
An Interview with Michael A. Olivas

*Michael A. Olivas passed away in April 2022 just weeks after this interview. We are extremely grateful for his generosity and the chance to discuss his work. Olivas was the William B. Bates Distinguished Chair in Law (Emeritus) at the University of Houston Law Center. In 2016–17, he was Interim President of the University of Houston-Downtown, which with 15,000 students, is the second largest baccalaureate institution in the city. He was the author of 16 books, and had a weekly NPR show, “The Law of Rock and Roll,” where he reviewed legal developments in entertainment law. He retired after almost 40 years at the University of Houston Law Center, where he taught Higher Education Law, Immigration Law, and Entertainment Law. His latest book, *Perchance to DREAM: A Legal and Political History of the DREAM Act and DACA* (New York University Press, 2020), is the subject of our interview.*



Michael A. Olivas

Interview by Benjamin Guterman

Your interest in undocumented students goes back to the early 1970s, before the *Plyler v. Doe* court decision of 1982. What were some of your early involvements with the legal issues concerning undocumented college-aged youth?

Beginning in grad school at Ohio State University, I recruited farmworkers in the agricultural part of the state, because they had begun to mechanize tomato-picking, resulting in Campbell, Ohio’s Campbell Soup factory to reduce the number of migrant family workers, so I figured their kids could be recruited for college. They were mostly from Texas, and migrated along the crop-ripening trail to pick cherries in Michigan, with stops in Ohio for tomatoes. But because they moved, they could not meet the residency durational requirements. I urged the State Coordinating Board to change the law, to allow them to meet the 12-month requirement over 3 years, and this would not only allow them OH benefits, but for those of other states with reciprocity (about six overall). It was my first successful advocacy, and even though it was just for U.S. citizens (which they all were), it gave me a taste of how the system worked. After I finished my OSU Ph.D., I immediately went to law school in order to sharpen my advocacy and research tools.

You write that this book was decades in the making. Why was that so? Certainly, your comprehensive approach required extensive research in the educational, legal, bureaucratic, legislative, and political aspects of the DACA story over the past 40 years.

I moved to Texas to start teaching at the University of Houston, and immediately saw the effect that 1982/*Plyler* would have on the area in which I had advocated, this time with immigration issues. Because I taught immigration law and college law, these were natural areas for me to focus on. I began advocating for the immigration issues and Texas residency, and eventually got Governor Rick Perry to sign the first undocumented residency state law. Overall, it was actually more than 40 years, from the Ohio efforts, to the Texas efforts, to DACA and *Perchance*. I was also involved with drafting the Top Ten percent plan and working with Governor George W. Bush, which also gave me the pathways to work on additional immigration issues, such as financial aid and the efforts to establish DACA.

What was the 10 percent plan, and what other immigration issues and state legislative measures did you work on in those years, including with Governor Bill Richardson of New Mexico?

When the 5th Circuit struck down the use of affirmative action in Texas, Louisiana, and Mississippi, Texas enacted a plan signed by then-Governor Bush to grant automatic admission to state institutions for graduates of Texas high schools who were in the top 10 percent of their graduating classes. This race-neutral law (later modified to the top 7.5 percent) substantially increased the number of high schools that sent their best graduates to the state's public colleges. With the residential segregation evident in high school attendance, and more school districts encouraging their students to attend colleges, the number and percentage of full-time, first-time students of color increased. (Later data revealed that the majority of Top Ten enrollees were still majority-white.) Subsequent Supreme Court decisions restored the use of Affirmative Action in the country, but the 5th Circuit had rendered the practice illegal for several years, leading minority enrollments to decline in the affected institutions.

In New Mexico, the state's residency requirement legislation signed by then-Governor Bill Richardson went even further than had the original Texas version. Whereas Texas granted resident-tuition eligibility to undocumented graduates who attended Texas high schools for 3 consecutive years, NM did so after 12 months. They also became eligible for the NM Lottery scholarships after 12 months of high school, in effect, their senior year.

Why did the question of the rights of immigrant children to public school education become an issue in the 1975 Texas case and not earlier? What was the wider context of campaigns for undocumented rights at that time?

There just were not enough undocumented kids enrolled before then to trigger law. Most schools didn't differentiate until the numbers began to grow. Most kids before were along the border, and their attendance actually helped schools, based upon the Average Daily Attendance funding. Tyler and other non-border areas eventually began to see more kids, and the attention just followed. Also, MALDEF [Mexican American Legal Defense and Educational Fund] was not focusing on them, so the issues did not percolate until Pete Tijerina and Peter Roos scoped out the natural evolution. The 2021 book on MALDEF by Benjamin Marquez reveals this history, which I had not followed, especially how the Ford Foundation determined its support and was not willing to fund immigration-related issues, but more fundamental Voting Rights and civil rights issues for Mexican American citizens.

The *Plyler v. Doe* decision in 1982 asserted 14th Amendment rights of equal treatment to undocumented students, giving them the right to attend public schools. What were the near-term reactions to and effects of the decision in Texas schools and elsewhere?

Once the decision became final, Texas and other states accepted its ruling, and no litigation arose in the country to challenge the holding, making *Plyler* the apex of undocumented rights. Additional cases worked out the details, including the rights of schools to require children enrolled in district schools to reside in the district attendance zones, as in *Martinez v. Bynum* (1983).

***Plyler v. Doe* challenged the strict use of citizenship as a basis for certain state rights and benefits. Subsequently, what additional, specific rights did advocates for the undocumented try to secure through the courts?**

The most important extension was in applying *Plyler's* logic and effect to college attendance. The decision substantially increased the number of undocumented high school attendees and graduates, and they desired to attend college, but ran into residency requirements that required immigration status. This situation meant that the more expensive nonresident tuition option was the only pathway, and their ineligibility to receive federal or state financial assistance led to many court challenges. The resultant rise of residency-eligibility—and eventually DACA—allowed over a million undocumented college students to enroll, until the Trump rescission and subsequent litigation put the constitutionality of DACA's benefits into question. In the 2020 decision in *Department of Homeland Security v. Regents*

of the University of California, the Supreme Court overturned Trump’s attempt to end the program, but in collateral federal litigation that is ongoing, the underlying constitutionality of DACA is being challenged.

You start the DACA story with analysis of legal challenges in the 1980s and 1990s to college residency rules for the admission of undocumented students—that is, could the students legally establish residency and qualify for in-state tuition? How was that period of “heightened scrutiny,” in the words of one judge, invaluable in defining the issues around many of the rights of undocumented students?

When you bring cases, you take advantage of whatever tools there are, and there had been other residency/benefit cases making their way by a variety of litigators. MALDEF was not an immediate player in SCOTUS cases, and eventually became successful—even when they lost as in the Denver desegregation case, where the remedy for the admitted racial isolation in schools was left for the school district to remedy—a technical win with actual defeat on the issues—the case had been brought by Black litigators with no Latino clients or lawyers. Being late to the game meant Chicano interests were subordinated to those of Blacks, even when Mexican American kids were more numerous, as in Denver.

Your history of the legal contests over residency requirements reveals the diversity and inconsistency of standards among states and colleges, some even misapplying U.S. immigration regulations. What are some of the major clarifications and reforms that emerged in admission standards from those cases?

As I also noted, several dozen states have extended in-state residency to undocumented applicants, and a number have also made them eligible for their state financial aid programs. While they remain ineligible for all federal financial assistance (and DACA continues this practice), states such as California even have enacted state-loans for undocumented college students, and New Mexico allows their undocumented students to receive Lottery Scholarships. Many institutions have also extended scholarship assistance in their own financial aid packaging. Virtually all the public and private efforts have been inclusive and have broadened eligibility for this vulnerable cohort of college students.

You also trace how the legal review process of the 1980s and 1990s raised questions about federalism in immigration issues. What did those court cases reveal about clarifying and defining the boundaries between federal and state responsibilities?

These are always elastic, and ebbed and flowed due to the laws of preemption and federalism, which turned on the type of issue, the actual implementation expected

of states, and the like. These were also playing out in health care in a series of Supreme Court cases that gave more rights to immigrants and the undocumented.

Could you summarize the judgments in a couple of those Supreme Court health care cases?

In 1971's *Graham v. Richardson*, the U.S. Supreme Court maintained that a state's aim to conserve welfare benefits solely for citizens would not legitimize the denial of welfare benefits to noncitizens and resident "aliens." The Court's justification was that they pay taxes and, consequently, contribute to the pool of money from which welfare benefits are drawn. As a result, the Court concluded that the welfare benefit restrictions violated the Equal Protection Clause of the 14th Amendment. Several additional cases expanded benefit eligibility. However, The Affordable Care Act fundamentally changed the entire system, and California legislators voted to expand Medi-Cal coverage to undocumented immigrants over 50. Different states have different plans, and there will be increasing participation in health care plans for undocumented students, including employment-driven benefits as a function of DACA's provisions for employment authorization.

Two Republican-led congressional acts of 1996 allowed the states to legislate whether or not to grant health and welfare benefits to undocumented students, including resident tuition. Your investigation of state actions up to 2010 finds a mixed picture of state policy revisions, but yet you write that there was a "certain sense of optimism." How so?

One by one, states decided to grant the college residency by narrowly opening the door—3 years instead of 12 months, etc. Perry was the first, but not the last to see that these kids were better off to be educated, and so the states began to be more generous and inclusive. And then, even financial aid was made available at the state level.

Stories of the Dreamers had wide popular appeal in the years before and after the DREAM Act was first introduced in 2001. Can you define the term Dreamers? Why was their predicament so moving, and can you briefly relate a couple of stories of these students?

I give examples in the book, and every state that enacted laws used testimony by the affected kids and the built-in headwinds they encountered and overcame. They began to achieve as they were allowed to be educated, such as being valedictorians and showing the resilience that came with being strivers. Educators signed on, encouraged the students, and influenced decisions-makers (legislatures, trustees, and administrators at the state and local levels).

The national emergency of 9/11 prompted extensive changes in the federal government's immigration bureaucracy and enforcement priorities, as well as in related politics and legislative coalitions. It also strengthened executive powers. Did those post-9/11 changes, on the whole, doom chances of passing a DREAM Act?

These efforts were not helpful, and the Texas law was before 9/11, but these kids, coming as most of them did, from Mexico, as well as Central and South American countries, were not as threatening as Muslims became with the so-called PATRIOT Act and Trump's Anti-Muslim efforts.

You cite a sense of momentum in the states after the defeat of several DREAM Act bills in Congress in the years after 2001. What were some of the critical changes in state laws regarding the rights of the undocumented?

I detailed them—residency, financial aid, access to restricted majors and admissions, and eventually employment.

Especially revealing is your complex analysis of the diversity of discretionary measures used by the U.S. Citizenship and Immigration Services (USCIS) and how they affect deportations and “lubricate” the immigration system. Can you discuss those dynamics, generally?

Federal law enforcement and signals were determined by whether Democrats or Republicans were in office (although Perry was a GOP governor, who got beaten up when he had national ambitions). And Chris Christie signed a New Jersey undocumented student residency-tuition bill to fuel his electoral chances. Utah's residency legislation was primarily due to conservative LDS support because of missionary work in Latin American countries.

But you trace how the Immigration and Customs Enforcement's use of “prosecutorial discretion” (settling low-priority cases) helped ease the case load somewhat in 2011 just prior to DACA. In what major ways were those discretionary actions helpful but essentially unsatisfactory?

Efforts to decide on positive use of discretion were time-consuming, and required enormous legal resources, whereas DACA's across-the-board benefits no longer required case-by-case reviews. For example, Employment Authorization for previous discretionary purposes had necessitated individual assessments of “extreme hardship” before granting permission to work. In most cases, blanket permissions meant that the detailed and complex individual decisions were no longer the means by which important benefits were distributed.

With realizations by 2012 that comprehensive immigration reform was highly unlikely, President Barack Obama established the Deferred Action for Childhood Arrivals (DACA) program based on the use of prosecutorial discretion, which would grant residency and employment rights to Dreamers who applied. Can you explain the rights extended and the limits of the program?

Essentially four benefits were granted to all the DACA applicants—Social Security numbers and SS eligibility, Employment Authorization, the right to apply for advance parole and leave the United States and return, and most importantly, “lawful presence,” all of which triggered benefits and eligibility for professional licensure, etc.

Many DACAmented youth have been able to find work and use their education in law, medicine, nursing, and teaching, and you provide extensive research into the very diverse, and often inconsistent, hiring guidelines for noncitizens among the states. What main insights have you gained from that research?

That licensing laws were not keeping up with the 20+ years of increasing access—and that there was no anticipation that hundreds of thousands would become eligible under old rules that expected rare exceptions, not the 800,000 that resulted and would have doubled had Trump not tried to shut down DACA (as is under consideration in the Judge Hanen case now moving ahead).

You caution that while expediting discretionary procedures in immigration caseloads would help, those efforts might benefit a cohort of about 16 percent of deferred action cases but leave 84 percent unresolved and in limbo. Are there possible remedies for more extensive processing of cases?

The Biden Administration has been a disappointment in not advancing Comprehensive Immigration Reform through budget reconciliation, or a stronger administration effort to enact the House-passed DREAM Act, which has died in the Senate. There has been too much turnover, and the iron is no longer hot with the upcoming mid-term elections.

Interestingly, you point out the increasing importance of advocacy work by the “immigration bar,” private organizations, and NGOs as we likely will see more short-term immigration exemptions and review procedures rather than comprehensive immigration reform in the near future. How are these advocates adjusting, and what major issues do you foresee in their work?

Each state presents different issues—now that I live in my native New Mexico, the differences from red GOP Texas are in the details—in NM, all immigration-related

restrictions in employment have been removed, the undocumented can become eligible for NM residency in 12 months, not 3 years, and get all financial aid, including lottery scholarships, etc.

You write that the Trump administration’s failure to both end DACA through the courts and to tie extension of the program to congressional funding for a border wall left the program on “a form of life support.” New DACA applications were on hold. Was the danger to the program due to possible court challenges at that time, to executive actions, or both?

That summarizes them, if there is no pathway to permanent residency. And MALDEF continues to litigate more than a dozen DACA matters, where many national firms refuse to hire, and then lose their cases despite the blanket employment authorization, and then must pay our lawyers’ fees and damages for our aggrieved clients. In addition, there are costs of discouraged rights-holders, who do not know how to invoke their rights or be in a position to benefit, when they are entitled to relief.

On September 10, 2021, the Biden administration appealed Judge Andrew Hanen’s ruling that DACA was illegal. What is the current status of the DACA program and its provisions, and do you see opportunities for widening the program to other groups?

We are appealing, but I do not speculate on the 5th circuit or SCOTUS.

You characterize the core dilemma of immigration reform in 2011—that reform required “substantial increases on the naturalization and evaluation side” while enforcement measures for national security would need to be “enhanced.” Have you seen any progress administratively in bridging these needs?

There is a natural rise and fall of immigration priorities in the country, and in the world. While Trump ground immigration efforts to a halt, even when his policies were eventually struck down by courts, the results were detrimental, and the “hole” was deeper. Anti-immigrant pressure prevailed, but were overcome in the Biden Administration—although re-building is always slower than running programs into the ground. Then Russia illegally invaded Ukraine, and pro-refugee and asylum efforts gained public favor, even from restrictionist Republican legislators.

In what ways have you been an advocate for Dreamers and immigration reform in the past several years?

Being a professor, especially a law professor, is an opportunity for many privileges, even while I am now retired. Teaching is the whole point, and 200+ articles,

chapters, and books later, I am still proudest of my accomplished students. As for writing, that skill is how I exhale. I write for publication, to engage with the public (Twitter, zoom, op-eds), and when the well runs dry someday, I will write less and read more. Service was an unexpected privilege of being an engaged professor—especially in my varied organizations at the national and international level. As for advocacy in the dictionary meaning, I testified before bodies, wrote legislation and regulations, lobbied, advised leaders, and planted seeds that grew. Because I am not in the classroom any longer, I do not come into regular contact with law clerks, doctoral advisees, and those in the pathways to academe, so my work with young faculty is very satisfying. I have decided that as long as I engage in these and my NPR show (THE LAW OF ROCK AND ROLL), I will be active and motivated—an extension of my fortunate life as a professor. I have been a very lucky boy.

What is your advice to the DREAMERS today?

The arc of justice is long but bends towards justice—in all these areas. I have dedicated my life and efforts to immigrant education, because my own community—indeed, all communities—benefits, and I believe the efforts pay off, by skill and luck, and hard work. I urge these investments in DREAMers and the undocumented because the United States benefits by their inclusion. I would argue that the fate of our country is determined by immigrant energies and dreams, especially by dedicating educational resources in these communities. Indeed, they have kept their part of the bargain, and the polity needs to do the same.

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