**Welcome To The Breakfast Club: Introduction To Immigration Law & Policy, Georgetown Law, Summer 2017 Edition**

By Paul Wickham Schmidt

The following is a revised and re-mastered version of the keynote address delivered by Immigration Judge Paul Wickham Schmidt, in his personal capacity, at the Eighth Annual Language, Culture, and Education Institute on March 29, 2008, at the University of Wisconsin-Oshkosh Campus. The Institute was co-sponsored by UW-Oshkosh College of Education and Human Services and the Office of Continuing Education and Extension, the Wisconsin Department of Public Instruction, and the U.S. Department of Education's Office of English-Language Acquisition. That speech was published at 13 *Bender’s Immigration Bulletin* 621 (May 15, 2008). A similar revised version was delivered on April 3, 2016, as part of the Adult Education Series entitled Immigration Challenges: Judicial, Legislative, and Ground Level Support, sponsored by Westminster Presbyterian Church, Alexandria, Virginia, and again to the Men’s Breakfast Group at Westminster Presbyterian on November 11, 2016. Another version was given to an undergraduate History class at Beloit College in Wisconsin in October 2016. Judge Schmidt retired from the United States Immigration Court in Arlington, Virginia on June 30, 2016. He now is an Adjunct Professor at Georgetown Law and writes the immigratoncourtside.com blog.

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**I. INTRODUCTION**

**Good afternoon.[[1]](#footnote-1) Welcome again to the Summer 2017 Edition of Immigration Law & Policy (“ILP”) here at Georgetown Law. Also, welcome to our Breakfast Club, or “BC.” Of course, every functioning organization needs a good acronym like this. We’ll be using a number of acronyms during this class.**

**I readily acknowledge that for this particular class we really should be talking about the “Mid-Afternoon Snack” Club. But, that would have required not only a longer acronym, but also more editing than I cared to do. This presentation, for whatever reason, has generally been given early in the morning, hence the title.**

***Congratulations* on your automatic membership in the BC, which was included in your registration for this class, *at no extra charge!* Similarly, most of us who happen to be U.S. citizens obtained *our* membership in the American community through U.S. citizenship *automatically and involuntarily* conferred at birth.**

**Now that we’re all members of the BC, what common purposes or values bring us together today? Should support of those values be a membership requirement? Do we want to recruit new members or just keep the membership we have? How do we recruit? What about folks who don’t share all our values? Can they be members? Can they attend our classes and be our “friends,” even if not members? How do we interact with them? How do we spread our values without treading on the rights and values of others who might disagree with us? Do we expel those whose actions no longer support our common values and purposes? What process would we use to do that? Has anybody ever been in a club or organization where disputes over membership rules and requirements led to threats to resign, or dissolution, or a split?**

**If we were able to play this out over the entire nine classes, when we were done we probably would have a set of rules and regulations that look somewhat like a “mini-immigration” system. In effect, all immigration and nationality systems are simply ways in which we define and regulate membership in our national community or “club.” The club model originally was suggested to me by the scholarship of my good friend and former government colleague, David A. Martin, Professor at the University of Virginia Law School.[[2]](#footnote-2)**

**No overstuffed leather chairs fill our clubroom, nor does the odor of stale cigar smoke linger in the air. *Our* club is the United States of America, a vibrant 21st Century democracy built on the promise of “liberty and justice for all.”**

**Membership issues have always been, and remain, among life’s most difficult, fundamental, and therefore contentious matters. They involve sometimes conflicting basic human needs such as belonging, control, self-determination, allegiance, loyalty, and even survival. The U.S. Supreme Court has said expulsion from our national “club” can result in the “loss of everything that makes life worth living.”[[3]](#footnote-3)**

**Today, I will talk about the U.S. immigration process. This issue does *not* affect *only* those living in Texas, California, New York, Florida, and states along our southern border. The Washington, D.C. area has numerous vibrant communities shaped by migration. *Your* very presence today reflects the profound significance of immigration in our community and our nation.**

**As you know, last fall, we had a *very* contentious national election in which immigration policy played a major role. The “winners” presented a far different immigration platform than the “losers.”**

**Already, we’ve heard reports of accelerated or more aggressive removals in some areas of the country. A number of politicians and Administration officials praise these efforts as long overdue.**

**At the same time, other politicians have reached out in an attempt to reassure vulnerable populations in our community that President Trump, whom some of them supported, will not or can not keep his campaign promises to deport some groups and bar the admission of others.**

**Our local television news has featured post-election stories of scared families who believe that they could soon be forced out of their homes in the United States and sent to foreign countries where they have not been for years, perhaps decades. Some U.S. citizen children who are part of these families face the prospect of exile to foreign countries they have never even visited. Consequently, the issue of who should be part of national “club” and how we treat those who are not welcome in our club will continue to occupy our nation and its leaders.**

**Now, this is the point at which I used to give my comprehensive disclaimer providing plausible deniability for everyone in the Immigration Court System if I happened to say anything inconvenient or controversial. But, now that I’m retired, we can skip that part.**

**Additionally, because *today* is *Tuesday*, it’s *first day of summer session*, and because *you* are such a great audience, I give you my *absolute, unconditional, money-back guarantee* that *this* lecture will be *completely free* from computer-generated slides, power points, or any other type of distracting modern technology that might interfere with your total comprehension or listening enjoyment. In other words, *I* am the “power point” of this presentation.**

**II. DESCRIBING THE “CLUB”**

 **A. Full Members**

**If we think of our national community as a *club*, then the “full voting members” are U.S. citizens. There is also a very small group of people who are so-called “nationals” of the United States, owing permanent allegiance, but who are not citizens of the United States. To simplify matters, I’m going to leave nationals out of today’s discussions.**

**Under the 14th Amendment to the U.S. Constitution, persons born in the United States *automatically* become U.S. citizens. The exceptions are children born to certain high-ranking foreign diplomats with immunity and rare individuals born on foreign public vessels who are not subject to the jurisdiction of the United States. U.S. citizenship vests *automatically* *regardless* of the legal status of the mother or father in the United States.**

**Although so-called “birthright citizenship” has become a somewhat controversial topic recently, it has been a firmly established constitutional rule for over a century. [[4]](#footnote-4) Because it is a constitutional rule, Congress *cannot change* it by statute. It would require a constitutional amendment or a *radical* reinterpretation of our Constitution by the Supreme Court.**

**Additionally, certain individuals born abroad whose parent or parents are U.S. citizens who lived in the United States prior to birth can automatically acquire U.S. citizenship at birth. So-called “citizenship by acquisition” is governed by statute, rather than the Constitution, and the rules have changed over the years.**

**This actually came up in connection with the recent Presidential race because, as we know, one of the leading primary candidates, Senator Ted Cruz, was born in Canada. Senator Cruz was born in Canada to a Cuban citizen father and a U.S. citizen mother who had lived in the United States for at least ten years prior to his birth. Consequently, by the then-applicable statute, he became a U.S. citizen at birth. That doesn’t necessarily answer the question of whether he is a “natural born citizen” eligible to become President under the Constitution.**

**Additionally, children born outside the United States may under certain conditions automatically *derive* U.S. citizenship upon the naturalization of at least one parent or upon being lawfully admitted to the United States to reside with a citizen parent.**

**Finally, certain individuals lawfully residing in the United States may, if eligible, choose to apply to the Department of Homeland Security (“DHS”) for naturalization. This is, in effect, a way in which a “prospective member” of our “club” may apply for and receive “full membership.”**

**While Article I, Section 8 of the Constitution gives Congress authority to establish “a uniform rule of naturalization,” and the 14th Amendment provides that naturalized individuals shall be citizens, the Constitution does not specify rules for naturalization. Theoretically, Congress could decide to have no provision for naturalization whatsoever.**

**The rules for naturalization are set by statute and also have changed over the years. They largely depend on lawful permanent residence, knowledge of the English language and basic civics, and good moral character. In other words, *only* naturalized citizens actually *earn* their status by some type of merit-based process. The rest of us are simply beneficiaries of *extreme* good fortune that we did absolutely nothing *personally* to deserve.**

**There is a process for de-naturalization of individuals who illegally obtained naturalization. Some of the most famous denaturalization cases involved Nazi war criminals who concealed their atrocities during the immigration and naturalization processes. Otherwise, however, one may lose U.S. citizenship only through “voluntary relinquishment.”[[5]](#footnote-5) In other words, Congress may not involuntarily strip an individual of legally acquired U.S. citizenship.**

**An “alien” is defined by law *not* as an “extraterrestrial being,” but rather as anyone who is not a citizen or national of the United States. I note, however, that an “ET” would meet the legal definition of “alien.”**

 **B. Associate Members**

**A second group of individuals might be characterized as “associate members” or “prospective members” of our club. In immigration terms, they generally are known as “lawful permanent residents.” While these individuals cannot vote or participate in our political processes, they can reside here on a permanent basis, provided that they obey our laws. Generally, they can work here without much restriction and can travel relatively freely abroad. Eventually, most individuals in this category can attempt to meet the criteria to become U.S. citizens, although they are not *required* to do so.**

**Lawful permanent resident aliens are by far the largest group of “associate members.” They sometimes are known as “green card” holders, because of the color of the identification card. Our permanent immigration system generally favors the admission of three basic groups: close relatives of United States citizens and lawful permanent resident aliens; those with needed job skills; and refugees. Approximately one million permanent residents were admitted into the United States in fiscal year (“FY”) 2013.[[6]](#footnote-6)**

**Immediate relatives of U.S. citizens, that is, spouses, minor children, and parents of adult U.S. citizens, can immigrate without numerical limitation. Approximately 440,000 immediate relatives, 250,000 of them spouses, were admitted as immigrants in FY 2013.[[7]](#footnote-7) You should know, however, that *only* parents of *adult* U.S. citizens who are over age twenty-one qualify for immediate relative status. Consequently, and perhaps contrary to some popular notions, the birth of a U.S. citizen child confers *no immediate* immigration benefits on the parents.**

**Two hundred and twenty-six thousand immigrant visas annually are allocated for other types of family reunification for adult children of U.S. citizens, spouses and children of lawful permanent resident aliens, and siblings of U.S. citizens. The latter category, however, has a waiting list of nearly 13 years.**

**Another 140,000 immigrant visas annually for employment-based immigrants are allocated primarily to professionals and other skilled workers. “Members of the professions holding advanced degrees,” and, “outstanding professors and researchers,” are within the preferred categories. Significantly, at present only 10,000 immigrant visas annually are available to unskilled workers whose services are needed by U.S. employers.**

**Some legislators have proposed a reduction in overall immigration and a reallocation of some of the family-based visas to the employment categories. However, I personally see no basis for such changes.**

**Family immigration contributes to the success of the American economy and enriches our society, as does employment-based immigration. Indeed, a more rational change would be to *increase* both family and employment-based legal immigration to better match the “market forces” of supply and demand as well as to reduce the number of individuals seeking to migrate outside the legal system.**

**Although they have to wait a short period to obtain a green card, refugees and asylees are also slated for permanent integration into U.S. society. Some refugees are selectively admitted directly from abroad. Approximately 70,000 refugees were admitted in this manner during FY 2013. [[8]](#footnote-8) Additionally, approximately 25,000 individuals already in the United States who satisfy the “refugee” definition were granted asylum in FY 2013,[[9]](#footnote-9) approximately 10,000 by the Immigration Courts,[[10]](#footnote-10) and the balance by the DHS Asylum Office.**

**“Refugee” status generally refers to individuals who have been pre-screened abroad. “Asylees” generally are those who enter the United States with no status or with a temporary status and seek to establish their refugee qualifications while in this country. Cases of such individuals formed the bulk of my work at the Arlington Immigration Court.**

**While refugees and asylees do not immediately become green-card holders, they have a right to remain in the United States indefinitely, can bring in spouses and minor children, and can work freely. In most cases, they eventually become eligible to receive green cards, which can lead to U.S. citizenship.**

**Let’s think about refugees for a moment in “real life terms.” Each morning when I wake up I’m thankful for two things. *First*, that I woke up, which, at my age is *never* a given. *Second*, that I’m *not* a refugee.**

**You might be aware that refugees and asylees recently have become extremely controversial both internationally and in the United States. The humanitarian disaster in Syria has sent over four million individuals, many of them women and children, pouring across the borders of neighboring countries in search of life-saving safety. Many found their way to the borders of Europe creating major issues as European Union leaders searched for solutions to resettle those who have arrived and to stem the tide of future arrivals.**

**One of President Trump’s first actions in office was to cut U.S. refugee admissions drastically, to 50,000 for this Fiscal Year. At the same time, in his first Executive Order on Immigration, sometimes referred to as “Travel Ban I,” he purported to specifically bar indefinitely the admission of Syrian refugees.**

**Perhaps fortunately, in my view, this Executive Order and its successor, known as “Travel Ban 2.0,” have to date been blocked by the Federal Courts. While the court injunctions did not deal with the reduction in refugee numbers, the State Department quietly announced last week that refugee admissions had been increased to more “normal” levels, although well short of the Obama Administration’s goal for this fiscal Year.**

**The current European practice is to force most of the “unwanted” refugees to return to, or remain in, Turkey, a country that is not a party to the Geneva Convention on refugees and has a very poor human rights record. In return, the European Union made various financial, immigration, and political concessions to Turkey.[[11]](#footnote-11) You might have seen in the news that some refugee applicants from Syria and Iraq were forcibly removed from Greece to Turkey.[[12]](#footnote-12) Meanwhile, hundreds of Turks have protested the establishment of a refugee camp in their community, while Austria mobilized troops to prevent refugees from crossing the Alps.[[13]](#footnote-13) The desire to insulate themselves from EU refugee and immigration policies was a leading factor in the United Kingdom’s vote to exit the EU. As I indicated, being a refugee in today’s world is a “tough business.”**

**Only a *relatively small* number of Syrian refugees have found their way to the United States, approximately 10,000 in FY 2016. According to a recent report from Oxfam International, our “fair share” of Syrian refugees would be *17 times* that amount, or 170,000![[14]](#footnote-14)**

**Notwithstanding the *minute* number of Syrian refugees we resettle, the rigorous pre-screening they receive, and that most of them are women, children, or family units, various U.S. state governors, including *notably* our Vice-President Mike Pence, when he was Governor of Indiana, have made well-publicized attempts to “slam the door” on Syrian refugee resettlement in their respective states based on bogus national security concerns. So far, Federal Courts have soundly rejected such efforts.[[15]](#footnote-15)**

**Nevertheless, a number of Administration officials and Members of Congress have expressed strong opposition to the current procedures for resettling Syrian refugees in the United States. Recently introduced pending legislation would give states authority to block refugee resettlement, narrow the already limited refugee definition, and make it generally more difficult for refugees to be admitted, particularly from Syria and the Middle East, while effectively giving preference to Christian refugees over Muslims and those of other religions.[[16]](#footnote-16)**

**Meanwhile, President Donald Trump has tried to severely restrict Muslim immigration, apparently largely to “make good” on campaign promises. While U.S. law generally does not permit such specific religious exclusions within the U.S., and the current Executive Order on refugees has been enjoined, as President, Mr. Trump ultimately has authority to determine the future of U.S. overseas refugee programs. In theory, he could designate any group of refugees as of “special humanitarian concern” to the U.S. or designate none at all. This probably does not bode well for future admission of Syrian Muslim refugees who are screened abroad.**

**I would like to put to rest one of the popular myths about U.S. refugee and asylum law: that we protect *everyone* who can show that they would be killed or in severe danger if returned to their home country. In fact, U.S. and international refugee law applies *only* to those who face harm because of one of five “protected” grounds: race, religion, nationality, political opinion, or the amorphous and highly controversial “membership in a particular social group.”**

**Let’s “unpack” that in “real life” terms. If, for example, your neighbor seeks to kill you and rape your daughter because you are a Christian or a member of the XYZ party, and the police can’t or won’t offer help, you *qualify* for refugee status. On the other hand, if your neighbor threatens to do the *very same things* to you and your family because of envy or lust or just plain old criminal behavior, you do *not qualify*. These are distinctions about which appellate judges and policy makers far removed from the scene argue endlessly. But, not surprisingly, to the refugee or asylum seeker, the person before me in court, the exact reason why he or she is likely to be killed or harmed upon return seems unimportant in relation to the very *real* danger.**

**A recent controversy that affects our community is so-called “Border Surge” cases, involving mostly women, children, and families from Central America fleeing violence and corruption. We face difficult questions as to where, if anywhere, such individuals fit within our asylum and immigration systems. In other words, will they be welcomed to our “club,” or booted back to the danger zones from whence they fled? The Trump Administration has pledged to hold all undocumented border crossers in expanded detention facilities in remote locations along the southern border pending final determination of their asylum claims.**

**Another myth that we sometimes encounter is “the line.” People often say that those who come here illegally should instead “just get in line.” However, unless an individual fits one of the three limited groups of permanent immigrants I have just described, *there is no line to join*. Even some of those who appear to fit our permanent immigration system may face lengthy waits or highly technical requirements that essentially disqualify them from any realistic chance of legal immigration in the foreseeable future.**

**I’m going to mention several “special” classes of permanent immigrants that might be of particular interest to you. One category, called NACARA, covers certain individuals from Nicaragua, El Salvador, Guatemala, Cuba, or former Soviet Bloc countries who entered the United States before cutoff dates in the past and meet certain criteria. Often, but not always, immediate relatives of such individuals can also obtain permanent status. Many individuals in our area from El Salvador, Guatemala, and Nicaragua received their green cards through NACARA.**

**Natives of Cuba who are in the United States usually are eligible to obtain green cards under a special, highly beneficial, procedure called the Cuban Adjustment Act of 1966. With the recent softening of relations between the U.S. and Cuba, some groups have advocated repeal of this special legislation. At present, however, there does not appear to be any political consensus for limiting Cuban immigration. However, as one of his last acts in office, in January 2017, President Obama ordered the Department of Homeland Security to drastically alter the procedures for Cubans entering the U.S. without documents so that they would not be able to utilize the Cuban Adjustment Act.**

**Another special provision we often encounter in this area, particularly with respect to children fleeing violence in Central America, is so-called Special Immigrant Juvenile (“SIJ”) status, which applies to certain foreign juveniles declared by a state court to be in need of care in the United States. There also are special green-card provisions relating to battered spouses and children passed by the Congress as part of the Violence Against Women Act (“VAWA”). Additionally, certain individuals without status who have been in the United States for at least ten years may apply for permanent residence based upon “exceptional and extremely unusual hardship” to U.S. citizen or permanent resident relatives. This is called “cancellation of removal,” another type of case that frequently came before me in Immigration Court. We will discuss these special provisions, and more, in Class 8, on June 22.**

 **C. Friends**

**A third membership category could be characterized as “friends” of the club, that is, individuals who are here with legal permission and may remain for a temporary period of time, sometimes quite lengthy, but who have no clear path to permanent residency or citizenship. The most numerous group of “friends” is “nonimmigrants.”**

**A “nonimmigrant” is distinct from an “immigrant.” The term “immigrant” generally refers to those, whether legal or illegal, who seek to remain permanently in the United States. Nonimmigrants, by contrast, seek only temporary admission to the United States, not permanent residence.**

**Visitors for business or pleasure, approximately 55 million in FY 2013,[[17]](#footnote-17) comprise the largest nonimmigrant category. An example of a “business visitor” might be a French national speaking at a conference and receiving no U.S. compensation other than payment of expenses. Members of a German family coming to see the cherry blossoms or visit Williamsburg could be classified as “visitors for pleasure.”**

**Another familiar category is nonimmigrant academic students in so-called “F-1" status. In FY 2013, approximately 1.6 million such individuals were admitted to the United States.[[18]](#footnote-18) An F-1 student must maintain a residence abroad, must demonstrate an intention to return to that residence upon completion of studies, must show the resources necessary to complete the course of study, and must maintain a full course load. Moreover, F-1 students generally cannot study at public elementary or secondary schools. Because of these requirements, F-1 status generally is not an option for undocumented alien schoolchildren in the United States.**

**There are numerous other classifications in the “alphabet soup” world of nonimmigrants. However, because of very specific technical requirements, and the general concept that a nonimmigrant is someone who is coming to the United States temporarily, these categories seldom are useful to undocumented immigrant families already living, working, and/or studying in the United States.**

**Recently, nonimmigrant visas have come into the limelight, because President Trump’s Executive Orders on immigration purported to bar visa issuance to nationals of certain, predominantly Muslim countries. Several Federal Courts have concluded that invoking bars on visa issuance for apparent religious reasons exceeds the President’s power under the Constitution, a notion that the Administration has vigorously contested.**

**Another group of “friends” that we in this area encounter on a regular basis is individuals in what is known as Temporary Protected Status, or “TPS.” The Secretary of Homeland Security may make TPS designations for nationals of countries where there is an “ongoing armed conflict” or where there has been a natural disaster.[[19]](#footnote-19) Individuals in TPS status can temporarily reside and work in the United States. TPS generally does not lead to green card status or U.S. citizenship, although some people in TPS status eventually are able to qualify for green cards through the normal immigration system.**

**Two of the largest groups of TPS individuals currently in the United States are nationals of El Salvador and Honduras who entered the U.S. prior to a cutoff date in the fairly distant past. There have been a number of *so-far unsuccessful* efforts to obtain TPS designation for recent arrivals who are fleeing violence and corruption in Central America, as well as for Haitians fleeing the recent storm devastation in Haiti.**

**Because TPS designations are within the sole discretion of the Executive Branch, the new Administration could decide to terminate or revoke any of the current TPS designations. This would leave individuals subject to removal from the United States if they failed to depart voluntarily.**

**Recently, Haitians in the U.S. with TPS received a 6-month extension from the Trump Administration. Apparently, this is meant to be a “terminal extension” to allow them to make arrangements for return to Haiti. Some, primarily in the Haitian community and their supporters in Congress, believe that a longer extension should have been granted.**

**D. Outcasts**

**Then, there are the estimated 11.2 million -- 5.6 million from Mexico[[20]](#footnote-20) --individuals in the United States who are outside our “club.” This group consists primarily of individuals who crossed the border surreptitiously or by fraudulent means, but also includes a significant group of individuals who entered legally as nonimmigrants, but overstayed or otherwise violated the terms of their admittance. Six states – California, Texas, Florida, New York, New Jersey and Illinois – are home to 60% of the undocumented population.[[21]](#footnote-21)**

**In some instances, the law permits individuals in the United States to change to “green card” status through a process known as “adjustment of status.” In FY 2013, approximately 531,000 individuals used this provision.[[22]](#footnote-22) However, the stringent requirements for that relief make it of little practical benefit to most who are here illegally.**

**Also, there is a smaller, yet highly visible, group of individuals who were granted lawful permanent residence, in other words, became “associate members” of the club, but who by their subsequent criminal misconduct forfeited that right and are therefore subject to expulsion from membership and removal from the nation.**

**Most people would agree that the latter group, criminals, presents plausible arguments for expulsion. Nevertheless, there may be circumstances where forgiveness based on an overall assessment of the equities, particularly the effect on U.S. citizen and lawful permanent resident family members, is warranted. Indeed, a limited form of discretionary relief called “cancellation of removal” is available to individuals whose criminal record is on the less serious end of the spectrum.**

**I also decided those cases on a regular basis. Many involved individuals held in immigration detention by the DHS. In this area, that usually meant detention in the DHS’s Farmville, VA Contract Detention Facility, which actually is located closer to the North Carolina border than to Arlington. The possibility of long-term *civil detention* of individuals awaiting hearings or eventual removal is always a controversial aspect of immigration enforcement. A case involving the permissible scope of pre-hearing immigration detention is now before the U.S. Supreme Court.[[23]](#footnote-23)**

**The Administration has announced plans to dramatically increase the use of immigration detention, particularly along our southern border with Mexico. This is in addition to President Trump’s plans to build a wall along that border, which has met with a mixed reception in Congress.**

**With respect to the other two groups, illegal entrants and status violators, there is an acrimonious ongoing debate. Some say that these individuals possess characteristics, such as willingness to work hard in jobs most Americans don’t want and U.S. citizen or green card holding relatives, particularly children, which make them strong candidates for membership in the club at some level. They also argue that mass removals of such individuals from the United States would be impractical and inhumane.**

**Others say such individuals are “lawbreakers” who are a drag on our society and should be removed, through active enforcement efforts, a strategy of “attrition,” or both. The “attrition strategy” depends heavily on more aggressive and effective enforcement of federal laws, on the books since 1986, prohibiting the hiring of aliens not authorized to work in the United States.**

**These laws also prohibit discrimination based on national origin or citizenship status against employees and job applicants authorized to work in the United States. Most of you probably have filled out the so-called I-9 employment verification form, which is part of the process for enforcing these laws. To date, however, these so-called “employer sanctions” laws have not effectively eliminated U.S. employment opportunities for unauthorized workers.**

**Groups favoring removal have consistently blocked efforts at overhauling the immigration system. One such effort, generally referred to as “comprehensive immigration reform,” was supported by then President George W. Bush and would have combined stronger border enforcement with an “earned legal status” for many individuals now residing and working in the United States without status. It also would have provided more avenues for the legal importation of temporary workers to do low-skill jobs.**

**A second unsuccessful proposal called the “DREAM Act” would have made it possible for certain undocumented youth, many of them U.S. high school graduates, who had lived in the United States since a young age to ultimately regularize their status by attending college, working in the United States, or joining the U.S. military.**

**In the absence of Congressional action, in 2012 the Obama Administration implemented an administrative program, known as Deferred Action for Childhood Arrivals (“DACA”) to allow some potential Dream Act beneficiaries to remain in the United States. As of 2015, approximately 700,000 individuals had registered under DACA.[[24]](#footnote-24)**

**A similar program for parents of U.S. citizens and green card holders known as Deferred Action for Parents of Americans (“DAPA”) was prevented from going into effect by an injunction issued at the request of Texas and other states which claimed that they would be harmed by this program. An evenly divided Supreme Court rebuffed the Administration and allowed this injunction to stand.**

**The restrictive position on immigration triumphed politically during the recent election. President Trump has undone various Executive Actions of the current Administration, but so far has left the DACA program intact. Terminating DACA would strip more than 750,000 young people of authorization to work or study and throw then into our Immigration Courts, which are already in chaos with a pending docket approaching 600,000 cases. Clearly, the related DAPA program is a dead letter.**

**At present, there are no politically viable comprehensive immigration proposals pending before Congress. Perhaps as a consequence, a number of states and localities have enacted or are considering immigration proposals, most aimed at discouraging the presence of undocumented immigrants. Examples include denying them in-state tuition, requiring local law enforcement to turn suspected undocumented individuals over to the DHS for removal, denying services or housing to undocumented individuals, or revoking the licenses of businesses that hire undocumented workers. Such laws and regulations have had mixed success in Federal Courts.[[25]](#footnote-25)**

**In a highly controversial countermove, some cities have enacted so-called “Sanctuary-City Laws” which limit cooperation between local police and Federal immigration enforcement agencies. The apparent rationale for such laws is that fear of being turned over to the DHS might inhibit cooperation from ethnic communities in reporting crimes or cooperating with law enforcement in solving crimes. This, in turn, has led to threats to enact laws on the Federal and State levels to withdraw funding from localities that have enacted such provisions.**

**In particular, Attorney General Jeff Sessions and DHS Secretary John Kelly have taken an aggressive stance on stripping “sanctuary jurisdictions” of various types of Federal funding. Like the “Travel Ban,” however, these efforts have run into roadblocks in Federal Court.**

**One often mis-stated aspect of the current debate is the proposition that “aliens in the United States illegally have no rights.” Although it is true that such individuals might ultimately have no right to remain in the United States, while here, they *do* have a number of important rights under our laws. Indeed, the Supreme Court recently reaffirmed that U.S. “representatives serve all residents, not just those eligible or registered to vote.”[[26]](#footnote-26)**

**First and foremost is the right to fair treatment under the Due Process and Equal Protection Clauses of the 5th and 14th Amendments to our Constitution.[[27]](#footnote-27) Guaranteeing due process to individuals charged with being removable from the United States is what my “day job” at the U.S. Immigration Court in Arlington was all about.**

**Sometimes, the course of history can be changed by a single vote. One of those instances is a 5-4 decision by the U.S. Supreme Court in 1982 in a case called *Plyler v. Doe*.[[28]](#footnote-28) The Court found that it was a violation of the Equal Protection Clause of the 14th Amendment for the State of Texas to deny undocumented school-age children the free public education that it provides to U.S. citizens and lawful permanent residents. In doing so, Justice Brennan, writing for the majority of the Court, observed, “education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.” [[29]](#footnote-29)**

**The right to receive free public education does not, however, extend to higher education. In many states, notwithstanding long residence, undocumented high school graduates have a difficult time continuing their education because they are required to pay *nonresident* tuition and are denied access to most scholarships or other forms of financial aid. This issue could face some of your children’s or grandchildren’s classmates. However, a 2014 legal opinion by the Attorney General of Virginia has enabled some undocumented students who qualify for DACA to pay “in-state” tuition and receive financial aid.[[30]](#footnote-30)**

**Occasionally, students who came with their parents at a young age might not be fully aware of their undocumented status until they fill out college application or financial aid forms and are asked to verify legal status in the United States. As I mentioned earlier, a measure called the “DREAM Act,” which would have addressed this situation, at least in part, failed in Congress, resulting in the DACA program. A recent study estimates that there are 1.25 million DACA-eligible individuals in the United States, thus making the issue of how to treat them a highly significant aspect of the immigration debate.[[31]](#footnote-31)**

**Not surprisingly, illegal presence does *not* relieve an individual from compliance with local civil and criminal laws. Thus, for example, an undocumented couple from Uganda who seek to marry in Alexandria must comply with Virginia law, rather than with Ugandan tribal customs.**

**Another important obligation under our laws that does not depend on legal status is payment of taxes. Failure to do so, and to be able to prove compliance, may be a serious impediment for a foreign individual who otherwise qualifies to regularize status in the United States. Under the Federal REAL ID Act, designed to improve security following the 9-11 attacks, in many states it is difficult or impossible for someone without legal status to obtain a driver’s license.**

**III. CONCLUSION**

**In summary, we have seen how our nation can be viewed as a “club” with the immigration system forming the basic rules of membership. I have described how the rules governing permanent club membership favor three groups: family, skilled workers, and refugees, while providing only limited opportunities for those who seek membership based on unskilled labor.**

**We have learned that even those who are not members of the club have certain well-recognized rights, including the right to receive public primary and secondary education and the right to fair treatment with respect to expulsion from the club and/or removal from the premises.**

**We can also see that immediate mass deportations of the more than 11 million foreign nationals living in the U.S. without documentation is highly unlikely, because all of these individuals have due process rights to a fair procedure prior to removal. Nevertheless, the Executive *does* have a great deal of discretionary power over immigration and clearly could revoke Executive protections granted by previous Administrations, terminate or restrict overseas refugee admission programs, and step up arrests, detentions, and removals. Therefore, immigration is likely to remain both highly controversial and in the public eye for the foreseeable future.**

**I hope that this information has helped you to better understand our existing immigration system and its many challenges which we will be studying and discussing during this class. I also trust that it has enabled you to better appreciate the situation of the people in our own community and our nation, and their relatives, friends, employers, teachers, fellow parishioners, and many others who are affected by this system. Perhaps by understanding the complexity and the essential human elements involved, we will be able to improve the tone and raise the level of the local and national debate about immigration policy.**

**Thanks again for signing up for ILP 2017. I, of course, look forward to the next meeting of our “BC.”**

**(05-31-17)**

1. I thank my wife, Cathryn Piehl Schmidt, for listening to and commenting on an earlier version of this speech. I am also indebted to my good friend and fellow Alexandrian Frank Fraser, formerly a Litigation Attorney at the Office of Immigration Litigation at the Civil Division, U.S. Department of Justice and Amey Upton, Director of Adult Education at Westminster Presbyterian Church for inviting me to participate in the April 2016 class. I dedicate this speech to my daughter, Anna Patchin Schmidt, a teacher in the Beloit, Wisconsin Public School System, and all of her hard-working colleagues who daily strive to make the promise of *Plyler v. Doe* a reality. [↑](#footnote-ref-1)
2. *See, e.g.*, David A, Martin, Due Process and Membership in the National Community: Political Asylum and Beyond, 44 *U. Pitt. L. Rev.* 165 (1983). [↑](#footnote-ref-2)
3. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). [↑](#footnote-ref-3)
4. *See United States v. Wong Kim Ark,* 169 U.S. 649 (1898). [↑](#footnote-ref-4)
5. *Afroyim v. Rusk*, 387 U.S. 253 (1967). [↑](#footnote-ref-5)
6. DHS, Yearbook of Immigration Statistics: 2013, Table 1, available at www.DHS.gov [hereinafter 2013 YB]. [↑](#footnote-ref-6)
7. *Id.* Table 6. [↑](#footnote-ref-7)
8. *Id.* Table 13. [↑](#footnote-ref-8)
9. *Id.* Table 16. [↑](#footnote-ref-9)
10. USDOJ, EOIR, FY 2013 Statistical Yearbook, at J-1, available at www.usdoj.gov/eoir [hereinafter EOIR 2013]. [↑](#footnote-ref-10)
11. *See, e.g.*, Elbers, Frank, “5 reasons the EU-Turkey deal won’t end the Syrian refugee crisis,” *Dallas Morning News*, March 28, 2016, available online at http://www.dallasnews.com/opinion/latest-columns/20160323-frank-elbers-5-reasons-the-eu-turkey-deal-wont-end-the-syrian-refugee-crisis.ece. [↑](#footnote-ref-11)
12. Booth, William, “Europe gets ready to ship refugees stuck in Greece back to Turkey,” *Washington Post* (April 2, 2016), available online at https://www.washingtonpost.com/world/europe/europe-gets-ready-to-ship-refugees-stuck-in-greece-back-to-turkey/2016/04/01/06a79270-f5d1-11e5-958d-d038dac6e718\_story.html. [↑](#footnote-ref-12)
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14. Cowan, Samantha, “These Countries Are Failing to Resettle Their ‘Fair Share’ of Syrian Refugees,” *Takepart* (March 29, 2016), available online at <http://www.takepart.com/article/2016/03/29/refugee-resettlement?cmpid=tp-ptnr-huffpost&utm_source=huffpost&utm_medium=partner&utm_campaign=tp-traffic>. [↑](#footnote-ref-14)
15. *See, e.g.*, Kowalski, Daniel, “Court: Texas Cannot Block Syrian Refugees, *LexisNexus Legal Newsroom Immigration Law*, available online at <http://www.lexisnexis.com/legalnewsroom/immigration/b/newsheadlines/archive/2016/02/09/court-texas-cannot-block-syrian-refugees.aspx>; CBS News, “Judge: Indiana can’t withhold Syrian refugee aid,” March 1, 2016, available online at http://www.cbsnews.com/news/judge-indiana-cant-withhold-syrian-refugee-aid/. [↑](#footnote-ref-15)
16. Human Rights First, “Bill Would Diminish Ability of United States to Resettle Refugee Victims of Mass Atrocities,” available online at http://www.humanrightsfirst.org/press-release/bill-would-diminish-ability-united-states-resettle-refugee-victims-mass-atrocities. [↑](#footnote-ref-16)
17. 2013 YB Table 25. [↑](#footnote-ref-17)
18. *Id.* [↑](#footnote-ref-18)
19. Currently, there are TPS programs in effect for nationals of El Salvador (02-13-01), Honduras (12-30-98), Nicaragua (12-30-98), Somalia (09-04-01), Sudan (01-09-13), South Sudan (01-25-16), Haiti (01-12-11), Nepal (06-24-15), Sierra Leone (11-20-14), Guinea (11-20-14), Liberia (11-20-14), Yemen (09-03-15), and Syria (01-05-15). [↑](#footnote-ref-19)
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21. *Id*. [↑](#footnote-ref-21)
22. 2013 YB Table 6. [↑](#footnote-ref-22)
23. *Jennings v. Rodriguez*, No. 15-1204. [↑](#footnote-ref-23)
24. Kerwin, Donald & Warren, Robert, Potential Beneficiaries of the Obama Administration’s Executive Action Programs Deeply Embedded in US Society, 4 JMHS 16, 22 (2016). [↑](#footnote-ref-24)
25. Chisti, Muzaffer & Bergeron, Claire, “Hazleton Immigration Ordinance That Began With a Bang Goes Out With a Whimper,” Migration Policy Institute (March 28, 2014), available online at http://www.migrationpolicy.org/article/hazleton-immigration-ordinance-began-bang-goes-out-whimper. [↑](#footnote-ref-25)
26. *Evenwel v. Abbott*, No. 14-940 (March 4, 2016). [↑](#footnote-ref-26)
27. *Zadvydas v. Davis*, 533 U.S. 678, 692-93 (2001); *Plyler v. Doe*, 457 U.S. 202 (1982). [↑](#footnote-ref-27)
28. 457 U.S. 202, 221-22 (1982); see also N. Rabin, M.C. Combs & N. Gonzalez, Understanding Plyler’s Legacy: Voices From Border Schools, 37 J. of L. & Educ. 15 (2008), available at www.bibdaily.com/pdfs/understanding%20 plyler’s%20legacy.pdf. [↑](#footnote-ref-28)
29. *Plyler v. Doe,* at 221-22 (citation omitted). [↑](#footnote-ref-29)
30. “Undocumented students gain in-state tuition benefits in Virginia,” WTVR CBS TV 6 (Nov. 25, 2015), available online at <http://wtvr.com/2015/11/25/undocumented-students-in-virginia/>. [↑](#footnote-ref-30)
31. Kerwin & Warren, *supra*, at 26. [↑](#footnote-ref-31)