2013

Closing the Schoolhouse Doors: State Efforts to Limit K-12 Education for Unauthorized Migrant School Children

Angela M. Banks

William & Mary Law School, ambank@wm.edu

Repository Citation
Banks, Angela M., "Closing the Schoolhouse Doors: State Efforts to Limit K-12 Education for Unauthorized Migrant School Children" (2013). Faculty Publications. 1839.
https://scholarship.law.wm.edu/facpubs/1839

Copyright c 2013 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
https://scholarship.law.wm.edu/facpubs
The Resegregation of Schools
Education and Race in the Twenty-First Century

Edited by Jamel K. Donnor and Adrienne D. Dixson
INTRODUCTION

One of the most controversial issues in public education is the schooling of unauthorized migrants. In 2010, approximately 1.1 million unauthorized migrants were children and another 1.29 million were young adults between the ages of 18 and 24 (Hoefer, Rytina, & Baker, 2011, p. 5). States and localities responsible for education frequently note concerns about the costs of educating unauthorized migrants. To defray these costs, states and localities have attempted to prohibit unauthorized migrants from attending K–12 public schools or require unauthorized migrants to pay to attend them. In 1982, the U.S. Supreme Court decided that states could not deny unauthorized migrant students the free K–12 public education they provide to citizens and authorized migrants (Plyler v. Doe). Despite this ruling, a growing number of states are considering or enacting legislation that will likely reduce unauthorized migrant student enrollment in K–12 public schools. Such legislation will have a disproportionate impact on Latinos. Although the majority of Latinos in the United States are citizens or authorized migrants, most unauthorized migrants are Latino (Hoefer et al., 2011, p. 4; U.S. Census Bureau, 2010). Efforts to exclude unauthorized migrants from K–12 public schools will deny a free public school education to a significant number of Latino students. Historically K–12 schools have played an important role in incorporating immigrants by providing students with the knowledge and skills essential for political integration and democratic participation such as knowledge of American democratic principles, U.S. history, and English-language skills (Abu El-Haj, 2007; Task Force on New Americans, 2008). Reductions in the enrollment or attendance of unauthorized migrant school children decreases the likelihood that they will be successfully incorporated into U.S. society, which will leave a disproportionate number of Latino students excluded.

It is estimated that 10.8 million unauthorized migrants live in the United States (Hoefner et al., 2011; Passel & Cohen, 2009). Unauthorized migrants are foreign-born individuals who have entered the United States without authorization or entered with authorization but have remained in the
United States beyond the time they were authorized to stay. Although the term "illegal alien" is frequently used within the public discourse, it focuses on potential criminal activity rather than immigration status. This chapter uses the term unauthorized migrant because it more accurately describes the immigration status of the individuals being discussed. Laws regulating the conduct of unauthorized migrants are based on their immigration status, not potential criminal violations. Thus the term unauthorized migrant better describes the population discussed in this chapter.

Unauthorized migrant students are, and will continue to be, long-term residents in the United States. Over 60 percent of unauthorized migrants have lived in the United States for at least 10 years (Hoefer et al., 2011, p. 3). These individuals have made the United States their home and the overwhelming majority of the U.S. public does not support mass deportation (Fitz, Martinez, & Wijewardena, 2010; Pew Research Center, 2011; The Opportunity Agenda, 2011, p. 35; New York Times/CBS Poll, 2010). Most Americans view mass deportation as an extreme response to individuals who have established significant roots in the United States. Because of the reality of long-term residence for unauthorized migrants in the United States it is important that they are incorporated as members and have an opportunity to acquire the skills, knowledge, and values associated with U.S. society rather than excluded as outsiders (Carens, 2010; Shachar, 2009). Members are residents who have an American identity and a commitment to the growth and improvement of the United States that is rooted in democratic principles (Banks, 2004, pp. 49-73). The transformation of immigrants into members is a two-way process; it requires efforts by both the host society and the individual immigrant (Massey & Sánchez, 2010; Portes & Rumbaut, 2001). When individual immigrants feel marginalized within the host society it is difficult for them to identify with and to develop the necessary commitment to the society. Yet if the host society believes that immigrants do not identify with or have a commitment to the state, then the host society is less likely to view immigrants as members.

Schools can play an important role in facilitating immigrant inclusion by fostering immigrant students' identity with and commitment to the United States, and enabling their classmates to see them as members of U.S. society. One way schools perform this role is through a civic education curriculum, also referred to as citizenship education and democratic education. The goal of civic education is to develop a commitment to democratic principles, values, and practices within students. Achieving this goal can be a challenge when students live in contexts that contradict democratic principles like equity and fair treatment. One way this challenge can be addressed is through lessons and exercises that acknowledge the students' experiences with prejudice, discrimination, and limited opportunities and examine how these experiences contradict democratic principles and values (Banks, 2004; Abu El-Haj, 2007). These types of lessons and exercises can create opportunities to develop a commitment to democratic principles
and values and a desire to realize them in the United States. For example, during the 1930s and 1940s prejudice reduction programs were used at Benjamin Franklin High School in New York City to assist in transforming Southern and Eastern European immigrants into members of American society (Banks, 2005). Denying unauthorized migrant students access to K–12 public schools deprives them of opportunities to develop a thoughtful and examined attachment to the United States despite their experiences with marginalization. Latino students will disproportionately be denied this opportunity.

This chapter contends that recent efforts to have K–12 public schools determine the immigration status of students will reduce unauthorized migrant school enrollment, which will undermine the incorporation of unauthorized migrants into U.S. society. The majority of the students impacted by these efforts will be students of color, the overwhelming majority of whom will be Latino. Eighty-six percent of unauthorized migrants in the United States were born in Mexico, El Salvador, Guatemala, Honduras, the Philippines, India, Ecuador, Brazil, Korea, and China. (Hoefer et al., 2011, p. 4). Sixty-one percent of this population was born in Mexico. (Hoefer et al., 2011, p. 4). If efforts to determine immigration status upon student enrollment are successful there will be a reduction in the number of students of color, particularly Latino students, educated in U.S. public schools.

The chapter begins with a description of the legal and historical factors that have resulted in a population of unauthorized migrants in the United States. The next section explains the legal rights of unauthorized migrant school children to a public K–12 education and the ways in which school districts are undermining these rights and contributing to the resegregation of American schools. The final section contends that providing unauthorized migrant school children a public K–12 education is necessary to provide educational opportunities for students of color and to facilitate their inclusion in U.S. society.

UNAUTHORIZED MIGRATION: HISTORICALLY AND TODAY

From the United States' founding in 1776 until the late 1880s, federal immigration law placed few restrictions on which foreign-born individuals could come to the United States (Neuman, 1993). This changed dramatically in 1924 with the enactment of national origin quotas in the Johnson-Reed Act (Sec. 4[c]). The national origin quotas were based on the percentage of the U.S. population from a specific country. For example, if 16 percent of the U.S. population was from Southern and Eastern European countries, then only 16 percent of immigrants admitted could come from Southern and Eastern European countries (Ngai, 2004, pp. 22–23). Countries in the Western Hemisphere were excluded
from these limitations. Congress decided to exclude the Western Hemisphere countries because Southwestern farmers and ranchers expressed a need for Mexican labor (Johnson, 1998, p. 1111; Ngai, 2004). Mexican laborers have played a significant role in the growth and development of the United States (Calavita, 1992; Ngai, 2004). Mexican workers have built railroads, worked in mines, and done labor-intensive agricultural work (Calavita, 1992; Ngai, 2004). To ensure continued access to this labor force immigrants from Canada, Mexico, Cuba, Haiti, the Dominican Republic, the Canal Zone, and independent countries in Central and South America were not subject to the new numerical limits (Johnson-Reed Act, 1924, Sec. 4[c]). They were free to enter the United States as long as they did not run afoul of the substantive exclusion grounds. Substantive exclusion grounds are substantive reasons the U.S. government can deny an individual admission to the United States. For example, an individual can be denied admission if she has been convicted of a felony or his financial resources suggest that he is likely to need public assistance.

Despite Congressional concern for Southwestern farmers’ and ranchers’ need for labor, public sentiment toward Mexican immigrants has been quite hostile, both in the past and today. For instance, in the late 1920s concerns about Mexican immigrants being culturally different, criminals, and taking American jobs led to the use of substantive exclusion grounds to deny Mexican immigrants visas to the United States (Ngai, 2004, pp. 53–55). In 1930 immigration officials expected the use of substantive exclusion grounds to cause a 76 percent drop in lawful migration from Mexico to the United States (Ngai, 2004, p. 55). Although the number of visas issued dropped significantly, the number of Mexican immigrants did not decline because Southwestern farmers and ranchers continued to depend on Mexican workers. Beginning in the 1920s and continuing today Mexican migration to the United States has remained relatively stable despite the creation of new legal restrictions. Legal restrictions have been successful in changing the legal status of Mexican nationals in the United States, but they have not been successful in limiting Mexican migration (Massey & Sánchez, 2010, p. 73). Therefore over time an increasing percentage of Mexican nationals in the United States have become unauthorized.

The need or desire for Mexican agricultural and railroad laborers in the United States eventually led to the creation of the Bracero Program in 1942. This program provided a government-regulated supply of contract laborers (Ngai, 2004, pp. 138–139). Over the 20-year period that the program was in place 5 million Mexican workers were contracted to farmers and ranchers in 24 states. An average of 250,000 Mexican workers were admitted per year (Calavita, 1992). The Bracero Program came to an end in 1964 after political support for farmers and ranchers diminished (Calavita, 1992).

The next year Congress adopted the Immigration Act of 1965. This act eliminated national origin quotas and adopted uniform quotas, which was an effort to establish formal equality in the immigration system. As noted
earlier, the national origin quota systems used past migration flows to determine future migration flows. With the enactment of the Immigration Act of 1965 past migration flows would no longer dictate future migration. This opened the door for significant migration from Asia, Africa, and Latin America. Since 1965, Mexico and the other countries in the Western Hemisphere have been subject to numerical restrictions. For instance, in 1965, Congress determined the appropriate level of annual immigration and allowed 120,000 individuals per year from the Western Hemisphere to enter the United States (Massey & Riosmena, 2010, p. 295). This limitation provided for less than half of the annual workers admitted from Mexico under the Bracero Program. This created a new opportunity for unauthorized Mexican migration because the need for immigrant laborers did not diminish. Unauthorized migration grew out of the increased use of substantive exclusion grounds and then numerical restrictions, and a simultaneous desire of and willingness by farmers, ranchers, and other employers to hire Mexican workers regardless of their immigration status.

Subsequent numerical restrictions exacerbated the issue of unauthorized migration. In 1976 Congress limited annual migration to 20,000 individuals per country (Massey & Riosmena, 2010, p. 295). In 1978, a worldwide quota was adopted that allowed 290,000 individuals per year to immigrate. That total was reduced in 1980 to 270,000, and in 1990 new limits on family migration were imposed (Massey & Riosmena, 2010, p. 295). Even in the face of these restrictions the agricultural industry and other labor-intensive industries continued to hire Mexican workers. The employers were indifferent to the manner in which the Mexican workers entered the United States because they did not face any legal consequences for hiring unauthorized migrants until 1986. Since 1986 it has been relatively easy for employers to avoid liability (Aleinikoff, Martin, Motomura, & Fullerton, 2012).

Individuals interested in living and working in the United States can seek entry as an immigrant or a nonimmigrant. Immigrants are granted permission to enter and reside in the United States indefinitely whereas nonimmigrants are granted permission to reside in the United States for a specific purpose and a limited period of time. Immigrants are commonly known as green card holders or lawful permanent residents ("LPR"). There are two primary avenues for obtaining a green card: family and employment. United States citizens and green-card holders can sponsor relatives. For example, a U.S. citizen can sponsor his or her spouse, minor and adult children, and siblings (Immigration and Nationality Act, § 203[a][1], [a][3], [a][4]). An LPR can sponsor his or her spouse, minor children, and unmarried adult children (Immigration and Nationality Act, § 203[a][2]). On the employment side green cards are available for highly accomplished and skilled workers (Immigration and Nationality Act, § 203[b]). For example, a company like Microsoft can sponsor an individual to work as a software engineer in the United States. Microsoft must however certify that qualified workers are not
available in the United States (Immigration and Nationality Act, § 20). This type of employment-based green card is not available for low-skilled labor jobs. To enter the United States to take a low-skilled job an individual can only obtain a nonimmigrant visa. Nonimmigrants are allowed to enter and reside in the United States for a specific purpose and a limited period of time. An example would be a visa for seasonal agricultural workers—an H-2A visa. An individual would be granted permission to enter the United States to perform agricultural labor for a specified period of time. If the individual engaged in nonagricultural work or stayed longer than the number of days specified he or she would violate the terms of admission and be out of status—unauthorized—and be subject to deportation.

In 2007 the United States issued 50,791 H-2A visas (Department of State). That year James Holt, an agricultural labor economist, testified before Congress that there were 2.5 million farmworkers working in the United States. Seventy-eight percent of U.S. farmworkers are foreign-born and the Department of Labor estimates that 53 percent were unauthorized migrants (Hearing to Review the Labor Needs of American Agriculture, 2007). This gap between available jobs and available visas fuels the continuation of the unauthorized migrant population (Massey & Riosmena, 2010).

There are two ways in which individuals can become unauthorized migrants in the United States. First, one can enter without inspection, in which individuals cross the border at places other than official ports of entry. For example, they can enter the United States through isolated deserts in Arizona and New Mexico. The United States has no record of these individuals’ entry and no opportunity to screen them. Such modes of entry are not only a violation of civil immigration law, but also federal criminal law. Second, an individual can overstay one’s nonimmigrant visa. As noted earlier nonimmigrants are granted permission to reside in the United States for a specified period of time. If the nonimmigrant remains in the United States after that time has expired he or she becomes an unauthorized migrant. Overstaying one’s visa is a violation of the civil immigration laws, but not federal criminal law. U.S. law is comprised of criminal law and civil law. Both criminal law and civil law regulate the conduct of individuals residing within the United States, but only violations of criminal law can result in imprisonment. Violations of civil law generally result in fines or monetary judgments. For example, a waiter’s failure to report tip income is a violation of the civil tax code and could result in an order to pay past due taxes and a fine, but not a prison sentence. Immigration law similarly has criminal and civil components. The majority of immigration law violations are civil violations and cannot result in imprisonment.

Those who are unauthorized migrants have very few opportunities to regularize their status. Students who are unauthorized migrants today are likely to remain in this status unless they leave and obtain lawful admission to the United States or obtain discretionary relief from deportation. The 1996 amendments to the Immigration and Naturalization Act created significant barriers to both of these options for individuals who are
unlawfully present. However, in 1986 Congress enacted the Immigration Reform and Control Act, which provided a pathway to legal status and citizenship for unauthorized migrants who had been unlawfully present since 1982. Without similar legislation today’s unauthorized migrant students will continue to be deportable, yet mass deportation does not enjoy widespread public support and it is practically infeasible (Fitz et al., 2010; Pew Research Center, 2011; The Opportunity Agenda, 2011, p. 35; New York Times/CBS Poll, 2010). Mass deportation is estimated to cost $28.5 billion and to give rise to collateral consequences such as civil liberty concerns and economic harms (Fitz et al., 2010). Absent mass deportation, unauthorized migrant students will continue to be part of U.S. society and the issue of unauthorized migrants’ education has become a lightning rod issue in a number of states. Within the past few years states like Alabama, Arizona, Georgia, North Carolina, Oklahoma, South Carolina, Texas, and Virginia have considered or enacted legislation that would discourage unauthorized migrants from attending K-12 public schools by requiring them to disclose their immigration status upon enrollment.

UNAUTHORIZED MIGRANTS’ LEGAL RIGHT TO K-12 EDUCATION

Within the United States education is seen as the great equalizer because it provides students with the tools and skills they need for upward mobility. Consequently the fight for equal education has been fought time and time again, and those pursuing greater educational opportunities have often been successful in U.S. courts (Brown v. Board of Education of Topeka, 1954; Hernandez v. Texas, 1954; Lau v. Nichols, 1974). In 1982 the U.S. Supreme Court addressed the educational opportunities of unauthorized migrants in Plyler v. Doe. In this case, school districts within Texas were prohibiting unauthorized migrant students from enrolling in K-12 public schools unless they paid tuition. The Court held that this policy violated the Equal Protection Clause of the Fourteenth Amendment. Recently there has been a resurgence of direct and indirect attacks on this ruling by states and localities seeking to limit or track the number of unauthorized migrants in the public schools. For example, Alabama enacted legislation requiring K-12 schools to ascertain the citizenship and immigration status of all enrolled students. These attacks are gaining success in turning families away from the schoolhouse doors and denying children the education that they and the United States so desperately need.

The number of K-12 students who are either unauthorized or have parents who are unauthorized has grown considerably due to the limited avenues for lawful migration from Mexico—and Latin America more broadly—and increased border control (Massey & Riosmena, 2010; Ngai, 2004). For example, in 2010 there were 1.2 million unauthorized migrant children in the United States (Hoefer et al., 2011, p. 5), whereas in 2008
approximately 6.8 percent of K–12 students had at least one parent who was an unauthorized migrant (Passel & Cohn, 2009). Many of these children are U.S. citizens because they were born in the United States; however having parents who are unauthorized migrants has made them the target of legislation in states such as Alabama and California.

States and localities have expressed concerns about the costs associated with unauthorized migration. Of particular concern is the cost of educating unauthorized migrants and their children and providing other social services such as health care. For instance, Representative Micky Hammon, the sponsor of Alabama's 2011 immigration legislation, estimated that it was costing the state of Alabama $200 million to “educate the children of illegal immigrants” (White, 2011). In an effort to reduce these costs a number of states have enacted legislation limiting or prohibiting unauthorized migrants' access to social services. For example, California voters adopted Proposition 187 in 1994, which denied unauthorized migrants access to K–12 public schools, health care, and other social services. Pursuant to Proposition 187 social service providers were required to report individuals they suspected of being unauthorized migrants to law enforcement officials (Bosniak, 1996, p. 555). Proposition 187 was the subject of legal challenges and the federal courts prohibited its enforcement. More recently Alabama enacted legislation requiring students to provide citizenship and immigration status information to enroll in K–12 public schools. The Alabama legislation also requires schools to ascertain whether the students' parents are unauthorized migrants. These types of laws are enacted to discourage unauthorized migrants from residing in a particular state. Many supporters see the laws as a tool to encourage self-deportation. After Proposition 187 was enacted in California there was a reported drop in Latino students' school attendance (Broder & Navarro, 1996, p. 298). The adoption of these laws has led Latino migrants, authorized and unauthorized, to leave states like Alabama, but it is unclear how many leave the country and how many simply move to another state (Rawls, 2011).

The Supreme Court’s decision in Plyler v. Doe is the starting point for the educational rights of unauthorized migrants, because it is the first and only Supreme Court case to address this issue. In 1977 the Board of Trustees of Tyler Independent School District in Texas refused to enroll unauthorized migrant children who did not pay a tuition fee of $1,000 per year. A group of Mexican children residing in Smith County, Texas could not establish that they were lawfully admitted to the United States. The parents of these students sued arguing that the Tyler Independent School District policy was unconstitutional. The parents argued that the policy violated the Fourteenth Amendment Equal Protection Clause. This constitutional provision dictates that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws” (U.S. Constitution, Amendment Fourteen). The Court agreed with the parents and held that Texas had not shown that its tuition policy for unauthorized migrant students furthered a “substantial goal of the State” (Plyler v.
The Court considered three potential state interests: "protection against an influx of unauthorized migrants in the state, unauthorized migrant schoolchildren create special burdens to providing a high-quality education; and unauthorized migrant schoolchildren are less likely than U.S. citizen or legally present noncitizen children to remain within Texas and put their education to use within Texas" (Banks, 2012). The Court rejected each of these justifications concluding that "whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs to these children, the State, and the Nation" (Plyler v. Doe, 1982, p. 230).

Despite the U.S. Supreme Court's clear statement that unauthorized migrant children cannot be denied a free K–12 public education, school districts across the country are closing the schoolhouse doors to these students. Not since 1994 and California's Proposition 187 has a state attempted to explicitly prohibit unauthorized migrant children from attending public schools. Today states are taking an indirect approach; they are requiring that schools obtain information regarding citizenship and immigration status from students when they enroll. The Department of Education and the National Education Association have both counseled against such requirements concluding that they could discourage parents and guardians from enrolling children in K–12 schools. Despite these warnings, Alabama, Arizona, Georgia, North Carolina, Oklahoma, South Carolina, Texas, and Virginia have recently considered legislation that would require schools to ascertain the citizenship and immigration status of students upon enrollment. As of August 2011 the legislative proposals failed in Arizona, North Carolina, and Virginia; were still pending in Georgia, Oklahoma, South Carolina, and Texas; and were enacted in Alabama. In August 2012 the United States Court of Appeals for the Eleventh Circuit enjoined enforcement of the Alabama provisions. Consequently these provisions is not currently being enforced.

The laws enacted in Alabama and considered in Georgia, Oklahoma, and Texas share three main components: (1) identifying unauthorized migrant students, (2) tracking expenditures related to such students, and (3) determining the impact such students are having on the standard or quality of education provided to U.S. citizen students. The stated motivation for these requirements is to gather information about the number of unauthorized migrant students in the school systems, determine the cost of educating these students, and ascertain the effect their presence is having on the education of U.S. citizen children. The legislation does not explicitly state an intention to deny unauthorized migrant students a free K–12 public education, however the legislation is often part of a larger strategy to limit the number of unauthorized migrants within the state (Chandler, 2011). Representative Micky Hammon explained that the Alabama legislation was "designed to make it difficult for [unauthorized migrants] to live here so they will deport themselves" (Chandler, 2011). The Alabama law requires every public elementary and secondary school to determine, at
the time of enrollment, whether the enrolling student “was born outside of the jurisdiction of the United States or is the child of an alien not lawfully present in the United States and qualifies for assignment to an English as Second Language class or other remedial program” (Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011, Sec. 28[a][1]). Schools are to make this determination based on the student’s birth certificate. If the school determines the student was born outside of the United States or is the child of an unauthorized migrant, “the parent, guardian, or legal custodian of the student shall notify the school within 30 days of the date of the student’s enrollment of the actual citizenship or immigration status of the student under federal law” (Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011, Sec. 28[a][3]). Although school officials are required to gather information on the citizenship and immigration status of enrolling students, they are not required to verify that information with the federal government. Federal immigration officials are the only entities that can conclusively determine immigration status (Aleinikoff et al., 2012). Determining an individual’s immigration status can be complicated due to pending proceedings, waivers, and temporary statuses (Aleinikoff et al., 2012). Therefore the conclusions made by school officials may not accurately reflect an individual’s immigration status.

In addition, schools are also required to compile data and annually report the number of students enrolled who are U.S. citizens, lawfully present aliens, and aliens believed to be unlawfully present. Further, the report must also identify the cost of educating unauthorized migrant students and the effect enrolling unauthorized migrant students has had on the standard or quality of education provided to U.S. citizen students. This information will be used to obtain more accurate information regarding the cost, in terms of finances and educational opportunities, of educating unauthorized migrants. The legislation considered in Georgia, Oklahoma, and Texas had similar provisions.

The federal government, the National Education Association, and the National School Boards Association have advised school officials not to ask for information that could reveal immigration status for fear that such requests could discourage student enrollment. This concern is particularly strong in Alabama because individuals who possess information regarding students’ citizenship and immigration status are allowed to provide this information to federal immigration authorities. Past experience suggests that the chilling effect feared by the federal government, the National Education Association, and the National School Boards Association is real. For example, after Oklahoma enacted the Oklahoma Taxpayer and Citizenship Protection Act in Spring 2007 Kendall-Whittier Elementary School in Tulsa, Oklahoma experienced a significant drop in enrollment (Walker, 2008). The 2007 legislation created new requirements for gathering immigration status in a number of contexts, but did not cover public schools. Parents had, however, heard rumors that immigration agents would be present at schools to deport parents and children who were unauthorized migrants. Kendall-Whittier’s
student population was 55 percent Latino and on the first day of school in August 2007, 200 of the school's 1,000 students did not show up (Walker, 2008). School officials concluded that parents were afraid that the school was involved in immigration enforcement and kept their children home from school. Only after teachers and school officials called each student's household and reassured families that the school was not involved in immigration enforcement did attendance increase (Walker, 2008). Recent research has found that the enrollment of Latino 4-year-olds in preschool dropped from 53 percent in 2005 to 48 percent in 2009 (Fuller & Kim, 2010). One factor contributing to this decline is a worry that some immigrant families have about contact with formal institutions (Melendez, 2011). Fear of contact with formal institutions is often based on the concern that these institutions are involved in immigration enforcement. This fear has been shown to cause families to avoid contact with educational institutions and healthcare providers, which deprives children (often U.S. citizens) of the educational and healthcare benefits they are entitled to (Melendez, 2011). The drops in enrollment at Kendall-Whittier and preschool more generally occurred in contexts where schools were not required to ascertain immigration status. It is very likely that similar drops in enrollment and attendance would occur in Alabama because the schools are required to determine immigration status and are not prohibited from providing that information to federal immigration officials. Early anecdotes from government officials and community members suggest that school enrollment of Latino students has dropped since the enactment of the Beason-Hammon Alabama Taxpayer and Citizenship Protection Act of 2011 (Treadwell, 2011).

The federal government has strongly suggested that enrollment practices that require citizenship or immigration status information violate federal law. In May 2011, the U.S. Department of Education and the U.S. Department of Justice sent a joint letter to school districts throughout the United States reminding them that they are legally required “to provide equal educational opportunities to all children residing within [their] district . . .” (2011). The school districts were reminded that it is a violation of federal law to utilize “enrollment practices that may chill or discourage the participation, or lead to the exclusion, of students based on their or their parents' or guardians' actual or perceived citizenship or immigration status” (U.S. Department of Justice & U.S. Department of Education, 2011). A similar letter was sent to superintendents in the Alabama public school system on November 1, 2011 (U.S. Department of Justice, 2011). Regulations enacted pursuant to Title VI of the Civil Rights Act of 1964 “prohibit districts from unjustifiably utilizing criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of a program for individuals of a particular race, color, or national origin” (U.S. Department of Justice & U.S. Department of Education, 2011). These legal requirements have led
some states to prohibit schools from requesting immigration status information. As of 2009, the Iowa Department of Education and the Maryland State Board of Education prohibited schools from requesting information regarding immigration status or questioning students about their immigration status (National School Boards Association & National Education Association, 2009).

Whether actions that deter or discourage unauthorized migrant students from enrolling in school is prohibited by Plyler has yet to be decided by a court (National School Boards Association & National Education Association, 2009). This issue was raised but not answered in League of Latin American Citizens v. Wilson. In 1995 the U.S. District Court for the Central District of California invalidated Section 7 of California’s Proposition 187. Section 7 required verifying the immigration status of students and parents, prohibited schools from enrolling unauthorized migrant students, and required reporting unauthorized migrant students to federal immigration authorities. The district court held that Plyler v. Doe prohibited states from excluding unauthorized migrant students from K–12 public schools, but did not specifically state whether obtaining information on immigration status violated Plyler. Absent a clear intention to deny unauthorized migrant students access to the public schools it is not clear that the courts would find that this practice violates Plyler.

The U.S. Department of Justice and the U.S. Department of Education contend that seeking information regarding citizenship and immigration status violates the Civil Rights Act of 1964. Title VI of this act prohibits discrimination on the basis of race, color, and national origin in programs and activities that receive financial assistance. An important question for future litigation will be whether the school practices constitute discrimination based on national origin, color, or race. These policies make distinctions based on immigration status, not race, ethnicity, or national origin. Yet the policies will have a disproportionate impact on Latinos and Mexican nationals. In Plyler the Court concluded that immigration status was “not a constitutional irrelevancy” so it reviewed the Texas school enrollment policy to determine if it was rationally related to a legitimate governmental interest. Whether immigration status will still be seen as constitutionally relevant or whether unauthorized immigration status would be seen as a proxy for ethnicity or national origin is an interesting question because well over half of all unauthorized migrants in the United States are Mexican (Hoefer et al., 2011, p. 4). Although the justifications for the state laws have focused on fiscal issues, concerns about culture, particularly language, also play a role in the opposition to unauthorized migrants. Exactly what role culture, race, and ethnicity play in motivating the recent state laws is difficult to determine. As a legal matter this raises complicated issues to resolve. As a policy matter Americans are left to decide what role education should play in the United States and who should be educated.
SCHOOLS AND THE CREATION OF COMMITTED DEMOCRATS

The United States strives to realize *e pluribus unum* amidst great diversity (Task Force on New Americans, 2008, pp. 1–3). This goal—one of many, requires the inclusion of unauthorized migrant children within U.S. society. One aspect of such inclusion is developing a commitment to the growth and improvement of the United States that is rooted in democratic principles and ideals. Fostering such a commitment is easy in the abstract. Most individuals interested in migrating to the United States see this country as a place of opportunity open to all willing to work hard. Maintaining this kind of commitment becomes challenging when immigrants experience prejudice, discrimination, and limited opportunities (Banks, 2004; Massey & Sánchez, 2010). This, however, is not a new task for the United States. Historically the United States has been a place of great diversity along lines such as ethnicity, language, religion, race, national origin, sexual orientation, and gender identity. For each of these types of diversity individuals have had experiences that are at odds with democratic principles and ideals such as equality and liberty. Despite experiences with exclusion and marginalization individuals have maintained a commitment to the growth and improvement of the United States and worked to create a more perfect Union.

Through civic education schools can play a valuable role in fostering students’ commitment to the United States despite their anti-democratic experiences (Abu El-Haj, 2007). Civic education, also referred to as citizenship education and democratic education, seeks to educate students who will “endorse the overarching ideals of the nation-state such as justice and equality, are committed to the maintenance and perpetuation of these ideals, and are willing and able to take action to help close the gap between the nation’s democratic ideals and practices that violate those ideals . . . ” (Banks, 2004, p. 4). Amy Gutmann refers to this as developing a commitment to “living up to the routine demands of democratic life, at the same time as [students] are committed to questioning those demands whenever they appear to threaten the foundational ideals of democratic sovereignty, such as respect for persons” (Gutmann, 1987, p. 52). Civic education benefits all students, immigrant and citizen alike. It seeks to develop and strengthen all students’ commitment to democratic principles in order to maintain and reinvigorate democracy within the United States. Educators have used civic education to bridge the gap between America’s principles and America’s practices so that students have the opportunity to develop and maintain a commitment to the United States.

Civic education was used foster a commitment to the United States among Eastern and Southern European immigrants during the 1930s and 1940s and African American students in the segregated South in the 1950s. In the 1930s and 1940s immigrants from Eastern and Southern Europe were often viewed as having political beliefs, religious practices, cultural
characteristics, and languages that were un-American (Banks, 2005; Jacobson, 1998, p. 573). They were viewed with suspicion and experienced prejudice and discrimination. During this time period teachers at Benjamin Franklin High School in New York City implemented prejudice reduction programs that were rooted in democratic principles, such as liberty, equality, justice, and fair treatment (Banks, 2005, pp. 49-73). These programs worked to “mend divisions between groups” by highlighting the similarities among all Americans. (Banks, 2005, p. 3). There was a presumption that immigrants would naturalize and become American citizens despite sentiments within the public discourse that these “new” immigrants were uninterested in assimilating and becoming U.S. citizens. The prejudice reduction program enabled the teachers to acknowledge that the prejudice and discrimination their students experienced were real, to explain these experiences were antithetical to democratic principles, and to foster greater cultural sensitivity among the student body. These lessons created an opportunity for students to develop a commitment to democratic principles. A review of the program at Benjamin Franklin High School reveals that there was a reduction in student prejudice after students engaged in the prejudice reduction programs (Banks, 2005). Students were able to see the similarities across groups and commonalities as Americans (Banks, 2005).

In the 1950s African American teachers in segregated schools used similar teaching strategies. For example, in Lee County, Arkansas teachers began each day by having the students sing the American national anthem, “The Star Spangled Banner,” the Negro national anthem, “Lift Every Voice and Sing,” and recite the Pledge of Allegiance. (Banks, 2004, p. 11). Every day the students would say that the United States is “one nation, indivisible, with liberty and justice for all” even though their daily experiences told them it was not. Like the teachers at Benjamin Franklin High School, the Lee County teachers acknowledged that the rules of the segregated South contradicted America’s principles and values, but they also used daily exercises and substantive lessons to allow students to develop a belief in and commitment to democratic principles and values. These teachers believed that their students “could use American democratic ideals to justify significant social and political change that would challenge and dismantle racial segregation and blatant inequality in the South” (Banks, 2004, p. 11). The teachers at Benjamin Franklin High School and the Lee County public schools taught their students to see themselves as connected to the United States and encouraged them to be committed to its growth and improvement. Rather than rejecting American democratic principles and values these teachers worked to develop a democratic commitment within their students.

Unauthorized migrant students need to have the same opportunity to critique American principles, values, and practices in a context that supports the development of a thoughtful and examined attachment to the United States. Unauthorized migrant students and their families will be long-term residents who develop and maintain connections to social, cultural, and economic
communities within the United States. It is important that these students see themselves as members of the society in which they reside. Limiting unauthorized migrant students’ access to K-12 schools disproportionately limits Latino students’ ability to develop this sense of membership. There is a social fact of membership within a society and a legal fact of membership, and two do not necessarily overlap. Legal membership is having the legal status of citizen within a country. The social fact of membership refers to the relationship between an individual and his or her state of residence. It exists when “an individual’s long-term circumstances of life . . . link her own well-being to a particular polity” (Bauböck, 2009, p. 111). Although unauthorized migrants face an uphill battle to become legal members of American society, their long-term residence in the United States provides an opportunity to become and remain social members of U.S. society. Primary and secondary schools have an important role to play in this process.

THE POWER OF ANTI-DEMOCRATIC EXPERIENCES

The anti-democratic experiences that students have within schools and throughout society can be more powerful than the academic lessons they learn in school. Recent research on immigrant identity suggests that immigrants’ willingness to identify as American is deeply connected to structural inclusion in the United States (Massey & Sánchez, 2010). Massey and Sánchez (2010) found that Latin American immigrants’ experiences with “prejudice, discrimination, [and] blocked opportunities” caused immigrants to “see the United States as a place of inequality and racism.” (p. 209). Experiences with structural exclusion led many Latin American immigrants to believe that Americans did not see them as American. For example, one respondent noted “I never would say I am American because nobody would believe me” (Massey & Sánchez, 2010, p. 207). Experiences with exclusion also limited Latin American immigrants’ connection to the United States. A Mexican woman in New Jersey explained that she “would like to feel American, but it’s not possible” (Massey & Sánchez, 2010, p. 208). Similar observations have been made by second-generation high school students of Vietnamese, Palestinian, Indian, Pakistani, and Bangladeshi descent (Abu El-Haj, 2007; Maira, 2004; Nguyen, 2008). Despite being U.S. citizens, these students’ experiences with marginalization within schools and larger society restricted the development of an American identity. These students recognized and acknowledged that they were U.S. citizens, but they saw a distinction between being a U.S. citizen and being an American. Being an American was connected to cultural practices and acceptance (Abu El-Haj, 2007). For first-, 1.5-, and second-generation immigrants experiences with exclusion and marginalization have hampered the development of an American identity.

Whether those hesitant to adopt an American identity are nonetheless committed to the growth and improvement of the United States is
unclear. The sociological understanding of identity is “a process of naming, of placing ourselves in socially constructed categories, with language holding a central position in this process” (Marshall, 1998). Peter Berger has described identity as being “socially bestowed, socially sustained and socially transformed” (1966). Commitment to the growth and improvement of the United States is a necessary component of American identity, but it might be possible for individuals to share this commitment without maintaining an American identity. Additionally, whether these students experienced the type of civic education discussed here is unknown. However, research on immigrant identity does suggest that civic education can do more to address the exclusion that immigrants, particularly unauthorized migrants, experience in the United States.

UNAUTHORIZED MIGRANTS AS COMMITTED DEMOCRATS

Schools have nonetheless had some success in supporting the development of an American identity and commitment to the United States among unauthorized migrant students. The commitment of DREAM students to the growth and improvement of the United States based on democratic principles is a testament to what can happen when unauthorized migrants have access to public K–12 schools. DREAM students are the individuals who would benefit from the Development, Relief, and Education for Alien Minors Act (“DREAM Act”). This act creates a pathway to lawful immigration status for individuals who entered the United States under the age of 16, have been physically present for at least 5 years, earned a high school diploma or a GED, have good moral character, and are not inadmissible or deportable based on criminal activity or national security concerns. The DREAM Act would grant these individuals conditional LPR status. The conditional LPR status would be valid for 10 years. If within that 10-year period the individual completed 2 years of college or military service and maintained good moral character, then he or she could apply for regular, not conditional, LPR status. They would become green-card holders who could eventually apply for citizenship.

On January 1, 2010, Carlos Roa, Felipe Matos, Gaby Pacheco, and Juan Rodriguez set off on the “Trail of Dreams” march from Miami, Florida to the nation’s capital. Carlos, Felipe, and Gaby are unauthorized migrants. They decided to risk deportation in a public walk from Miami to Washington, DC because the restrictions on their life due to their immigration status had become unbearable (Preston, 2010). The DREAM Act provided an opportunity to regularize their immigration status and their march brought national attention to the pending legislation. They and numerous other unauthorized young adults who have been raised in the United States are coming out of the shadows to reveal their unauthorized immigration status and to seek legislative reform that will grant them equal access to
education and jobs in the United States. This student movement is rooted in American democratic values of equality, justice, and fair treatment. One young man named Uriel explained his reasons for taking action: "When we fail to speak up, when we fail to criticize, when we fail to stand up for our ideals, and when we fail to improve the lives of those around us; it is a far greater blow to the freedom, the decency, and to the justice which truly represents this nation we call home" (The Dream is Coming).

Uriel and his fellow advocates exemplify Gutmann's democratic commitment. As a society, the United States should encourage the development of more Uriels within the unauthorized migrant student population. The country has more to lose when unauthorized migrant youth do not see themselves as members of U.S. society and when U.S. society does not see these young people as members. Discouraging unauthorized migrant students from enrolling in K–12 public schools denies them access to an important vehicle for developing an American identity and a commitment to the growth and improvement of the United States. The inclusion of unauthorized migrant youth is essential if the United States is going to actualize e pluribus unum rather than continue to be a fractured and divided country.

REFERENCES


Hearing before Committee on Agriculture, House of Representatives (statement of James Holt).


U.S. Constitution. (1868). Amendment XIV.


