn’t sit too well with the Hispanic community.” A boycott of the schools ensued. John Castillo was in the Political Association of Spanish-speaking Organizations (PASO), which formed a group called the Mexican American Education Council. Lionel Castillo

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became the executive director of the Council, which organized schools for thousands of Mexican American students who had been pulled out of HISD.  

Something like the “huelga schools” (“strike schools”), as participants called them, were recreated ten years later for the undocumented children excluded from public school districts pursuant to Texas Education Code 21.031. In large cities like Dallas and Houston, activists, educators, and religious organizations created ad hoc schools of their own to educate the children. In Dallas, religious and civics groups also organized three private schools for the children excluded from the public schools. The Dallas school district had refused admission to undocumented children altogether, regardless of whether or not they could pay tuition. The schools were financed by $50,000 in donations, and were run by Sister Caroleen Hensgen, who administered them as part of the local Catholic school system. In Houston, “Instituto Mexico” was a makeshift private school created to educate some of the undocumented schoolchildren. The school, in a community center on the city’s East End, was across the street from Anson Jones Elementary School. The students at both schools were overwhelmingly Hispanic. The Instituto Mexicano had a staff of six, taught about 100 children, and charged a tuition of $6 per week for four hours of instruction each day, offering classes in English, reading, spelling, and math. It was one of three schools serving about 500 of the undocumented children in Houston.

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53 Oral History Interview with John Castillo, 1998, by José Angel Gutierrez, CMAS No. 50. Tejano Voices, University of Texas at Arlington Special Collections.


55 Newspaper clipping, Linda Austin, “Judge orders public schools to admit aliens,” Dallas Times Herald, July 22, 1980, Box 13, Folder 8, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
with another 500 children on waiting lists. The director of Instituto Mexicano was Gail Quintero, a deeply religious woman who spent two years after high school in a Catholic convent before pursuing a career in education.

On February 19, 1980, the trial began with opening statements by the plaintiffs’ lead attorney, Peter Schey, by the attorney representing the State of Texas, Susan Dasher, and by Linda Baker, attorney for the United States Justice Department, Civil Rights Division.

In his opening statement for the plaintiffs, Peter Schey argued that “a very large percentage” of the children at the center of this lawsuit would stay in the United States and eventually become permanent residents. Schey argued that there was no evidence that the quality of education in Texas had improved in any way with the passage of Section 21.031, and argued that the statute should be subject to strict scrutiny for a number of reasons. One factor was “the relative innocence” of the children who were affected by the statute. Another factor was that the case involved a state discriminating against “non-citizens,” rather than the federal government. A third would be that the statute deprived children of an education, “one of the most important rights that are available to people within these United States.” Last, the statute was a form of “wealth discrimination” because “certain children with money can go to school and certain children without money cannot go to school.” The rational basis test wasn’t enough, he said, arguing that “a fair and substantial relationship would have to be shown between the purposes of


the statute and its effect in implementation. Schey said that the statute would fail under even the rational basis test, as it was difficult to find any rational justification of the statute, which was motivated by the claim “that admitting these children will have a negative impact on everybody else’s education within the state of Texas.” In other words, the claimed justification for the statute and its actual effects were not even rationally related to one another. This was because, even if the state’s assumptions about how many undocumented children there were in Texas were true, the impact on the state’s public education system of admitting those children would be very slight. In fact, he claimed that Texas didn’t have “a single shred of objective evidence” that excluding undocumented children in 1975 had improved conditions in the public schools. He argued that even if there were 100,000 undocumented schoolchildren in Texas, admitting them to the Texas schools would cause so little a financial impact that “each person in the state of Texas will have one penny less to spend. When you analyze it from the perspective of the total revenues of the state of Texas, admitting 100,000 children is a grain of sand on a beach 100 miles long…. ”

Schey pointed out that federal assistance for education was based on the total number of schoolchildren in the state, without reference to citizenship status. He argued that “all persons who work in the state of Texas pay federal and state taxes and those taxes are going towards funding the educational system, whether the adults paying the taxes are documented immigrants or they are undocumented immigrants…. ” He argued that the statute was “not in harmony” with how the Immigration and Naturalization Service determined a child’s legal status, attempting “to create a category based on alienage and yet which ignores the federal categories on alienage.”

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Schey argued that the Texas statute forced school districts to make determinations of a child’s immigration status in ways that were inconsistent with due process rights and with how the federal authorities made such determinations. He pointed out that the administrative process might take several months, but while parents were fighting to avoid deportation their children would not be allowed to attend public schools, an example of Texas “jumping the gun” and adjudging the children guilty before the administrative process had even played out. Schey suggested that this constituted interference on Texas’s part in the federal immigration sphere. He also said that the law was unconstitutional because of international law, because the Treaty of Buenos Aires called for “a free education for all persons, residents in the areas, the geographical areas of the signatories of the treaty.”

Susan Dasher gave the opening statement for the State of Texas. “Your honor,” Ms. Dasher began, “No case has ever held that an illegal alien was entitled under the Constitution to the same benefits as a citizen or alien lawfully present in the United States.” She quoted from a recent Supreme Court decision that said, “Neither the overnight visitor, the unfriendly agents of a hostile foreign power, the resident diplomat nor the illegal entrant can advance even a colorable constitutional claim to a share and a bounty that a conscious sovereign makes available to its own citizens and some of its guests.” Ms. Dasher mentioned a case in Judge Justice’s court in Tyler that had only recently finished hearing testimony in which the Mexican-American Legal Defense Fund and the U.S. Justice Department had argued that Texas’s bilingual education program was so inadequate as to be in violation of the constitutional rights of Hispanic students. She pointed out that the central problem in the case was that “there are not enough qualified

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bilingual teachers at the present time in the state of Texas.” She pointed out that the same districts which were desperately in need of more bilingual teachers—districts in the Valley, as well as large urban districts like Dallas and Houston—were also the districts facing the biggest challenge from an influx of undocumented aliens. She argued that the plaintiffs in this case sought to overburden Texas’s “already inadequate facilities” by doubling the number of children legally entitled to bilingual education. Responding to Peter Schey’s criticism of Texas for determining the legal status of children without due process, Dasher pointed out that Congress “without the benefit of a deportation hearing for anyone… denies welfare benefits, A.F.D.C., Social Security aid to the alien, disabled, blind, it makes it a felony to harbor or shield an illegal alien.” Dasher blamed the federal government. “If the federal government were to come forward with funds sufficient and teachers sufficient to implement this program or if they were able to regulate the flow of immigration or made any attempt to, perhaps the states would not have to act to preserve resources the way Texas has in this case.” Ms. Dasher pointed out that Mexico had a stricter policy than Texas: “The Constitution of Mexico, in Article Three and Article Thirty provides that free education will only be given to Mexican citizens and naturalized Mexican citizens. There is no way that an American child could get a free education in Mexico.”

One of the most important developments in the litigation in Houston was the decision on the part of the Civil Rights Division of the United States Department of Justice to intervene on behalf of the plaintiffs. On December 10, 1979, attorney Linda Baker of the Civil Rights Division of the United States Justice Department wrote to Judge Seals asking for permission to attend the conference on December 20. Noting the Department’s participation in the Plyler v.

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Doe case in Tyler, she said that the Department wished to stay apprised of “any other proceedings regarding the constitutionality of this statute,” and was “currently in the process of deciding whether or not” to seek to participate in the consolidated case in Seals’ court.\textsuperscript{62} On Feb. 5, 1980, Judge Seals approved of the Justice Department’s request to intervene in the case on the plaintiffs’ side.\textsuperscript{63} The Justice Department’s representative in court, Linda Baker, said that it chose to intervene on behalf of the children because “they are discriminated against on the basis on their status as Hispanic and undocumented.”\textsuperscript{64}

Linda Baker gave the opening statement for the United States. The United States’ argument was that the statute should be struck down as violative of the fourteenth amendment because it was “an invidious discrimination against a class of children on the basis of their status as Hispanic and undocumented.” Baker argued that the central question in the trial was whether or not the equal protection clause applied to undocumented aliens—if it did, then the court “did not need to reach the other issues that have been raised by the plaintiffs.” Unlike the plaintiffs, the Department of Justice did not argue that the statute was preempted by federal law or violated due process rights. The Justice Department intended to show “that any additional costs in educating these children is not a legitimate basis under any standard for denying a free public education to these children.”\textsuperscript{65}

\textsuperscript{62} Letter from Linda Baker to Judge Woodrow Seals, Dec. 10, 1979, Box 8, Folder marked “MDL-398 # 1,” Record Group 21: Records of District Courts of the United States, 1685-2009, National Archives at Fort Worth, Texas.

\textsuperscript{63} Newspaper clipping, “Justice Department intervention OK’d,” Feb. 5, 1980, Box 28, Folder 36, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

\textsuperscript{64} Newspaper clipping, “Jobs called main lure for Mexican illegals,” Feb. 20, 1980, Box 28, Folder 36, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

The Houston trial lasted six weeks. The trial was significantly longer than the Tyler one, which had only lasted two days. Among the expert witnesses were Raul Vesteiro, the superintendent of the Brownsville Independent School District, who said that the statute protected his district from being overrun by an influx of undocumented schoolchildren from Mexico, and that local citizens didn’t want to have to pay higher taxes in order to educate undocumented aliens. Leonel Castillo, the former INS Commissioner, was another expert witness; he explained that the federal government’s immigration enforcement efforts were so inadequate as to constitute “a program of de facto amnesty.” Dr. Jorge Bustamante, a researcher at Colegio de Mexico, Mexico City, testified that only one percent of undocumented workers in the U.S. had children enrolled in American schools, suggesting that Texas wildly overestimated the undocumented school-age population and that the contested statute would have little effect on the overall problem of illegal immigration. A San Antonio psychiatrist said that he had examined undocumented alien children excluded from public schools and found that they suffered “depression, hyperactivity and alienation” as well as damage to their self-esteem.

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66 Newspaper clipping, Nancy Stangill, “Illegal alien schooling case has many facets, broad ramifications,” Houston Chronicle, March 30, 1980, Box 13, Folder 8, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

67 Newspaper clipping, Nancy Stangill, “Illegal alien schooling case has many facets, broad ramifications,” Houston Chronicle, March 30, 1980, Box 13, Folder 8, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

68 Magazine clipping, “Can Illegal Aliens Go to Public School?” Newsweek, March 31, 1980, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

He predicted that the children, if not educated, would be “overrepresented in the criminal justice and welfare systems and unemployed” in the future.\textsuperscript{70}

The last witness for the plaintiffs was Dr. Meliton Lopez, an assistant superintendent in the Chula Vista school district in California. Lopez told the court that he had come to the United States thirty-three years earlier “at 13 as a wetback from Mexico.” His parents settled in San Perlita, Texas, on the Rio Grande border. He was placed in a class called “primer” to focus on learning English, and remembered that from time to time class would be interrupted by someone picking up kids to be deported along with their parents. Within a year Lopez had learned enough to join the regular classes, and six years later he was the school valedictorian. Lopez became a legal resident in 1953, and a citizen in 1960 while serving in the U.S. army.\textsuperscript{71}

\textbf{A most senseless statement}

During the trial, Judge Seals attracted unwanted attention with an off-the-cuff remark. Questioning the importance of Spanish language instruction, Seals had asked, “Well, why should English students in the United States want to learn Spanish when they ought to be learning German, Russian, Chinese or Japanese? I don’t read the Spanish language, newspapers, but I read international reviews that review books that are published in all languages, and I never see anything worldwide published in Spanish of importance.”\textsuperscript{72}

\textsuperscript{70} Newspaper clipping, “Behavior of illegal alien child said to suffer due to exclusion by schools,” Feb. 23, 1980, Box 28, Folder 36, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

\textsuperscript{71} Newspaper clipping, “Judge Seals asked to disqualify himself,” Houston Chronicle, March 26, 1980, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

\textsuperscript{72} Transcript of Proceedings, Box 12, Folder 31, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
After his remarks about the Spanish language were publicized, State Representative Paul Moreno of El Paso demanded that Judge Seals recuse himself. “Any judge with any integrity and with such a glaring bias would, in the interest of justice, remove himself from the case.” Moreno pointed out that the legacy of Spanish law was still present in Texas jurisprudence, and said that “considering the importance of the Spanish language and Spanish speakers to the political and economic life of the state of Texas, the judge’s comments are dangerously ignorant.”73

James A. Castañeda, a Spanish professor at Rice University, called the remark “a biased, irresponsible utterance” that was the product of “unfounded prejudice.” Castañeda expressed surprise that Seals, known as a staunch supporter of minorities, made such a statement.74 A few days later, Seals apologized by letter and in court for his remark, which he called “a most senseless statement.”75 Some observers said that they couldn’t recall another instance of a federal judge apologizing like that in court.76

Some letter-writers were dismayed by Judge Seals’ apology. One writer from California complained that “those dam mexicans” [sic] were “filthy people” and that “all mexican printing, radio stations and TV programs” should be banned.77 Another writer, from Houston, urged Seals not to take Professor Castaneda seriously. Castaneda, he said, was “in fact not Spanish, but

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73 Newspaper clipping, “Judge Seals asked to disqualify himself,” Houston Chronicle, March 26, 1980, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

74 Letter from James A. Castañeda to “Sound-Off” (The Houston Post), March 1, 1980, Box 12, Folder 31, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

75 Letter from Woodrow Seals to James A. Castañeda, March 6, 1980, Box 12, Folder 31, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

76 Newspaper clipping, Juan Ramon Palomo, “Judge Seals calls Spanish comment ‘senseless, dreadful,’” The Houston Post, March 7, 1980. Box 12, Folder 31, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

77 Letter to Woodrow Seals, authors’ name illegible, April 7, 1980, Box 12, Folder 31, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
Jewish, and like all Jews is more willing to sell America down the drain for his own selfish ends.  

Why did Seals’ remark provoke such outrage, and why did it call for an apology? One answer is that it seems that his casual insult of the Spanish language touched upon a sore spot with the Mexican American community in Houston and throughout the Texas. In 1980, many Mexican Americans would have had personal memories of being forbidden to speak their native language in schools, and of being discriminated against in other ways as well.

In interviews with Mexican Americans who grew up in the 1950s and 1960s in Texas, the humiliation of being ostracized or punished for speaking Spanish at school was a common theme. Frances Rizo, who went on to become a community activist and Dallas media figure, recalled being humiliated by her kindergarten teacher in Dallas in the early 1950s. One day, Frances had a nosebleed, but did not know how to tell her teacher in English. The teacher refused to let her go to the bathroom until she spoke English. “I remember putting my hands in a fist, because I knew I was being embarrassed and I knew I was being humiliated even if I didn’t understand all her words. And so you can imagine how that affected me if I’m telling you about it now at the age of sixty-seven.” Severita Lara vividly recalled being paddled in the eighth grade for speaking Spanish in the hallways at school in Crystal City, Texas, in the 1960s. In testimony before the U.S. Commission on Civil Rights in San Antonio in 1969, high school students talked about being paddled in elementary, junior high, and high school for speaking

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78 Letter from Ira T.C. Tizen to Judge Woodrow Seals, March 12, 1980, Box 12, Folder 31, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.


80 Oral History Interview with Severita Lara, CMAS 13. Tejano Voices, University of Texas at Arlington Special Collections.
Spanish. “I didn’t like the idea of being punished because I was speaking Spanish,” Irene Ramirez told the Commission. “I mean, to me it is a way to identify myself. I mean I feel that it is my language and I don’t see why I shouldn’t speak it. But the thing is that since you enter elementary school you are taught that it is bad.”

Ironically, Judge Seals was well aware of Texas’s legacy of discrimination against Mexican Americans in schools. In 1970, Judge Woodrow Seals ruled in *Cisneros v. Corpus Christi Independent School District* that Mexican Americans were “an identifiable ethnic minority group for purposes of public school desegregation” and that *Brown v. Board of Education* therefore applied to segregation against Mexican Americans just as it did against black Americans. For Seals, a key part of his determination was that Mexican Americans had been identified and discriminated against as an ethnic minority group, especially in Corpus Christi, where the case arose. In Corpus Christi’s public schools, Anglo children and Spanish surnamed children were each about 47% of the student body, “Negro” children were just over 5%, and students labeled as “American Indian” or “Oriental” each constituted less than one percent. Despite the almost exactly equal numbers of Anglo and Hispanic students, there were eleven schools in Corpus Christi in which over 90% of the students were Hispanic, and six schools in which over 90% of the students were Anglo. Mexican American and Black parents

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82 Law review article, Guadalupe Salinas, “Mexican-Americans and the Desegregation of Schools in the Southwest,” 1971, Pages 929-930, Box 13, Folder 4, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

83 “Corpus Christi Public Schools Ethnic Distribution Totals 1969-1970,” Box 12, Folder 21, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

84 “Corpus Christi Public Schools Ethnic Distribution for 1970-1971,” Box 12, Folder 21, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
complained that the school district had mixed their children with one another but segregated both
groups from the Anglo children, taking advantage of the fact that Mexican Americans were
legally considered “white” in order to superficially satisfy desegregation orders while actually
continuing to maintain a dual, segregated system. In ruling for the plaintiffs and against the
school district, Judge Seals declared, “It is clear to this court that these people which we have
used the word Mexican-Americans to describe their class, group or segment of our population, is
an identifiable ethnic minority in the United States, and especially so in the Southwest and in
Texas and in Corpus Christi,” Seals wrote.85

The Ruling

On July 21, 1980, Judge Seals issued his ruling prohibiting Texas from refusing to admit
to its public schools and from charging tuition to anyone aged five to twenty-one “on account of
their status under United States immigration law.”86

Although he came to the same conclusion that Judge William Wayne Justice did—that
Section 21.031 of the Texas Education Code was unconstitutional—there were important
differences in Judge Seals’ opinion. First, although both judges suggested in their opinions that
strict scrutiny was appropriate in the case (rather than the rational basis test, which almost always
resulted in upholding the challenged statute), Judge Seals committed himself more forcefully to
the idea. He argued that, although the U.S. Supreme Court said that education was not a
fundamental right (such as speech or religion), the statute in question “absolutely deprives

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85 Newspaper clipping, “A Key Ruling on Chicano Identity,” San Francisco Chronicle, June 6, 1970, Box 12,
Folder 27, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

86 Newspaper clipping, “Texas Bar To Aliens In Public Schools Voided By U.S. Judge,” The New York Times,
July 22, 1980, Box 13, Folder 8, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston
Public Library.
undocumented children of access to education.” Furthermore, he saw a direct relationship between an education and other fundamental rights, such as the right to vote and to freedom of speech, such that depriving a child absolutely of access to education deprived them indirectly of the full enjoyment of their other rights.\textsuperscript{87} Under the strict scrutiny test, Texas needed to show that discriminating against undocumented aliens was necessary in order to accomplish a “compelling government interest.” After examining the state’s arguments about the fiscal burden of educating undocumented alien children, the impact that the undocumented children would have on already strained bilingual education programs, and other factors, Seals concluded that the state had failed to meet its burden.\textsuperscript{88}

Another difference was that international law was a more important issue in the Seals decision.\textsuperscript{89} The plaintiffs had argued that section 21.031 was preempted by treaties to which the United States was a signatory, and that it interfered with the federal governments’ authority to conduct foreign policy.\textsuperscript{90} Judge Seals disagreed, considering each of the treaties to which the plaintiffs referred. One argument was that the 1967 Protocol of Buenos Aires had amended the Charter of the Organization of American States, so that Article 31 said that “member states agree to dedicate every effort to achieve …. Rapid eradication of illiteracy and expansion of educational opportunities for all.” Article 47 of the treaty referred to a “right to education” and said that when elementary education was “provided by the State it shall be without charge.”

\textsuperscript{90} “Plaintiffs’ Post-Trial Brief: International Law Argument,” In Re: Alien Children Litigation, MDL No. 398, Box 13, Folder 22, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
According to the plaintiffs, since section 21.031 violated Article 31 and Article 47, it was unconstitutional, because the Supremacy Clause of the United States Constitution declares that treaties, once ratified, are the supreme law of the land. The problem with the plaintiffs’ argument, Seals pointed out, was that treaties are either self-executing or must be given effect by congressional legislation. There clearly was not congressional legislation incorporating Articles 31 and 47 into American law, and the treaty was not (despite plaintiffs’ arguments to this effect) self-executing. Other language in the treaty, such as the statement that opened Article 47 (“The Members States will exert the greatest efforts in accordance with their constitutional processes, to insure the effective exercise of the right to education…” indicated that the treaty was not meant to be self-executing. As to the assertion that the Texas statute contradicted the Carter administration’s policy of promoting human rights, including a right to education, Seals wrote that a state statute’s constitutionality could not depend upon the “shifting winds of the State Department.”

Seals’ ruling was hailed by some as a major victory for human rights and for undocumented children. His mentor, Ralph Yarborough, wrote to him to congratulate him for the decision, which showed “vision” and “statesmanship.” “You granted rights to one group of people without taking away correlative rights from another. You have opened the door of hope for one group of people largely without hope except for your decision, without closing a single window. Your decision reflects the spirit and vision of America.” Ruben Bonilla, LULAC national president, said that Seals’ ruling was “the only decision that was just and proper under the circumstances… It is a giant step for the concept that all residents of America are entitled to

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92 Letter from Ralph W. Yarborough to Honorable Woodrow Seals, July 24, 1980, Box 12, Folder 31, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
equal protection of the laws. It is also a decision which should strengthen our understanding and relations with Mexico.”

Texas newspapers were mostly supportive. The *Houston Post* said, “Federal Judge Woodrow Seals made the only proper decision under these circumstances. To leave thousands of children in Texas uneducated because of frailties in law and law enforcement at the adult level would be shortsighted and costly.” The *Austin American-Statesman* called Seals’ order “wise and just” and said that state officials should not appeal the decision. “Though some school districts may complain that the cost of educating large numbers of aliens will be high, that cost is nothing that can’t be borne and is little in comparison to the cost in dollars and human terms of relegating thousands of innocent children to a permanent peon status.”

Mike Kingston, a *Dallas Morning News* editorial staff writer who thought Seals’ ruling was “common sense,” was honest about the answer to the frequent question, why not just close the border and deport the undocumented aliens? “If we don’t want to educate illegal alien children, their parents should be kept out of this country. And that’s not practical or politically feasible. Particularly in the Southwest, the illegal aliens make a substantial contribution to the economy. Thousands of cattle would not be worked, crops would not be harvested, roads and

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93 Newspaper clipping, Marion Zientek, “Texas must educate children of undocumented,” The Texas Catholic Herald, June 25, 1982, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.


95 Newspaper clipping, “Alien education a Texas must,” *Austin American-Statesman*, July 24, 1980, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
other facilities wouldn’t be built, restaurant dishes would not be washed and hundreds of menial jobs that domestic workers turn this noses up at would not be done.”

The Suffering Servant

Woodrow Seals was a deeply committed Christian and a lifelong Methodist. He was active as a layperson in his church, garnering recognition from fellow church-members and from fellow Christians of other denominations for his service to the faith. For an example of Seals’ beliefs about Christianity and the church’s role in society, one can look at the resolution that Seals proposed in 1976 at the General Conference of the United Methodist Church, asking that it declare every congregation of the UMC “a servant.” Seals was a Texas delegate to the conference, which met in Oregon. Jesus was the “Suffering Servant,” he said, and pointed out that “to the non-Christian hearer the authenticity of the Gospel often times depends upon the credibility of the witness.” His proposal was that there be an “emphasis on servanthood,” that “every congregation a servant” be recognized as a church motto, and that “all United Methodist people emphasize by whatever means they feel appropriate the role of servanthood in the church….”

Pope John Paul II presented Woodrow Seals with a rare award, a medal called the Benemerenti, in 1979. Bishop John Morkovsky of the Galveston-Houston Diocese recommended Seals for the honor for founding the Society of St. Stephen, a charitable organization within the United Methodist Church, as well as for “the witness that he has given as a federal judge to the

96 Newspaper clipping, Mike Kingston, “Justice For Illegal Aliens,” The Dallas Morning News, July 24, 1980, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

97 Undated newspaper clipping, “Judge Seals Proposes Methodist Resolution,” Box 28, Folder 32, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
values of the gospel.” Monsignor Joseph Fiorenza said it was “very unusual” for a non-Catholic to be given the award. The Society of St. Stephen, which Seals modeled on the Catholic’s Society of St. Vincent de Paul, was founded in 1963 and had expanded to over 100 chapters in southeast Texas and a few dozen more throughout the nation.98

A large majority of the letters that Seals received from people who agreed with his decision came from his fellow Methodists and from others who identified with a religious faith and tied that faith to their opinions on the case. For example, Spurgeon Dunnam III, editor and general manager of a weekly newspaper for Texas members of the United Methodist Church, wrote to tell Seals, “I am always pleased to be able to refer to you as a friend and brother in the faith, but never more so than today after reading about your decision relative to public education for illegal aliens. I am proud of that decision not only because it is right, but because it looks to long-term societal consequences and not just short-term inconvenience.”99

The pastor of Bering Memorial United Methodist Church, in Houston, also wrote to Seals. “As one deeply concerned about the rights and needs of undocumented aliens in the Houston area, I wish to applaud your recent decision upholding the fundamental right of these children to receive an education.” Like many others, he pointed to the pragmatism of providing an education to the children, suggesting that the Texas policy would have created thousands of illiterate adults. He thanked Seals for upholding rights “guaranteed, both to the citizens and the stranger within the gate, by the Constitution of the United States of America.”100

98 Newspaper clipping, “Judge Seals receives high honor from pope,” Sept. 17, 1979, Box 28, Folder 35, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

99 Letter from Spurgeon M. Dunnam III to Judge Woodrow Seals, July 22, 1980, Box 13, Folder 3, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

100 Letter from Ronald D. Pogue to Judge Woodrow Seals, July 23, 1980, Box 13, Folder 3, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
The United Methodist Reporter discussed the case. The editor called Seals’ decision an “extraordinary” example of “Christian social action.” By “Christian social action,” the author meant that Seals was “able to witness effectively to his Christian convictions while faithfully discharging his duties in the judicial branch of our nation’s government.”101

The pastor of the United Methodist Church in Chandler, Texas, also wrote to Seals to congratulate him for his “courageous and moral decision…. We cannot continue to on the one hand use and abuse these workers and deprive their children at the same time.”102 Eugene Slater, a UMC pastor from Dallas, praised Seals’ ruling, saying that it reflected “Christian idealism and practical realism.”103 Robert McClean wrote from the United Methodist Office for the United Nations in New York to thank Seals for “lifting the sights of the Texas lawmakers and, by implication, the sight of all of us.” 104

T. Randall Smith, pastor of St. Luke’s United Methodist Church in Beaumont, Texas, wrote to tell Seals how happy he was with the ruling. “Our Lord demonstrated that God is eternally concerned with the plight of the poor and the oppressed, and the Prophets declared the righteous judgment of God on a people who forgot the poor, the orphan, and the widowed. I give thanks that you are carrying out the teachings of the Kingdom of God in your ruling. I will

101 Undated newspaper clipping, “We are each called to engage in ‘Christian social action’,” The United Methodist Reporter, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

102 Letter from Jim Bankston to Judge Woodrow Seals, July 27, 1980, Box 13, Folder 3, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

103 Letter from O. Eugene Slater to Judge Woodrow Seals, July 24, 1980, Box 13, Folder 3, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

104 Letter from Robert McClean to Judge Woodrow Seals, July 24, 1980, Box 13, Folder 3, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
continue to pray that God will use you as an instrument of his justice through your service on the bench.”

Seals was congratulated on his decision by people of other religious faiths, as well. Most Reverend John McCarthy, of the Diocese of Galveston-Houston, wrote to offer his “heartfelt thanks” for Seals’ decision. Joseph A. Fiorenza, Bishop of the Diocese of San Angelo, said it was “tragic” that Texas attempted to deny children the “basic human right” to education. He called Seals “a dedicated Christian” who had made “a valuable contribution to a more just society.” John Minter, a Presbyterian minister in Houston, called the decision “the only legal opinion possible, and it was also the right human and even Christian opinion.”

Rev. James C. Suggs, the president of the Texas Conference of Churches, praised Seals’ ruling and said Texas would be “bankrupt morally” if it failed to provide a free education to undocumented schoolchildren. “It is premature to conclude that Texas schools will be bankrupt by the influx of children of undocumented workers, but we know for sure that our state is bankrupt morally if we continue to refuse to educate those children.” In 1979 and 1980, the conference passed resolutions supporting free public education regardless of immigration status. “It is deceitful to suggest that Texans can save money by denying free public education to one

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105 Letter from T. Randall Smith to Judge Woodrow Seals, July 24, 1980, Box 13, Folder 3, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

106 Letter from John McCarthy to Judge Woodrow Seals, July 23, 1980, Box 13, Folder 3, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

107 Letter from Joseph A. Fiorenza to Judge Woodrow Seals, July 28, 1980, Box 13, Folder 3, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

108 Letter from John P. Minter to Judge Woodrow Seals, July 29, 1980, Box 13, Folder 4, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
group of children. What about the tremendous cost—not only in dollars but also in wasted potential—of generations of immigrant children growing up without education.”

The rich collection of congratulatory letters in the Seals archives from coreligionists suggests that there is an aspect of the debates over borders and immigrants that receives too little attention from mainstream scholars, which is the key role that religion plays in how many people analyze the ethical and legal issues. Seals never appealed to religion in explaining his decision, but it is reasonable to assume that the religion that played such an important role in his life also influenced his approach to the law and his attitude towards the children, who were by all accounts innocent of wrongdoing. The evidence indicates that religion played an important role throughout the struggle to vindicate the legal rights of the undocumented children in Texas. In Tyler, the plaintiffs first approached a local Catholic worker for help, not a lawyer. In the Houston trial, a Catholic Bishop testified on behalf of the children. Wherever makeshift schools were created to accommodate undocumented children banned from the public schools,

109 Newspaper clipping, “Church official praises ruling on alien school issue,” undated, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.


112 Undated newspaper clipping, “Denial of Education to Aliens Held Illegal,” Box 13, Folder 8, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
churches and religious laypeople often were the driving force in their creation.\footnote{113} One year after the Supreme Court’s \textit{Plyler} decision, the United Methodist Church officially endorsed the sanctuary movement, which aimed to protect Central American refugees from deportation. “In our time as in previous times, our places of worship are needed as places of protection. For people of faith these refugees are not aliens but our sisters and brothers.”\footnote{114}

With Judge Woodrow Seals’ opinion in \textit{In re Alien Children Education Litigation}, the courtroom battles in Texas came to a close. The next stage was in New Orleans, where the Fifth Circuit Court of Appeals would hear arguments on the Tyler and Houston trials and render its judgment.


CHAPTER 3
FRANK M. JOHNSON AND THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

The Appeals

In 1980, as Judge Woodrow Seals heard testimony, studied briefs and petitions, and readied his opinion in the case of In Re Alien Children, the United States Court of Appeals for the Fifth Circuit considered the appeal by Texas and the Tyler Independent School District of Judge William Wayne Justice’s ruling in Plyler v. Doe. The two trials proceeded almost simultaneously, with Judge Seals’ decision handed down only three months before a Fifth Circuit panel upheld Justice’s ruling. The State of Texas found itself in the strange position of arguing one case in district court while at the same time arguing for a reversal of another case from another district court involving the same statute, some of the same witnesses, and largely the same set of facts.

In late January, after the Fifth Circuit had received a motion to expedite the appeal from the plaintiffs, the State of Texas submitted a motion asking the Court to reconsider its decision to grant an expedited appeal and to stay the appeal until after the Houston case ended. Susan Dasher, the lead attorney for Texas in much of the litigation related to Section 21.031, argued that “17 consolidated cases covering every judicial district in Texas are presently set for trial on February 11, 1980, in the Southern District of Texas, Houston Division, and are challenges to the statute which is at issue in the above-captioned cause. The record that will be developed in the trial in the consolidated cases is a detailed picture of statewide impact and therefore critical to the
State’s presentation of a rational basis for the aforementioned statute.”¹ Judge Thomas Clark denied the motion on February 14, 1980.²

On February 12, 1980, Tyler I.S.D. filed a motion in the Fifth Circuit Court of Appeals asking that the court either postpone oral arguments or stay the appeal until the outcome of the case in Judge Seals’ federal district court in Houston. The Houston case was set for trial to begin a week later, and the Tyler school district argued that the Fifth Circuit would benefit from the record produced in that trial.³ On February 21, Judge Clark denied the motion.⁴

Judge Frank M. Johnson, who would write the opinion for the Fifth Circuit Court, was also unwilling to wait. On July 1, 1980, Fifth Circuit Judge John R. Brown wrote him about the case in Houston. “For whatever it is worth, when I learned of this I thought it might be of interest to your panel to know that Judge Woodrow Seals held a six weeks evidentiary hearing in a similar case involving, presumably, the entire public school system of Texas. Whether it would or would not have any effect on your case I have no way of knowing nor would I inquire. But to the extent that the extended evidentiary hearing might have some bearing upon the legal issues presented in both cases, your panel might well consider awaiting a decision by Judge Seals.” A handwritten note at the bottom suggested the reply: “Judge does not want to wait.”⁵ On July 22,

¹ “Motion of Intervenor-Appellant For Reconsideration of Order Expediting Appeal,” Box 69, Plyler v. Doe, 78-311, National Archives at Fort Worth, Texas.


³ “Motion to Postpone Oral Argument or Motion to Stay Appeal Pending Decision in In Re Alien Children of Texas Education Litigation MDL-398,” National Archives at Fort Worth, Plyler v. Doe, 78-311.

⁴ “Order Denying Tyler ISD Motion for Postponement,” Box 69, Plyler v. Doe, 78-311, National Archives at Fort Worth, Texas.

1980, Judge Brown sent a copy of Judge Woodrow Seals’ “monumental opinion” to Judges Johnson, Dyer, and Politz, thinking that “it might be of some help in the decision of your case.”  

After Seals’ decision was announced, Gov. Bill Clements promised to appeal. “I don’t agree with it. There’s a contradiction of terms in this that goes beyond mere legal question. We have the contradiction of someone being illegal on the one hand and being forced into a legal school situation. I don’t think it will stand in appeal court.” Alton Bowen, the State Education Commissioner, estimated that the ruling would cost Texas up to $100 million, aside from the added costs of finding new teachers and more classroom space. 

Texas Attorney General Mark White said that the state would appeal Judge Seals’ ruling. In addition, he said that the state was considering a lawsuit against the federal government.

“Now we’re being told to pay for the failures of the Justice Department,” he said. “They’re calling upon the taxpayers in the state to pay for undocumented workers’ children who are unlawfully in the country.” The federal government “caused the problem and they’re the ones who should pay for it.” White stressed the fact that the United States Justice Department intervened on behalf of the children in the Houston lawsuit. “I think people should be aware that the Justice Department is taking a position supporting illegal alien children when they (the government) are the cause of the problem in the first place.” He predicted that Mexican-American students would suffer from the ruling, as it would overburden the already stressed bilingual education program. “This would tend to dilute bilingual efforts. We already have

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7 Newspaper clipping, “State School Funds For Aliens Ordered,” The Phoenix Gazette, July 22, 1982, Box 13, Folder 4, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
difficulty finding bilingual teachers. It would dilute it possibly to the point of defeating the whole purpose of providing a quality education for these children.”

Houston school board president Tarrant Fendley also complained about Texas having to absorb the cost of the new students. “Since they’re here because of U.S. Immigration and Naturalization Service didn’t do its job, the financial burden should be their responsibility. It should fall on the people of North Dakota as well as the people of Houston and Laredo.”

Texas Attorney General Mark White said, “I think what we have here is a classic case of where the federal government failed to enforce the immigration laws and now they are saying we have to pay for their failures…. I am not against educating illegal aliens’ children. But the problem is, who is going to pay? There are two big losers in this. First, the children of Mexican-Americans who are trying to use the bilingual program. It is going to be spread too thin. There are not enough teachers. Second, the taxpayer who is going to be required to pay for the expenses of these children, who should be paid for by the nation as a whole.”

Bob Bullock, the state comptroller, publicly disagreed with state officials who predicted that Seals’ decision would bankrupt the state. He said that educating the undocumented children would only increase the state education budget by about 1.4%, or about $40 million of the state’s $2.8 billion budget for education. Others had estimated that the cost would be up to five times higher. Bullock pointed out, “Illegal aliens have been paying sales tax, motor vehicle tax and gasoline tax just like Texas residents. Some may treat them as second class citizens, but they are

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8 Jorjanna Price, “Texas to Appeal Aliens Decision,” undated newspaper clipping, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

9 Undated newspaper clipping, “Denial of Education to Aliens Held Illegal,” Box 13, Folder 8, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

10 Newspaper clipping, “Schooling for aliens,” Austin American-Statesman, July 23, 1980, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
first class taxpayers.””\textsuperscript{11} “Frankly,” Bullock said, “it’s time we quit worrying about where some kid was born and start worrying about what kind of education all our kids are getting.”\textsuperscript{12}

On August 12, 1980, about three weeks after Seals’ ruling, the Fifth Circuit Court of Appeals stayed Seals’ decision, meaning that school districts were excused from obeying Seals’ injunction to enroll undocumented children. \textsuperscript{13} In response, Houston I.S.D. reverted to its policy of demanding a $162 per month tuition fee for undocumented alien children. Dallas I.S.D. officially prohibited their admittance altogether, but enforcement had been and was expected to continue to be lax. Gov. Clements praised the decision, but supporters of Seals’ ruling were understandably dismayed. “The higher court is creating chaos and disorder,” complained Ruben Bonilla, president of the League of United Latin American Citizens. “I never thought a federal court would advocate functional illiteracy. It (the ruling) is legally and morally unconscionable.” Isaias Torres, an attorney involved in the Houston cases, was disappointed. “This means the children probably won’t be able to go to school for several years.”\textsuperscript{14}

In a letter to former U.S. Senator Ralph Yarborough, Seals told the former Senator that he had recently discussed the case with another judge, John R. Brown, and with a celebrated Houston attorney, Joe Jamail. The topic of conversation was the Fifth Circuit stay, which had the

\textsuperscript{11} Newspaper clipping, “Church official praises ruling on alien school issue,” undated, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

\textsuperscript{12} Newspaper clipping, “Texas can afford to educate alien children, Bullock says,” \textit{Austin American-Statesman}, July 24, 1980, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

\textsuperscript{13} Newspaper clipping, “Access to Free Education for Illegal Alien Children,” \textit{The New York Times}, August 26, 1980, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

\textsuperscript{14} Newspaper clipping, “Court Stays Illegal Alien Ruling,” \textit{The Phoenix Gazette}, Aug. 3, 1980, Box 13, Folder 4, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
effect of freezing Seals’ ruling while the Fifth Circuit considered the case rather than allowing the ruling to take effect. Seals predicted that Judge Lewis Powell would overturn the stay:

“I told Jamail and Judge Brown that the opinion was written for one person and that person was Mr. Justice Powell. 
“I further told them that if Mr. Justice Powell read this decision closely, he would vacate the Fifth Circuit’s stay. Judge Brown thought it was a little presumptuous of me to think that way, but I was certain that Mr. Justice Powell would know what we were writing about. 
“Lo and behold, the next day Mr. Justice Powell vacated the stay imposed by the panel of the Fifth Circuit.”  

Judge Seals was right, and on September 4, 1980, Justice Lewis Powell lifted the Fifth Circuit stay, ordering that undocumented schoolchildren across Texas could attend school that fall pursuant to Judge Seals’ order.  

Now those interested in the contest over Section 21.031 turned to another three-judge panel of the Fifth Circuit, where a ruling on Judge William Wayne Justice’s district court decision was imminent.

**Judge Frank M. Johnson**

Studies of *Plyler v. Doe* have focused on the District Court in Tyler and William Wayne Justice and on the Supreme Court decision written by Justice William Brennan, while overlooking the crucial Fifth Circuit decision written by Frank Minis Johnson. On one hand, the tendency to overlook the Fifth Circuit is understandable – the case was probably headed for the Supreme Court no matter what the outcome at the Fifth Circuit might be. It presented a truly novel constitutional question, the applicability of the Equal Protection Clause to undocumented

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15 Letter from Woodrow Seals to Ralph W. Yarborough, September 9, 1980, Box 12, Folder 31, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

immigrants; it technically only addressed the decision by Judge Justice, even though the constitutional questions were identical to those addressed by Judge Seals in *In re Alien Children*; and the case produced conflicting results in different district courts, suggesting profound differences of opinion in the federal courts that the highest court should address.

Scholars of legal history, however, will note that Frank M. Johnson was arguably the most highly regarded of the federal judges who wrote opinions on the *Plyler* case. In 1976, after twenty years as a district court judge, *New York Magazine* declared him “The Real Governor of Alabama,” noting that he had almost single-handedly forced his state to change its prisons and mental health institutions, its voting districts and regulations, its schools, and how it levied property taxes, among other things. Martin Luther King had declared that Johnson gave “true meaning to the word justice,” but even those he ruled against admired and respected him. The Alabamian who wrote George Wallace’s 1963 “segregation now and forever speech,” for example, admitted, “Johnson is the finest judge I’ve ever seen. I always felt he was he was totally fair.” Fred Gray, a civil rights lawyer, remembered, “When (Johnson) became a federal judge in October of 1955, everything in this state was totally segregated – including buses, restaurants, theaters, prisons and schools. His rulings changed everything.”

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In 1977, the MacNeil/Lehrer Report summed up Frank Johnson’s impact on Alabama in his two decades on the federal bench:

His life was continually threatened and his mother’s house bombed as a result of civil rights and civil liberties decisions he’s made, and they include: ordering the city buses of Montgomery and the public schools of Alabama integrated; the abolition of the state poll tax; reapportionment of the state’s voting districts and restructuring its tax structure; upgrading conditions for prisoners and inmates of Alabama prisons and mental hospitals; and putting women on juries. 20

Texas Monthly, in a 1978 article calling William Wayne Justice the “Real Governor of Texas,” recognized Johnson and Justice both belonged to a new breed of judges “who have grasped the lesson of Brown v. Board: ultimately the remedy is more important than the substantive decision. Judges have always been part of the equation of American politics—few powers are more potent than the ability to strike down laws as unconstitutional—but until recently their power has been mostly abstract. No longer: judges run school districts, prison systems, mental hospitals, and state property tax administrations.” 21

Johnson was a rarity in Alabama – a lifelong Republican in an overwhelmingly Democratic state. He was from Winston County, located in a part of northern Alabama where cotton didn’t grow and slavery wasn’t as prevalent. Johnson’s home was nicknamed the “Free State of Winston” during the Civil War when it refused to support the Confederacy and tried to secede from Alabama. 22 His great-grandfather was the first Republican sheriff of Fayette County, Alabama, in 1875, and his father was a probate judge and at one point the only


Republican in the Alabama state legislature. Johnson graduated from law school in 1943, and then was drafted into service in World War II. He was wounded twice and received a Bronze Star for his service in the D-Day invasion of Normandy, where he fought under General Patton. After returning from war, Johnson became active in Republican politics while practicing law. He campaigned for Eisenhower in 1952, and was rewarded with an appointment as U.S. Attorney when the position opened in Eisenhower’s first term. Johnson was only 34, making him one of the youngest U.S. Attorneys in the nation. When Johnson was only 37, Eisenhower made him the youngest U.S. District Court judge in the country. Just over a decade later, Time called Johnson “one of the most important men in America,” claiming that he had wrought social and political changes that affect … all of the nation.”

In 1956, Judge Johnson took the lead on a three-judge panel that applied the principles of Brown v. Board of Education to the segregated bus system in Montgomery, Alabama. His decision in Browder v. Gayle was an important victory for the Civil Rights Movement, vindicating the Montgomery bus boycott. It was an audacious decision, because technically the “separate but equal” standard of Plessy v. Ferguson still applied to public transportation. Johnson recalled a quarter of a century later that his decision was “probably the first time in the history of

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24 Steven Brill, “The Real Governor of Alabama.”

25 “Interpreter in the Front Line.”

26 Ibid.

this country that a district court has ever overruled a decision of the Supreme Court of the United States.”

In what *Time* magazine called “his finest hour,” Johnson presided over a trial of three Klansmen who murdered Viola Liuzzo after the 1965 Selma march. The three had been tried and acquitted of murder in a state court, despite the testimony of an FBI informant who saw the murder. In Judge Johnson’s court on a lesser charge, the jury reported to Johnson that it was “hopelessly deadlocked” after just one day of deliberation. Johnson gave them a lecture and motivational speech: “There is no reason to assume that the case will ever be submitted to twelve more intelligent, more impartial or more competent men to decide it, or that more or clearer evidence will be produced on one side or the other,” he told them. Prodded to do its duty, the jury reported back with guilty verdicts three hours later.

Like other southern judges who issued unpopular civil rights opinions, Johnson faced social ostracism, threats, and one attempted bombing attack. After his first controversial ruling in favor of the bus boycott in Montgomery, Johnson and his wife found that no one would sit near them at their Baptist church. After two weeks of seeing their fellow parishioners get up and move away from their pew, the Johnsons stopped attending the church. The bombing occurred in 1967 after Johnson issued a series of controversial rulings concerning school desegregation. The dynamite bomb targeted Johnson but was placed at his widowed mother’s house by mistake.

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30 “Interpreter in the Front Line.”

31 Steven Brill, “The Real Governor of Alabama.”
and damaged exterior walls and windows of the two-story house. Johnson’s mother, who was alone and upstairs at the time, was uninjured.\textsuperscript{32} The perpetrator of the bombing was never got.\textsuperscript{33}

Although the civil rights movement considered him an important ally, and despite his obvious sympathy for the movement, Johnson insisted on deciding cases according to the law and the Constitution as he saw them rather than according to political preferences. He took a dim view of some of the more confrontational tactics of the civil rights movement, for example, preferring that activists seek change in the courts rather than in the streets. When 167 protestors were arrested at a demonstration in Montgomery in March 1965, Johnson insisted that they must face the consequences for disobeying the law: “Those who resort to civil disobedience such as petitioners were engaged in prior to and at the time they were arrested cannot and should not escape arrest and prosecution.” He denied that anyone, whether his cause was “civil rights” or “states rights,” could pick and choose which laws to obey and which to disobey, and said that the idea that someone could refuse to obey laws he or she considered morally wrong was contrary to the rule of law. Johnson concluded:

Demonstrations and protests in a disorderly and unpeaceful and unlawful manner are not sanctioned by the law as this court understands it. There is a place in our system for citizens, both Negro and white, who wish to protest civil wrongs or present grievances against violations of their rights to do so, provided they act in a peaceful and orderly manner and provided they resort to the courts and not to the streets when they are thwarted in the exercise of this privilege by authorities acting under color of the law.\textsuperscript{34}

\textsuperscript{32} “Terrorist Bomber To Be Caught, Police Chief Vows,” \textit{The Montgomery Advertiser}, April 27, 1967.

\textsuperscript{33} Frank M. Johnston interviewed by Bill Moyers, Montgomery, Alabama.

Johnson’s only reversal by the Supreme Court came in a case early in his career. Ironically, he was overturned for hewing closely to Supreme Court precedent in a 1957 case involving a challenge to heavily gerrymandered voting district lines that prevented almost all African Americans from voting in municipal elections in Tuskegee, Alabama, despite comprising about eighty percent of the population. Johnson correctly ruled that prevailing constitutional law gave him no power to intervene in state elections. The Supreme Court overruled him in *Gomillion v. Lightfoot*, a case considered a stepping stone to the Court’s historic “one man, one vote” decision in *Baker v. Carr*. The Tuskegee attorney that Johnson ruled against in that 1958 case was named Fred Gray. Gray had successfully argued the Montgomery bus boycott case before Johnson, and would appear in Johnson’s court many times over the next several years. When the Judge died in 1999, Gray remembered, “Judge Johnson set the precedent and gave moral courage to individual litigators who felt they had nowhere else to go for redress.”

An ACLU lawyer who argued many cases in Johnson’s court said he was unpredictable and yet consistent – he always interpreted the law as he saw it rather than play favorites. “You never know how he’s going to rule,” the lawyer said, “But no matter whether he’s ruling for me

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36 “Interpreter in the Front Line”; Johnson’s decision was in *Gomillion v. Lightfoot*, 167 F. Supp. 405 (1958); the Supreme Court ruling was in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).


or against me… I always know that it’s based on how he reads the law. Frank Johnson is the system at its best.”

Texas Politics: Mexican Americans and the Gubernatorial Campaign of 1978

When John Hill defeated Dolph Briscoe for the Democratic Party nomination for governor, one congratulatory letter addressed him as “Governor Hill,” perhaps assuming as many did that the general election was a foregone conclusion. Another writer congratulated Hill’s wife, Bitsy, on becoming “Texas’s First Lady” and asked that she pass along his greetings to “The Governor.” The sense of overconfidence evident in the congratulatory letters to Hill was a sign of a bygone era when Texas was ruled by Democrats and the only competitive races were in the primaries. Between Judge Justice’s ruling for the U.S. District Court in Tyler in the fall of 1978 and the Fifth Circuit Court’s decision to uphold that ruling two years later, Texas would undergo a historic change in its political history. For the first time since Reconstruction, a Republican would elect governor.

The Plyler v. Doe case was litigated through the courts from 1977, when the case was first filed in William Wayne Justice’s federal district court in Tyler, to 1982, when the Supreme Court issued its opinion upholding Justice’s decision. During that time, Texas and the nation

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39 Steven Brill, “The Real Governor of Alabama.”

40 Letter from Bob England to John Hill, May 8, 1978, Box 8, Folder 253-8-6, John Hill Campaign Office Records, University of Texas at Arlington Special Collections.

41 Letter from Bill Rudd to Bitsy Hill, May 8, 1978, Box 8, Folder 253-8-6, John Hill Campaign Office Records, University of Texas at Arlington Special Collections.

were undergoing an important political change. For the first time in history, Texas was a battleground state. For a few decades, after about a century as a solidly Democratic state and preceding its recent stretch as a solidly Republican one, Texas had one U.S. Senator from each of the two major political parties, while the two parties traded terms in the Governor’s office. Texas had voted for Dwight Eisenhower, a Republican, twice in the 1950s, then had voted for Democratic candidates in 1960, 1964, and 1968. After casting its electoral votes for Richard Nixon in 1972, Texas chose a Democratic candidate for the last time in 1976, when Jimmy Carter won the state. Just as Plyler v. Doe was making its way to the Supreme Court, Ronald Reagan’s landslide victory over Jimmy Carter in the 1980 presidential elections seemed to mark the emergence of sunbelt conservatism as a legitimate rival to the Democratic liberal coalition that had dominated American politics since the 1930s. The Democratic Party’s dominance was also waning at the state level, as Republicans gradually began to contest statewide elections and took more seats in the state legislature. After dominating Texas politics for almost a century after Reconstruction, Texas Democrats were under increasing pressure from the Republican Party.43

In 1977, Willie Velasquez, founder of the Southwest Voter Registration Education Project, told Robert MacNeil of the MacNeil/Lehrer report that Democrats and Republicans were paying attention to Mexican American voters in Texas as never before:

This is the first time that I have seen a reasonable approach to the Mexican American vote. Previously, for example, what you would normally see is the Spanish translation of the English campaign. Now you’re seeing the campaigns being run more professionally. By that I mean they are starting to run Mexican American Latino campaigns; they are

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starting to take surveys, they’re starting to take polls, they’re starting to do things completely in Spanish and not merely translating their English-speaking campaigns into Spanish. That, I think, is a significant difference because in that way they’re starting to address themselves to the Mexican American vote, not so much because they, in my opinion, like the Mexican Americans or the Latinos so much as because they are starting to read the reports and they’re starting to see the vote totals.  

During this time period, there were troublesome signs of disaffection among Texas Mexican-American Democrats. In 1978, Texas Mexican-American Democrats expressed concern about a Carter administration plan to transfer about 4000 people from Immigration and Naturalization Services in the Justice Department to the Treasury Department, weakening INS Commissioner Leonel Castillo, a Texan and the first Mexican-American to hold the position. Castillo’s supporters said he had brought “understanding and compassion for civil rights to INS.” There were concerned that he was being slighted, and worried that the reorganization signaled a retreat from his approach that would “have damaging consequences for the Mexican-American community.”

One outlet for disaffected Mexican-American Texans was the Raza Unida Party. Rosie Castro, a young Mexican American from San Antonio active with the Raza Unida Party, explained the disillusionment with the two major parties. In the Democratic Party, Chicanos were “getting nowhere fast. I mean, Mexicanos were not an integral part of the party, not at the state level and not at the national level and even not at the local level. There was, you know, we

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used to say there was more money in Texas allocated for sheeps and goats and roads than for migrant farm workers.” The Republican Party was virtually nonexistent, but the Democratic Party didn’t prioritize any of the needs of Mexican-American people. Castro had been active in San Antonio Democratic politics in the 1960s, and “I knew that someday that if I stayed in the party structure, I could benefit myself from the stand point that I could probably reach whatever the cap was for Mexicans to reach. But that was not what it was about. Our people were excluded and treated differently basically because we were Chicano. And that is what Raza Unida pointed out.”

The Raza Unida Party claimed to offer “Chicanos and other disenfranchized minorities of Texas meaningful participation in the political process of this state,” and argued “that the Democratic and Republican Parties have never had (and never will have) the interest or desire to serve the needs of the Chicano Community.”

One of the issues that Raza Unida addressed, and which some young Mexican Americans found both Democrats and Republicans to be inadequate on, was the plight of undocumented immigrants. At its 1978 state convention, the Raza Unida Party strongly supported undocumented immigrants:

Be it resolved that the Texas La Raza Unida Party continue its support of the undocumented worker from Mexico as well as increase community awareness of the real issues by rejecting the Carter proposal and emphasizing that the issues are racism and exploitation, and that much of the current debate serves only to obscure the basic problems…. Be it resolved that the Texas La Raza Unida Party supports unconditional amnesty for all Latinos in this country, regardless if they are here legally or not. This amnesty is to

47 Oral History Interview with Rosie Castro, by José Angel Gutiérrez, July 1, 1996. Tejano Voices, the University of Texas at Arlington Center for Mexican American Studies.

48 “11 Questions About RAZA UNIDA PARTY,” Box 2, Folder 14, Raza Unida Party Records, 1969-1979, Benson Latin American Collection, University of Texas Libraries, the University of Texas at Austin.
include equal access to all social services, equal protection under the law, and the right to vote if duly registered.\textsuperscript{49}

In his 1978 campaign for governor, the Raza Unida Party candidate Mario Compean expressed weariness of one-party rule in Texas. It was time for a change, he suggested. “Even a change to a Republican governor would be healthy. I would love to be governor, but what’s the next best thing? Change.”\textsuperscript{50} Years later, Compean claimed that his gubernatorial campaign in 1978 helped prevent Democrat John Hill from winning the state election: “We have enough of a block that we can deny elections to candidates. And that’s what happened with my race. You see the first Republican governor elected since Reconstruction in Texas. However small amount of votes I got it was enough to deny John Hill the election.”\textsuperscript{51}

After the election, Compean told reporters that seeing John Hill lose felt like a victory. “I was considered a spoiler, but as far as we are concerned, we won.” He predicted that in the long run the election of Bill Clements and the reelection of John Tower would be good for Mexican-Americans. “We are extremely happy with the results,” he said. “This will definitely help Mexican-Americans in the long run, because this means that the Democratic Party no longer has a monopoly on the Mexican vote.” He also figured that the Democratic Party would learn its lesson after losing the two 1978 races, predicting that now its “harassment of the Raza Unida Party will end.” He predicted that “Mexican-Americans will be better off under Clements than

\textsuperscript{49} “Resolutions to be Voted on at State Convention 1978,” Box 6, Folder 2, Raza Unida Party Records, 1969-1979, Benson Latin American Collection, University of Texas Libraries, the University of Texas at Austin.

\textsuperscript{50} Newspaper clipping, Mike Stephens, “Raza candidate sees victory in November.” Box 6, Folder 8, Raza Unida Party Records, 1969-1979, Benson Latin American Collection, University of Texas Libraries, the University of Texas at Austin.

they would have had Hill won the race” because “Clements knows… that he will have to listen to us.” He had met Clements two weeks before the election, and was impressed. “He was willing to discuss the differences between our parties. At least he was willing to talk. Hill was not. I think Clements will be very tolerant to our point of view. He knows he will have to be very careful what he decides and how he decides matters relating to the Chicano community, and that is good.” Senate candidate Luis Diaz de Leon also claimed to feel “very good that I managed to be the spoiler in this race, claiming that the 18,000 votes he received made the difference in the outcome. 52

Perhaps in response to the Raza Unida Party’s threat to take Mexican-American votes from the Democrats, a new organization called “Mexican American Democrats of Texas” was organized in the late 1970s to fight for Mexican-American interests within the party. Sylvia Rodriguez, leader of the group and a national Democratic committeewoman from San Antonio, admitted to reporters in 1978 that President Carter was “in somewhat of a little trouble” in Texas. 53 Rodriguez, also the president of Democratic Women of Bexar County, admitted that she was “not enamored” of President Carter, but said she had “no use” for either the Raza Unida Party or the Republicans, and didn’t approve of the tactic of threatening to “defect” from the Democratic Party in order to win concessions. 54

52 Newspaper clipping, Guillermo Garcia, “Raza Unida candidates pleased with spoiler role,” Austin-American Statesman, Nov. 9, 1978. Box 6, Folder 8, Raza Unida Party Records, 1969-1979, Benson Latin American Collection, University of Texas Libraries, the University of Texas at Austin.


The Carter administration tried to reach out to organizations like MAD (Mexican-American Democrats). Sylvia Rodriguez was part of a group of 600 Hispanic leaders invited to the White House in September 1978. While President Carter was forced to miss the reception and brunch for the guests because he was at Camp David negotiating a peace deal between Egypt and Israel, First Lady Rosalynn Carter told the invitees that they were “a very special group,” and that she and the President had “a feeling of warmth” for them “because we traveled widely in Spanish-speaking areas long before Jimmy was President.”

Nevertheless, Carter received a share of the blame when Republicans were successful in the 1978 state elections. One San Antonio commentator suggested that candidate Bill Clements had wrapped “Jimmy Carter around John Hill’s neck like a dead chicken.”

Carter’s limited appeal to Hispanic voters in Texas may have contributed to the low turnout that led to victory for Republicans like John Tower and Bill Clements. A San Antonio newspaper listed “apathy among Mexican-American and black voters” as a contributing factor in the Democrats’ defeats, noting that turnout was low among minorities in Bexar, Nueces, and Cameron counties, while turnout was higher in traditionally Republican sections of those counties. The low turnout in Bexar County alone may have been enough to determine the outcome of both the U.S. Senate and the gubernatorial elections, which were very close. The chairwoman of the Bexar County Democratic Party claimed that the Democratic candidates would have won their contests with

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56% of the Bexar County vote rather than the 51% she received. She claimed that an extra 25,000 votes could have been had with more effort from the candidates and higher turnout among the Democratic voters. One factor that may have contributed to the low turnout, at least among Mexican Americans, was the harsh criticism of Carter that came from Hispanic organizations like LULAC, which suggested just weeks before the elections that President Ford had been better than Carter on issues important to Hispanics.

The Raza Party Unida candidates for U.S. Senate and Texas Governor, Luis Diaz de Leon and Mario Compean, were happy to take credit for the Republicans’ victories. “We won by losing,” said Compean. “We showed both Democrats and Republicans they have to take us seriously. We said at the beginning we wanted to break the Democratic Party’s monopoly and we accomplished that goal. I’m very happy about that. This gives Mexican-Americans the necessary clout to negotiate with both parties for things we want in the future.” Democrats agreed that the Raza Unida candidates were spoilers in the election. “There’s no doubt about it,” said Bexar County Democratic Party Chairwoman Joyce Peters. Her Republican counterpart in Bexar County concurred. “Raza Unida made the difference and proved its point,” said Republican County Chairman Lamar Smith. “Both parties will take the Mexican-American vote more seriously in the future.” Compean said, “We’re the best thing that happened to the Republican

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Party in Texas,” and that “finally, there will be a competitive, two-party political system in the state. That’s a healthy trend.” 60

Alex Viera, a Bexar County Raza Unida co-chairman, agreed that the advent of two-party politics in Texas was good for Mexican Americans. “We believe in this election that Mexican-Americans won out in the long run. We want to spread the word that Mexican-Americans don’t have to be afraid of having a Republican governor, because now the Republicans will have to look to our interests more and more. We’re in a position to tell both parties what more must be done for Mexican-Americans and both parties will have to take us seriously. We want action, not promises. One thing’s for certain. If Clements doesn’t help the Mexican-American community, he’ll be a one-term governor.” 61

In another interview, Compean admitted forthrightly that he was very happy that Clements won, admitting that he preferred the Republican candidate to his Democratic rival John Hill. Likewise, Raza Unida U.S. Senate candidate Luis Diaz de Leon pronounced himself “tickled to death” by the reelection of Republican John Tower. A few weeks before the election, de Leon had accused Bob Krueger, the Democratic candidate, of trying to buy him out of the race. 62 Krueger’s campaign denied the accusation. 63


61 Ibid.


Bill Clements and the Issue of Undocumented Immigration

During the years that the *Plyler* decision wound its way through the courts, Republicans like Bill Clements were aware of the importance of the emerging Mexican American voting bloc. Clements addressed the national LULAC convention in Houston in 1979, declared “Hispanic Heritage Week” in 1980, and stumped for voters in Brownsville in 1982.

Clements himself seems to have had an uneasy relationship with Hispanic organizations, however, and occasionally made ill-advised quips that must have hurt his efforts to appeal to Mexican American voters. When asked his opinion about a Hispanic scholar in 1981, Clements was dismissive, “He’s just another Mexican with an opinion.” Ruben Bonilla, national president of LULAC in 1979, urged Clements to appoint more Mexican Americans to positions in Texas government, saying, “You know, Governor Clements, you’re our governor, too.” “No, I’m not,” Clements retorted. “You people supported John Hill.” When members of the Texas Farm Workers Union completed a 600 mile march to the Texas capital, Clements suggested that they keep marching—to California, to visit Governor Brown. During the 1978 campaign, Clements’

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64 Remarks prepared for Governor William P. Clements, Jr. to the National Convention of the League of United Latin American Citizens, Houston, Texas, June 14, 1979, Box 30, Folder 43, Cushing Memorial Library & Archives, Texas A&M University, Clements Texas Papers, https://tx.clementspapers.org/clementstx/27180?solr_nav%5Bid%5D=5432ffcd45cbeed0d785&solr_nav%5Bpage%5D=0&solr_nav%5Boffset%5D=0, accessed January 28, 2021.

65 Official memorandum by Governor William P. Clements, Jr., declaring Hispanic Heritage Week, September 4, 1981, Box 5, Folder 16, Cushing Memorial Library & Archives, Texas A&M University, Clements Texas Papers, https://tx.clementspapers.org/clementstx/7921?solr_nav%5Bid%5D=151ff78c1bfe46d0a27e&solr_nav%5Bpage%5D=0&solr_nav%5Boffset%5D=0, accessed January 28, 2021.

66 Newspaper clipping, “Governor stumps for Hispanic vote--Clements hears plight of poor Brownsville parishioners on campaign swing,” October 26, 1982, Box 21, Folder 6, Cushing Memorial Library & Archives, Texas A&M University, Clements Texas Papers, https://tx.clementspapers.org/clementstx/87759?solr_nav%5Bid%5D=4894107d6606e6b5d9c7&solr_nav%5Bpage%5D=0&solr_nav%5Boffset%5D=0, accessed January 29, 2021.

67 List of quotes regarding Bill Clements on Mexican-Americans, undated, 1981, Box 70, Folder 46, Cushing Memorial Library & Archives, Texas A&M University, Clements Texas Papers,
aides asked him not to talk about bilingual education in at a LULAC function because his stance on the subject had already upset Mexican Americans. In 1982, advisors asked him to stop comparing Spanish-speakers in Texas to Quebec separatists, as the comparison offended many Mexican Americans.

There was open animosity between Clements and Ruben Bonilla, the national leader of LULAC. While campaigning for governor in 1978, Clements angered Bonilla by referring to illegal immigrants as “wetbacks.” When asked about issues relating to Mexican-Americans in Texas, an exasperated Clements responded, “I’m not running for governor of Mexico, you know.” In response to a letter from a Texan in 1979, Clements called Bonilla “a gnat.” Bonilla responded by calling Clements a “buffoon.” Bonilla said, “Clements’ pattern is consistently anti-Hispanic, anti-minority… I feel I properly represent Hispanic sentiment in this state. The governor does not.” Referring to Clements’ attitude towards illegal immigrants, and perhaps even to all Mexican immigrants, Bonilla said, “The governor has shown a great interest in Mexico’s oil, but rejects its people.”

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68 Memo from Luis Vera to Bill Keener regarding LULAC Function, La Villita Assembly, August 10, 1978, August 10, 1978, Box 14, Folder 31, Cushing Memorial Library & Archives, Texas A&M University, Clements Texas Papers, https://tx.clementspapers.org/clementstx/1125?solr_nav%5Bid%5D=b898a7996926478d99c3&solr_nav%5Bpage%5D=0&solr_nav%5Boffset%5D=0, accessed January 28, 2021.

69 Memo from Rick Montoya to Jim Francis regarding Quebec Statement, July 12, 1982, July 12, 1982, Box 26, Folder 17, Cushing Memorial Library & Archives, Texas A&M University, Clements Texas Papers, https://tx.clementspapers.org/clementstx/11685?solr_nav%5Bid%5D=0a53f8288079ee701295&solr_nav%5Bpage%5D=0&solr_nav%5Boffset%5D=0, accessed January 28, 2021.


Clements was consistent throughout his administration on two points with regards to the issues regarding *In re Alien Children, Plyler*, and the constitutionality of Section 21.031. He complained that it was wrong for Texas to have to pay for the education of undocumented children, while simultaneously calling for a new guest worker program and the legalization of undocumented aliens already in the United States. On a call-in radio show in October 1979, Clements protested that it was “not fair” and “not equitable” for Texas taxpayers to have to pay for the education of undocumented immigrants. A woman called into the program to ask, “How can we say we’ll educate the children when the parents are here illegally?” Clements agreed, but suggested that the solution to the problem was to document them. “This way, they would be entitled to municipal services and equal protection under the law. If they’re legal, they will pay taxes and Social Security and be like any other citizen.”

While *In re Alien Children* was underway in Judge Seals’ Court in Houston and a three-judge panel considered the Texas’s and Tyler I.S.D.’s appeal of Judge Justice’s decision in *Plyler*, Gov. Clements outlined his own proposal for solving the nation’s illegal immigration problem. In March 1980, Clements suggested that there should be a “special accelerated way” for undocumented immigrants who had lived in the United States for five years to become “viable citizens.” Once documented, they could pay taxes and receive public benefits like education and other social services. In the summer of 1980, some Republicans urged Clements to reconsider his opposition to providing public school educations to undocumented immigrant

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children, a stance which some feared would hurt Ronald Reagan’s chances in Texas in the looming presidential election.  

Just days before Judge Seals’ opinion, Clements defended his plan. He suggested a $1000 fine for employers, which he insisted on calling a “relocation fee” rather than a criminal sanction, saying, “I am opposed to a criminal fine against employers. This is wrong.” Clements wanted a new guest worker program, which he claimed would be superior to the old Bracero program because workers would be guaranteed a minimum wage as well as health insurance. He also proposed that those undocumented immigrants already in the United States be given a “tremendously accelerated” path to citizenship if they had clean records, arguing that “hardworking people in the community should have a fast track for citizenship.” Leonel Castillo, former head of the Immigration and Naturalization Service, praised Clements’ proposal while suggesting that it was “more liberal” than Jimmy Carter’s defeated immigration plan. Clements was irked by the comparison, saying, “I didn’t know President Carter had a plan.” He argued that his “fast track” to citizenship was not amnesty, saying of Carter’s proposal, “Amnesty is a buzzword for procrastination. It will never work.”

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74 Memo to William P. Clements through thru Jon Ford for G.G. Garcia regarding Education for Children of Illegal Aliens Recent Court Decision, July 23, 1980, Box 19, Folder 1, Cushing Memorial Library & Archives, Texas A&M University, Clements Texas Papers, https://tx.clementspapers.org/clementstx/26627?solr_nav%5Bid%5D=80c176085860d356592e&sorl_nav%5Bpage%5D=0&sorl_nav%5Boffset%5D=0, accessed January 28, 2021.

The Fifth Circuit Ruling

On October 20, 1980, the United States Fifth Circuit Court of Appeals upheld U.S. District Court Judge William Wayne Justice’s ruling in Plyler v. Doe. Judge Frank M. Johnson wrote the opinion explaining the three-judge panel’s unanimous decision.76

The Fifth Circuit opinion was issued almost exactly three months after Judge Woodrow Seals’ decision in In re Alien Children.77 Judge Johnson’s opinion was more similar to Judge Seals’ decision of July 21, 1980, than to Judge Justice’s decision in Tyler. Like Seals, Judge Johnson rejected the argument that Section 21.031 was preempted by federal legislation, but nevertheless concluded that the law violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution. After Seals’ decision, the State appealed to a panel of Fifth Circuit judges for a stay to prevent Seals’ injunction from taking effect. The panel agreed, providing a stay which would have allowed school districts to continue excluding undocumented children or requiring tuition payments. However, on September 4, 1980, Judge Lewis Powell of the United States Supreme Court vacated the stay, allowing undocumented children across Texas to attend school.78

Johnson expressed sympathy for Texas’s concerns. “A large part of the controversy surrounding illegal immigrants,” he wrote, “springs from the resentment that the federal government is not enforcing its immigration laws and the fears that the aliens illegally residing in

76 Doe v. Plyler, 628 F.2d 448 (1980). Copies of the draft of the opinion that Frank Johnson sent to his colleagues on the panel are also available in Box 229, Doe v. Plyler case file 78-3311, Folder 1 of 4, Frank M. Johnson Papers, Manuscript Division, Library of Congress, Washington, D.C.


the United States will depress local labor markets or drain states’ social programs.”

However, sympathy for Texas’s predicament did not equate to approval for its methods of dealing with the problem. Johnson acknowledged that “Texas is suffering the local effects of a national problem,” and that when “national immigration laws are not or cannot be enforced, it is the states, most particularly the border states, that bear the heaviest burden.” Nevertheless, federal courts “cannot suspend the Constitution to aid a state to solve its political and social problems.”

In *De Canas v. Bica*, a case originating in California that had been decided by the U.S. Supreme Court in 1976, the Court had rejected the argument that “every state enactment that which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power…” In *De Canas*, the Supreme Court had upheld a California statute mandating criminal and civil penalties to employers of undocumented workers “if such employment would have an adverse effect on lawful resident workers.” Following the *De Canas* precedent, Johnson argued that Section 21.031 was preempted by federal law only if “Congress has clearly and manifestly evidenced an intent to occupy the field of education of illegal aliens” or if the statute “is an obstacle to the achievement of a congressional purpose.” The former argument was not made by the district court or by the plaintiffs. As for the latter argument, Johnson concluded that “the perceived conflicts” between the Texas statute and federal law “are at most illusory and that Section 21.031 does not conflict with federal policy.” Noting that federal policy excluded undocumented immigrants from food stamps, supplemental

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security income, Medicaid, and even most federal jobs, Johnson said that it was consistent with “federal policy for Texas to likewise deny illegal aliens its largess.”

Despite disagreeing with Judge Justice on the preemption issue, Frank Johnson nevertheless upheld the lower court’s decision. The key to Johnson’s decision to uphold the lower court was his conclusion that “all aliens—even those illegally within the territorial boundaries of the United States—are entitled to the equal protection of the laws.”

Johnson rejected Texas’s reliance on the case of Leng May Ma v. Barber for support. In that 1958 case, the Supreme Court had declared that an alien paroled within the United States but not legally admitted to the United States was not “within the United States” under the terms of the Immigration and Nationality Act. However, that decision was “wholly one of statutory construction”—how to understand the phrase “within the United States” in the Immigration and Nationality Act—and not constitutional interpretation, leading Johnson to conclude that the case was “inapplicable to the present situation.”

Judge Johnson noted that the Supreme Court in Yick Wo v. Hopkins had suggested, although not explicitly ruled, that the Equal Protection Clause applied even to illegal aliens. The Court had said, “The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: ‘Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.’ Those provisions are universal in their application to all persons within the territorial

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jurisdiction, without regard to any differences of race, or color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws.” (Emphasis added in decision)\(^{85}\)

Texas had also argued that it was unfair and illogical to “require the states to grant educational benefits to aliens illegally within the United States solely because the aliens violated the federal immigration laws and entered the country illegally,” pointing out that when the immigrants resided in their own countries, prior to their illegal entry to the United States, they clearly had no right to a free public education. Judge Johnson was dismissive, saying, “we find no merit to this argument.” Johnson pointed out that the right to due process accrued to all persons, even “upon mere illegal entry into the country.”\(^{86}\) Texas had likewise argued that it was illogical to hold that the federal government could deny benefits to illegal aliens when states could not; Johnson pointed out that Supreme Court precedent already held that states could not withhold benefits from legal aliens, but that the federal government could. “The illogic perceived by defendants is nothing more than a failure to recognize that the denial of federal benefits rests on the power of the federal government to regulate immigration—a power that was not reserved to the states.”\(^{87}\) Johnson concluded that the defendants had “advanced no plausible argument suggesting that the equal protection clause does not extend to aliens illegally within the country.”\(^{88}\)

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\(^{85}\) Ibid.

\(^{86}\) Ibid.


\(^{88}\) Ibid.
Having determined that the Equal Protection Clause protected illegal immigrants, Judge Johnson turned to the issue of the correct standard of review. Here, his reasoning followed very closely the reasoning of district judges Seals and Justice, declaring that the Texas statute failed to satisfy the demands of the rational basis test, the least strict of the methods for determining that a statute ran afoul of the Equal Protection Clause. Judge Johnson denied, as had the district court judges, that a mere desire to save money constituted a rational basis for the statute. “To accept this contention would mean that cost, *in and of itself*, could justify the exclusion of any group of people from any government program that requires funding. This is clearly not the case.” He also dispensed with Texas’s contention that the law would “lessen the incentive for aliens to illegally enter the United States,” making much of the fact that “the number of illegal aliens who bring their children to the United States is a small percentage of the total number of aliens illegally residing in the United States. Hence, Section 21.031 is aimed at only a small part of the total illegal immigration problem.” Although Johnson acknowledged that “a state is not required to ‘choose between attacking every aspect of a problem or not attacking a problem at all,’” (quoting a 1970 Supreme Court opinion, *Dandridge v. Williams*), he nevertheless took Texas to task for choosing “an ineffective means for discouraging illegal immigration,” while refusing “to enact the measure most likely to achieve its stated goal,” (sanctions on employers). This led Johnson to conclude “that the statute is not rationally related to its asserted goal.”

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Why did Johnson change his mind?

The substance of Frank Johnson’s opinion, especially regarding the two areas where he, Justice, and Seals all agreed – the Equal Protection Clause and the failure of Texas’s statute to pass the rational basis test – was not significantly different than the opinions of the two lower court judges. All three judges employed similar arguments in deciding that the Equal Protection Clause applied to illegal aliens and in determining that Section 21.031 lacked a rational basis sufficient to make it constitutional. Given that the three opinions are so similar in that respect, the most interesting thing about Johnson’s opinion is that he changed his mind at some point in the process of writing it, switching from the belief that the Equal Protection Clause did not apply to illegal immigrants and that the Texas statute should be upheld to the belief that the Equal Protection Clause applied to all persons regardless of their immigration status and that Judge William Wayne Justice’s opinion should be upheld. 92

Writing to his fellow panelists David W. Dyer and Henry A. Politz on September 10, 1980, Judge Johnson said, “You will remember that after oral argument and during our personal conference, I expressed the opinion that the case should be reversed. Further study and research have convinced me that the district court was correct in holding a denial of equal protection and that we should affirm on that basis.” 93 Two days later Judge Politz mailed his reply from his offices in Shreveport, Louisiana. “I enclose my concurrence in this excellent opinion. I am proud

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93 Ibid.
that my name is carried as a member of the panel.” A handwritten note stapled to the letter said, “Truly and excellent, scholarly opinion. Hank.” 94

On Sept. 8, 1980, Judge Johnson received from John R. Brown, a Judge on the Fifth Circuit Court of Appeals, a copy of Justice Lewis Powell’s order vacating the stay of District Judge Seals’ injunction against the enforcement of Section 21.031. 95

Johnson read the opinion and underlined several portions of it. Justice Powell wrote that in order for the Supreme Court to vacate a stay, “there must be a significant possibility that a majority of the Court eventually will agree with the District Court’s decision.” Powell said that In re Alien Children raised “a difficult question of constitutional significance” that “also involves a pressing national problem.” Therefore, it was “not unreasonable to believe that five Members of the Court may agree with the decision of the District Court.” Johnson underlined part of the next sentence as well, where Powell wrote that it was “possible to accept the District Court’s decision without fully embracing the full sweep of its analysis.” Powell concluded, “Under these circumstances, I conclude that the balance of harms weighs heavily on the side of the children, certainly in those school districts where the ability of the local schools to provide education will not be threatened. I therefore will vacate the stay instituted by the Court of Appeals, which applies to all school districts within Texas.” [Underlined in the original] 96

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Is there a clue to Johnson’s thinking in the opinion by Justice Powell? It’s doubtful that Powell’s decision swayed Johnson. First, it arrived only two days before Johnson’s opinion was ready to be circulated to the other members of the panel, so Johnson’s own opinions on the case were probably already formed. Powell was careful to point out that he had not reached a decision on the merits of the case, and did not discuss the merits in much detail, simply reciting the broad outlines of Judge Seals’ conclusions. Justice Powell did dismiss as “meritless on its face” Texas’s argument that an additional year without school would “not add further irreparable harm” to the undocumented children. Powell noted that expert testimony in the trial indicated that further delay would indeed cause irreparable harm to the children. Judge Johnson, probably having already made up his mind and about to release his own opinion, may have found in Justice Powell’s opinion confirmation of some of his own thoughts about the case – that it would likely be taken up by the Supreme Court, and that several Justices, including probably Powell himself, would agree with the opinions of judges Justice, Seals, and Johnson.97

An intriguing clue to Johnson’s change of mind is hinted at in the text of the opinion and explored more fully in footnote 20. At the conclusion to the section of the opinion discussing the Equal Protection Clause, Judge Johnson wrote, “Indeed, when we consider the ultimate results that would obtain if illegal aliens were not afforded the equal protection of the laws, we are convinced that the Fourteenth Amendment means what it says: All persons within the jurisdiction of a state are entitled to the equal protection of the laws of that State.” 98

Footnote 20 expands upon the “ultimate results” that convinced Johnson that the Equal Protection Clause applies to illegal immigrants: “For example, if illegal aliens were not afforded

97 Ibid.

equal protection of the laws, what would invalidate a state statute that established the maximum penalty for theft at 10 years if committed by a citizen or legal alien, but at 50 years if committed by an illegal alien?” 99 The hypothetical Johnson used in the footnote, and which convinced him that the Equal Protection Clause must protect all persons, was taken from a Bench Memo written by his law clerk and circulated to the other panel judges. 100

Johnson underlined certain segments of the memo, suggesting their importance to his thinking on the case. On page 3, he underlined the question that his clerk identified as the first issue presented by the case: “Does the Equal Protection Clause Apply to Illegal Aliens?” The clerk quoted the relevant passage of the Fourteenth Amendment, and Johnson underlined the words “deny to any person within its jurisdiction.” Was Johnson initially swayed by Texas’s contention that undocumented immigrants were not “within its jurisdiction”? Johnson’s clerk wrote, “I believe the words ‘any person’ mean what they say and that illegal aliens do have equal protection rights in each state.” (Johnson underlined “that illegal aliens” himself.) At the top margin on the following page, Johnson wrote, “I do not believe the equal protection clause is to be extended to illegal aliens.” (Underlined passages by Johnson himself.) 101

The law clerk went on to address the appropriate standard of review. Pointing out that “the classification arguably is not based on alienage but on illegal status,” the clerk argued that there “is nothing inherently suspect about this class that would all for strict scrutiny.” Johnson wrote in the margin, “I agree,” and underlined the two passages. The clerk distinguished the case


101 Ibid.
from a recent decision, *Nyquist v. Mauclet*, in which the Supreme Court applied strict scrutiny while striking down a New York statute that denied state financial assistance for higher education to legal resident aliens unless they affirmed an intent to apply for U.S. citizenship when eligible. The Court pointed out that the law was “directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class.” Johnson’s clerk argued that the *Plyler* case could be distinguished from *Nyquist*, because the Texas statute “distinguishes on the basis of lawful residence in the United States and includes citizens and legal aliens within one class.” The judge agreed, and added in parenthesis, “The classification also might be construed to include nonresidents in the class with illegal aliens.” ¹⁰²

Johnson’s clerk argued,

Focusing on education specifically, I do not think illegal aliens have a “right” to education in the U.S. The U.S. does not have the obligation to educate citizens of foreign countries – so why should this obligation be imposed if a person illegally enters the U.S.? I think the inquiry should be whether the state has an interest and whether the law is reasonably related to that interest. In this case, Texas has an interest in preserving its funds to educate those who are legally within its jurisdiction and the law is reasonably related to this interest. ¹⁰³

Johnson noted no disagreement with this analysis, merely crossing out the words “in the U.S.” to write, “by a state.” His clerk went on to compare *Plyler* with a 1978 Supreme Court case in which the Court upheld a New York statute requiring a person to be a citizen in order to be eligible to be a state trooper. The Court wrote,

Our cases generally reflect a close scrutiny of restraints imposed by States on aliens. But we have never suggested that such legislation is inherently invalid, nor have we held that all limitations on aliens are suspect… [I]t would be inappropriate [to] require every statutory exclusion of aliens to clear the high hurdle of “strict scrutiny,” because to do so

¹⁰² Ibid.

¹⁰³ Ibid.
would “obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.”

Johnson underlined the last part of the quote from the case, Foley v. Connellie, suggesting that he too was inclined to see Plyler as about the inherent distinction between citizens and aliens. 104

The law clerk’s final point was “Texas may, and does, charge out-of-state residents tuition. In a sense, that is what it is doing in this case: Texas is demanding tuition from those who are not lawful residents of the state.” Johnson seems to have emphatically agreed with this argument, for he underlined “lawful” and wrote a large exclamation point in the margin to the left of the text. 105

It was the clerk’s penultimate point that provides a clue to what might have changed Johnson’s mind about the case, resulting in a ruling almost the opposite of what his clerk recommended. The clerk wrote,

For example, if Texas passed a statute imposing a sentence of five years for theft on all U.S. citizens and legal aliens and a sentence of fifty years for theft on all illegal aliens, I believe the statute would be unconstitutional [sic] on equal protection grounds. First, there is a liberty interest involved. Also, the classification is irrational and does not further any state interest. The state cannot punish illegal aliens for their status, for that power belongs solely to the federal government under its deportation powers, and such a law would be irrational because it cannot be said that illegal aliens as a class are more likely to commit theft. 106

Frank Johnson made no substantive comments on the passage, only crossing out the word “imposed” and adding “illegal” between “their” and “status.” However, something clearly

104 Ibid.
105 Ibid.
106 Ibid.
changed between the composition of the clerk’s memo and the circuit court’s ruling in October 1980. The hypothetical example posed by Johnson’s clerk is similar to the hypothetical posed by Johnson in footnote 20 of his opinion, but the purposes of the two hypotheticals are strikingly different. The clerk, having assumed that undocumented aliens are covered by the Equal Protection Clause, uses the hypothetical to provide an example of a statute that would fail the rational basis test. Judge Johnson, on the other hand, may have pondered the hypothetical and read it as a kind of reductio ad absurdum – if undocumented aliens were not protected by the Equal Protection Clause, then hypothetical statutes such as the one suggested by his clerk would be constitutionally permissible despite their obvious irrationality, unfairness, and absurdity. Therefore, undocumented aliens must fall within the Clause’s protection. Considering such a result, Johnson would say in his opinion, convinced him that the Equal Protection Clause must indeed protect all persons. 107

Another law clerk, Mark Zaiger, also wrote a memo about Plyler for the judge. Zaiger was a clerk for Judge Johnson in from the summer of 1979 to the summer of 1980, and as one of his last duties of the clerkship wrote a hasty memo fleshing out ideas about the case probably suggested to him by the judge himself. Zaiger predicted that the case would “inevitably wind up in the Supreme Court,” and concluded that “although the equal protection clause covers undocumented aliens, this statute will withstand rational basis scrutiny…” Zaiger relied upon the language and the logic of the Fourteenth Amendment to suggest that illegal aliens were covered by the Equal Protection Clause, and quoted from a 1938 case, Gaines v. Canada, to argued that the “within its jurisdiction” phrase meant only that “the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own

107 Ibid.
jurisdiction,” meaning that the phrase operated not to exclude any set of people within the geographical boundaries of a state but merely to protect against attempted arguments that people actually residing outside of a state were also somehow entitled by the Equal Protection Clause to a share of its bounty. Zaiger went on to argue that the rational basis test was appropriate, and that Texas satisfied the test. He admitted that “it’s not too clear that the statute could meet any stricter test,” and that under a rational basis test lowering education costs could be a justification for excluding undocumented aliens. 108

Judge Johnson came to agree with Zaiger that the Equal Protection Clause did protect the plaintiffs in Plyler but disagree with the conclusion that Section 21.031 withstood rational basis scrutiny. Zaiger’s clerkship was over before the judge’s opinion was written in September and published in October, so he had no direct knowledge of how Judge Johnson’s thinking on the case developed, but the year that he spent working with the judge did give him some useful insights. Zaiger, “a farm kid from Iowa,” recalls working for Judge Johnson in 1979 and 1980 and offers possible clues to the Judge’s thinking on the case. “The one thing I would say about him,” Zaiger says, “he was always an extremely careful lawyer. So probably more important than his background, probably, you know, where he grew up and those sorts of things, he just couldn’t reconcile that the word person in the Constitution or citizen in the Constitution had different meanings for different sorts of people. At base that’s an extremely conservative position.” Zaiger suspected that the fact that what was being denied to the children was an education may have weighed heavily upon Judge Johnson. He insisted that Johnson never made decisions for policy reasons, but recalled the language of the Brown v. Board of Education decision about the importance of education, and mused that perhaps Judge Johnson was

unwilling to read into the Fourteenth Amendment “a difference between citizens and noncitizens” or “a difference between lawfully present noncitizens and unlawfully present noncitizens” with regards to an equal right to educational benefits. ¹⁰⁹

In an interview with Bill Moyers that aired in two parts at the end of July 1980, just after Woodrow Seals had issued his ruling in Houston, Judge Johnson emphatically denied that he imposed his own sense of morality upon cases he decided. We “have a government of laws,” he said. He claimed to have never taken a “moral position” in deciding a case, and argued that a “judge cannot be, if he stays within his role as a judge, be a crusader.” Just two years earlier, he had aroused controversy by deciding that Alabama State University, a historically black university, had engaged in a pattern of racial discrimination against white faculty. “Blacks got incensed,” he said, “just like whites get incensed when a ruling comes that they don’t like,” but the case was more evidence that Johnson believed that when the Constitution said that “persons” were entitled to the equal protection of the laws it meant just what it said, and it was not up to him to look for or tolerate exceptions, whether based on race, citizenship, or political justifications. ¹¹⁰

A week after the circuit court’s decision was announced, the State of Texas and the Tyler Independent School District each filed an identical Petition For Rehearing. The Petitions recycled arguments familiar from earlier petitions and hearings, citing four cases that supposedly buttressed the view that illegal immigrants could not be legal residents. They cited Leng May Ma v. Barber, which Johnson had considered and rejected the relevance of in his opinion; United States v. Shapiro, a 1942 United States District Court case holding that “anyone who enters this


¹¹⁰ Frank M. Johnston interviewed by Bill Moyers, Montgomery, Alabama.
country illegally cannot thereby acquire a legal residence as a basis for application for citizenship”; *Schneider v. United States Immigration and Naturalization Service*, from a U.S. District Court in Washington, which likewise said that words such as “residing” or “dwelling” in the federal immigration statutes could only be applied to someone who had “been admitted in conformity to the immigration law”; and *In re Simmiolkjier*, a 1947 district court case that said, “The term ‘residence’ used in nationality acts is legal residence, and anyone who enters illegally cannot thereby acquire legal residence as a basis for application for citizenship.” 111 These cases all involved the interpretation of federal statutes, not the Fourteenth Amendment of the Constitution. Since Judge Johnson had already considered such an argument with regards to the *Leng May Ma* case, it was hardly surprising that he rejected the Petitions for Rehearing. 112 The time for argument before Judge Johnson was over, and Texas had lost, for the third time in a row, in its defense of the constitutionality of Section 21.031. The last battle would be before the Supreme Court of the United States.

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CHAPTER 4
THE SUPREME COURT RULING: ALIENS ARE PERSONS, TOO

Introduction

When the Plyler litigation began in Texas in the 1970s, the Carter administration sided with the undocumented alien schoolchildren in Texas, filing amicus briefs and arguing in court on their behalf in the Tyler and Houston federal district courts and in the Fifth Circuit Court of Appeals. This support had irritated Texas Governor Clements, who exclaimed that it was outrageous that the federal government was siding against Texas and on behalf of undocumented immigrants. When Californian Ronald Reagan won the 1980 presidential election, Clements hoped for a more helpful approach from the federal government. 1 At the same time, Judges Seals and Justice feared the change in administration meant for their case. Judge Seals wrote to Justice shortly before the presidential election, “These children still have a long way to go and I am really hoping that the Texas Legislature will repeal the law. I hate to think what will happen to my decision if Governor Reagan wins the election and appoints four new Justices to the Supreme Court. I do not think those children would have much of a chance.” 2

In reality, the change from a Carter Justice Department to a Reagan Justice Department did not help Texas’s cause in Plyler nearly as much as Governor Clements hoped or Judge Seals

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1 Frank Kemerer, Sixth Annual Clements Lecture, Texas A&M University, Box 164, Folder 7, William Wayne Justice Papers, Tarlton Law Library, The University of Texas at Austin.

2 Letter from Woodrow Seals to Ralph W. Yarborough, September 9, 1980, Box 12, Folder 31, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
feared. Instead of vigorously fighting for Texas and against the undocumented alien children, the Reagan Justice Department took a strangely neutral position. Although it no longer argued in favor of the plaintiff schoolchildren, it did not publicly embrace the Texas’ position, either. Instead, Reagan’s Attorney General William French Smith and U.S. Solicitor General Rex Lee argued that the United States had no position on the constitutionality of Texas’s statute, section 21.031 of the Texas Education Code. Supporters of the Texas policy must have been disappointed to not receive a more helpful attitude.³ One reason for the administration’s refusal to strongly support Texas may have been concern about its standing with Hispanic organizations. The League of United Latin American Citizens, for example, was harshly critical of the Reagan administration’s record with Hispanics. The organization blamed Reagan’s policies for very high unemployment among Hispanics (13.2% in 1982, according to LULAC), considered the president’s tax cuts “a major inequity” because the benefits went primarily to the wealthy and to big businesses, and criticized Reagan’s military spending. LULAC criticized Reagan’s policies on civil rights, housing, the Legal Services Corporation, and affirmative action. In 1982, the President offended LULAC by his lack of support for reforms to the Voting Rights Act and by his support for reductions in funding for Title VII of the Elementary and Secondary Education Act (Bilingual Education).⁴

In Texas, Attorney General Mark White was campaigning for governor against incumbent Bill Clements as the Supreme Court considered the arguments in Plyler. It was a race that White would win in November 1982, just a few months after the Plyler decision was announced. Despite Clements’ support not just from Republican politicians like George H.W.

³ Frank Kemerer, Sixth Annual Clements Lecture.

Bush, but also from several former Democratic Texas governors, White won the race by a comfortable margin, 53 to 46 percent. During the campaign, White came under pressure from many letter-writers to fight vigorously for Section 21.031 of the Education Code. One writer, who had lived for several years in Mexico, complained of the hypocrisy of Mexican authorities denying public educations to legal foreign residents of their country while its citizens demanded a free education in the United States. Several writers asked why taxpayers should have to pay the cost of educating those who had no legal right to be in the country. Two of the writers used offensive language, calling the migrants “parasites.” To all of these writers, Attorney General White explained his opposition to the court decisions against Texas and extolled his efforts to fight them all the way to the Supreme Court, and insisted that if Texas must educate unauthorized immigrants then the federal government should pay the cost. Of course, not all the letters were against the education of unauthorized alien children, and White had to balance his

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vigorouss defense of the Texas law with careful explanations to religious leaders and others that it was not the “background” of the children, but only their immigration status that he objected to.\textsuperscript{10}

In \textit{Plyler v. Doe}, the United States Supreme Court for the first time held that the Equal Protection Clause applied to undocumented aliens. In doing so, the Court built upon a century of jurisprudence. In several cases in the nineteenth century, the Supreme Court had recognized that the Constitution’s protections extended to noncitizens. In \textit{Wong Wing v. United States} (1886), the Court considered whether the federal government was free to condemn, without a jury trial, an alien resident to hard labor for violating immigration law. The government’s argument was reminiscent of the Federalists’ view in the 1790s. An alien was not protected by the U.S. Constitution, the government said, because it “was not made nor intended for all humanity, nor to operate as a restriction on the Government to protect foreigners against its action in political matters, but was ordained and established by the people of the United States for their own benefit and the benefit of those lawfully within their Territory.”\textsuperscript{11} The Supreme Court disagreed, saying that while the government possessed the power to exclude or deport aliens without a jury trial, it had no right to subject them to criminal punishments without affording them their rights under the Fifth and Sixth Amendments. In the \textit{Yick Wo} case, in which San Francisco passed an ordinance discriminating against Chinese launderers, the Supreme Court held that the Fourteenth Amendment protects aliens. The protections of due process and equal protection, the Court said,

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“are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . .”

At one time, individual states discriminated against those who were not American citizens with apparent impunity, and whether or not such discrimination violated the Constitution was still a subject of debate until after World War II. In the 1800s, state and local ordinances that discriminated against immigrants were common. Noncitizens were often denied licenses to operate businesses in such fields as medicine, dentistry, engineering, and the law. Immigrants were sometimes forbidden to operate barbershops or pool halls or to work as bus drivers or undertakers. States with large numbers of immigrants tended to have the most such restrictions.

The best example of discrimination against noncitizens is the long struggle over California’s Alien Land Laws of 1913 and 1920, which prohibited non-citizens ineligible for American citizenship from owning land in California. These laws were initially upheld in a Supreme Court decision in 1923, but eventually struck down. In Oyama v. California (1948), the Supreme Court ruled that U.S. citizen Fred Oyama’s rights had been violated when his father, a Japanese immigrant who was not a citizen, was prevented from purchasing land in his son’s name and naming himself as his son’s guardian. This decision did not rule that the California laws violated the equal protection rights of non-citizens, however; that came five years later in Sei Fujii v. California (1952). In that case, the Supreme Court of California agreed with the

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12 Ibid, 53-55.
plaintiff, who was not a citizen, that the California Alien Laws violated his rights under the Equal Protection Clause of the 14th Amendment.\footnote{Sei Fujii v. California, 38 Cal.2d 718, 242 P.2d 617 (1952).}

In an important case in 1972, the Supreme Court significantly weakened the states’ prerogative to discriminate against non-citizens.\footnote{William Wayne Justice explained the Graham, In re Griffiths, Sugarman, and Mathews cases in a lecture to the Chicano Law Students Association at the University of Texas School of Law on April 5, 1986. Box 165, Folder 5, William Wayne Justice Papers, Tarlton Law Library, The University of Texas at Austin.} In Graham v. Richardson, the Court unanimously held that the Equal Protection Clause prohibited states’ from withholding welfare benefits from legal aliens. In that case, the state of Arizona had denied welfare benefits to those who were not U.S. citizens or had not lived in the U.S. for a minimum of fifteen years. In Pennsylvania, the law restricted state welfare benefits to those who had were either citizens or had applied for citizenship. The Court used strict scrutiny, its most rigorous test for determining whether a statute violated the Equal Protection Clause, in striking down the statutes. The Court said that strict scrutiny was warranted because legal aliens were a “suspect class,” a “prime example of a ‘discrete and insular minority’ for whom such heightened judicial solicitude is appropriate.”\footnote{Graham v. Richardson, 403 U.S. 365, 372 (1971).}

In 1973, In re Griffiths was decided by the Supreme Court in favor of an immigrant woman from the Netherlands who had been denied the opportunity to sit for the bar exam in Connecticut because she was not a U.S. citizen. In a 7-2 decision, with the majority opinion written by Lewis Powell, the Court agreed with Griffiths that the Connecticut policy that applicants to the state bar be U.S. citizens violated the Equal Protection Clause. Connecticut failed to justify its use of the “suspect class” of alienage, as there was no compelling justification
for denying immigrants a chance to become lawyers in the state. Justices Burger and Rehnquist, who would go on to dissent in the *Plyler* case, also dissented in *In re Griffiths.*

In that same year, *Sugarman v. Dougall* was decided. In this case, the Court struck down a New York statute that denied non-citizens the right to hold jobs in the state’s civil service sector. Applying the “strict scrutiny” standard to the classification, the Court determined that it was unconstitutional. Although the Court recognized that states had an interest in ensuring the “undivided loyalty” of their civil servants, the New York statute was not carefully tailored to further that interest. Therefore, its use of the distinction between citizens and aliens violated the Equal Protection Clause.

However, while chipping away at state discrimination against legal immigrants, the U.S. Supreme Court declined to defend immigrants from discrimination by the federal government. In *Mathews v. Diaz*, in 1976, the court rejected a request to declare unconstitutional the denial of Medicare to immigrants who had not been admitted to the United States as permanent residents and had not lived in the United States for at least five years. The Court ruled that the policy in question did not violate the immigrants’ due process rights under the Fifth Amendment. Judge John Paul Stevens wrote the opinion for a unanimous court, emphasizing that Congress had broad powers over immigration and naturalization, such that there was no question whether Congressional discrimination in favor of citizens and against immigrants was permissible.

*Plyler v. Doe* significantly expanded of the Equal Protection Clause’s coverage, settling the question of whether “any person” within a state’s “jurisdiction” entitled to “the equal protection of the laws” included undocumented aliens as well as legal aliens and citizens.

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Unfortunately, the opinion’s clarity about the status of undocumented aliens under the
Fourteenth Amendment was not matched by clarity in the Court’s reasoning about the Texas
statute that it struck down or the decision’s impact on other state policies. Harvard Law School
professor Mark Tushnet, for example, called Justice William Brennan’s opinion in *Plyler v. Doe*
“analytically indefensible.” Tushnet wrote that the opinion “cannot be taken seriously as a piece
of legal analysis.” The opinion “jams together doctrines that other cases carefully held apart and
refrains in a footnote from deciding an issue that plays a crucial role in a later section of the
opinion.” The “awkwardness” of the opinion revealed that Brennan was “building a coalition”
rather “writing a carefully crafted opinion.”

Judge William Wayne Justice also complained that the Supreme Court’s decision, while
containing the “important and commendably forthright holding” that undocumented aliens were
protected by the Equal Protection Clause, was “far less lucid” explaining why the Court struck
down the Texas statute. The “precise reasoning” and “exact consequences” of the decision were
“somewhat speculative,” he said. Justice explained that most statutory classifications were
uphold by courts as long as the classification had some sort of “rational basis.” This was the
lowest standard of scrutiny, and an easy one for legislation to meet. The highest standard, called
“strict scrutiny,” was employed when a statute targeted a “suspect class” like race or nationality,
or when it denied anyone a “fundamental right” and courts would only uphold legislation under
this standard of scrutiny if it was precisely tailored to meet a “compelling and legitimate state
goal.” In *Plyler*, the Supreme Court used neither of those standards, but instead an “intermediate
standard,” but without being entirely clear as to why. Was it because it affected a “quasi-suspect
class of illegal aliens,” or because it denied a “quasi-fundamental right to public education,” or

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pp. 1257-1273, at 1263.
because it punished children for the crimes of their parents, or because of the unique aggregation
of all those factors in one case? If the latter, Justice admitted, “then this decision has little
precedential weight.”

The Supreme Court’s majority opinion in *Plyler v. Doe* was the product of months of
behind-the-scenes debate and negotiation between the justices that eventually comprised the
five-person majority in the case. In particular, Justices William J. Brennan and Lewis F. Powell
engaged in months of polite but crucial argument over how broad the Court’s opinion should
be. In an early draft of his opinion, Brennan defended the idea that undocumented aliens were a
suspect class and should be afforded the same protection that the Court gave to religious and
ethnic minorities. Justice Powell pushed back strongly against that idea, threatening not to join
the opinion. This would have resulted in a judgment without a majority opinion, giving the case
almost no precedential value.

The papers of Justices Brennan and Powell give insight into the coalition-building that
went into the majority opinion in *Plyler*. They help explain some of the strangeness of the
opinion—it is never quite clear what standard of review the Texas statute is being evaluated
under, and the implications of the decision for the denial of other benefits to aliens, both
documented and undocumented, are left unclear. An analysis of the majority opinion, the
concurrences, and the dissent, as well as of the extensive paper trial of memos and letters
between the judges and their clerks, will help us to understand the opinion and its impact.

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23 Undated Plyler summary, Box 168, Folder 12, William Wayne Justice Papers, Tarlton Law Library, The
University of Texas at Austin.

24 Michael Olivas, *No Undocumented Child Left Behind: Plyler v. Doe and the Education of Undocumented

25 For more on Justice Brennan’s career, see Roger Goldman, *Justice William J. Brennan, Jr.: Freedom First*
(New York: Carroll & Graf Publishers, Inc., 1994); Seth Stern, *Justice Brennan: Liberal Champion* (Lawrence, Kansas:
Forming a Majority

On November 27, 1981, Justice Lewis Powell reviewed a memorandum prepared for him by a clerk, David Levi, two days before. The oral arguments were scheduled for the first of December, just days away. In the margins of the memorandum, Powell wrote that he considered this an “extremely difficult case.” Levi claimed, “Although commonsense rebels, the conclusion that illegal aliens are a ‘suspect class’ seems ineluctable.” Powell agreed, writing, “It does!” However, Powell underlined “commonsense rebels,” and wrote in the margins, “not yet for me.” Powell wondered about the ramifications of finding that the undocumented children were a suspect class. “If we held that only the ‘children’ are a suspect class, the [sic] would be some limit. But would a state also have to provide food, health care, etc.”

In the oral arguments, on December 1, 1981, all nine justices of the Supreme Court questioned the attorneys. Justice White asked John Hardy, the Tyler I.S.D. attorney, whether or not the state could refuse to recognize an undocumented immigrant’s right to own property. Justice Stevens asked about drivers’ licenses. Justice Marshall asked if the state could deny fire protection. Justice O’Connor questioned whether or not states could punish children for

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26 For more on the life and judicial career of Lewis Powell, see John C. Jeffries, Justice Lewis F. Powell, Jr., (New York: Scribner, 1994).


something that they had no control over. Assuming that the children remained in Texas, Justice Stevens asked why Texas would rather have them uneducated than educated.  

Some of the questions and exchanges were tough on the Texas attorneys. Justice Stevens, who would vote to affirm the Circuit Court and strike down the statute, asked: “They’re going to be part of the community anyway then. So you’d rather have them uneducated than educated?” Justice O’Connor asked, “Does the Texas statute punish children for something over which they have absolutely no control?” Justice Marshall asked, given Texas’s theory that undocumented aliens were not protected by the Fourteenth Amendment, whether Texas could pass a law denying fire protection services to undocumented aliens. “That’s a tough question,” the Tyler I.S.D. attorney admitted.

Two of the attorneys representing the undocumented children came away from the oral arguments with the mistaken impression that Sandra Day O’Connor would be the swing vote in their favor. Isaias Torres, a young Houston lawyers, recalled that O’Connor was “the most prepared, the most articulate justice. She asked the most incisive questions and was the most sympathetic. She drilled the state attorneys to no end… I went away thinking O’Connor would cast the deciding vote. I was surprised she voted against us.” Peter Schey, who had also represented undocumented children in Houston, also thought that O’Connor would be the deciding vote in their favor. He was impressed that she asked the Texas attorneys if the statute

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31 Newspaper clipping, “Attorney hopes to go beyond ‘opening’ created by illegal alien decision,” Box 8, Unmarked Folder, Record Group 21: Records of District Courts of the United States, 1685-2009, National Archives at Fort Worth, Texas.
shouldn’t require an intermediate form of scrutiny, something more difficult than the rational basis test, since the statute penalized innocent children.\textsuperscript{32}

Within days of the oral arguments, Powell’s position on the \textit{Plyler} case had solidified. In a “sketch outline” of his thoughts on the case, Powell first wrote that he thought it should be decided on Fourteenth Amendment Equal Protection Clause grounds, not on preemption (the Supremacy Clause.) The class would be children brought unlawfully to the United States, and the standard of analysis should be “heightened (but not strict) scrutiny; the class is composed of children barred from all primary & secondary education. (Left open in \textit{Rodriguez} Children so barred are a ‘discreet’ minority w/out access to political process.” Powell then wrote, “Our opinion, if written on this theory, should be \textit{limited} to alien children (a helpless class) & to the need to educate them.”\textsuperscript{33}

The next day, December 4, the nine justices discussed the \textit{Plyler} case and took a preliminary vote. Warren Burger, the Chief Justice, voted to reverse the Fifth Circuit, which had ruled against Texas. He suggested that aliens might be a suspect class, but not illegal aliens, who had no constitutional entitlement to education or welfare benefits. Justice Brennan voted to affirm the lower court, arguing that the Texas statute violated the Equal Protection Clause and that undocumented aliens were a “suspect class,” meaning that legislation aimed at them should be closely examined. On Brennan’s side were Justices Powell, Justice Marshall, Justice Blackmun, and Justice Stevens. Marshall agreed with Brennan, and said that the Equal Protection Clause “means what it says,” suggesting that “all persons” included undocumented aliens. Justice

\textsuperscript{32} Letter from Peter Schey to Hon. Woodrow Seals, June 25, 1982, Box 12, Folder 31, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

Blackmun thought that the statute could be struck down on either Equal Protection or preemption grounds. Justice Stevens wanted to strike the statute down on Equal Protection grounds and did not think it was preempted by federal law. He argued that the Texas did not have a compelling justification for the statute, suggesting that he wanted a middle analysis between the traditional “rational basis” and “strict scrutiny” levels. Justices Rehnquist and White agreed with Chief Justice Burger, believing that the Texas statute should be upheld on the rational basis test. Justice O’Connor was undecided. On February 11, 1982, Justice Sandra Day O’Connor indicated that she was still undecided. On February 26, Chief Justice Burger circulated a copy of his dissent; O’Connor, finding it persuasive, decided to join the Chief.

Several weeks later, Justice Brennan took what he called the “unusual step” of circulating a copy of his Plyler draft only to Justices Powell, Blackmun, Stevens, and Marshall. Brennan explained that he had taken a “historical approach” to the opinion, and that, “although leading to strict scrutiny here, is for that reason largely self-limiting and unlikely to force us down any uncharted paths in the future.” The purpose of the circulated copy seemed primarily to win over Justice Powell, who wanted to the narrow the class to undocumented children, rather than undocumented people in general, and wanted to avoid formally declaring a new “suspect class”

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and triggering strict scrutiny. Justice Brennan wrote, “In my view, the Texas statute would fail under even an intermediate standard of review, with the draft cut short on page 23, and picked up again on 34, with the same ultimate result. But I do suggest that exclusive reliance on the ‘innocent children’ rationale, would truncate our real concern here—that whatever else the state may do with respect to illegal aliens, barring the innocent children among them from basic education is most perverse.”

Justice Brennan’s preliminary draft was forty-one pages long. Much of the draft was broadly agreeable to the other four justices that eventually joined the opinion, but a few pages aroused the ire of Justice Lewis Powell. On page 18, Section A of Part III of the opinion, Brennan began a lengthy discussion of the concept of the “suspect class” and strongly suggested that undocumented aliens were such a class. He pointed out that the Court subjected to rigorous scrutiny legislation that adversely affected “discrete and insular minorities,” meaning groups that were “small in number, identifiable by immutable or nearly immutable personal attributes or status,” and that were “habitually victimized.” Brennan claimed that, “Illegal aliens display many of the characteristics of those ‘discrete and insular’ minorities for which the Constitution offers a special solicitude.” He suggested that they had been subjected to unequal treatment, “relegated to such a position of unequal treatment,” and “saddled” with such “disabilities” that many of the arguments which the Court in an earlier case had found persuasive for considering legal (or

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documented) aliens a suspect class applied with even greater force to the undocumented or illegal aliens.\textsuperscript{39}

In an unsent letter, Justice Powell expressed his dismay at Justice Brennan’s attempt to write a sweeping opinion that categorized all undocumented aliens as a “suspect class” worthy of special protection from the Supreme Court. He insisted that the “only class before us” in this case was a class he characterized as the “school age children of illegal aliens.” He objected to Justice Brennan’s attempt to write on behalf of “all illegal aliens, adults as well as children.”\textsuperscript{40}

For Justice Powell, the key to the case was understanding that the Texas statute targeted children, not that it targeted undocumented aliens.

On January 30, 1982, Justice Powell responded. He strongly rejected the idea of labeling undocumented aliens a “suspect class,” saying, “We have never held that persons unlawfully in this country, whatever their age, are a suspect class in the full meaning of the term.” Instead, he outlined the form that the majority opinion would eventually take: “I view the classification before us as a unique one. As the class is composed of innocent children, uniquely postured, I would agree that a ‘heightened’ level of scrutiny is required. Thus, the state must establish a substantial interest to justify the discrimination. In a sense, this may be viewed as middle-tier analysis.” Texas had not advanced any interest substantial enough to justify the discrimination, and the statute therefore violated the Equal Protection Clause. “In sum, as to the class discriminated against, I could not agree that it is ‘suspect’ in the sense in which we have


previously used this term. I do agree that the classification depriving innocent children of an education merits heightened scrutiny, and that it doesn’t meet this test.”

Powell also made clear that he had not wavered on his position that there was no constitutional right to an education:

I have served for 19 years on the Richmond Public School Board and the Virginia State Board of Education. I fully share your view as to the importance of education, particularly in a democracy. We are talking, however, about what the Constitution requires and this was my concern in Rodriguez. It was my view then and now that there is no constitutional right to a state provided education any more than there is such a constitutional right to welfare, housing, health services, public works and public utilities — all of which are considered by most of us to be essential. I therefore would not characterize education as a “fundamental” right in the constitutional sense.

Powell expressed unease that the Brennan draft “sweeps rather broadly, and leaves me a little uneasy as to inferences that may be drawn from it in other connections not clearly foreseeable.” He said that he would join in Brennan’s judgment, but would have to see how the “drafting and redrafting process” played out before knowing whether he could join in the opinion, also.

Justice Brennan wrote back to Powell on February 2, 1982. He acknowledged that the case for “middle-level scrutiny” was strong, but suggested that rather than specify the standard of heightened scrutiny, the Court simply “describe the nature of the ‘uniquely discrete class’ being

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42 Ibid.

discriminated against here.” In short, Brennan asked, would it be enough to win over Powell if he dropped the several pages of his earlier draft that argued for the categorization of undocumented aliens as a suspect class? In the margins of his copy of the letter, Justice Powell wrote, “Yes.” Nevertheless, two days later Powell told Brennan that he would join the Court’s judgment but write his own separate opinion. “My concern,” he explained, “as to the ‘open endedness’ of equal protection prompts me to be extremely cautious in this case as to the reach of the precedent we set.”

Justice Brennan wasn’t ready to give up on winning over Powell. On February 8 he sent another draft, significantly shorter than the preliminary version he had circulated. In March, Justice Blackmun sent a letter to Justice Brennan, with ideas for how to get Powell on board the majority opinion. Blackmun had originally favored using preemption to strike down the Texas statute, and only backed off because the others favored the Equal Protection argument.


Nevertheless, in his letter to Brennan he advocated an equal protection argument that avoided the dispute between Brennan and Powell over whether or not to label undocumented aliens a suspect class, an argument that he admitted had strong “pre-emption overtones.” Blackmun wrote,

The class of ‘illegal aliens’ is a poorly defined one; the District Court found that a substantial percentage of the children involved in this case in fact will reside here permanently, and that many are not presently deportable. The way in which the immigration laws are set up makes it impossible for the State ever to be sure which children will be deported or are deportable. Thus, every child has a ‘right’ to be here until he actually is placed under a deportation order, and at every step of the immigration process a federal official still has the discretion to allow the child to remain in the United States. Many of these children, therefore, have, or will have, political and related rights, and there is no way for the State to determine which children do not have such rights. Once it is granted that some quantum of education is fundamental in a constitutional sense, the State cannot deprive the entire group of the right to attend school. If such an approach to the case is taken, one could delete the reference to illegal aliens as a suspect class and, also, the analogy of illegal alien children to illegitimates; neither of these will then be necessary. 48

In a letter to Justice Blackmun, Powell admitted that this was a “perplexing” case. The correct decision seemed clear to him, but finding the “controlling principle” was difficult. He said, “I am inclined to agree with John [John Paul Stevens] that the preferable equal protection approach is quite simply that what Texas is doing is irrational. Texas is penalizing these children. The asserted state interest (expense of educating them) is insubstantial as compared with the eventual cost to the state of dealing with the serious problems that will result from the alien children who will remain in the state without even a grade school education.” 49

48 Ibid.

In April, Justices Brennan and Powell finally agreed on language in Brennan’s opinion for the majority. Powell was particularly insistent that the final opinion reflect that “an adult illegal alien is here in willful violation of our laws,” despite their mutual sympathy for “peoples all over the world who would like nothing better than to live in our country.” However, in language he suggested that Brennan include in the final draft, “These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants.” 50 Chief Justice Burger was dismayed by the final product of the negotiations between Justices Brennan and Powell, and complained to the latter, “What limiting principle can confine this massive expansion of the Fourteenth Amendment to ‘persons’ simply on the basis of their age”? How, he asked, could the Court “rationally confine the holding” so that undocumented aliens, parents as well as children, would not be entitled to “the whole spectrum of welfare benefits”? 51

The Ruling

Justice Brennan delivered the opinion of the Court, which voted 5-4 to uphold Judge William Wayne Justice’s decision to strike down the Texas statute. Joining him were Blackmun, Powell, Stevens, and Marshall. Blackmun, Powell, and Marshall also wrote separately to explain


their decision to join the majority. In the dissent were Chief Justice Burger, who wrote the dissenting opinion, and White, Rehnquist, and O’Connor.

First, Justice Brennan reviewed the District Court’s findings of fact. The District Court (Judge Justice) had found that neither the state statute nor Tyler I.S.D.’s policy would have “either the purpose or effect of keeping illegal aliens out of the State of Texas,” and that the increase in enrollment that Texas claimed its policy was a response to was primary the result of legal, not illegal, immigration. The District Court had also found that excluding undocumented children from schools would save little money because “funding from both the State and Federal Governments was based primarily on the number of children enrolled,” and that any savings that were realized would not necessarily improve the quality of education. Also, the District Court had found that illegal immigrants with school-age children were only a small subset of illegal immigrants in general, most being young men without families. Last, a child affected by the policy “may well be the legal alien of tomorrow,” but would be “permanently locked into the lowest socio-economic class” by the discrimination suffered due to section 21.031.52

Based upon those findings, the District Court had held that Texas statute violated both the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause. The Court of Appeals for the Fifth Circuit had agreed with the District Court regarding the Fourteenth Amendment, but disagreed regarding the Supremacy Clause, finding no evidence of a Congressional policy to education the undocumented children of illegal aliens. Regarding the Equal Protection Clause, the Court of Appeals had held that the Texas statute was

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“constitutionally infirm regardless of whether it was tested using the mere rational basis standard or some more stringent test.”

First, the Supreme Court addressed the question of whether the Equal Protection Clause applied to illegal aliens. In finding that it did, the Court relied on inferences from previous opinions regarding the applicability of the Fourteenth Amendment’s Due Process Clause to noncitizens and on the legislative history of the Amendment. In 1886 the Supreme Court had declared that the “Fourteenth Amendment to the Constitution is not confined to the protection of citizens…. These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection of equal laws.” Several years later, the Court had declared that the “within its jurisdiction” language of the Equal Protection Clause simply referred to the territorial reach or the boundaries of the State, meaning that the clause referred to all persons within a State’s territorial boundaries. In 1936, the Court further clarified that “the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained.”

The Court found that the legislative history behind the 14th Amendment lent credence to the idea that its authors in Congress intended for it to curb the sovereign state’s authority to discriminate against all persons, including noncitizens. In the House of Representatives, Representative John Bingham, the principal architect of the Amendment, asked his colleagues:

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Is it not essential to the unity of the people that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States? Is it not essential to the unity of the Government and the unity of the people that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property? 56

Senator Jacob Howard, a member of the Joint Committee of Fifteen that wrote the bills and floor manager of the Amendment in the Senate, explained that the Amendment applied to all persons:

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjectsing one caste of persons to a code not applicable to another…. It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the united States, and to all persons who may happen to be within their jurisdiction. 57

Justice Brennan argued that the purpose of the Equal Protection Clause was “to work nothing less than the abolition of all caste-based and invidious class-based legislation,” and he suggested that to allow Texas to carve out an exception through the “within the jurisdiction” language would undermine that purpose. 58 Justice Brennan concluded that the phrase was not meant to limit or detract from the scope of the Equal Protection Clause but to confirm that it extended to everyone, “citizen or stranger,” and extended to “every corner” of a State. A


person’s mere presence in the State, whether lawful or unlawful, conferred upon him or her the Amendment’s protection.\(^\text{59}\)

In a footnote, Brennan admitted that the Supreme Court had never specifically considered the meaning of the phrase, “within its jurisdiction.” However, it had previously considered the meaning of a related phrase, “subject to the jurisdiction thereof,” which qualifies the language about citizenship at the beginning of the Fourteenth Amendment (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.”) In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the Court wrote that it was “impossible to construe the words ‘subject to the jurisdiction thereof’ … as less comprehensive than the words ‘within its jurisdiction,’ in the concluding sentence of the same section; or to hold that persons ‘within the jurisdiction’ of one of the States of the Union are not ‘subject to the jurisdiction of the United States.’” Justice Gray, writing the majority opinion in that case, went on to conclude that every “citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction of the United States.”\(^\text{60}\) In a separate opinion in the *Wong Wing* case, Justice Field wrote, “A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.”\(^\text{61}\)

\(^{59}\) Ibid, at 215 (1982).


Having determined that the Equal Protection Clause applied to illegal immigrants, the Court next discussed what standard of scrutiny to apply. It discussed the two most common standards, the rational basis test, in which the Court seeks “only the assurance that the classification at issue bears some fair relationship to a legitimate purpose,” and the standard of strict scrutiny, in which the State is required “to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.” The Court then suggested a third standard, in which the State’s classification didn’t target a “suspect class” (such as race or religion) and therefore didn’t trigger strict scrutiny, but nevertheless could give rise “to recurring constitutional difficulties.” In these few circumstances, the Court scrutinized the classification to determine “whether it may fairly be viewed as furthering a substantial interest of the State.”

In this case, strict scrutiny was clearly not called for. The class of “illegal aliens” or “undocumented immigrant children” clearly did not fit the criteria for being considered a “suspect class.” In a footnote, the Court explained: “Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a ‘constitutional irrelevancy.’”

However, the Court thought that the undocumented children in this case deserved more than the mere rational basis test. As Judge Justice had done four years earlier, the Court argued that the fact that the classification involved children called for heightened scrutiny, albeit not strict scrutiny. Arguing out that it was “difficult to conceive of a rational justification for penalizing these children for their presence within the United States,” the Court pointed out that

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it was the parents, not the children being punished by this statute, who had made the decision to violate U.S. immigration laws. Furthermore, the Court was strongly influenced by a 1972 decision that had declared it to be “illogical and unjust” to punish children for their parents’ misbehavior. In the 1972 case, the court had struck down a law discriminating against illegitimate children. “Even if the State found it expedient to control the conduct of adults by acting against their children,” Brennan concluded, “legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”

The Court also found that the plaintiffs’ interest in education was not a “fundamental right” that triggered strict scrutiny, but neither was it “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.” Because of the importance of education both to the child and to the nation at large, having “a fundamental role in maintaining the fabric of our society,” the State’s deprivation of the students’ access to education merited some form of heightened scrutiny, as well.

The Court was vague about exactly what the test was that it was holding Section 21.031 to, but said that in determining the statute’s rationality, “we may appropriately take into account its costs to the Nation and to innocent children who are its victims. In light of these countervailing costs, the discrimination contained in 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.” Apparently, some sort of balancing test was done – because of the importance of the educational interest to the children, only a “substantial goal” would justify excluding them from the public schools.

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64 Ibid, at 220 (1982).
65 Ibid, at 221 (1982).
The Court suggested three possible “substantial goals” that could conceivably justify section 21.031. First, Texas could “seek to protect itself from an influx of illegal immigrants.” However, the Court agreed with Judge Justice that this law was “a ludicrously ineffectual attempt to stem the tide of illegal immigration,’ at least when compared with the alternative of prohibiting the employment of illegal aliens.”

Second, if the class of undocumented children was a unique burden on the school system, such that excluding them from school might save money that could not be saved in any other way, then section 21.031 might by justified. Again, however, the Court concluded that this was not the case, saying that the class of undocumented children was “basically indistinguishable” from children who were legal residents but not citizens. Further, it supported the District Court’s finding that whatever savings might accrue from the policy would “not necessarily improve the quality of education” for the remaining students in the school system.

Last, Texas had argued that the unlawful presence of the students in Texas made it less likely that they were would remain in the State after receiving their education. Since they would be less likely “to put their education to productive social or political use within the State,” the State was justified in excluding them. The Court noted the difficulty in quantifying such a claim, and pointed out that Texas had no way of knowing which of its citizens and legal residents would remain in the state after receiving their educations. Moreover, it was “difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates.”

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Having failed to find a “substantial state interest” that would justify Texas’s denial of a free public education to these children, the Supreme Court upheld the Court of Appeals and the invalidation of section 21.031.69

In his concurrence, Justice Powell compared the status of the undocumented children in *Plyler* to the status of illegitimate children. In a case decided a decade earlier, the Court had said that punishing children for the misdeeds of their parents was “contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”70 In this case, the children had been “assigned a legal status due to a violation of law by their parents. Texas’s use this classification in justifying its denial of education to these children could only be upheld if it bore a “substantial relation to any substantial state interest.”71

**The Dissent**

Chief Justice Burger began his dissent by calling section 21.031 “senseless,” “folly,” and “wrong,” claiming that “[w]ere it our business to set the Nation’s social policy,” he would join the majority in striking it down. However, it was not the Court’s business to serve as “Platonic Guardians” striking down laws which did not meet its standards “of desirable social policy, ‘wisdom,’ or ‘common sense.’” He accused the majority of trespassing upon the policymaking functions of the other branches of government and attempting to provide “effective leadership” where it judged that Congress had failed to do so.72

69 Ibid.


Chief Justice Burger did not dispute that the Equal Protection Clause applied to undocumented immigrants: “I have no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment applies to aliens who, after their illegal entry into this country, are indeed physically ‘within the jurisdiction’ of a state.” Burger’s chief target was the majority’s standard of scrutiny. He accused the majority of “an unabashedly results-oriented approach,” picking the result that it wanted and then “patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis,” and then spinning out “a theory custom-tailored to the facts of these cases.” Burger complained, “In the end, we are told little more than that the level of scrutiny employed to strike down the Texas law applies only when illegal alien children are deprived of a public education.” Burger predicted that the majority’s opinion had been so carefully tailored to fit the facts of this case that it would “likely stand for little beyond the results” in Plyler.

Burger drew attention to a fundamental problem with the majority’s decision, which was that it did not attempt to distinguish between public education, which the Plyler decision now entitled undocumented immigrants to receive, from other government benefits that were still withheld from them, such as healthcare, housing, and food. Burger questioned the analogy between undocumented and illegitimate children, pointing out that the former category had been created by Congress, not “thrust upon” the plaintiffs by the State. Burger argued that when the relationship between an alien and this country “is a federally prohibited one,” there can “be no presumption that a state has a constitutional duty to include illegal aliens among the recipients of

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74 Ibid, at 244 (1982).
its governmental benefits. Burger argued against the majority’s “opaque observation” that although education was not a fundamental right, “neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.” Burger argued that Brennan never really pointed out exactly how education was distinguishable: “Is the Court suggesting that education is more ‘fundamental’ than food, shelter, or medical care?” Why was the government’s interest in education more important than its interest in “public assistance, health care, or housing”? 

Burger noted the many cases in which the Federal Government denied public benefits to undocumented immigrants: the food stamp program, old-age assistance, aid to families with dependent children, Medicare, Medicaid, and others. The Court did not require the Federal Government to prove that barring illegal aliens from Medicare would greatly improve the quality of Medicare for its remaining recipients, or that not doing so would have a “grave impact” on the quality or fiscal sustainability of the program, but the Court required Texas to prove that admitting illegal aliens to its public schools would have a “grave impact on the quality of education.” Burger pointed out that the Texas law would have easily passed the traditional “rational basis test,” in which a law that did not discriminate against a racial, religious, or other minority would be upheld as long as was rationally related to some legitimate state purpose. “In the absence of a constitutional imperative to provide for the education of illegal aliens,” Burger

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76 Ibid, at 246 (1982).
argued, “the State may ‘rationally’ choose to take advantage of whatever savings will accrue from limiting access to the tuition-free public schools to its own lawful residents….“80

Burger asked, “Is the Court suggesting that education is more ‘fundamental’ than food, shelter, or medical care?” This question struck at the central problem with the majority’s reasoning. If it was irrational to deny illegal aliens an education in the absence of some substantial state interest, how could states deny any of the other necessities of life such as food, housing, or medical care to illegal aliens? It seemed that the logic of the Plyler decision ought to have implications for many state programs, and ought to work inexorably to erase the distinction between citizen and undocumented immigrant with regards to access to those programs.81

Burger pointed out that the Court had, just a few years earlier, held that a State could protect its “fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens.” The Court had also affirmed the legitimate interest of States in protecting the quality of their schools and “the right of its own bona fide residents to attend such institutions on a preferential tuition basis.” Burger acknowledged that Texas’s desire to “prevent undue depletion of its limited revenues,” which he took to be its primary rationale for section 21.031, would not by itself justify either discrimination against illegal immigrants or “an arbitrary and irrational” denial of services to the group, but also pointed out that it was not “per se an illegitimate goal.” The pertinent question was whether or not section 21.031 was a rational means to furthering its fiscal ends. Here, Burger’s central difference with the majority was clear:

Without laboring what will undoubtedly seem obvious to many, 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. By definition, illegal aliens have no right whatever to be here, and the state may reasonably, and constitutionally, elect not to provide them with governmental services at the expense of those who are lawfully in the state.  

Burger feared that by rushing in to solve a problem created by the political branches, the Court only made it less likely that they would act on their own to resolve the country’s immigration problems. “I find it difficult to believe that Congress would long tolerate such a self-destructive result – that it would fail to deport these illegal alien families or to provide for the education of their children.” By compensating for “congressional inaction,” the Court only encouraged “the political branches to pass their problems on to the Judiciary.”

After the ruling

The Court’s split in the Plyler ruling was one of several such splits that confirmed, for conservative critics of the court, an ominous pattern. Justice Harry Blackmun, who had been appointed to the court by President Nixon in 1970, was now consistently voting with the liberal bloc, consisting of Justices Brennan and Marshall, and consistently voting against Chief Justice Burger. This surprised many commentators and disappointed conservatives, because Burger and Blackmun had been nicknamed the “Minnesota Twins” by the press a decade earlier by observers who predicted that they would frequently vote together. In 1982, however, the year Plyler was decided, Burger and Blackmun disagreed on 53 of the 93 cases in which the court had not had a unanimous verdict.

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The New York Times hailed the ruling, saying that “any other result would have been a national disgrace.” The Times noted that the “decision marked the first time that the Supreme Court had held explicitly that the 14th Amendment’s equal protection guarantee ‘extends to anyone, citizen or stranger,’ who is within a state’s boundaries, regardless of immigration status.” Linda Greenhouse, the Times’ reporter covering the Supreme Court, correctly predicted that the “close vote, as well as the majority’s emphasis on the special role of education and the special needs of children, indicated that a majority of the Court would be unlikely to extend the analysis to a ruling that adult illegal aliens are constitutionally entitled to Government benefits, such as welfare.”

The Dallas Morning News welcomed the news that “Texas’ lonely quest to discriminate against the children of illegal aliens is over,” and claimed that the “entire episode is embarrassing.” The newspaper mentioned that, “to its credit,” the Texas House of Representatives had voted to repeal the 1975 statute in 1981, but the Senate version of the bill did not make it out of committee. The editorial emphasized that the parents of the undocumented schoolchildren “pay every state tax that other Texans do.” The implication was that since they subsidized the education system no less than other Texans did, their children ought to be entitled to attend the public schools. “It is unfortunate,” the paper concluded, “that the Supreme Court had to do what the Texas Legislature should have done long ago. But that does not make the

action any less appropriate. Anything less would have been an assault on both justice and common sense.”

In Houston, attorney Peter Williamson celebrated the ruling, which officially brought to a conclusion years of legal battles he had fought on behalf of Mayra Aracely Martinez. “This is so good,” he said. “It means that all of these kids we have been representing in court or waiting in the wings for the outcome of the litigation are now going to proceed with their education and get on with their lives.” Dallas Independent School District superintendent Linus Wright also welcomed the decision. He predicted that the enrollment of undocumented alien schoolchildren would double the following year in response to the Supreme Court’s ruling, but described the Texas statute as a “bad law” and welcomed the Court’s clarification. Although Dallas had completely banned the enrollment of undocumented children before 1980, when it was ordered to enroll them pursuant to Judge Woodrow Seals’ ruling, Wright claimed that the district’s policy was now different. “The DISD has taken the position that if these children live in the country, then they ought to be educated. Without an education, these children would be condemned to a life of illiteracy and possibly poverty.”

LULAC president Tony Bonilla also welcomed the ruling. “It is a tremendous victory and comes at a crucial time for the Hispanic community because of the numerous setbacks we have suffered under the Reagan administration,” he said. “The burden now shifts to the Congress and to the state legislatures to see that adequate funds are provided to meet the special educational needs of these youngsters.”

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90 “Court says illegal aliens must get schooling,” The Montgomery Advertiser, June 16, 1982.
In Tyler, the school district was disappointed by not surprised. School superintendent Jack Davidson admitted that there were “humane considerations” on the children’s side, and attorney John Hardy said he knew it would be “an uphill battle” getting the Supreme Court to reverse the lower courts’ decisions. Lawyer Larry Daves, who had filed in the lawsuit in September 1977 in conjunction with the Mexican American Legal Defense and Education Fund, said he was “ecstatic.”

Several school districts in Texas accepted the ruling with equanimity. Most school districts had already adjusted their policies in response to Judge Woodrow Seals’ injunction against the state statute in 1980, which had been by Justice Lewis. Barry Nettles, assistant superintendent of the Baytown Independent School District, said, “This decision is not going to have any impact on us at all. It will be business as usual. It’s our basic goal that we provide education to all children (living in the district). They (alien children) are treated like any other student.” Several other school administrators in the Gulf Coast area concurred. Having been forced two years earlier to accept all students, some of the administrators had no idea if undocumented students were in their districts or how many there were. Some reported that they had not even given the case much thought, and all agreed that it would have little effect on their current practices.

James W. Crawford, the Senior Minister at the Old South Church in Boston, Massachusetts, wrote to Justice Brennan to thank him for the ruling, which he called “an inspiration.” He complemented the Justice for his “insights into the importance of public education, and the dimensions of the Fourteenth Amendment,” and expressed his gratitude that

the Supreme Court was, “the current Chief Justice notwithstanding … an advocate for the powerless.”  

After the Supreme Court ruling, Gov. Clements admitted that Texas could provide public education to undocumented aliens. “I’m sure we’ll handle it in Texas in good form.” Texas had already been doing so for two years, since the Seals’ ruling in 1980. Clements did, however, think that the Supreme Court’s ruling would provide a new incentive to immigrate illegally to the United States. “I don’t think there is any question at all that once again we have created a situation here that makes illegal immigration, primarily from Mexico, attractive.” Data showed that in the two years since Seals’ decision 12,000 and 18,000 undocumented aliens had attended Texas public schools, and Clements predicted that more would come. “I think you will see this increase because it is an attraction, but I would also call it a periphery issue to the entire subject of illegal immigration and undocumented workers from Mexico.”  

The Texas Commissioner of Education said, “For two years we’ve been educating them, and the immediate impact is minimal. But if the question becomes will this bring more workers and families into this country, it is a ruling that has broader implications for food stamps, unemployment compensation and so forth.” As for education, he said, “We’ve got the money, we can appropriate the money. The problem is we don’t have enough bilingual teachers now and we’re not getting any assistance whatsoever.”

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94 Undated newspaper clipping, “Texas Governor Says Compliance With Court Ruling Is No Problem,” The New York Times, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
95 Ibid.
In recent years, the Supreme Court had ruled that states could not deny welfare benefits to legal aliens, could not ban legal aliens from all civil service jobs, and could not deny them licenses to practice law or financial aid to attend college. Would the Supreme Court ruling in *Plyler* force now states to provide food stamps, medical care, and other social services to undocumented aliens? Legal experts were divided. Some thought that the decision was so narrowly written that it would apply only to undocumented alien children who were brought to the United States by their parents. For example, the Texas Department of Human Resources did not interpret the ruling to imply that undocumented aliens were now eligible for welfare benefits. 96

Others saw the ruling as opening the door to a wider array of social services. Rodric Schoen, a constitutional law professor at Texas Tech University, argued that the ruling meant that states now had to consider undocumented aliens, citizens, and legal residents equally when determining eligibility for government benefits. He said that state governments would no longer be allowed to distinguish between legal and illegal residents when allocating resources. “What you have is a resident who is impoverished.” Lynn Hughes, another constitutional law professor, said *Plyler* meant that states must now “show a good reason” when they wished to distinguish between legal and illegal aliens when allocating rights and benefits. 97

Peter Roos, the MALDEF attorney, said that the *Plyler* decision did not definitely answer the question about eligibility for other benefits. “It seems to me the court was fairly careful to say that it was the innocence of children and the essence of education that led the court to its ruling.” However, another MALDEF attorney, John Huerta, hoped that *Plyler* would be a helpful

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96 Newspaper clipping, Tom Moran, “Legal experts divided on impact of Supreme Court decision,” *Houston Chronicle*, June 16, 1982, Box 13, Folder 7, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

97 Ibid.
precedent in another case in which MALDEF challenged a Los Angeles county decision to deny medical care, except for emergencies, to undocumented aliens at its hospitals. 98

The decision in Plyler provoked outrage among some who held to the old notions of citizenship, sovereignty, and the nation-state, and who found it absurd that citizens of the United States were required to pay for the educations of those who had no legal right to reside here in the first place. Raul Besteiro, a Mexican American and the Superintendent of the Brownsville Independent School District, said, “I don’t think they have any right to demand anything because they shouldn’t be in this country. That’s the law of this country. They have no business here….If I went to Mexico and didn’t have any papers, I’d be in jail.” 99

On April 30, 1982, Mrs. Karoline Brennan wrote to Justice Brennan to express her disappointment in the decision. “Up until the last few years we were a nation of people who lived according to the laws of the land,” she wrote. “Today, illegal aliens are coming into our country by the thousands knowing full well they are breaking the law. Punishment is not following but instead they are reaping all the benefits of our judicial system and they themselves are demanding ‘their rights.’” Mrs. Brennan suggested that decisions like Plyler only encouraged more lawlessness. “Unless those of you who represent the highest court in the land make clear once and for all that the United States of America is a land of law and order and is governed according to the laws of the land, more and more illegal aliens will continue to cross our borders…..” Perhaps meaning to refer to the Court’s decision that the Equal Protection Clause encompassed undocumented aliens, Mrs. Brennan complained that “any one who is not a citizen

98 Ibid.
of this country is not entitled to the provisions outlined in our Bill of Rights.”

Another writer, Mr. Lee Van Hosen Jr., complained that the Supreme Court had ignored “the current immigration laws, citizenship laws and the will of the American [sic] people…” He argued that “aliens” were not entitled to “the rights and privileges of American citizens.”

In Houston, Judge Woodrow Seals had received many letters expressing similar themes. Many disputed the notion that “aliens” were entitled to the same rights, privileges, and benefits as American citizens. Many were dismayed at the idea of undocumented aliens being allowed to sue in American courts rather than being promptly deported.

Carolyn Mayfield wrote, “Our very own Preamble to our Constitution begins with, ‘We the people of the United States.’ Not foreigners of the U.S. or illegal aliens or their children. I don’t know where they get off saying we are discriminating against them. They shouldn’t be entitled to our rights.” Mayfield complained that her brother, a construction worker, couldn’t find work because the foremen only hired undocumented Mexican workers. “Why is it,” she asked, “that you have to be foreign (illegal or otherwise) to reap the American benefits that rightfully belong to American citizens?”

Jack Gray was confused as to why the immigrants weren’t simply deported rather than given a hearing in court. “What I am saying is, why are some laws enforced and others not? And it seems the only ones who have to obey every one, are the citizens, who serve in the armed forces.”


101 Letter from Carolyn Mayfield to Judge Seals, received March 6, 1980, Box 13, Folder 1, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
forces, pay taxes, keep their dollars here, vote, serve on juries when called, and pay for the illegal
aliens to go to school, get free medical care, etc. Why is this?” 102

An acquaintance of Judge Seals’ who attended part of the trial in Houston also wrote to
complain about the idea of undocumented aliens receiving a free education. “It violates my sense
of citizenship in a nation. I feel that what is happening should be happening to a defeated nation.
Illegal aliens entering at will and receiving favorable and sympathetic hearing in our courts
against citizens…. An interpretation that causes the constitution to deny our state protection
against this staggering invasion would be a crushing blow to the weakened spirit of the people of
the United States.” 103

A woman named Maxine Swan echoed the many writers who found the idea that
undocumented aliens were entitled to a free education absurd. To Swan, this was like “returning
home to find a burglar and welcoming him to become a member of your family – is he now a
part of your household just because he gained admittance to your house?” 104 Jean Hendricks
asked, “Are all rights reserved for those that break the law?” Hendricks declared that she was
against “anyone being allowed to stay in my Country on an illegal basis,” and against “rewarding
them, for breaking our laws, by educating their children free of charge.” She complained, “It is
time that our government stop giving everything we have to the foreigner and nothing to the
citizen.” 105 Another writer, whose parents were Hungarian immigrants, asked, “What is the

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102 Letter from Jack P. Gray to Judge Seals, received March 6, 1980, Box 13, Folder 1, Judge Woodrow B.
Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

103 Letter from H.L. Jack Poston to the Hon. Judge Woodrow Seals, March 6, 1980, Box 13, Folder 1, Judge
Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

104 Letter from Maxine Swan to Judge Woodrow Seals, undated, Box 13, Folder 1, Judge Woodrow B. Seals
Papers, Houston Metropolitan Research Center, Houston Public Library.

105 Letter from Jean E. Hendricks to Judge Woodrow Seals, July 23, 1980, Box 13, Folder 1, Judge Woodrow
B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.
meaning of illegal – doesn’t that mean unlawful? If a person does something said to be illegal, the next step is usually punishment by due process of law. Yet we reward these people for being in this country illegally.”

A letter to a Colorado newspaper argued that the Supreme Court’s *Plyler* decision “dilutes the privilege of citizenship not only for those who are born citizens but, especially, for those who have entered the country legally and earned citizenship with years of law-abiding, work and participation in the tax structure of the country.” The author complained about the erasure of distinctions between citizens and non-citizens, legal immigrants and illegal immigrants: “Foreign students receiving food stamps, aliens receiving welfare checks and illegal immigrants getting medical bills paid through Medicaid and Medicare….”

These letters reflected the belief, as Justice Burger said in his dissent, that one of the essential attributes of a sovereign state is the right to restrict its privileges and benefits to its own citizens. These letter-writers saw the *Plyler* decision as eroding the distinction between “legal” and “illegal” and between “citizen” and “alien.” To them, a sovereign state had the right and even the obligation to prefer its own citizens to those of a foreign power. The *Plyler* decision was about far more, then, than whether allowing illegal alien children to attend public school for free was a good or bad policy; it was about what it meant—if anything—to be a citizen of this nation rather than an alien. According to political scientist David Jacobson, the decision “eroded the concept of national sovereignty in that it conferred important benefits of membership in the nation” and in the process chipped away “at concepts of consent, sovereignty, and self-

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106 Letter from Mr. and Mrs. Francis Racz to Judge Woodrow Seals, July 23, 1980, Box 13, Folder 1, Judge Woodrow B. Seals Papers, Houston Metropolitan Research Center, Houston Public Library.

determination.” Jacobson concluded that “[c]itizenship as the cornerstone of national identity in the United States … is in decline.” 108 Texas had expressed this idea in its Jurisdictional Statement to the U.S. Supreme Court. “Nonresident aliens have no constitutional right to enter this country,” Texas insisted. “If they are here unlawfully, they are not constitutionally entitled to be here, let alone be educated at public expense.” 109

At the time *Plyler v. Doe* was being contested undocumented immigrants and even legal immigrants were ineligible for many federal benefits programs. For example, undocumented immigrants were ineligible for the food stamp program (Supplemental Nutrition Assistance Program, or SNAP), for nonemergency Medicaid, and for Aid to Families with Dependent Children (AFDC). Those in the U.S. on temporary visas were also ineligible for those programs. The 1996 welfare and immigration reforms further restricted the access of non-citizens, including legal immigrants, to federal benefits, by imposing a five year waiting period before they could become eligible. For example, in 1998 the Department of Health and Human Services published a list of 31 HHS programs, including Medicaid, Social Security Income, and TANF (the replacement for AFDC, the New Deal welfare program), for which immigrants were ineligible. However, access to emergency Medicaid (including, for example, treatment during labor and delivery), immunizations, and school breakfast and lunch programs is still available. After *Plyler*, legal disputes over whether or not states could deny state benefits to lawful immigrant residents had mixed results. Courts struck down a Maryland law and a Massachusetts law denying healthcare coverage to legal immigrants, but upheld Maine and Connecticut laws


terminating the healthcare coverage of legal immigrants and a Washington state law denying food stamps to some legal immigrants.\textsuperscript{110}

The \textit{Plyler} ruling that undocumented alien schoolchildren are entitled to a free public education has only been seriously challenged once.\textsuperscript{111} California in the early 1990s faced “an especially deep and long recession,” combined with “a large increase in the number of illegal and legal immigrants.” In late 1993, a small group of activists in Orange County wrote what would become Proposition 187.\textsuperscript{112} The proposition became the most galvanizing question of the California elections of 1994, drawing more interest from voters than the U.S. Senate race. In September 1994, the \textit{Los Angeles Times} received more letters about the Proposition than anything else on the November ballots. Republican governor Pete Wilson embraced the issue, helping turn around a campaign that was struggling to overcome four years of recession, with military bases closing and the aerospace industry suffering. Wilson’s administration had already highlighted the illegal immigration issue by suing the federal government in 1993 for the states’ costs related to housing, incarcerating, and educating illegal immigrants. Despite being outspent nearly four to one, the Proposition’s opponents appealed to voters who were pessimistic about the state’s economy, an example of what some researchers called “cyclical nativism brought on by economic downturns.” For several months, Californians and other Americans debated the economic impact of immigration, the cultural assimilation of immigrants, the impact of population growth on the environment, and concerns over the rule of law.\textsuperscript{113}

\begin{itemize}
\item \textsuperscript{111} Michael Olivas, \textit{No Undocumented Child Left Behind}, 39-42.
\item \textsuperscript{112} Andrew Wroe, \textit{The Republican Party and Immigration Politics} (New York: Palgrave MacMillan, 2008), 1-10.
\item \textsuperscript{113} Robin Dale Jacobson, \textit{The New Nativism: Proposition 187 and the Debate over Immigration} (Minneapolis: University of Minnesota Press, 2008), xiii-xxvii; see also, Lina Newton, \textit{Illegal, Alien, or Immigrant:}.
\end{itemize}
On November 8, 1994, the people of California voted 59% to 41% in favor of Proposition 187, which intended to prevent the “illegal aliens in the United States from receiving benefits or public services in the State of California.” The law obligated school personnel, as well as other government workers and agencies, to verify the immigration status “of persons with whom they come in contact,” “report those persons to state and federal officials,” and “deny those persons social services, health care, and education.” The Proposition was challenged in federal courts immediately after its approval by the voters, resulting in a temporary restraining order that prevented most of the law from going into effect.\textsuperscript{114}

Section 7 of the Proposition was entitled, “Exclusion of Illegal Aliens From Public Elementary and Secondary Schools,” and contained various subsections with instructions and requirements for schools to verify the immigration status of children, “to assure that undocumented children will be denied access to public education.” Judge Mariana Pfaelzer wrote, “In light of the United States Supreme Court’s decision in Plyler v. Doe …, in which the Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits states from excluding undocumented alien children from public schools, section 7 in its entirety conflicts with and is therefore preempted by federal law.”\textsuperscript{115}

In the end, Justice Burger was right about the constitutional legacy of the Plyler decision.

Because Justice Powell had successfully forced Justice Brennan to back off of his inclination to use the Plyler case to greatly expand the rights of undocumented aliens, and because Powell had successfully insisted that the “class” under discussion was not “undocumented aliens” and not


\textsuperscript{115} Ibid.
even “undocumented alien children”, but rather “undocumented children denied an education,”
the ruling in *Plyler* did not have the sweeping domino effect that some feared and others hoped
for. Although it successfully secured the right to a public education for undocumented children,
it did not erase the distinction between documented and undocumented immigrants with regards
to all public benefits, much less the distinction between undocumented immigrants and citizens.
CONCLUSION
IMMIGRATION AND WELFARE REFORMS (1981-1996) AND THE DENIAL OF FEDERAL BENEFITS TO UNAUTHORIZED ALIENS

In July 1981, the Reagan administration announced its immigration policy, asking Congress to legislate the series of reforms that five years later would become, with some revisions, the Immigration Reform and Control Act of 1986. Reagan requested the enactment of employer sanctions, an amnesty or legalization process for unauthorized immigrants who had arrived before January 1, 1980, and $75 million in new spending on border agents, detention facilities, and other law enforcement measures.¹

Reagan’s U.S. Attorney General, William French Smith, declared, “We have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively.” Smith explained and defended the administration’s proposed employer sanctions. He said that under Reagan’s proposal, employers would merely have to request to see an applicant’s birth certificate, social security card, driver’s license, or draft registration certificate to satisfy their obligations. The administration, he said, was “explicitly opposed to the creation of a national identity card.” Smith denied that employers were being asked to do the work of federal immigration officials, or that the threat of sanctions would lead to discrimination against people who were citizens or legal residents. “Since employers may rely on existing documents and will not be required to make judgments about the authenticity of those documents,” he said, “they would have no occasion make subjective and possibly discriminatory judgments about persons

who may appear to be foreign.”  

Critics of the proposal immediately pointed out that counterfeit versions of all of those documents were “easily obtained all along the Mexican border, and it could be argued that any law satisfied by such documents would be no law at all.”

In 1982, the same year that the U.S. Supreme Court decided *Plyler v. Doe*, a major comprehensive immigration reform bill was passed by the U.S. Senate but died in the House of Representatives. The Senate tried again the following year, and in 1984 a version of the 1983 Senate bill passed in the House, but a House and Senate conference committee failed to reconcile the differences between the two bills.

On May 23, 1985, Wyoming Senator Alan K. Simpson, a Republican, introduced a new comprehensive immigration bill. It was the third attempt by Simpson in four years to overhaul the nation’s immigration system; previous attempts had been sponsored in the House of Representatives by Romano L. Mazzoli, a Democrat from Kentucky. This version, unlike its predecessors, promised to delay the component offering “amnesty” to unauthorized aliens “until after the United States had better control of its borders,” by creating a Presidential commission that would have to certify that sanctions on employers were reducing the entry and employment of unauthorized aliens before the legalization of those already present could go into effect. The new bill was endorsed by the United States Chamber of Commerce, which had opposed earlier versions of the legislation as too burdensome for employers. Simpson’s bill included fines for the employment of unauthorized aliens, ranging from $100 to up to $10,000 for employers who

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engaged in a “pattern or practice” of hiring unauthorized laborers, but it appeased business
groups by reducing the paperwork and record-keeping requirements placed on employers.
However, Simpson’s new bill did not address concerns voiced about earlier versions that the
sanctions on employers would lead to discrimination against legal or authorized aliens, causing
groups such as the American Civil Liberties Union, the League of United Latin American
Citizens, and the Mexican American Legal Defense and Educational Fund to oppose the new
bill.⁵

The bill made it out of the Senate on September 19, 1985. The bill passed with over a
two-to-one majority, 69 to 30, and was supported by about four-fifths of the Republicans in the
Senate (41-11) and about three-fifths of the Democrats (28-19). This was a closer vote than in
previous years, where versions of the bill had passed by four-to-one margins. Like its
predecessors, the bill tried to balance three reforms in a way that would garner sufficient support
to pass both houses of Congress—make it illegal to hire unauthorized aliens, stiffen enforcement
of the existing immigration laws to deter future illegal immigration, and provide a path to
legalization and citizenship for those unauthorized immigrants already in the country. “It’s a
balanced and well-intended proposal,” author Alan Simpson argued, “which, if enacted, would
promote the general best interest of the United States.” The bill would now go to the House,
where the previous year’s version had passed by only five votes (with an attempt to reconcile the
House and Senate versions then dying in a conference committee.) One provision in the bill was
a requirement that states check the immigration status of persons applying for welfare, food

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stamps, Medicaid, and other benefits, to prevent unauthorized aliens from receiving those benefits.\(^6\)

The bill’s path through the House of Representatives was much longer and more difficult than its path through the Senate had been. The final passage was by a comfortable margin, 230 to 166, but in the House Republicans tended to oppose the bill and Democrats were more likely to support it. Final passage was almost derailed by a proposal to eliminate the section offering amnesty to unauthorized aliens who had entered the country before January 1, 1982, but the proposal was defeated by seven votes. Only a last minute compromise allowing farmers to continue using “foreign workers to harvest fruit and vegetables” preserved the bill’s passage. Also, in what was considered a major victory for farmers, a provision was adopted prohibiting federal agents from entering a farm without first obtaining either a search warrant or the permission of the farmer. Meanwhile, Democratic Representative Robert Garcia, from the Bronx, New York, won another concession from the bill’s supporters, who agreed to end the penalties against employers who hired unauthorized aliens six and a half years after the bill became law. Garcia had argued that these penalties would lead to discrimination against Hispanics in hiring practices.\(^7\)

Just a few days later, the House and Senate conference committee agreed to a compromise bill. “This is miraculous,” said Representative Peter Rodino, a Democrat from New Jersey who had been working to pass similar legislation for fourteen years. “This bill will regularize our immigration policy and shows the big heart of America.” Two last-minute agreements saved the bill. One agreement was to drop a provision from the House version that


barred the deportation of Nicaraguans and Salvadorans, and another permitted lawyers financed by the Legal Services Corporation to represent aliens hired as temporary farm workers in employment disputes involving matters such as wages and housing. \(^8\)

Calling illegal immigration a “challenge to our sovereignty,” President Ronald Reagan signed the Immigration Reform and Control Act of 1986 on November 6. Reagan lauded the legalization component of the act, saying it would “go far to improve the lives of a class of individuals who now must hide in the shadows, without access to many of the benefits of a free and open society. Very soon many of these men and women will be able to step into the sunlight and, ultimately, if they choose, they may become Americans.”\(^9\)

The Immigration Reform and Control Act (IRCA) offered to legalize the immigration status for millions of unauthorized aliens who could prove that they had entered the United States before January 1, 1982.\(^10\) The Immigration and Naturalization Service announced that over the next six months it would create up to one hundred offices around the country to process applications. Unauthorized aliens would have up to one year to apply for temporary residence; eighteen months later, they would be eligible for permanent resident status if they could pass basic tests of English and American history and government; five years after that, they would be eligible to become American citizens. For the first five years after legalizing their immigration status, immigrants would be ineligible for federal benefits such as welfare and food stamps. In addition to the legalization or amnesty program, IRCA authorized the federal government to set

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aside one billion dollars a year to reimburse state governments for their expenses for the education and health care of unauthorized aliens. 11

Possibly the most important aspect of the new law was that, for the first time, it became a federal crime to knowingly hire unauthorized aliens, with civil penalties from $250 to $10,000 per unauthorized worker. Reagan called this provision the “keystone” of the bill, saying, “It will remove the incentive for illegal immigration by eliminating the job opportunities which draw illegal aliens here.” Employers who showed a “pattern or practice” of violating the law would incur criminal penalties of up to a $3000 fine and six months in prison. 12

President Reagan called the act “the most comprehensive reform of our immigration laws since 1952,” and suggested that it would allow the United States to “regain control of our borders and thereby preserve the value of one of the most sacred possessions of our people, American citizenship.” Optimism was guarded, even among the bill’s supporters in Congress. Charles Schumer, the Brooklyn Democrat who supported the bill in the House of Representatives, said, “The bill is a gamble, a riverboat gamble. There is no guarantee that employee sanctions will work or that amnesty will work. We are headed into uncharted waters.” Alan Simpson, the chief sponsor of the bill in the Senate, admitted, “I don’t know what the impact will be, but this is the humane approach to immigration reform.” 13

Ten years after the signing of IRCA, Congress again enacted major legislation affecting the lives of both legal immigrants and unauthorized aliens. On September 30, 1996, President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which


12 Ibid.

13 Ibid.
toughened the nation’s laws with respect to illegal immigration. The number of border patrol agents would be doubled and 2,700 new detention cells created, and penalties for smuggling people into the United States were stiffened. Penalties for using fraudulent government-issued identification documents were tripled, from five years imprisonment to fifteen years.¹⁴

The most controversial aspect of the debates over the immigration bill was the “Gallegly amendment,” introduced by California Republican Elton Gallegly. The amendment, which would have given states the right to deny a public education to unauthorized alien schoolchildren, was the last serious attempt at the federal level to overturn the *Plyler v. Doe* decision. Knowing that President Clinton would veto any bill that included the amendment, some accused the amendment’s supporters of a cynical ploy to hurt the President’s reelection chances by forcing him to veto the immigration reform package, but Gallegly insisted that his proposal was serious. “As long as we have a law on the books that you should not legally enter this country, we should enforce that law,” he said. “We are rewarding people illegally coming to this country and harming citizens.”¹⁵

The Gallegly amendment passed the House in March with the support of Speaker Newt Gingrich, who said, “There is no question that offering free taxpayer goods to illegals attracts more illegals.” The measure passed 257 to 163, and its passage provoked outrage among advocates for unauthorized aliens and even split Republicans who otherwise supported the 1996 immigration reform bill. A spokesman for the Mexican American Legal Defense and Education Fund called the amendment “mean-spirited, appealing to the worst instincts in American politics today.” Vibiana Andrade, the national director of immigrant rights for MALDEF, said,


“Congress just can’t tell states to go ahead and violate the equal protection provisions of the Constitution,” but others suspected that the Supreme Court would back down if Congress and the President decided to strip unauthorized alien schoolchildren of the right to a free public education. Pete Wilson, the governor of California, welcomed the amendment. “This is a hard-earned victory for the people of California who have made it clear time and time again that they do not want to foot the bill for continued illegal immigration.”

Republicans were split. Texas Senators Phil Gramm and Kay Bailey Hutchison opposed the Gallegly amendment. On the conference committee appointed to iron out differences between the House and Senate versions of the immigration bill, Republicans Alan Simpson, Lamar Smith, and others agreed amongst themselves to drop the amendment out of fear that it would derail the entire legislation. The conference committee produced a reconciled version of the bill that September, which was signed by President Clinton on the last day of the month.

In 1996, President Clinton also signed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which further restricted immigrants’ access to welfare and food stamp benefits. Future immigrants would be barred from means-tested federal programs such as Medicaid and Temporary Assistance for Needy Families (TANF) for five years or until they naturalized. The law marked, according to observers, “the first time in modern history that Congress has explicitly authorized states to discriminate against legal immigrants in the administration of their public benefit programs.” Previously, in a series of decisions, the Supreme Court had curtailed states’ authority to do so. This occurred while the United States legally admitted about 800,000 immigrants per year with a path to citizenship, an immigration

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policy more generous than that of all Western European countries combined. Elderly and
disabled immigrants had their access to Medicaid and SSI restored a year later with the Balanced
Budget Act of 1997, but not their access to food stamps. Some estimated that over one million
legal immigrants would lose their food stamps as a result of the legislation. Despite all of these
changes in policy towards immigrants, the PRWORA explicitly retained the eligibility of legal
immigrants for education programs such as Head Start and means-tested elementary and
secondary education programs. However, the law gave states more responsibility “to police
benefit programs to ensure that unauthorized immigrants do not receive benefits.” Unauthorized
aliens would still be ineligible, with some specific exceptions, for SSI, food stamps, Medicaid,
TANF, other federal means-tested benefits, and other state and local public benefits. Exceptions
included such things as immunizations and emergency medical services.  

Almost immediately after Clinton signed the welfare reform bill, California Governor Pete Wilson signed an executive order cutting off state aid for unauthorized aliens. Wilson called
the federal legislation “a vindication” and an answer to Californians’ demand that “the Federal
government end the magnetic lure of public services and benefits that have substantially
spawned our national crisis of illegal immigration.” Meanwhile, thousands of immigrants
rushed to naturalize before they could fall victim to the harsh new immigration and welfare laws.
By the end of the fiscal year on September 30, 1996, over one million immigrants had become
American citizens, which was over twice the number of naturalizations that had happened the
previous year. “As an American citizen, you have protection,” explained a Texas man, Hector


Peña, who had moved to Houston from Monterrey, Mexico, eighteen years earlier, and who cited the new legislation in 1996 as a motivation to naturalize.  

One of the consistent criticisms voiced over the years in letters to Judges Justice, Seals, and others was that unauthorized aliens were lawbreakers who should be deported rather than invited guests who deserved a share of the nation’s bounty, and another was that public benefits should be reserved for citizens and taxpayers. Although testimony showed that unauthorized aliens did pay taxes, these were themes that apparently resonated with many in the public and that manifested themselves in the anti-immigrant legislation of 1996. The legislation can be seen as a counter to the perceived errors of the Plyler decision and the IRCA law of 1996; the 1996 immigration and welfare reforms responded to the widespread public perception that lawbreakers were not being punished and that an undeserving class was receiving benefits more properly reserved for American citizens. California governor Pete Wilson expressed these ideas in an op-ed in the *New York Times*, where he responded to Texas Senators Gramm and Hutchison, who had said that the Gallegly amendment was “unacceptable national policy” and that it was “untenable to deny children an education.” Wilson characterized free education as a reward “for violating our borders,” a “crushing burden on California’s schools” that “actually encourages unlawful behavior.”

Did the PRWORA violate the Equal Protection rights of unauthorized aliens? Shortly after the 1996 legal and welfare reforms were put into effect, an unauthorized immigrant named Astrid Quiceno died of renal failure caused by lupus while unsuccessfully fighting a legal battle in Connecticut for access to Medicaid. The Connecticut Superior Court denied her appeal, saying

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that the “fatal consequences” of the discontinuation of her medical care consequent to the denial of Medicaid coverage did not “transform into emergency medical condition care,” meaning it did not qualify as emergency healthcare services.  

Critics of PRWORA were quick to note that “uninsured undocumented immigrants have little choice but to wait until their medical conditions turn into emergencies, at which point hospitals may treat them with Medicaid funds.” States wishing to treat undocumented immigrants prior to an emergency were required to do so with their own funds and to pass their own laws creating the medical assistance. One writer urged the courts to consider unauthorized aliens a “quasi-suspect class” and to treat Medicaid access as an “important” government right, triggering the same kind of heightened scrutiny that was employed in Plyler.  

Unauthorized aliens had not been eligible for Medicaid coverage before PRWORA, and the U.S. Department of Health and Human Services had issued an explicit clarification of that point a few years earlier. Nonetheless, some scholars believed that prior to the 1996 legislation many health care providers had assumed that the Plyler decision obligated them to treat unauthorized aliens. The 1996 law clarified the matter by specifically prohibiting non-emergency Medicaid services.  

In 1976, the U.S. Supreme Court heard a challenge to the constitutionality of the denial of federal welfare benefits to legal immigrants. In Mathews v. Diaz, Diaz and others argued that 42 U.S.C. §1395o(2)(b), which denied Medicare eligibility to aliens unless they were permanent

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residents who had resided in the United States for five years, violated the Fifth Amendment’s
guarantee of due process rights. A federal district court agreed that §1395o(2)(b) was
unconstitutional and unenforceable. The judge argued that, “even though fourteenth amendment
notions of equal protection are not entirely congruent with fifth amendment concepts of due
process,” the danger of unjustifiable discrimination against aliens was such that this statute
should be examined with the same scrutiny that would be applied in equal protection analysis to
a state statute. Doing so, the judge found the statute’s discrimination between some aliens and
others to be irrational.\textsuperscript{26}

The U.S. Supreme Court disagreed, stating that Congress’s “broad power over
immigration and naturalization” meant that it had “no constitutional duty to provide all aliens
with the welfare benefits provided to citizens.” The Court declared that the “real question” was
not “whether discrimination between aliens and citizens is permissible, as it clearly is, but
whether the statutory discrimination within the class of aliens is permissible.”\textsuperscript{27} In other words,
the Court didn’t consider the question of whether Congress could exclude aliens from Medicare
to be very difficult, and that the only interesting constitutional question was about the division of
immigrants into two groups, those who met the five-year-residency requirement and those who
did not. The Court unanimously found Congress’s selection of a five-year requirement to be the
kind of policy choice it was “reluctant to question.”\textsuperscript{28}

In language that would be frequently quoted, in \textit{Plyler v. Doe} and in many other cases,
the Court vigorously defended Congress’s power to distinguish between citizens and aliens:

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\textsuperscript{27} \textit{Mathews v. Diaz}, 426 U.S. 67, at 77-80 (1976).

\textsuperscript{28} Ibid., at 82-84.
The fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for all aliens. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests.\textsuperscript{29}

The Court considered it “obvious that Congress has no constitutional duty to provide \textit{all aliens} with the welfare benefits provided to citizens,” and suggested that even if the permanent residence and the five-year threshold requirements were eliminated, “surely Congress would at least require that the alien’s entry be lawful….”\textsuperscript{30}

The Court easily distinguished its ruling in \textit{Mathews} from a ruling a few years earlier, \textit{Graham v. Richardson}. In \textit{Graham}, the Court had struck down a state statute that imposed a length of residence requirement on legal immigrants who applied for federal benefits. The \textit{Graham} decision, the Court said, “actually supports our holding today that it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens. The equal protection analysis also involves significantly different considerations, because it concerns the relationship between aliens and the States, rather than between aliens and the Federal Government.”\textsuperscript{31}

The Court further explained that to the state, there was little constitutional difference between “citizens of another State” and “citizens of another country…. Thus, a division by a State of the category of persons who are not citizens of that State into subcategories of United

\footnotesize{\textsuperscript{29} Ibid., at 80.}
\footnotesize{\textsuperscript{30} Ibid., at 82.}
\footnotesize{\textsuperscript{31} Ibid., at 84-85.}
States citizens and aliens has no apparent justification, whereas a comparable classification by the Federal Government is a routine and normally legitimate part of its business.” \(^{32}\)

Two cases after the passage of the 1996 welfare reform law challenged the constitutionality of the denial of public services to unauthorized aliens. In *Rodriguez v. United States*, legally admitted aliens who were not eligible for federal benefits challenged the constitutionality of PRWORA, arguing that its distinction between “qualified” and “unqualified” immigrants violated the Equal Protection Clause. The plaintiffs were ineligible for Social Security Income and food stamps and claimed that the statute violated their equal protection rights by categorizing them as “unqualified.” Constitutionally, this was very similar to *Mathews v. Diaz*, which the U.S. District Court and Circuit Court relied upon in rejecting their argument. \(^{33}\)

*Lewis v. Thompson* involved unauthorized aliens who argued that their denial of prenatal care violated their equal protection rights. The “unqualified alien pregnant women” argued that the statute merited heightened scrutiny because of the risk presented to their unborn children by the denial of prenatal care. The federal courts rejected that argument and employed the most lenient standard of review, the rational basis test, upholding the legislation. \(^{34}\)

Courts have therefore repeatedly confirmed Congress’s power to make distinctions between aliens with regards to eligibility for public benefits, but what about the distinction between authorized and unauthorized aliens, cutting off the latter from any hope of eligibility for benefits as long as their immigration status remains unchanged? In other words, does separating unauthorized aliens apart from other immigrants violate their equal protection rights? If courts

\(^{32}\) Ibid., at 85.


\(^{34}\) *Lewis v. Thompson*, 252 F.3d 567 (2d Cir. 2001).
analyzed a challenge to the denial of Medicaid benefits to unauthorized immigrants under rational basis review, the standard of review most favorable to the government, “undocumented immigrants would have the burden of proving there was no conceivable basis for Congress to believe that denying undocumented immigrants access to Medicaid deters illegal immigration.”

Even a scholar sympathetic to the unauthorized aliens admitted that it was “highly unlikely the courts would accept such a claim.”

The problem with raising the level of scrutiny, as the Plyler decision acknowledged, was that it was difficult to justify labeling unauthorized aliens a suspect class. “Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action.” Of course, the central aspect of the Plyler case, at least for Justice Powell, was that it involved a subset of unauthorized aliens – children – who could convincingly argue that their status was NOT the product of voluntary action. Children are not the only unauthorized aliens with a strong argument that they did not choose their status – victims of sexual trafficking, several thousand of whom are trafficked across the border illegally each year, are also not in any meaningful sense members of a category that they have chosen through voluntary action.

So, why was it unconstitutional for Texas to deny a free public education to unauthorized alien schoolchildren, but not unconstitutional for the federal government to deny unauthorized alien children access to Medicaid or to food stamps? I think there are two answers.

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The first is that in *Plyler*, unlike in *Mathews*, the challenged statute was enacted by a state rather than the federal government, and the constitutional clause at issue was the Equal Protection Clause rather than the Due Process Clause. The Court chose to utilize a heightened scrutiny to examine the statute because the class that it targeted was children and because of the importance of education. When Texas tried to deny a free public education in 1975 and when California tried to do so in 1994, the federal courts subjected the legislation to a fairly stringent analysis. In *Mathews v. Diaz*, *Rodriguez v. United States*, and *Lewis v. Thompson*, the courts were extremely deferential to Congress.

In the 1954 case, *Bolling v. Sharpe*, decided on the same day as the more celebrated *Brown v. Board of Education*, the U.S. Supreme Court declared segregated schools in Washington, D.C., unconstitutional. The Court acknowledged that the Equal Protection Clause in the 14th Amendment applied to the states and that the 5th Amendment, which applied to the federal government, had only a due process clause. The Court pointed out that in view of its “decision 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.” The court reasoned that segregation in the D.C. schools imposed on black children “a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.” In other words, “discrimination may be so unjustifiable as to be violative of due process.”

Why doesn’t the denial of food stamps or healthcare coverage by the federal government attract the same commendation from the federal judiciary as the denial of an education by state governments? In the latter case, federal courts found the denial unjustifiable, so why wouldn’t

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federal courts do as they did in *Bolling* and rule that the denial of health care and food stamps was “discrimination … so unjustifiable as to be violative of due process.” After all, as Chief Justice Burger said in his dissent, it was hardly clear that education was a more fundamental necessity than food or health care.

The answer, perhaps, lies in Justice Lewis Powell’s insistence that the Supreme Court avoid declaring unauthorized aliens a “suspect class” that would trigger the most heightened level of judicial review, strict scrutiny. In the lower courts, judges Justice and Sears had used their opinions to argue that the Supreme Court should consider unauthorized immigrants a protected class, similarly to its treatment of racial and religious minorities. Led by Justice William Brennan, four of the U.S. Supreme Court justices had been inclined to follow that advice, but Lewis Powell had threatened to deny the Court a majority if they so. Powell had feared that such a step would be a precedent for far more sweeping changes than the Court was prepared to actually endorse – or, at least, than he was ready to endorse. For Powell, keeping the opinion very narrowly focused on the fact that children who happened to be unauthorized aliens were being denied an education was a way to prevent himself and the Court from opening the door to the access of all government benefits, such as food stamps, Medicaid, and more. The back and forth dialogue between Brennan and Powell in 1982 about the scope of the *Plyler* decision had far-reaching consequences, then, as Powell’s victory in that debate gave the federal courts just enough intellectual space to continue defending unauthorized schoolchildren’s right to a free public education while refusing to challenge Congress’s decision to deny them many other public benefits.
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