1995

Foreword

Rachel F. Moran

Follow this and additional works at: https://scholarship.law.berkeley.edu/blrlj

Part of the Law Commons

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38307Z

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley La Raza Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Foreword—Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond

Rachel F. Moran†

Today, the United States faces significant demographic changes that will shape its political destiny. As two researchers wrote recently: "Latino population growth is the future." The White population is declining, the African-American population is stable, and the Latino and Asian-American populations are expanding rapidly. The Asian-American population is growing more quickly than the Latino population, but Latinos constitute a considerably larger segment of the population than Asian Americans. Consequently, Latinos are predicted to become the largest racial or ethnic minority group in America in the early part of the twenty-first century.

As these nationwide population shifts take place, California finds itself on the cutting edge of social and political transformations because it has experienced more rapid demographic shifts than the rest of the country. According to recent projections, California will expand its political and economic clout as it grows to represent nearly 15% of the country's population; that is, about one in seven Americans will reside in the state. California also "will supplant New York as the nation's new Ellis Island for immigrants, setting the pace for America's transformation into a more racially

† Professor of Law, University of California School of Law (Boalt Hall) and Chair, Chicano/Latino Policy Project, Institute for the Study of Social Change, University of California at Berkeley. A.B. 1978, Stanford University; J.D. 1981, Yale Law School.


2. By 2010, Latinos will surpass African Americans in size; Latinos will total 40.5 million, while African Americans will total 40.2 million. Each group will be about 2 1/2 times as large as the Asian-American population and about 1/6 the size of the White population. Paul R. Campbell, U.S. Dep't of Commerce, Current Population Reports: Population Projections for States, by Age, Sex, Race and Hispanic Origin: 1993 to 2020, P25-1111, 21, (Mar. 1994). By the year 2020, Whites will make up 78.2% of the nation's population; African Americans, 13.9%; Native Americans, 0.9%; Asian Americans, 7.0%; and Latinos, 15.7%. Jennifer Cheeseeman Day, U.S. Dep't of Commerce, Current Population Reports: Population Projections of the United States, by Age, Sex, Race, and Hispanic Origin: 1993 to 2050, P25-1104, xxii, (Nov. 1993). These figures sum to more than 100% because persons of "Hispanic" origin may be of any race. The term "Hispanic" and "Latino" are used interchangeably.

3. Campbell, supra note 2, at xi.
and ethnically diverse society. . . ." Census projections indicate that by 2020, Whites will constitute 34% of the state's population; Latinos, 36%; Asian Americans, 20%; African Americans, 8%; and Native Americans, 1%. These demographic projections have led Dr. Lawrence Bobo, a sociologist at the University of California at Los Angeles, to conclude that: "In many ways California is the leading edge of a series of social changes that will inevitably affect the rest of the nation. As it has been for more than a decade, it's the testing ground for a lot of situations and trends that are going to be seen in the country as a whole."

As the racial and ethnic diversity of the population grows, tensions have increased. Debates have raged over whether new populations, including Latinos, are assimilating to an American way of life or instead are seeking to preserve distinctive cultures and values in a pluralistic society. Fears that demographic shifts will alter the balance of power among racial and ethnic groups have sparked damaging conflicts. One of the most dramatic examples of this growing discomfort was the rioting in Los Angeles that followed the acquittal of four police officers accused of beating a Black man, Rodney King. As media commentators were quick to point out, the dynamic of the violence appeared to stem not so much from Black-White hostilities as from simmering tensions among racial and ethnic groups in competition for a small piece of the American dream; conflict between African Americans and Korean-American shopkeepers seemed particularly intense. Yet, the unrest in Los Angeles was only the most recent and salient example of clashes among Whites, African Americans, Latinos, and Asian Americans in diverse, congested urban areas.

In addition to these domestic conflicts regarding race and ethnicity, immigration concerns have polarized the political debate at the national level as well as in California. Restrictionists favor combating illegal immigration by bolstering support for the Border Patrol, creating a national identification card, and eliminating access to government benefits for the undocumented; some restrictionists also want to cut back on legal immigra-

---

6. de Lama, supra note 4.
8. Id. at 885-902.
9. Id. at 888.
10. Id. at 889.
tion. Their opponents favor shifting the focus to punishing employers who hire undocumented workers rather than penalizing the workers themselves; proponents of this approach typically support preserving the current level of legal immigration. Observers have noted that the controversy surrounding immigration is most intense in California because of the huge influx of newcomers, particularly Spanish-speaking immigrants, between 1985 and 1990. At least some commentators believe that anti-immigration sentiment is at the top of California's political agenda with Governor Pete Wilson calling for a crackdown on illegal immigration, state legislators passing laws that limit immigrant access to benefits and services, and a popular initiative seeking to "Save Our State" by restricting immigration. Demography, unfortunately, seems to be leading to distrust.

Today, more than ever, responsible leadership from academic, legal, and policymaking circles is needed to ensure that demography and distrust do not spell disaster. In particular, today's population shifts provide a critical juncture at which to explore two areas of law and policy that have been of critical importance to Latinos: civil rights and immigration. Traditional civil rights law has been rooted in the experience of African Americans in the South, and its underlying assumptions and remedies must be reexamined as emerging racial and ethnic populations demand recognition of their unique needs. Immigration policies that use nostalgic images of earlier immigrants from Europe as the benchmark of legitimacy also may do an injustice to recent arrivals to the United States, who must grapple with the contemporary realities of a global economy. To fairly address the rights and responsibilities of these newcomers, policymakers must confront both the international and domestic implications of American immigration policy.

12. Id.
This Foreword will briefly review the traditional civil rights and immigration models and their potential limitations as a prelude to the more in-depth analyses that follow in the symposium contributions. This interdisciplinary symposium provides an opportunity to explore these themes by drawing on the expertise of social scientists and lawyers; in doing so, the symposium hopefully will serve as a catalyst in building bridges between academic researchers and policymakers. The symposium addresses concerns about civil rights and immigration in an area of crucial importance to Latinos: education. The participants have evaluated the use of civil rights protections to address Latino concerns about school policies and practices and the effect of immigration policies on educational service delivery to Latinos. Hopefully, this symposium will be the first of a series of efforts to devise a coherent theoretical framework for addressing Latino issues and to solidify a compelling reform agenda.

I. THE CIVIL RIGHTS MODEL: BEYOND RACE

African Americans have assumed a leading role in the pursuit of racial justice and continue to be premier spokespersons for civil rights. The present civil rights framework is rooted in African-American demands to dismantle an enforced caste system, particularly in the South. As demographic changes take place in the United States, it is not clear how well this framework will continue to serve the needs of a diverse population. In the area of education, civil rights reform is typified by efforts to integrate the schools. The shifting demographics of school populations have placed increasing strain on the use of integration as the remedy of choice for students of color. Here, I will chronicle the rise of the integration initiative and then demonstrate how Latinos have sought to alter this model of reform to fit their own needs. I will conclude that demography may be leading to distrust and disension among various elements of the civil rights community at a time when coalition-building is likely to be essential to implement new approaches to achieving equal educational opportunity.

The role of the African-American community in the development of civil rights is exemplified by the push to achieve equal educational opportunity by integrating the public schools. The push for school integration was rooted in a longstanding campaign that the National Association for the Advancement of Colored People (NAACP) began in the 1930s and 1940s.15 This effort directly confronted the legacy of a racial caste system in the South that mandated segregation of public facilities by law; this de jure

segregation with its message of racial inferiority and subordination had been upheld in *Plessy v. Ferguson*,\(^\text{16}\) an 1896 Supreme Court decision.

The NAACP's painstaking litigation campaign culminated in the Supreme Court's declaration in *Brown v. Board of Education*\(^\text{17}\) that "[s]eparate educational facilities are inherently unequal"\(^\text{18}\) when mandated by law; this decision is properly hailed as a landmark in the evolution of civil rights. In part because of the need to achieve unanimity, the *Brown* opinion contained several strands of analysis, including both the need to protect racial minorities from invidious discrimination and the recognition of the central role of education in modern-day life. Some believe that *Brown* originally stood as much for the proposition that education is a fundamental right as for the proposition that race-based classifications are inherently harmful and merit close judicial review.\(^\text{19}\)

At first, implementation of the *Brown* case was stymied by the need to litigate in a number of federal district courts that faced a range of local conditions. The NAACP struggled with limited resources to pursue desegregation lawsuits across the South. Even when the NAACP successfully filed suit, its efforts were hampered by the federal courts' reluctance to enter desegregation orders that would meet with decisive resistance from local citizens, school officials, and political representatives. In recognition of the dangers of exposing the federal courts to outraged reactions, the Supreme Court ordered district court judges to mandate that school systems "make a prompt and reasonable start toward full compliance" but at the same time permitted violations to be remedied "with all deliberate speed."\(^\text{20}\)

The effort to convert *Brown* from rhetoric into reality received a significant boost when Congress passed the Civil Rights Act of 1964, which authorized federal officials to investigate school districts' compliance with *Brown* and to withhold federal funding if districts failed to comply with a negotiated agreement or court order.\(^\text{21}\) During the late 1960s and 1970s, these federal efforts prompted the desegregation of public schools in the

---

\(^{16}\) 163 U.S. 537 (1896). As Justice Henry Billings Brown wrote in the *Plessy* case:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

*Id.* at 551.

\(^{17}\) 347 U.S. 483 (1954).

\(^{18}\) *Id.* at 495.

\(^{19}\) *See* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 Geo. L. J. 1, 43-44, 87 (arguing that doctrinal ambiguity was the price of unanimity in *Brown*).


South. Today, these schools are among the most racially integrated for Blacks and Whites in the United States. As federal intervention led to significant enforcement efforts, the Supreme Court began to elaborate on the meaning of \textit{Brown} in ways that narrowed the case's significance. In \textit{Swann v. Charlotte-Mecklenburg Board of Education}, the Court set forth the remedial implications of a finding of unlawful segregation. The Court made clear that "[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." In defining the scope of the district courts' equitable remedial powers, the Court noted that "judicial powers may be exercised only on the basis of a constitutional violation." The Court concluded that to remedy past intentional discrimination by school officials, district courts could make limited use of racial balance in the schools "as a useful starting point in shaping a remedy to correct past constitutional violations." The Court further noted that school officials had to satisfy the courts that the continued existence of a small number of one-race schools was not the product of their past or present discriminatory actions. Finally, the Court found that districts could alter attendance zones and employ busing plans that did not jeopardize children's health or impinge on the educational process. After evaluating the district courts' remedial powers, the Court noted in closing that:

> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

Subsequently, African Americans sought to expand \textit{Brown}'s scope by using it to tackle segregated school conditions in Northern and Western districts. These efforts were only partially successful. In \textit{Keyes v. School Board of State of Colorado}.

\begin{itemize}
\item[23.] 402 U.S. 1 (1971).
\item[24.] \textit{id.} at 15.
\item[25.] \textit{id.} at 16.
\item[26.] \textit{id.} at 25.
\item[27.] \textit{id.} at 26.
\item[28.] \textit{id.} at 28, 30-31.
\item[29.] \textit{id.} at 31-32.
\end{itemize}
District No. 1, the Supreme Court indicated that school districts would be liable for segregation in the public schools only if it resulted from intentional discrimination by state officials; if the schools were segregated due to private housing patterns rather than invidious state action, the federal courts would not intervene to promote racial balance in the student population. The Court made clear that intentional discrimination could be established not just by statutes and regulations mandating public school segregation, but also by circumstantial evidence such as racially-motivated statements by school officials or racially-sensitive decisions regarding school boundaries, school closings, or school construction. The Court thus indicated that where plaintiffs could amass a persuasive body of circumstantial evidence regarding state officials’ racially discriminatory motives, federal judicial relief would be forthcoming.

In Milliken v. Bradley, however, the Court demonstrated that even where such intent could be shown, the resulting relief might be extremely limited in scope. Echoing the corrective justice rationale in Swann, Milliken made clear that the scope of a judicial remedy would be tailored to the impact of the intentional segregative practices that had taken place. As the Court noted:

The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. . . .

In short, if the plaintiffs established intentional discrimination by a core urban school district, the federal courts could mandate that suburban school districts participate in desegregation efforts only if they had engaged in intentional discriminatory acts themselves or if the core district’s wrongdoing had significant interdistrict effects. Because the harms associated with a core district’s discriminatory assignment practices were often hard to trace, courts typically did not order suburban schools to join in a metropolitan desegregation remedy. The Milliken decision thus became synonymous

31. Id. at 201-03.
33. Id. at 744-45.
with white flight to the suburbs, which largely defeated efforts to rectify past discrimination in urban school systems through integration.\(^{34}\)

Because the desegregation remedy was tied to remedying past discrimination, federal courts had to cease intervention once earlier wrongs had been corrected, even if serious educational inequities persisted. Increasingly in recent years, federal courts have been terminating desegregation lawsuits, even though substantial school resegregation will result. Judges have become less willing than in previous years to attribute segregated conditions in the schools to past discrimination rather than to contemporaneous private preferences and socioeconomic differences for which the schools are not responsible.

Most notably, in *Dowell v. Board of Education*,\(^{35}\) the Supreme Court indicated that federal district courts could bring desegregation lawsuits to a close even when schools revert to being segregated. A court-ordered desegregation plan had been implemented in Oklahoma City in 1972; five years later, the district court held that the school system had eliminated the effects of past intentional discrimination and terminated jurisdiction over the case.\(^{36}\) Afterwards, the school board adopted a Student Reassignment Plan, which would create some identifiable one-race schools.\(^{37}\) Because the federal district court found that the board’s proposal was not intended to discriminate and further concluded that the reemergence of one-race schools was an outgrowth of residential patterns rather than past school board policies, the judge approved the plan. The court of appeals reversed on the ground that insofar as the plan resulted in one-race schools, it failed to preserve a system in which past segregative practices had been eliminated root and branch.\(^{38}\)

The Supreme Court overturned the court of appeals’ decision because resegregation could result from voluntary, private decisionmaking, rather than from school board policies. That is, school segregation could reflect residential segregation, which in turn was a product of economics and personal preferences rather than past discrimination in the schools.\(^{39}\) It was up to the district court to determine the origins of segregated school attendance patterns, and the Court remanded the case for further findings of fact.\(^{40}\) On remand, the district court held that it had properly terminated its jurisdi-

\(^{34}\) Wilkinson, supra note 15, at 224-25.


\(^{39}\) 498 U.S. at 243, 250 n.2.

\(^{40}\) Id. at 249-51.
tion. The Dowell case signaled to federal district court judges that they could end oversight under desegregation orders if plaintiffs could not persuasively establish that there was a link between current school segregation and past discrimination.

In short, as Brown was implemented in subsequent decisions, the federal courts interpreted the case narrowly as establishing a desegregation remedy for intentional discriminatory acts by school officials. Reflecting its historical roots in the dismantlement of a racial caste system in the South, Brown came to represent a civil rights framework that turned on doing corrective justice in the courts to remedy official acts of intentional discrimination. This approach made it difficult to address the complex web of circumstances that promote inequality. Plaintiffs often could not trace the interactive effects of various government agencies' actions; moreover, plaintiffs could not explore the interplay of private and public conduct in the perpetuation of racial inequality.

The focus on corrective justice by the courts committed civil rights activists to a backward-looking perspective designed to rectify historical wrongs; this framework was not particularly suited to making prospective policy regarding race relations. In fact, the desired end state that came to be associated with Brown was one in which race would no longer matter in governmental decisionmaking. This vision of colorblindness was fundamentally an assimilationist one in which previously disadvantaged Blacks would conform to dominant White norms. Under this view, color consciousness was treated as a vestige of racism rather than the outgrowth of a healthy racial identity.

Dramatic demographic shifts, particularly the explosive growth of the Latino population, have challenged the limits of the civil rights paradigm that Brown and its progeny exemplify. At first glance, it might appear that Brown provides relevant solutions to pressing Latino problems. As the Latino population expands, Latino youth find themselves in highly segregated public schools. Dr. Gary Orfield of Harvard University reported that: "During the 1991 school year, Latino students were far more likely than African Americans to be in predominantly minority schools and slightly more likely to be in intensely segregated schools." Segregation among

---

42. The Supreme Court provided further evidence of its willingness to reduce federal courts' involvement in desegregation lawsuits in Freeman v. Pitts, 503 U.S. —, 112 S.Ct. 1430, 118 L.Ed. 2d 108 (1992). There, the Court held that judges could relinquish jurisdiction over some facets of a school system's operations when the district had achieved compliance in those areas, even when the district remained out of compliance in others. However, to end its oversight of selected areas, these features of the district's activities could not be integrally linked to areas of non-compliance.
44. ORFIELD, ET AL., supra note 22, at 7.
Latino students has been steadily increasing since the 1960s; the level of Latino segregation has grown most rapidly in the West where the majority of Latinos reside. Moreover, segregation of Latino students appears to be correlated with diminished educational performance.

However, Brown's approach may not work for much of the Latino student population. Many Latinos attend schools that have not been found guilty of intentional discrimination; their segregation often reflects recent, rapid growth in ethnic enclaves, a development that the federal courts would likely characterize as a product of private preferences and economics. Even when Latinos are enrolled in school districts found to have engaged in wrongful segregative acts, White flight may have rendered desegregation meaningless, and lawsuits may be drawing to a close after years of judicial oversight. Ironically, then, just as Latinos find themselves most in need of decisive action to promote equal educational opportunity, Brown's remedies seem most unavailable.

Additionally, Latino activists have been somewhat ambivalent about certain aspects of the civil rights framework embodied by Brown and its progeny. In attacking the evils of discrimination against Blacks in the South, this framework has elevated race and ethnicity to a position of central importance in defining equality of opportunity. However, race and ethnicity have proven to be somewhat artificial organizing principles for Latinos because they have different racial origins and come from a range of countries. Consequently, issues related to racial and ethnic identity frequently have been barriers to overcome, rather than sources of mutual identification and support.

Precisely because Latinos have diverse racial and ethnic origins, they often have been attuned to questions of class, rather than race or ethnicity, in formulating a reform agenda. Affluent Latinos typically have been more able than African Americans to escape segregated neighborhoods by moving to the suburbs; as a result, many Latinos believe that the most significant impediment to upward mobility is neither race nor ethnicity, but poverty. In keeping with this perspective, Latino advocates have been at the forefront of efforts to implement class-based reforms. For example, in San Antonio Independent School District v. Rodriguez, the Mexican

45. Id. at 1, 8.
46. Chapa & Valencia, supra note 1, at 181.
American Legal Defense and Education Fund (MALDEF) attempted to elaborate on the strand of Brown that dealt not with racial equality but with the centrality of education in the modern State. MALDEF argued that school finance reform was constitutionally mandated because education was a fundamental right; districts therefore could not offer markedly different levels of instructional services based on the wealth of districts. In addition, MALDEF contended that class differences, just as much as racial ones, deserved strict scrutiny from the courts; thus, states could not classify districts based on their property tax bases in determining the degree of support for educational services without a compelling justification. Both arguments were unsuccessful, but they illustrate Latinos' interest in alternatives to race and ethnicity as predicates for educational reform.

After its defeat in the Rodriguez case, MALDEF turned to bilingual education as a key reform strategy. In pressing for bilingual education, MALDEF emphasized language and culture as organizing principles for Latinos. Although these characteristics were treated as proxies for race and ethnicity under the traditional civil rights paradigm, this approach masked deeper differences between the Latino initiative and Brown's legacy. Although some proponents of bilingual education treated it as a means of assimilating non-English-proficient and limited-English-proficient children by teaching them English, others emphasized language and culture as distinct and valued characteristics of the Latino population. While Brown had come to represent an assimilationist paradigm, the bilingual education push contained seeds of a pluralist conception of racial and ethnic relations.

Under this pluralist vision, color consciousness was not necessarily a vestige of racism but instead could reflect a healthy racial or ethnic identity. According to this view, the persistence of racial and ethnic differences did not necessarily constitute a negative outcome so long as groups were respectful and tolerant of their disparate values and ways of life. In the field of education, pluralist reformers have relied less on desegregation and more on multicultural curricula, bilingual education, and community control of well-financed neighborhood schools. Pluralists have demanded a prospective effort to regulate race relations and promote respect and tolerance, rather than simply a retrospective focus on doing corrective justice to eliminate the vestiges of a racial caste system.

50. Id. at 18-39.


53. See Rachel F. Moran, Knocking on the Schoolhouse Door and Wondering What's Inside, 4 BERKELEY W. L. J. 259, 276-84 (1989-90) (describing various reform initiatives designed to promote a pluralistic educational process).
This account of educational reform initiatives after *Brown* illustrates some of the dilemmas that the traditional civil rights framework confronts in the face of demographic transformations. The framework is rooted in the discrimination that African Americans suffered under a system of racial stratification erected by Whites, most openly in the South. As other racial and ethnic groups grow in importance throughout the nation, the bilateral model of race relations that *Brown* addressed no longer captures the richness and complexity of multilateral racial and ethnic relations. Although *Brown* and its progeny may not fully account for the problems of newly emerging racial and ethnic constituencies, such as Latinos, these groups still encounter significant obstacles to equality of opportunity and must seek creative reform strategies to improve their life chances.

As courts withdraw from desegregation lawsuits, the *Brown* paradigm may become increasingly anachronistic for African Americans as well.\(^5^4\) Indeed, differences in the reform agendas of Latino and African-American activists may be shrinking in importance. With the decline of desegregation, both groups must turn to other strategies, including the development of new curricula responsive to diverse students' needs and school finance reform to support schools likely to remain segregated for the foreseeable future. These new initiatives often will be consistent with a forward-looking, pluralist vision of race relations, rather than a backward-looking, assimilationist conception of corrective justice. While the push for some of these changes has taken place in the courts, much of the effort will have to be directed to extrajudicial settings, such as the legislature and administrative agencies. Insofar as judicial activism is on the wane, the future of civil rights advocacy may well be determined in these more openly political fora.\(^5^5\)

In all likelihood, the growing convergence of interest between Latinos and African Americans will lead to effective new reform strategies only if durable coalitions for change result. So far, strong political alliances have not emerged, in part due to the internal factionalization of each group and to intergroup rivalries.\(^5^6\) In evaluating the contributions to this symposium, it

---


\(^5^6\) For a fuller discussion of these issues, see Rachel F. Moran, *New Faces, Old Battles: The Future of Brown v. Board of Education* (manuscript on file with author).
is therefore critical that readers consider not only how new approaches to
civil rights advocacy will mesh with the traditional paradigm of corrective
justice, but also whether pluralist innovations will be politically feasible or
will succumb to political undermobilization and the failure to build effec-
tive reform coalitions.

II.
IMMIGRATION POLICY: A NEW POLITICS OF BELONGING

Just as demographic shifts have challenged the limits of the civil rights
framework, the increasingly global nature of the economy has heightened
awareness of immigration policy and called into question long-held as-
sumptions about the relationship between the United States and its migrant
populations. In this global economy, the fluidity of capital means that jobs
can be exported to countries with cheap labor supplies. Although labor is
less mobile than capital, workers too can relocate in search of employment.
Itinerant laborers can do jobs that more privileged sectors of the population
would prefer to leave to others; these workers may remain a stratified, sep-
arate underclass, or they may be integrated into the host country's eco-
nomic, social, and political life over the long run.\[57\]

The United States Supreme Court's decision in *Plyer v. Doe*\[58\] reflects
concerns about creating a permanent underclass, particularly of undocu-
mented immigrants, if basic services such as education are denied them. In
holding that a Texas statute that denied undocumented school-age children
a free public education violated the Equal Protection Clause, the Court
noted that aliens, whether documented or not, were "persons" within the
scope of constitutional protection because the Clause was "intended to work
nothing less than an abolition of all caste-based and invidious class-based
legislation."\[59\] The Court went on to observe that:

Sheer incapability or lax enforcement of the laws barring entry into this
country, coupled with the failure to establish an effective bar to employment
of undocumented aliens, has resulted in the creation of a substantial
'shadow population' of illegal immigrants — numbering in the millions —
within our borders. This situation raises the specter of a permanent caste of
undocumented resident aliens, encouraged by some to remain here as a
source of cheap labor, but nevertheless denied the benefits that our society
makes available to citizens and lawful residents. The existence of such an
underclass presents most difficult problems for a nation that prides itself on
adherence to principles of equality under law.\[60\]


\[59\] Id. at 213.

\[60\] Id. at 218-19 (footnotes omitted).
The Court’s portrayal of the immigration dilemma is equally apt today, as California embarks on an effort to bar undocumented children from access to elementary and secondary education. In Plyler, the Court properly balked at the prospect of a racial or ethnic caste system, with Latinos heavily represented in the immigrant underclass; such rigid stratification along racial and ethnic lines raises the specter of the harms that Plessy perpetuated and that Brown and its progeny have yet to undo. In its opinion, the Court acknowledged that alienage was not a suspect classification and that education was not a fundamental right; therefore, strict scrutiny under the Equal Protection Clause was inappropriate. Nevertheless, the Court was concerned about a classification that burdened innocent children with a complete deprivation of education that would hamper their ability to pursue fulfilling and productive adult lives. As the Court put it:

[The Texas law] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the law], we may appropriately take into account its cost to the Nation and to the innocent children who are its victims.

Applying a rational relation test with bite, the Court struck down the statutory scheme as inadequately related to the State’s objectives. The Court found that the provision was not effective in deterring illegal immigration because the primary incentive for adults to come to the United States was the availability of jobs, not a free public education for their children. A bar on hiring undocumented persons would therefore be a far more effective deterrent than the approach the Texas legislature adopted. Moreover, the Court concluded that undocumented children could not be excluded from access to free public education to improve the educational opportunities of other students because the undocumented students were largely indistinguishable from legally resident alien children in terms of educational cost and need. Finally, the Court rejected the State’s argu-
ment that it could single out undocumented children for exclusion from public education because they were "less likely than other children to remain within the boundaries of the State[ ] and to put their education to productive social or political use within the State." The Court found that many undocumented children were apt to stay in the United States indefinitely, and some would become permanent legal residents or citizens. Under these circumstances, the costs of "the creation and perpetuation of a subclass of illiterates" far outweighed any savings that would stem from denial of a free public education.

The Court in Plyler also correctly touched on the international aspects of the immigration issue. Unlike Brown and related civil rights initiatives, which the courts treated as purely domestic issues, an appropriate understanding of immigration-related issues necessarily requires that the United States' treatment of newcomers be placed in a global perspective. The Plyler Court noted Congress' plenary power with respect to naturalization, foreign relations, and international commerce as well as its inherent power as sovereign to close its borders. The Court concluded that while classifications based on alienage were "'a routine and normally legitimate part' of the business of the Federal Government," "only rarely are such matters relevant to legislation by a State." States could use classifications based on alienage to advance federal objectives and legitimate State interests, but here, Texas could not point to any clearcut federal policy advanced by its denial of a free public education to undocumented children.

The Court was deeply divided by the Plyler case. Four Justices dissented vigorously from the holding. The dissent argued that the majority had elevated social policy above legal analysis in reaching its decision. Although the dissent recognized that "[t]he failure of enforcement of the immigration laws over more than a decade and the inherent difficulty and expense of sealing our vast borders have combined to create a grave socio-

66. Id. at 230.
67. Id.
68. Although the federal courts did not acknowledge international pressures, some scholars have argued that the United States Supreme Court was receptive to the Black plaintiff's claim in Brown because of a need to redress the embarrassment of a racial caste system in a country dedicated to establishing itself as the leader of the free world. See Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 73 (1991) ("The rhetoric of the Cold War... highlighted racial discrimination as a blight on American democracy in its fight against communism.").
69. 457 U.S. at 225.
70. Id.
71. Id. at 225-26.
72. Justice Brennan wrote the majority opinion for five members of the Court, including Justices Marshall, Blackmun, Powell, and Stevens. Id. at 203. Justice Marshall and Justice Powell each wrote concurring opinions. Id. Chief Justice Burger wrote the dissenting opinion, which was joined by Justices White, Rehnquist, and O'Connor. Id.
73. Id. at 242.
economic dilemma," the dissent believed that these pressing issues must be addressed by the political branches of government, not by the judiciary.

Because alienage was not a suspect classification and education was not a fundamental right, the dissent concluded that the Court was obligated to apply a rational relation test to the Texas statutory scheme. Under this standard, according to the dissent, the State’s goals of preventing undue depletion of its limited resources for education and preserving the fiscal integrity of its school financing system were legitimate. In the dissent’s view, the State could rationally conclude that:

[I]t 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.

The dissent concluded that the State could use the savings from denying undocumented children a free public education to improve the public school system or to enhance other social programs.

With the rise of new efforts to restrict undocumented persons’ access to public benefits and services, this symposium’s efforts to address immigration law and policy are both timely and critical. One of the key observations in the Plyler case is the disjuncture between formal immigration policy and the informal realities of migrant labor flows. Although the relevance of this observation to constitutional analysis was disputed, all of the Justices seemed to agree that the failure to develop a coherent regulatory framework for immigration posed grave social dangers. To enhance the development of immigration law and policy, whether in the judicial, legislative, or executive branch or at the federal or state level, scholars and policymakers must build on the Plyler Court’s insight by confronting the disparity between traditional images of immigration and the contemporary realities that immigrants face.

The traditional image of immigration to the United States is based on the historical experience of immigrants from Europe; this account is a nostalgic exercise that conveniently omits the less successful features of past immigration policy. Despite its historical inaccuracy, this revisionist

74. Id. at 243.
75. Id.
76. Id. at 248.
77. Id. at 249.
78. Id. at 250.
79. Id. at 252.
80. Johnson, supra note 57, at 1150. See generally Nathan Glazer & Daniel P. Moynihan, Beyond the Melting Pot (2d ed. 1970) (describing obstacles that confronted early immigrants to the
story of earlier immigrants' experiences exerts a powerful normative influence on the evaluation of current immigrants' experiences. According to this account, immigrants come to the United States by invitation only; that is, the Immigration and Naturalization Service reviews their applications to reside in the United States and determines which are deserving based on criteria laid down by the United States Congress. These criteria may change over time, but the fundamental tenet that the United States as a sovereign power determines the boundaries of membership in its country remains constant. Having accepted the invitation, immigrants who come to the United States make a long-term, permanent commitment to their new home; most are expected to become United States citizens through a process of naturalization. When naturalized, these immigrants forswear allegiances to their countries of origin and ally themselves exclusively with the United States. Having made this commitment to their new home, immigrants can anticipate a steady path of upward mobility as their children and grandchildren participate in the benefits of the American dream.

The traditional story of a warm reception for immigrants is, of course, incomplete. The exercise of the sovereign power to regulate immigration has been marred by instances of intolerance. In the late 1800s and early 1900s, for example, as the locus of immigration shifted from northern and western Europe to southern and eastern Europe, Asia, and Latin America, concerns grew over whether the new arrivals were assimilating to an American way of life. At the federal level, these fears led to passage of restrictive immigration laws, such as the Chinese Exclusion Act in 1882. Citing the plenary power of Congress to regulate immigration, the Supreme Court upheld the Act, noting that racial differences caused the Chinese to "remain strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country." The Court concluded that Congress could exclude the Chinese "if... [it] considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security."
In keeping with these concerns about the assimilation of immigrants, state governments promoted Americanization programs that mandated that schools teach exclusively in English. These actions were based not on a principle of national sovereignty but on the states' police power to promote health, safety and welfare. The Supreme Court was less receptive to state initiatives like the English-language instructional requirements, primarily because they infringed on the rights of citizens, such as teachers, parents, and students who preferred an alternative language of instruction.

In addition to these historical departures, the experiences of Latinos, whose countries of origin are within close proximity to the United States, further belie this traditional account of immigration. With Latin America and particularly Mexico next door, American employers often are tempted to draw on a ready supply of cheap labor, which can be used on a temporary, permanent, or recurring basis to do unskilled or semi-skilled work. These workers may come to the United States on less favorable terms than other immigrants. Some laborers may receive temporary work visas, rather than invitations to become members of the polity; others simply come to work without receiving formal federal approval but are well aware that little will be done to prevent their entry so long as work is plentiful. One Spanish jingle among Mexican-origin workers in Los Angeles in 1978 reflects this common wisdom:

Right now they're paying
Two dollars an hour;
It isn't much, buddy,
But at least we're working.
When we're working
The Border Patrol doesn't bother us.
With a green card or without,
Here we will stay.
When the work ends
Is when the Border Patrol comes;
They'll run off everyone
Oh, what terrible luck!
Then in the summer again,
We'll return to work;
California awaits us
Paying two dollars an hour.

89. Johnson, supra note 57, at 1150-51.
In contrast to the traditional immigration story, these Latino workers do not find entering the United States an experience of empowerment and self-actualization. The informality of labor arrangements frequently means that workers survive as members of a shadowy underclass. They are economically marginal, socially unacknowledged, and politically excluded. The impermanence and fragility of these populations in turn foster a sense of personal effacement, the despoliation of their individual identities. Or as workers themselves put it: "To cross is to die a little."

Often, these migrant laborers dream of returning to their home countries; they hope that with the savings from their work in the United States, they can improve their economic fortunes in their countries of origin. Rather than climbing the social, political, and economic ladder in the United States, these immigrants see their entrepreneurial aspirations as portable. Those who dream of returning to their homelands in triumph sometimes forego full integration into American life, even when the possibility of return is more theoretical than real. One amnesty recipient, for instance, "tells the story, of a beloved uncle who lived in California for 40 years, fathered nine children, but always insisted that he would go back to Mexico. The uncle died a few years ago — in Los Angeles, where he is buried." The nephew said that when he visited his uncle's grave, he told him: "See, uncle, you never did make it back!"

Some emigrés to the United States retain loyalties to their home countries for other reasons. Political refugees fleeing persecution may hope to return to their countries of origin when oppressive regimes are ousted. Again, they at times cling to this dream, even when few refugees do in fact return, and this continuing allegiance to the country of origin may impede the development of close ties to the United States. As Julia Alvarez writes in her book *How the Garcia Girls Lost Their Accents*:

> For three-going-on-four years Mami and Papi were on green cards, and the four of us shifted from foot to foot, waiting to go home [to the Dominican Republic from New York]. Then Papi went down for a trial visit, and a revolution broke out, a minor one, but still. He came back to New York reciting the Pledge of Allegiance, and saying, 'I am given up, Mami! It is no hope for the Island. I will become un dominican-york.' So, Papi raised his right hand and swore to defend the Constitution of the United States, and we were here to stay.

While Papi chose to become a United States citizen, immigrants resolve conflicts about loyalty to the home country and the United States in a

91. See supra note 60 and accompanying text.
92. Davis, supra note 90, at 98.
94. Id.
variety of ways. Often, they retain some sense of allegiance to both the United States and their countries of origin. Some scholars have described the evolution of transnational communities, which are defined as "rural Mexican communities that have specialized in the production and reproduction of international migrant workers; after a long tradition of migration to the United States, these communities have developed 'daughter' communities in the United States through the concentrated settlement of families." Transnational workers respond not just to economic incentives but also to the intricate social networks that bind mother and daughter communities together across international borders. Community members see their welfare as integrally linked to the fortunes of both countries.

Even among persons who reside permanently in the United States but have roots in a Latin American country, a transnational identity may develop. In interviews with various Latinos, Marilyn P. Davis unearthed some of these dual self-images. For example, Dr. Celestino Fernandez, Vice-President of Academic Affairs at the University of Arizona, came to the United States at the age of 8 1/2 after residing in a small town in Mexico. He stated that: "I feel Mexican and I behave American. Inside, my feelings, my values, my attitudes, my beliefs are based in Mexican culture, but my behavior is very American."

Similarly, a writer who lives in Ciudad Juarez, Mexico and commutes each day to his job at the University of Texas at El Paso explains:

I consider myself a Chicano. I was born over there, I received the adult part of my education in the United States as a Mexican. But I can't separate myself from what I feel for Mexico. It just happens; I think it's a question of geography. If I [had] been born and raised in Las Cruces[,] New Mexico[,] I would have been a totally different person. To be honest with myself, politically honest with myself and culturally honest with myself, I have to be a Chicano. I can't be a Mexican and not be an American. And I can't be an American without being Mexican.

This sense of a dual identity often discourages Latino immigrants from relinquishing citizenship in their countries of origin. Because the renunciation of these prior ties is a prerequisite to citizenship, Latinos have lower rates of naturalization than other immigrant groups. This failure to become United States citizens in turn reduces the political influence that Latinos can wield over issues, such as education and the delivery of social services.
services, that affect their successful incorporation into the American polity.  

In contrast to the images of traditional immigrants, which typically equated their newfound loyalties with prospects of intergenerational upward mobility, Latinos face a continuing controversy about whether the children and grandchildren of immigrants in fact enjoy greater access to the American dream than their forebears. Although many commentators have suggested that Latinos will pursue the same path to success as other immigrant groups, others have argued that racial stratification and subordination will block Latinos' access to educational attainment and economic security. Recent studies in the field of public health, for example, suggest that second- and third-generation Latinos have poorer health outcomes than first-generation Latinos, suggesting that acculturation is not uniformly beneficial. Theorists suggest that, among other things, first-generation Latinos, who gauge their personal position by the standards of their countries of origin, basically consider themselves successful. By contrast, second- and third-generation Latinos, who measure their status by standards set in the United States, often find their personal circumstances disappointing.

Thus, the Latino immigration experience challenges the traditional account: Latinos may arrive without formal invitation through semi-permeable borders in a global economy; they often have ongoing contacts with their home countries and develop a transnational identity rather than exclu-


104. See Elizabeth Hervey Stephen, Karen Foote, Gerry E. Hendershot & Charlotte A. Schenborn, Health of the Foreign-Born Population: United States, 1989-90, 74 ADVANCE DATA 1, 4 (1994) (the health of Latino immigrants declines the longer they have resided in the United States, and immigrants are healthier than native-born Latinos; immigrants over time “had or acquired physical conditions or behaviors that put them at risk in their new environment” as well as suffering the effects of limited access to health care); Paul D. Sortie, Eric Backlund, Norman J. Johnson & Eugene Rogot, Mortality by Hispanic Status in the United States, 270 JAMA 2464, 2468 (1993) (foreign-born Latinos have lower mortality rates than native-born Latinos, a phenomenon referred to as the “healthy migrant effect”); Hector Balcazar, Carolyn Aoyama & Xi Cai, Interpretative Views on Hispanics’ Perinatal Problems of Low Birth Weight and Prenatal Care, 106 PUB. HEALTH REP. 420, 422-24 (1991) (describing the superior outcomes with respect to birth weight for Mexican-born women residing in the United States as compared to women of Mexican origin born in the United States and hypothesizing that the difference may be attributable to protective behaviors and attitudes associated with Mexican culture).

105. See Jacqueline M. Golding & M. Audrey Burnam, Immigration, Stress, and Depressive Symptoms in a Mexican-American Community, 178 J. NERVOUS & MENTAL DISEASE 161, 169 (1990) (suggesting that native-born persons of Mexican origin in the United States may have higher rates of depression than foreign-born immigrants because “[the immigrants]’ focus of social comparison is a reference group in Mexico, whereas U.S.-born Mexican Americans are more likely to compare themselves with groups in the United States and therefore may perceive themselves as disadvantaged.”).
sive loyalty to the United States; and they may not find themselves on a straightforward path of upward mobility once they arrive because of a legacy of racial and ethnic discrimination and their sometimes uncertain immigration status.

More fundamentally, the Latino experience challenges the characterization of immigration as simply a domestic debate over who belongs. The traditional vision of immigration is linked to a strong sense of national sovereignty; each nation-state can independently police its borders and determine the boundaries of membership through the invitations it extends.106 The growing pressures of globalization, by heightening international interdependency, make these simplistic images of sovereignty increasingly obsolete.107 Scholars therefore must reframe the immigration controversy as not merely a domestic dispute, but an international dilemma that tests the role and influence of nation-states in a global economy with fluidity of capital and mobility of labor.

The Latino immigration experience is a reminder that labor flows have international dimensions; advances in transportation and technology have drawn nations with disparate standards of living and distinct principles of governance closer together. The ability to exploit cheap labor pools in countries with limited opportunities has aggravated the socioeconomic divide between highly skilled and unskilled or semi-skilled workers.108 This growing disparity is particularly threatening to countries like the United States, which have been committed to principles of political equality and free enterprise.109

As readers review the contributions on immigration in this symposium issue, they should consider how effectively the authors have bridged the gap between domestic concerns and international imperatives. The increasing salience of a regime of international human rights, for example, reflects the new balance between national sovereignty and global interdependence. As the fortunes of the world’s populations grow ever more interconnected, international standards of dignity, tolerance, and respect for all persons will become increasingly integral to the preservation of rights, liberties, and opportunities for citizens of each nation-state, including the United States.110

Because the federal judiciary has long deferred to Congress and the execu-

109. Id. at 1614-15.
tive branch in immigration matters under a plenary power doctrine, efforts
to redress immigration abuses and promote American leadership in the
human rights field will largely have to be directed at the political branches
of the federal government.111

The push for international human rights does not exist in an economic
policy vacuum, of course. Commentators have noted that regional develop-
ment in countries like Mexico that are ready suppliers of cheap labor for
United States employers will be necessary to stem illegal immigration and
prevent erosion of American wages.112 Another related strategy may be
internationalization of labor organizing efforts to ensure safe and humane
working conditions irrespective of international boundaries.113 Yet a third
strategy may be enhancing the skills and productivity of the American
workforce to preserve jobs and wages in the face of enhanced labor mobil-
ity.114 Again, these economic initiatives typically will require legislative
and executive, not simply judicial, action.

As civil rights and immigration advocates seek legislative and admin-
istrative as well as judicial solutions to Latino concerns, they will have to
insure that their commonalities of interest reinforce one another's proposals
and that divergent reform objectives do not stymie their respective efforts.
In the short run, civil rights advocates acting on behalf of vulnerable, disadvan-
taged American populations may be pressured to adopt a restrictionist
approach to immigration that appears to preserve their constituents' jobs
and benefits.115 A recent study of California politics, for example, revealed
that when Blacks and Latinos build high-level political coalitions, these alli-
ances often collapse at the grass-roots level over concerns about job compe-
tition and displacement from urban neighborhoods.116 By recognizing that
immigration issues are part of an international challenge related to global-
ization of the economy, civil rights and immigration advocates may be able

111. Johnson, supra note 57, at 1186.
112. WAYNE CORNELIUS, LABOR MIGRATION TO THE UNITED STATES: DEVELOPMENT OUTCOMES
AND ALTERNATIVES IN MEXICAN SENDING COMMUNITIES 35 (Commission for the Study of International
simple relationship between regional development and migration flows, see ALARCÓN, supra note 96, at
20-21.
113. See Lance Compa, International Labor Rights and the Sovereignty Question: NAFTA and
115. Whether immigrants in fact displace native-born Americans from their job remains a hotly
disputed topic. For a review of the literature, see ROGER MARTINEZ, DISPELLING THE JOB COMPETITION
MYTH: AN ANALYSIS OF UNDOCUMENTED IMMIGRANTS’ IMPACT ON U.S. WORKERS (Chicano/Latino
Policy Project Working Paper 1994). For an effort to apply new statistical methods to this nagging
question, see ABEL VALENZUELA, COMPatriOTS OR CoMPErrrORS?: A STUDy OF JOB COMPETITION
BETWEEN THE FOREIGN-BORN AND NATIVE IN LOS ANGELES, 1970-1980 (Chicano/Latino Policy Project
116. STEVEN P. ERIE & HAROLD BRACKMAN WITH THE COLLABORATION OF JAMES WARREN INGRAM
III, PATHS TO POLITICAL INCORPORATION FOR LATINOS AND ASIAN PACIFICS IN CALIFORNIA xiv (Califor-
to alert their respective constituents to common ground: the need for long-
term, cooperative solutions that ensure minimum standards of living 
through regional development, skills training, and enforcement of human 
rights and labor protections.

III.
CONCLUSION

These are challenging times for lawyers, academicians, and policy-
makers. Traditional civil rights and immigration models will be tested by 
burgeoning new populations that reflect in part the growing interdepen-
dence of the world economy. To alleviate the strains on the civil rights and 
immigration paradigms, researchers and policymakers must work to devise 
creative new approaches to achieve equality of opportunity, particularly for 
Latinos. Hopefully, this symposium will contribute to the development of 
this body of work.

As this event proceeds, participants should share their ideas in a spirit 
of openness; limits of old models should be tested without trivializing their 
contributions or demeaning their proponents. Distrust can only hamper an 
exploration of demographic challenges to the traditional discourses of civil 
rights and immigration. As Latinos make their emerging concerns known, 
their challenges to the received wisdom should be inspired by the words of 
Sandra Maria Esteves:

When you come to me, don’t assume
That you know me so well as that
Don’t come with preconceptions
Or expect me to fit the mold you have created
Because we fit no molds
We have no limitations
And when you do come, bring me your hopes
Describe for me your visions, your dreams
Bring me your support and your inspiration
Your guidance and your faith
Your belief in our possibilities
Bring me the best that you can
Come in a dialogue of we
You and me reacting, responding
Being, something new
Discovering.117

117. Sandra Maria Esteves, Transference, in WOMAN OF HER WORD: HISPANIC WOMEN WRITE 35 
(Evangelina Vigil 2d. ed. paperback 1987).