

1-1-1995

## Storytelling Out of School: Undocumented College Residency, Race, and Reaction

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### Recommended Citation

Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019 (1995).

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# Storytelling Out of School: Undocumented College Residency, Race, and Reaction

By MICHAEL A. OLIVAS\*

## Table of Contents

I. Introduction .....	1020
II. The Law and Policy of Residency Requirements.....	1026
III. Courts, Colleges, and Undocumented Aliens .....	1039
IV. The Social Science of Alienage .....	1063
V. Conclusion: The Discourse and the Danger .....	1080

I never even knew I was Mexican, I mean really Mexican. I thought I was born in Magnolia or the East End, since that's all I really remember. Except when my class went on a trip to NASA, I've never really left Houston. Except we went to Corpus [Christi] with my grandfather when the Aquarium opened. So I thought all along I was Mexican American, you know, Chicano, until "la IRCA"<sup>1</sup> came along. My mother took me down to the "Migra,"<sup>2</sup> and we waited in line with a green bag full of papers, you know, with a twister tie on it like for grass and leaves. That was when I found out I was really Mexican, not Chicano. Born in Mexico. Except to talk to my grandfather and that, I don't even speak Spanish very well. Now I'm afraid to leave town, cause the "Migra" is, like, really coming down on illegals. Now, it turns out I'm illegal even though I've got my driver's license and that, even the SAT. If I'm illegal, what about these Mexicans who stand around the corners? I think the law should round them up, not me. I've been like a citizen up to now. It was "la IRCA" that made me illegal, but the lawyer said I could become a permanent resident and get a green card. I thought I could vote when I was 18, but now I

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1. IRCA is the popular name for the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986), codified in scattered sections of 8 U.S.C.

2. "Migra" is a derogatory term for the Immigration and Naturalization Service. MADELAINE N. RIOS, *MANUAL OF IMMIGRATION TERMS* 23 (Deborah Feizaig ed., 1984).

have to become a citizen first. I'm gonna do it, but I'm not going to tell anybody, cause I want to go to college. I can go to college, can't I?<sup>3</sup>

It wasn't until they had the amnesty that I found out I wasn't born in Texas. We grew up in Laredo, but my parents got divorced and I moved to Houston with my mother and my sisters. She doesn't speak English, but she wants me to go to school. She cleans offices downtown, like law offices and a bank building. She can't help me with my homework, but she makes me do it before [I can watch] TV. If I can go to college, it's because she made me want to go. It's like for her. But now I found out I'm *mojado*,<sup>4</sup> but we're going to get legal papers. [The lawyer] had me bring in my school grades to show that we were in the U.S. before the time. My sisters knew we were *mojados*, but I didn't. They said I was *pocho*,<sup>5</sup> like tourists. But now I can go to college, *maybe be a lawyer or doctor*.<sup>6</sup>

. . . night [law] schools enrolled a very large proportion of foreign names . . . [E]migrants [sic] covet the title [of attorney] as a badge of distinction. The result is a host of shrewd young men, imperfectly educated . . . all deeply impressed with the philosophy of getting on, but viewing the Code of Ethics with uncomprehending eyes.<sup>7</sup>

## I. Introduction

In *Rashomon*, Akira Kurosawa's brilliant 1950 film, the same event is told in four different ways by four different persons. Moviegoers are drawn into the competing stories, and are left with no clear resolution of which story is the most nearly true.<sup>8</sup> The law is often like this: trial lawyers argue that complex transactions are either predatory pricing<sup>9</sup> or just regular business practices,<sup>10</sup> or that the failure of the savings and loan industry was due either to vindictive,

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3. Interview with Manuel H., in Houston, TX (Feb. 24, 1987).

4. "Mojado: Wetback [(derogatory)]." RIOS, *supra* note 2, at 23.

5. "Pocho: Mexican-American, Chicano, Mexican born in the United States (derogatory)." RIOS, *supra* note 2, at 24.

6. Interviews with Jose G., in Houston, TX (Feb. 24, 1987).

7. SUSAN K. BOYD, *THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR* 17 (1993) (quoting Dean Harry S. Richard, University of Wisconsin Law School, and Chair, ABA Section on Legal Education and Admission to the Bar, 1908-1909).

8. R. AKUTAGAWA, *In a Grove*, in *RASHOMON AND OTHER STORIES* 19 (T. Kojima trans., 1970).

9. Roger Parloff, *Fare's Fair: Why the Predatory Pricing Case Against American Airlines Got to Trial — And No Further*, AM. LAW, Oct. 1993, at 60.

10. Andrea Sachs, *A Rare Loss for Joe Jamail*, A.B.A. J., Nov. 1993, at 16.

harassing regulators<sup>11</sup> or massive industry greed.<sup>12</sup> The best, most successful, and widely admired trial lawyers are often world class raconteurs, able to tell their client's story in moving and cinematic fashion.<sup>13</sup> At its core, law is storytelling.

This essay is about a *Rashomon*-like case. It is, alternatively, an admissions case, an immigration matter, a taxpayer suit, a state civil procedure issue, an issue of preemption, a question of higher education tuition and finance, a civil rights case, and a political issue. In addition to being a true story, it is also representative of the stories of many other similarly-situated persons who seek admission to college. From a social science perspective, this case is a subset of the admissions cases, and a very specific subset at that: it is an immigration-related admissions case. At bottom, though, it is a story about college-aged kids who have lived virtually all their lives in the United States and who want to attend college and enjoy the upward mobility a college degree provides.

Although this story has some of the attributes of the legal storytelling associated with critical race theory, I do not believe it is truly in that genre. That type of legal analysis, begun in the 1980s, has as its aim to develop "outsider narratives," "counterstory jurisprudence," and to offer critical, alternative versions of stock legal stories.<sup>14</sup> This story does not fit that description. If it were a more profound, synoptic, complex tale, this essay could be situated within the streams of storytelling and counterstorytelling, structural determinism, and race, sex, and class intersections — identified by the movement's bibliographers, Richard Delgado and Jean Stefancic, as critical race theory themes.<sup>15</sup> However, it is actually a simple narrative, one that turns on definitions, tainted by prejudice and misplaced scapegoating.

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11. See, e.g., Charles H. Keating, Jr., *Quest for Truth: A Search for Sanity in a \$500 Billion Tragedy*, 2 STAN. L. & POL'Y REV. 147 (1990).

12. See, e.g., Michael Waldman, *The S & L Collapse: The Cost of a Congress For Sale*, 2 STAN. L. & POL'Y REV. 47 (1990).

13. See GERRY SPENCE & ANTHONY POLK, GERRY SPENCE: GUNNING FOR JUSTICE (1982); see also RICHARD L. ABEL, AMERICAN LAWYERS (1989).

14. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988). For news stories about Critical Race Theory, see, e.g., Stephanie B. Goldberg, *The Law, a New Theory Holds, Has a White Voice*, N.Y. TIMES, July 17, 1992, at A23; Jon Wiener, *Law Profs Fight the Power*, THE NATION, Sept. 4, 1989, at 246.

15. Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993).

The story is "about" college students, whose legal presence or status in the United States is unauthorized or undocumented, and who apply to or have been admitted to an institution of higher education. Many colleges and universities will not admit undocumented students at all. There are some public institutions, however, that will admit them, but have barred them from claiming in-state residency status. As a result, dozens of postsecondary residency/alienage cases have appeared on state court dockets.<sup>16</sup> Unfortunately, these cases have not clarified the issue, though, because their rulings have not been uniform. This has been the case despite the fact that the United States Supreme Court has ruled on several dozen residency and domicile cases,<sup>17</sup> including the near identical issue of charging tuition to undocumented school children in K-12 public schools.<sup>18</sup> The Court has not ruled directly on this issue and the result has been a range of decisions from the state courts.<sup>19</sup> In addition, several higher educational systems have acted to accommodate the undocumented, exercising their traditional academic freedom to determine for themselves who shall attend their institutions, adding yet another factor to this already complicated equation.

In order to fully understand these cases, one must recognize that they have been decided against a background of mounting xenopho-

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16. See, e.g., *Gurfinkel v. Los Angeles Community College Dist.*, 175 Cal. Rptr. 201 (1981) (higher education not a fundamental right); *Leticia "A" v. Board of Regents of the Univ. of Cal. (Leticia "A." I)*, No. 588982-4 (Cal. Super. Ct., Alameda Cty. May 30, 1985) (undocumented students can establish residency), *clarified in*, *Leticia "A" v. Board of Regents of the Univ. of Cal. (Leticia "A." II)*, No. 588982-4 (Cal. Super. Ct., Alameda Cty. May 19, 1992); Board of Regents of the Univ. of Cal. v. Superior Ct. (*Bradford II*), 276 Cal. Rptr. 197 (Cal. Ct. App. 1990) (undocumented aliens not eligible to become residents); *American Ass'n of Women v. Board of Trustees of the Cal. St. Univ. (AAW)*, No. BCO61221 (Cal. Super. Ct., L.A. Cty. Sept. 28, 1992) (undocumented aliens not eligible to become residents). See generally Michael A. Olivas, Plyler v. Doe, Toll v. Moreno, and Postsecondary Admissions: Undocumented Adults and "Enduring Disability," 15 J.L. & EDUC. 19 (1986) [hereinafter Olivas, *Enduring Disability*]; Peter Roos, *Postsecondary Plyler*, University of Houston, Institute for Higher Education Law and Governance, Monograph 91-7 (1991).

17. See, e.g., *Martinez v. Bynum*, 461 U.S. 321 (1983); *Toll v. Moreno*, 458 U.S. 1 (1982); *Zobel v. Williams*, 457 U.S. 55 (1982); *Vlandis v. Kline*, 412 U.S. 441 (1973).

18. *Plyler v. Doe*, 457 U.S. 202 (1982).

19. *Judith A. v. Arizona Bd. of Regents*, No. 87-21579 (Az. Super. Ct., Maricopa Cty. Nov. 24, 1987) (undocumented aliens may become residents); *Alarcon v. Board of Trustees of the Univ. of Ill.*, No. 87-Ch. 02858 (Ill. Cir. Div. July 14, 1987); William O'Connell, *College University Attendance by Out-of-Status and Undocumented Students* (Feb. 1992) (New York state survey of college residency practices) (unpublished manuscript, on file with author). For an analysis of the academic freedom dimensions, see Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom,"* 45 STAN. L. REV. 1835 (1993); see generally Roos, *supra* note 16.

bia and immigration restrictions, the modern day responses to the story and reality of the United States as a nation of immigrants. These reactions are not surprising, given that economic downturns have historically led to scapegoating alien workers, whether in legal status or not, where these individuals are said to be stealing jobs from citizen workers.<sup>20</sup> This has been particularly apparent in California, where a sluggish economy in the 1990s and a related contraction of the country's largest state higher education systems have contributed to the public outcry against the state's substantial Asian and Latino immigrant populations.<sup>21</sup> Thus, this story is also necessarily about prejudice and retrenchment.

In general, the higher education system in the United States is one of the things we do right. The vast system, with over 3300 collegiate campuses, offers a variety of elite, highly competitive, selective institutions, as well as many easily accessible, inexpensive community colleges and open door institutions.<sup>22</sup> American higher education attracts students from all over the world, enrolling more than 400,000 international students in 1991,<sup>23</sup> as well as many others who were foreign-born but have since become permanent residents or citizens. By a wide margin, United States colleges admit more foreign students than those in any other country in the world.<sup>24</sup> In some fields of

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20. For examples of scholarship documenting public reaction and the scapegoating phenomenon, see THOMAS MULLER, *IMMIGRANTS AND THE AMERICAN CITY* (1993); ALAN DOWTY, *CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT* (1987); RITA J. SIMON, *PUBLIC OPINION AND THE IMMIGRANT: PRINT MEDIA COVERAGE, 1880-1980* (1985) (reviewing negative media coverage of immigrants in newspapers and magazines). For a recent story on how immigrants fit into a community, see Deborah Sontag, *New Immigrants Test Nation's Heartland*, N.Y. TIMES, Oct. 18, 1993, at A1, C11 (immigrants who "do the plant's dirty work presented no economic threat").

21. For some sample articles on this issue, see Frank Acosta & Bong Hwan Kim, *Race-Baiting in Sacramento*, L.A. TIMES, May 4, 1993, at B7; Scott Armstrong, *California Melting Pot Boils Over As Illegal Immigrants Enter State*, CHRISTIAN SCI. MONITOR, Apr. 6, 1993, at 1; Tim Ferguson, *California Feels Anti-Immigrant Tremors*, WALL ST. J., Dec. 29, 1992, at A10; William Hamilton, *Harvest of Blame: Californians Turn on Illegal Immigrants*, WASH. POST, June 4, 1993, at A1.

22. There is a life's worth of reading on this topic. Some of the better works in this genre include ALICE CHANDLER, *OBIGATION OR OPPORTUNITY, FOREIGN STUDENT POLICY IN SIX MAJOR RECEIVING COUNTRIES* (1989); BRUCE JOHNSTONE, *SHARING THE COSTS OF HIGHER EDUCATION* (1986); MAUREEN WOODHALL, *STUDENT LOANS AS A MEANS OF FINANCING HIGHER EDUCATION: LESSONS FROM INTERNATIONAL EXPERIENCE* (1983); INSTITUTE OF INTERNATIONAL EDUCATION, *OPEN DOORS, 1990/91: REPORT ON INTERNATIONAL EDUCATIONAL EXCHANGE* (1991).

23. See Alice Chandler, *Looking at Trendlines: Foreign Student Issues For the 90's 1 n.1* (May 18, 1992) (unpublished manuscript, on file with author).

24. *Id.* (noting France, the country with the second highest number of foreign students, had only 132,000 foreign students in 1991).

study, particularly in the sciences and engineering, a high percentage of graduate students are foreign born. In 1992, for example, 58% of all engineering PhD's, 32% of all life sciences PhD's, and 43% of all physical sciences doctorates in the United States were awarded to noncitizens with either a permanent or temporary visa.<sup>25</sup> Comparatively, the number of undocumented students seeking admission to United States colleges is very small, but the fierce competition for the scarce openings in some of the California institutions has helped to cast the admission of these students as a matter of displacement of both Anglo students and citizen students of color.

Having won legal permission to enroll, to establish residency, and to pay in-state tuition, in a series of cases in the 1980s,<sup>26</sup> undocumented students received a blow in 1991, when a California Court of Appeal case, *Board of Regents of the University of California v. Superior Court (Bradford II)*, held that undocumented students could not establish residency.<sup>27</sup> It is important to note that because of the size<sup>28</sup> of the California postsecondary educational system and the geographical location<sup>29</sup> of the state, California's policies and related legal decisions have a disproportionately heavy impact on the national undocumented alien population. As a result, it is not surprising that this single state appellate court decision had a huge national impact. This is not to say that there are not some differences between the way various states handle undocumented students. In contrast to California, New York State has been more accommodating of these students, as have both Arizona and Illinois.<sup>30</sup> Texas, on the other hand, has an

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25. Denise K. Magner, *Blacks Earned Fewer Doctorates in 1992 Than in 1991, Study Finds*, CHRON. HIGHER EDUC., Sept. 29, 1993, at A18.

26. See Plyler v. Doe, 457 U.S. 202 (1982); Martinez v. Bynum, 461 U.S. 321, 321 (1983) (holding states may regulate undocumented aliens who commute or reside in district for sole purpose of attending schools); *Leticia "A" I*, No. 588982-4, slip op. at 2 (May 7, 1985).

27. *Bradford II*, 276 Cal. Rptr. at 200-02 (holding California may preclude undocumented alien students from qualifying as residents for tuition purposes); see also *AAW*, No. BC061221 (Cal. Super. Ct., L.A. Cty. Sept. 28, 1992) (states may preclude undocumented aliens from establishing domicile); see also *infra* notes 216-271 and accompanying text.

28. The University of California (UC), the California State University System (CSU), and the California Community College System (CCC) comprise nearly 150 campuses and 1.5 million students. THE ATLAS OF AMERICAN HIGHER EDUCATION 209 (Table 2.4) (James Fonseca and Alice Andrews eds., 1993).

29. Nearly 40% of the undocumented aliens in the United States are believed to reside in California. Deborah Sontag, *Analysis of Illegal Immigrants In New York Defies Stereotypes*, N.Y. TIMES, Sept. 2, 1993, at A11.

30. See *supra* note 19 (referring to interpretations of the provisions in Arizona, Illinois and New York allowing the undocumented to establish residency).

uneven record due to its decentralized higher education systems.<sup>31</sup> As the other major destination for undocumented college students, Texas' policies also have a broad impact on the national immigrant population.

This story, therefore, is also one about administrative and regulatory law: of residency statutes, agency implementation, and administrator discretion. Above all, however, this story is about eighteen to twenty-two-year-olds, whose birthplace was, quite literally, an accident of birth; individuals who have resided in and lived in the United States virtually all their lives, who have vied successfully in a highly competitive admissions process, only to find themselves constructively precluded from attending colleges into which they have been admitted.<sup>32</sup>

This article proceeds as follows. Part I is, of course, introductory. Part II thoroughly investigates the residency system in postsecondary education. Every state has enacted a tuition scheme to differentiate between residents and nonresidents, who pay substantial tuition differentials.<sup>33</sup> In many states, this mechanism is used to deny undocumented aliens — even those who meet all the traditional tests for establishing domiciles — the opportunity to pay in-state resident tuition. Part II describes the basic legal and fiscal operations of residency requirements, with special emphasis upon alienage issues; distinguishes “residence” from “domicile” for alien students; categorizes state governance mechanisms for determining residency and exemptions; and reviews problems with current institutional practices.

Part III examines how courts have addressed the problems of residence and domicile for the undocumented students. It traces the development of two judicial themes: first, some courts have held that undocumented students cannot meet the traditional test for establishing residence since their very presence in this country is unauthorized;

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31. Olivas, *Enduring Disability*, *supra* note 16 (study of Texas requirements); *see also* Richard Padilla, *Immigration Status and Residency Determination for Tuition Purposes*, University of Houston, Institute for Higher Education Law and Governance, Monograph 91-4 (1991); Nestor P. Rodriguez, *Undocumented Immigrant Students and Higher Education: A Houston Study*, University of Houston, Institute for Higher Education Law and Governance, Monograph 90-10 (1990).

32. For example, a student who leaves one state for another may sever all ties with the former state, yet not meet the residency durational requirements in the new state. For tuition purposes, this leaves many students with no verifiable formal residence in either state. For one such example, see *Frame v. Residency Appeals Comm.*, 675 P.2d 1157 (Utah 1983) (married couple unable to establish Utah residency after foreign study period).

33. *See* Patricia M. Lines, *Tuition Discrimination: Valid and Invalid Uses of Tuition Differentials*, 9 J.C. & U.L. 241 (1982-83).



a second, mutually exclusive theme is that other courts have concluded that these students are, in fact, entitled to establish their domicile if they meet all the durational and intentional criteria required of all transient students.

Part IV briefly examines the social science of undocumented alien students, including ethnographic studies and extensive case histories. Here, I analyze the judicial themes through individual stories, noting how the telling of the same tale from different perspectives can result in different endings, or "morals" of the stories. I then attempt to use the individual data and research findings to answer the objections of those opposed to granting resident status or even admission under any circumstances to undocumented alien college students. In this account, aliens are characterized as having positive features and posing no genuine threat to the polity. This narrative draws from the extensive literature on college choice. Part V concludes that the higher education enterprise is enriched and strengthened by the admission of alien college students. Finally, a brief note incorporates reference to Proposition 187, the recent anti-alien initiative enacted in California, and its treatment of college admissions.

I write from the perspective that the admission of undocumented students into college has been improperly cast as a complex geopolitical act when, in fact, each instance is a personal transaction. Being undocumented does not always mean the students have done anything wrong. Treating these individuals on their own *academic* merits and credentials acknowledges the complexity of the undocumented's position in a multicultural society, and recognizes that talent should transcend cartography.

## II. The Law and Policy of Residency Requirements

Public colleges draw distinctions between resident and nonresident students on the premise that public institutions should be available at lower costs to those taxpayers and their families whose money supports the colleges. The result is that nonresidents, who do not pay state taxes are required to pay a higher share of the costs.<sup>34</sup> These differentials can be quite substantial: for example, in the 1994-95

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34. For this discussion of residency, I draw from earlier research on the subject, including: Michael A. Olivas, *State Residency Requirements: Postsecondary Authorization and Regulation*, 13 C.L. DIG. 157 (1983); Michael A. Olivas, *Administering Intentions: Law, Theory, and Practice in Postsecondary Residency Requirements*, 59 J. HIGHER EDUC. 263 (1988) [hereinafter Olivas, *Administering Intentions*]; and Michael A. Olivas, *The Political Economy of Immigration, Intellectual Property, and Racial Harassment: Case Studies of the Implementation of Legal Change on Campus*, 63 J. HIGHER EDUC. 570 (1992).

school year, the ratio between nonresident and resident tuition at the University of Houston, Texas, was approximately six to one.<sup>35</sup> At the University of California in 1993, undergraduate nonresidents paid three times the tuition and fees that California residents were required to pay.<sup>36</sup>

This power to set residency policies and tuition rates is well-established. Court cases dating back to 1882 have clearly held not only that states can charge these differentials,<sup>37</sup> but that they may decide which students are entitled to be classified as residents and which are not.<sup>38</sup> In most situations this procedure works well enough because state institutions spell out the basic residency requirements and students seem to understand the rules. Officials in most states have realized that a mix of in-state and out-of-state students is desirable, and therefore, have made it possible for students to migrate to public colleges as long as the higher tuition costs "equalize" the tax burden upon residents.<sup>39</sup> The balance properly favors resident taxpayers, yet does not fence out those nonresidents who wish to attend schools in that state. This arrangement acts as an incentive for states to establish strong public postsecondary sectors. The state has an incentive to do so to prevent a mass migration to states with lower fees and to engender loyalties, both political and academic, to those state institutions. By means of compacts and state consortia agreements, states can also distribute scarce places in highly specialized and expensive curricula, such as optometry, pharmacy, and veterinary medicine, where not all

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35. For example, at the University of Houston, a public institution, tuition for each undergraduate semester hour was \$28 for residents in 1994-95, while the charge was \$171 for nonresidents. UNIVERSITY OF HOUSTON, GRADUATE AND PROFESSIONAL STUDIES 26 (1994-96). See also Joyce Mercer, *Many States Toughen Policies on Non-Resident Students, Raising Tuition and Stiffening Residency Requirements*, CHRON. OF HIGHER EDUC., June 2, 1993, at A18.

36. Telephone interview with Manuel Gomez, Associate Vice Chancellor, University of California at Irvine (Oct. 10, 1993). There have been unanticipated consequences of the UC tuition hikes, even for the more well-to-do and citizen populations. Louis Freedberg, *Neighboring States Benefit from Exodus*, S.F. CHRON., Aug. 3, 1993, at A1 (describing steep rise in California residents attending colleges in other states). For a reaction to this phenomenon, see UNIVERSITY OF CALIFORNIA, UC OFFICE OF THE PRESIDENT, *THE EFFECT OF FEE INCREASES ON NEW CALIFORNIA RESIDENT FRESHMAN ENROLLMENT AT THE UNIVERSITY OF CALIFORNIA: FALL 1990 TO FALL 1992* (1993).

37. *Wisconsin ex rel. Priest v. Regents of the Univ.*, 11 N.W. 472 (Wis. 1882) (upholding institution's right to charge out-of-state surcharge).

38. See generally Olivas, *Administering Intentions*, *supra* note 34.

39. Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981); James N. Morgan, *Tuition Policy and the Interstate Migration of College Students*, 19 RES. HIGHER EDUC. 183 (1983).

states offer such programs.<sup>40</sup> The practical application of residency policies, however, lacks the elegance of its theoretical premise. In a surprisingly large number of situations, applicants or students have presented increasingly sophisticated residency claims that were not anticipated by the state legislatures. The result has been inconsistencies in the way the rules are applied. Since there are a comparable number of factual permutations when it comes to immigration issues, similar problems arise with respect to undocumented aliens.

By employing several approaches, this Part reviews the law, theory, and administration of residency requirements. First, I outline basic operational definitions of the legal and fiscal issues, including the vexing problems of "domicile" and "residence." Second, I categorize the governance structures of the states according to their formality and level of decisionmaking. The result is a comparison of the various state practices through an analysis of their similar residence requirements. Third, I discuss the extensive system of exemptions, exceptions, and waivers to the residency rules. One commentator has noted that this elaborate set of rules and regulations is a patchwork which has resulted in a dissimilarity of treatment that has given rise, not only to inconvenience to the participants, but to injustice. The commentator further concluded that "this heterogeneity is neither in the interest of the students, of the states, nor of the nation."<sup>41</sup> Fourth, I discuss the problems with institutional practice; there is considerable administrative discretion at the institutional level in the indices and criteria of residential intent, the burden of persuasion, the evidentiary requirements, and the weight accorded the various criteria.

In many respects, these requirements are troubling: the residency statutes, regulations, and practices are often confusing and illogical; potential students "forum shop" among colleges and exploit technical loopholes; and many statement-of-intent criteria are difficult to administer or verify and these flaws in the system invite circumvention and dishonesty. Moreover, these complex technicalities often work against aliens, who do not always have the requisite paperwork or documents for establishing their residence. In addition, the immigration categories themselves are often a bramblebush of conflicting definitions and technical distinctions.

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40. See, e.g., Olivas, *Administering Intentions*, *supra* note 34; David Palley, *Resolving the Nonresident Student Problem: Two Federal Proposals*, 47 J. HIGHER EDUC. 1 (1976); ROBERT CARBONE, *ALTERNATIVE TUITION SYSTEMS* (1974); ROBERT CARBONE, *STUDENTS AND STATE BORDERS* (1973) [hereinafter CARBONE, BORDERS].

41. ROBERT CARBONE, *RESIDENT OR NONRESIDENT? TUITION CLASSIFICATION IN HIGHER EDUCATION 2* (1970).

Persons who have lived in a single state for many years are easily defined as residents. Conversely, a student who moves from State A to State B solely for the purpose of attending State B college is clearly a nonresident, at least at first. The wide space between these two situations, however, is the problem. As a general rule, states will allow a person who moves to a state to become reclassified as a resident after a specified period of time. This time period ranges from ninety days to twelve months, the period used by nearly all the states.<sup>42</sup> In several states (for example, New York<sup>43</sup> and Tennessee<sup>44</sup>), it is possible to become reclassified immediately upon arrival.

Absent other exceptions or complications, when the specified time passes, the eight states<sup>45</sup> with a simple durational requirement will allow a citizen student to pay the lower tuition as a resident. This is usually an objective standard with certain proof about continuous presence required for the reclassification. To be sure, this objective standard is subject to measurement problems, since even the seemingly simple standard of counting a particular number of days can become complicated: Do holidays away from the state count? Does the "clock" begin when the person moves to the state? When s/he obtains employment? When s/he registers to vote? When s/he buys a house? It is easy to imagine many possible variations on these themes, and an experienced registrar is bound to have heard them all.

As difficult as this "objective" measurement becomes, forty states have complicated matters by requiring more than mere duration: these states also require that residents establish domicile, which entails forming the legal intention of making that state their "true, permanent, and fixed abode."<sup>46</sup> This is a very complicated requirement, both conceptually and operationally. Instead of merely counting days in the requisite waiting period (already noted as deceptively complicated), states that employ domicile also require a legal declaration and

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42. D.C. CODE ANN. § 31-601 (1993); see, e.g., Olivas, *Administering Intentions*, *supra* note 34, at 287-90 (app. I).

43. N.Y. EDUC. LAW § 680(1)(c) (McKinney's 1995); see Olivas, *Administering Intentions*, *supra* note 34, at 287-90.

44. TENN. CODE ANN. § 49-8-102(c)(2) (Michie 1994); see Olivas, *Administering Intentions*, *supra* note 34, at 287-90.

45. ALASKA STAT. § 14.40.170(a)(6) (Univ. of Alaska); HAW. REV. STAT. § 304-4; ILL. ANN. STAT. ch. 144, para. 190 (Smith-Hurd 1988); IND. CODE ANN. § 20-12-1-1 (Burns 1988); KAN. STAT. ANN. § 76-729 (1988); LA. REV. STAT. ANN. § (West 1988); MO. REV. STAT. § App. B 6-2 (1978); NEV. REV. STAT. ANN. § 396-540.

46. See generally Christopher T. Corson, *Reform of Domicile Law for Application to Transients, Temporary Residents and Multi-Based Persons*, 16 COLUM. J. L. & SOC. PROBS. 327 (1981).

evidence to prove that residents consider the state their principal establishment. Confusion frequently arises because the terms "residence" and "domicile" are often used interchangeably or "residence" is measured with language denoting intentionality, which is generally not required for mere residence.<sup>47</sup> As a point of law, "domicile" includes "residence," but has a more specific meaning than does "residence."<sup>48</sup>

To establish a domicile, students must prove two elements: (1) residence and (2) an intention to make that residence their permanent home. Persons may maintain more than one residence, but only one domicile.<sup>49</sup> For example, many students plausibly maintain several residences, some simultaneously (summer state, mother's and father's state, the state in which they live and vote). Incidentally, the place where students vote is not necessarily their domicile, as mere residence and brief waiting periods are the requirements to register for voting in local or federal elections.<sup>50</sup> As difficult as the concept of domicile is for United States citizens, it is even more difficult in the immigration context.

Given the high degree of confusion in ascertaining student intentions, why do states employ domicile as a determinant of residence? The logic is threefold: 1) to ensure, as effectively as possible, that students establish and maintain genuine ties to the state; 2) to ensure that students do not "forum shop" between several states where they can manufacture or allege contacts; and 3) to make the declaration of residence more meaningful and seriously considered than mere presence requires. Taken individually, these intentions do not always substantially advance the state interests, except through the attendant complexity that discourages (to a limited extent) frivolous claims and thereby protects the states' fiscal resources. This unarticulated prem-

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47. *Id.*

48. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11(2) ("Every person has a domicil [sic] at all times and, at least for the same purpose, no person has more than one domicil [sic] at a time.").

49. *Id.*; see also Gary S. Josephs, *A Checklist for Determining Domicile*, *PRAC. LAW.*, July 15, 1981, at 55; Adam B. Schiff, Comment, *State Discriminatory Action Against Non-residents: Using the Original Position Theory as a Framework for Analysis*, 22 *HARV. J. ON LEGIS.* 583 (1985).

50. *Id.*; see also Josephs, *supra* note 49; Joseph A. Bollhofer, Comment, *Disenfranchisement of the College Student Vote: When a Resident is Not a Resident*, 11 *FORDHAM URB. L.J.* 489 (1983) (reviewing voting practices affecting students who live in campus housing).

ise appears to be a strong driving force behind several residency policies or practices.<sup>51</sup>

To make matters worse, forty states require the establishment of domicile and a waiting period,<sup>52</sup> while an additional two states require domicile with no specified durational period.<sup>53</sup> This leaves nine states with pure durational requirements. Upon closer examination, however, the rationales for the widespread practice of exacting declarations of intention fail to advance any substantial guarantees for establishment of domicile beyond those provided by mere durational requirements. The cost of administering intentions is high, both in dollar terms and in the considerable ill will it exacts. None of the three ostensible reasons for domiciliary requirements truly guarantees loyalty or tax contributions. In fact, none of the three rationales for strict domiciliary requirements assures states that the newly arrived nonresidents have been transformed into genuine residents.<sup>54</sup> This is as true for citizens as it is for undocumented aliens. First, the fact that students establish a legitimate principal home and abode does not guarantee that they will remain in the state beyond commencement or contribute to the tax system while they are enrolled in school. In all likelihood, students will move wherever employment is available or the quality of life, family considerations, and circumstances allow. Through the use of domicile requirements, states may achieve the second goal of preventing "forum shopping" since students cannot maintain more than one domicile. However, a variety of permutations is possible for students, since they can maintain more than one legal residence, which can give sufficient evidence for students to meet residency requirements in more than one state.<sup>55</sup> A greater problem is the possibility that students may have to relinquish residence or domicile in the "home" state to establish sufficient contacts in a new state.

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51. Interview with University of Houston residency officer (Oct. 8, 1993) (identity withheld upon request); see generally Lines, *supra* note 33; Varat, *supra* note 39.

52. Interview with University of Houston residency officer (Oct. 8, 1993) (identity withheld upon request); see generally Lines, *supra* note 33; Olivas, *Administering Intentions*, *supra* note 34, at 287-90; Varat, *supra* note 39.

53. Olivas, *Administering Intentions*, *supra* note 34, at 287-90 (Tennessee and New York).

54. For example, because the intent requirement cannot be measured or enforced until after the educational resource is consumed (i.e., after graduation or the completion of studies), the true measure is likely to manifest too late. In an earlier work, I proposed a time-shifting alternative that would tie tuition benefits to a rebate *after* the completion of studies. Olivas, *Administering Intentions*, *supra* note 34, at 284-85.

55. For example, a student could simultaneously establish residence in one or more of the following: the "home state," the school state, the parents' state(s), a holiday or summer job location.

This has led, in many instances, to students having no one state in which they can successfully claim a domicile for tuition purposes.<sup>56</sup> The third rationale, making declarations more meaningful, is only exhortatory and unlikely to prove efficacious in determining domicile, since there is no legal means to force students to remain in the state after consuming the postsecondary resources.

Despite the demonstrable defects of domiciliary requirements, particularly those that also include waiting periods, states and institutions persist in requiring them. In addition, more than lower resident tuition lies in the balance. Many other benefits may accrue to state residents in public or private colleges, such as preferential admissions, scholarship or loan assistance, inclusion in quota programs, eligibility for consortia or exchange programs, and participation in specialized programs negotiated among states in legislative compacts.<sup>57</sup> It is these stakes, not merely the tuition differentials (which, in certain instances, can be "equalized" by federal need-based aid formulae) that have contributed to the overall rise in residency litigation.

To complicate matters, there is an extraordinary number of exemptions, exceptions, and waivers to state residency practices.<sup>58</sup> The most common factors singled out for special treatment include: whether an individual is a dependent or minor, what their marital status is, whether they are military personnel, and what their alienage is. These are four areas which receive some type of special consideration in nearly all states. States employ special treatment for a wide range of categories, resulting in thousands of exceptions to residency requirements. Other groups frequently singled out for special treatment include university employees (seventeen states), financially needy students (sixteen states), and senior citizens (ten states). Table 1 summarizes state data on special treatment, but as complicated as these practices are, this table significantly understates the exemptions. For example, in the seventeen states with institutional autonomy to devise their own residency requirements, only a flagship system or campus was sampled; the residency requirements in those states vary from in-

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56. See, e.g., *Frame v. Residency Appeals Comm.*, 675 P.2d 1157 (Utah 1983).

57. See, e.g., CARBONE, BORDERS, *supra* note 40. For example, with only fourteen schools of optometry in the United States, the University of Houston School of Optometry reserves a set number of places for residents of other states and the states are forced to "contract" with the University for those places in each year's class. Interview with Dr. Enrique Mendrano, University of Houston, Houston, TX (Jan. 6, 1994).

58. Michael A. Olivas, *Postsecondary Residency Requirements: Empowering Statutes, Governing Types, and Exemptions*, 16 C.L. DIG. 268 (1986) [hereinafter Olivas, *Postsecondary Requirements*].

stitution to institution, as do the exemptions from these rights. These exemptions are undoubtedly even more widespread than the data suggest, due to the different ways the legislatures confer exemptions and ways these rules are applied. For example, states may use fiscal riders, revenue bills, or appropriations language to enact exceptions (for one year or several), and these or other quasi-legislative means could not be discovered in a statute search. As one example, Texas uses an appropriations bill each session to limit out-of-state enrollments in public law schools to a certain percentage of their total.<sup>59</sup>

TABLE 1  
Exemptions, Exception, and Waivers to  
Postsecondary Residency Requirements

Category	No. of State Provisions <sup>60</sup>
Alienage	71
Marital Status	81
Military	173
Minors/dependents	27
Other misc. provisions (33 categories)	173

Source: Olivas, *Postsecondary Requirements*, *supra* note 58, at Table 2, App. II.

The most striking feature among these patterns is how few exemptions or special treatment have anything to do with the fundamental concepts of duration or intention. In some instances, the exceptions are aimed at classes of persons who are mobile, for instance, military or migrant workers, or for whom domicile is difficult to determine, as with children or Indians.<sup>61</sup> However, the largest class is those for whom residency (or tuition waivers) is a conferred benefit, without reference to duration or intent. Although the data in Table 1 are not arranged to show each state's exemptions (due to the wide number of exceptions), some states are truly spectacular in their legerdemain around strict requirements. For example, Texas offers more than eighteen categories of exceptions or special treatment to a strict domiciliary requirement with a one year waiting period including

59. See Michael A. Olivas, Invited Testimony to Texas House of Representatives, Committee on Higher Education (March 11, 1985) (transcript on file with author).

60. Each state could, and many did, have more than one provision per category. As a result, the totals are higher than 51 (50 states and the District of Columbia).

61. Olivas, *Postsecondary Requirements*, *supra* note 58; J. Youngblood Henderson, *The Question of Nonresident Tuition for Tribal Citizens*, 4 AMER. IND. L. REV. 47 (1976) (analyzing residency classifications that conflict with domicile determinations for reservation Indians).



graduate assistants, recipients of "merit" scholarships, and certain border nonresidents.<sup>62</sup> In nearly every instance, the benefit is conferred to reward a desirable characteristic or a favored class of persons, such as graduate students (as an employment perquisite), meritorious students, certain fortunate employees, or residents of certain adjoining states.<sup>63</sup> Ironically, in other respects, the Texas legislature has sought to make state residency even more difficult to achieve, especially for undocumented aliens residing within its borders.<sup>64</sup>

Some of these exemptions may not pose bad results, but they are, for the most part, unprincipled, except when they ease the evidentiary burden upon groups for whom duration or domicile genuinely poses a particular problem. Graduate students rarely are paid well and certainly provide important instructional or research services to institutions. Paying their tuition seems a modest benefit and one well worth preserving, but using the residency requirement to deem the students "residents" is a curious bookkeeping maneuver, one that undermines the residency determination system. Particularly troubling are the many discretionary means to confer residency upon the advantaged, as, for instance, when the state confers residency exceptions to its employees or to children of employees of choice industries.<sup>65</sup> The growth of such arbitrary and unprincipled exceptions, exemptions, and waivers undermines the already weak scheme erected to regulate the migration of out of state students.

On the one hand, it is understandable that exceptions would occur and desirable that some flexibility is available for the institutions that must administer these strict residency requirements; play in the

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62. See Olivas, *Invited Testimony*, *supra* note 59; TEX. EDUC. CODE ANN., §§ 54.052, 54.059, 54.063 (West 1995). For an extreme example, Texas provides nonresident tuition waivers for federal prisoners incarcerated in Texas correctional facilities, provided the inmate designates a Texas domicile. Op. Tex. Att'y Gen. No. H-559 (March 20, 1975).

63. For a good example of the waivers for the fortunate few, see recent certifications registered under TEX. EDUC. CODE ANN. § 54.052(h) (West 1995): employees (and families) of Citicorp (August 16, 1993); Venture Stores (July 30, 1993); Southwestern Bell Telecom (August 2, 1993); and Menasco Aerosystems (August 3, 1993) (on file with author).

64. In April 1993, a bill was introduced in the Texas Legislature to address the problems of intending permanent residents or persons permanently residing under color of law (PRUCOL) but it died in committee. See H.B. No. 2510 Introduced Version, 73rd Reg. Sess., April 28, 1993 (on file with author). For excellent studies of PRUCOL aliens, see Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law Into the Breach Once More*, 21 N.M. L. REV. 219 (1991); John W. Guendelsberger, *Equal Protection and Resident Alien Access to Public Benefits in France and the United States*, 67 TUL. L. REV. 669 (1993); Robert Rubin, *Walking a Gray Line: The "Color of Law" Test Governing Noncitizen Eligibility for Public Benefits*, 24 SAN DIEGO L. REV. 411 (1987).

65. See *supra* note 63.

joints is always useful for large organizations, and reasonable accommodations seem to be a social good. On the other hand, the extensive and unprincipled exemptions in this area have gone far beyond their original purpose. They suggest that the basic residency requirements are so outmoded or wrongheaded that only irregular institutionalized circumvention can make the system work.<sup>66</sup> This Goldbergian scheme is neither rational nor reasonable, and institutional practices, discussed next, only add to the confusion.

The first step in understanding these discretionary practices is an examination of the indices and criteria used to implement residency requirements.<sup>67</sup> As has been noted, domiciliary requirements entail subjective as well as objective measures of evidence. In the purest sense, one who has never left a state and never intends to leave incontestably meets all the presence, duration, and intent criteria. At the other end of the spectrum, someone who has never been in a state and never intends to go there is just as clearly not its domiciliary. Between these two points, however, there is much room for judgment. In most instances, the first inquiry is: do the circumstances indicate any presence in the state, and if so, was it for a sufficient time to meet the durational requirement? As simple as this appears to be, counting the time periods, as noted, frequently poses problems: When does the clock start? When does it stop? Do absences from the state count? If so, how long can I be out of the state and still establish it as my domicile? A review of admissions practices reveals that nearly half the sampled institutions require that applicants for residence status reside in the state for the appropriate period, as counted backwards from the date of application, on the theory that events could change between that time and the time of enrollment; the other states permit students to run the clock until enrollment, a practice that can substantially shorten the waiting period.<sup>68</sup>

The measurement of intent is even more inexact than the measurement of duration, and the forty-two states with domiciliary requirements predictably employ a wide range of criteria to determine the concept.<sup>69</sup> Often, other measures of long-term residence and community ties are used: for example, voter registration is widely used by institutions to indicate students' intent. In truth, it is a poor proxy

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66. See, e.g., Olivas, *Administering Intentions*, *supra* note 34, at 276-78 (likening practices to "one-hoss shay").

67. The following discussion of discretionary practices was taken from my previous work, *Administering Intentions*, *supra* note 34.

68. Olivas, *Enduring Disability*, *supra* note 16, at 42-44.

69. Olivas, *Administering Intentions*, *supra* note 34, at 287-90.

because durational residency requirements for voting are required by law to be of short duration, usually between ninety days to six months, and rarely are probative of long-term intent.<sup>70</sup> People may regularly vote in their domicile, but they need not do so. Conversely, not being registered to vote in a new state is likely to be interpreted as not having established domicile. In any event, the extensive litigation in student voting rights cases suggests the great degree of difficulty in measuring intentionality for meeting voting residency requirements.<sup>71</sup> However, every state sampled either allowed or required voter registration as a criterion of domiciliary intent.

The problems of evidence and burden of proof are important for determining both objective facts (for example, how long have students resided in the state) and subjective intent (where is their true, permanent, and fixed abode), but those states that hold students to durational standards appear to exact the same evidentiary requirements as those states where domicile must be proven. Therefore, even where subjective intent is not required, similar proof — including items that measure intentionality — is exacted.<sup>72</sup> This curious finding suggests that even nondomiciliary states are employing domiciliary criteria and evidence, creating higher standards than the technical requirements of the statutes or regulations.

The kinds of evidence allowed to prove residence or domicile are summarized in Table 2, data gathered in a survey of all state practices. The data show a remarkable consistency, for nearly every state required or allowed the following as evidence: Internal Revenue Service (IRS) returns; automobile registration or other tax records, property ownership, voter registration card; paycheck stubs; affidavits from landlords, employers, or others; students' sworn statements; transcripts; and other documents, testimony, or proof of residence.

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70. *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down one year voter registration residency requirement); *see also* Bollhofer, *supra* note 50.

71. *Dunn*, 405 U.S. at 333-36 & nn. 3-6 (reviewing difficulties in residency determinations and cases requiring reasonable accommodations).

72. Olivas, *Administering Intentions*, *supra* note 34, at 274-77 (analyzing problems of evidence and burden of proof in residency/domicile determinations).

TABLE 2  
Documentation Allowed or Required by States as  
Evidence or Residency or Domicile

Evidence	No. of States <sup>73</sup>
IRS returns, W-2, W-4, state tax returns	51
Voter registration	51
Driver's license	48
Car or property papers	48
Proof of housing (rental or owned)	48
Payroll checks, stubs	45
Affidavits (from landlords, employers, others)	44
Applicants' affidavits	44
Transcripts	35
Immigration papers	30
Military papers	26

*Source:* Olivas, *Postsecondary Requirements*, *supra* note 58, at Table 3.

Many states grant wide latitude in the evidence which is required to prove residence, but it is the patterns of the evidence that administrators rely upon to make their determination. For instance, a student holding all the documentation listed in Table 2, but voting in another state, will likely be classified a nonresident; even if the student registered to vote in the new state, many registrars would likely start the clock at the point of reregistration. The burden of proof is always upon the student in classification cases, and courts will likely uphold such a state practice unless it includes an irrebuttable presumption (that is, that students, once classified nonresidents, can never become residents)<sup>74</sup> or an unconstitutional provision, which attempts to do what only the federal government can do, such as regulate immigration.<sup>75</sup> Thus, to overcome the burden of proof, students will not only be required to show that they are residents or domiciliaries of the state, but that they are not domiciliaries or residents of any other state. These are heavy burdens to overcome, and although the requirements for duration are less stringent than those for domicile, the evidence deemed necessary for one is no less than that required for the other.

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73. 50 states and the District of Columbia.

74. The leading "irrebuttable presumption" case arose in the area of postsecondary residency requirements. *Vlandis v. Kline*, 412 U.S. 441 (1973) (striking down irrebuttable presumptions in out-of-state college applications).

75. *Toll v. Moreno*, 458 U.S. 1, 9-10 (1982) (striking down state college residency requirement for G-4 aliens on preemption grounds).

The weight accorded the evidence does not substantially differ between determinations of residence or domicile. In both instances, states rely upon similar evidence and accord the evidence the greatest weight when the records show uninterrupted presence and abandonment of domicile elsewhere. As noted earlier, even durational requirement determinations have elements of intentionality, and taking into account the whole picture inevitably considers intentions. The care with which materials are scrutinized can depend on a range of elements, including political or legal considerations. For example, even in those institutions that enjoy considerable autonomy in residency matters, admissions numbers and policies can subtly affect whether or not institutional strict scrutiny is applied to residency petitions; when enrollments are down or when substantial tuition increases occur, it may prove efficacious for institutions to be more lenient in borderline residency cases rather than risk losing students.<sup>76</sup> If a school has differential admissions practices for transfer students — requiring higher GPA's for transfer admissions than those required for enrolled students — such flexibility may actually be a way to improve the quality of students. Of course, such practices cannot be articulated as formal institutional policy, lest state auditors investigate or students begin to expect easier reclassification in the future.

There are also occasions where institutions reinterpret state legislation or regulations, as in one state, where a virtually unenforceable provision of dubious constitutionality was ignored by the state institutions in an unspoken compact.<sup>77</sup> This has also happened in states where the existing practice has been struck down by a court decision. One study found a number of states whose laws regarding alien students had not been brought into conformity with a United States Supreme Court postsecondary residency decision, several years after such requirements had been found unconstitutional.<sup>78</sup> Institutional officers were aware of the court case and had been advised by legal

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76. Interview with University of Houston residency officer, Houston, TX (Sept. 8, 1993) (identity withheld upon request).

77. The requirement was that a Texas resident be "gainfully employed." TEX. EDUC. CODE ANN. § 54.052(e) (West 1995). This requirement has been finessed to mean "substantially," "more than part-time," "non-work study," or "not a public charge" (i.e., not on welfare). Telephone interviews with registrars and residency officers at various Texas public institutions throughout Spring 1993, all of whom requested that their names be withheld.

78. See Olivas, *Enduring Disability*, *supra* note 16, at 36-55. The practice was the treatment of G-4 alien students.

counsel to ignore the formal state requirements and abide by the Court's decision.<sup>79</sup>

The fluctuations of enrollments, institutional priorities, and legal criteria all contribute to the accordion-like tightening and loosening of the evidentiary requirements, burdens of proof, legal standards, and discretionary factors in residency determination. Like the multiple exemptions found in nearly all states, the wide swings evident in the administration of residency suggest the deterioration of the system into one that does not always protect either the institutions' interest or the students' rights. As troubling as the system is for citizens simply moving to a new state, the calculus for aliens, particularly undocumented aliens, is even more complex.

### III. Courts, Colleges, and Undocumented Aliens: *Plyler Goes to College*

*Plyler v. Doe*<sup>80</sup> stands at the apex of immigrants' rights in the United States. With this decision, the Court struck down Texas' attempt to deny free public education to alien children.<sup>81</sup> The Texas statute denied state funds to school districts enrolling children who

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79. *Id.*

80. 457 U.S. 202 (1982), *aff'g* Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980), *aff'g* Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978). For careful studies following the decision, see José A. Cárdenas & Albert Cortez, *The Impact of Plyler v. Doe Upon Texas Public Schools*, 15 J.L. & EDUC. 1 (1986) (finding *Plyler* had a "minimal" impact upon Texas schools, with a greater impact upon urban areas and certain border districts); Manuel Garcia y Griego, *The Rights of Undocumented Mexicans In The United States After Plyler v. Doe: A Sketch of Moral and Legal Issues*, 15 J.L. & EDUC. 57 (1986) (reviewing normative obligations to undocumented aliens in the United States).

81.

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such persons or his parent, guardian or person having lawful control resides within the school district.

were not "citizens of the United States or legally admitted aliens."<sup>82</sup> Justice Brennan, in his majority opinion striking down the statute, characterized the Texas argument for charging tuition as "nothing more than an assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools."<sup>83</sup> He employed an equal protection analysis to find that a state could not enact a discriminatory classification "merely by defining a disfavored group as nonresident."<sup>84</sup> He then considered and dismissed arguments proffered by Texas in support of the challenged statute.

Justice Brennan easily dismissed the State's first argument that the classification or subclass of undocumented Mexican children was necessary to preserve the State's "limited resources for the education of its lawful residents."<sup>85</sup> A similar argument had been raised and rejected in *Graham v. Richardson*,<sup>86</sup> where the Court held that the concern for preservation of state welfare resources could not justify an alienage classification used in allocating those resources.<sup>87</sup> Furthermore, the district court in *Plyler*<sup>88</sup> made factual findings that the exclusion of all undocumented children would only eventually result in some small savings to the state,<sup>89</sup> but that since both state and federal governments based their allocations to schools primarily on the number of children enrolled, those savings would, at best, be uncertain. The court further found that barring those children would "not necessarily improve the quality of education."<sup>90</sup>

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82. *Id.* It is not surprising that such anti-Mexican legislation would have originated in Texas, a jurisdiction widely regarded to have "a legacy of hate engendered by the Texas Revolution and the Mexican American War." GUADALUPE SAN MIGUEL, "LET THEM ALL TAKE HEED": MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981 (1987); see generally ARNOLDO DE LEÓN, THEY CALLED THEM GREASERS (1983). According to historians, this history of conflict has

generated distrust and dislike between Anglos and Texas Mexicans. Most importantly, it shaped Anglo attitudes towards Mexicans by (a) justifying the inferior status to which they were relegated, (b) legitimizing the stereotype of Mexicans as "eternal enemies" of the state, and (c) encouraging their denigration. Additionally this legacy undergirded the historical attitude of Anglo disparagement of Mexican culture and the Spanish language.

SAN MIGUEL, *supra* note 82, at 32 (citing RODOLFO ACUÑA, OCCUPIED AMERICA 3-23 (1981)).

83. *Plyler*, 457 U.S. at 227.

84. *Id.*

85. *Id.*

86. 403 U.S. 365 (1971).

87. *Id.* at 375. The classification involved state welfare benefits. *Id.* at 366.

88. *Doe v. Plyler*, 458 F. Supp. 569 (E.D. Tex. 1978).

89. *Id.* at 576-77.

90. *Plyler*, 457 U.S. at 229 (citing *Plyler*, 458 F. Supp. at 577).

The State also argued that it had enacted the legislation to protect itself from a putative influx of undocumented aliens.<sup>91</sup> The Court acknowledged the concerns of the State, but found that the statute was not tailored to meet the stated objective: "Charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration . . . ." <sup>92</sup> Further, the Court noted that immigration and naturalization policy is within the exclusive powers of federal government.<sup>93</sup> A state may enact legislation affecting aliens only if 1) the power to regulate in this area is delegated to the states, 2) the law mirrors federal policy, and 3) the statute furthers a legitimate state goal. The Court found no conceivable educational policy or any state interests that would justify denying undocumented children an education.<sup>94</sup>

Finally, the State maintained that undocumented children were singled out because their unlawful presence rendered them less likely to remain in the United States and, therefore, less likely to use the free public education they received to contribute to the social and political goals of the United States community.<sup>95</sup> The Court distinguished the subclass of undocumented aliens who live in the United States as a family from the subclass of adult aliens who enter the country alone and whose intent is to earn money and stay temporarily.<sup>96</sup> The Court went on to state that for those who reside in the United States with the intent of making it their home, "[i]t is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."<sup>97</sup>

As in many equal protection cases, an important issue in *Plyler* was the level of scrutiny to be accorded the Texas statute. Undocumented aliens, prior to *Plyler*, had won constitutional protection in Fourth,<sup>98</sup> Fifth,<sup>99</sup> and Sixth<sup>100</sup> Amendment cases, as well as in a range

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91. *Id.* at 229-30.

92. *Id.* at 228 (citing *Plyler*, 458 F. Supp. at 585).

93. *Id.* at 225-26.

94. *Id.* at 226 ("We perceive no national policy that supports the State in denying these children an elementary education.").

95. *Id.* at 229-30.

96. *Id.* at 230.

97. *Id.*

98. *United States v. Barbera*, 514 F.2d 294, 296 (2d Cir. 1975) (undocumented alien has standing to assert Fourth Amendment violation).

99. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (all aliens are "persons" protected by the Due Process Clause of the Fifth Amendment); *Mathews v. Diaz*, 426 U.S.



of civil litigation.<sup>101</sup> However, the Supreme Court had never been faced with the question of whether undocumented aliens could seek Fourteenth Amendment equal protection.<sup>102</sup> The Supreme Court had earlier held that undocumented aliens are "persons"<sup>103</sup> protected by the due process provisions of the Fourteenth Amendment.<sup>104</sup> However, the State of Texas argued that, because undocumented children were not "within its jurisdiction,"<sup>105</sup> they were not entitled to equal protection. Justice Brennan rejected this line of reasoning, drawing upon the legislative history of the Fourteenth Amendment,<sup>106</sup> and concluding that there "is simply no support for [the] suggestion that 'due process' is somehow of greater stature than 'equal protection' and therefore available to a larger class of persons."<sup>107</sup>

Once he had determined that undocumented aliens were entitled to equal protection, Justice Brennan decided upon the degree of scrutiny the case required. He discarded strict scrutiny, noting that undocumented aliens were not a "suspect class"<sup>108</sup> and that education was not a "fundamental right."<sup>109</sup> He also rejected the minimal scrutiny inherent in a two-tiered standard.<sup>110</sup> Instead, he chose the "intermediate scrutiny" standard of *Craig v. Boren*,<sup>111</sup> and found that the

67, 81 (1976) (permanent residents and parolees protected by the Fifth Amendment from invidious discrimination by the federal government).

100. *Wong Wing*, 163 U.S. at 238 (all persons within territory of United States entitled to the protection of Sixth Amendment).

101. *Torres v. Sierra*, 553 P.2d 721, 724 (N.M. Ct. App. 1976) (undocumented alien is "person" within meaning of Wrongful Death Act); *Arteaga v. Literski*, 265 N.W. 2d 148, 149 (Wis. 1978) (undocumented aliens may bring suit in personal injury actions); *Ayala v. California Unemployment Ins. Appeals Bd.*, 126 Cal. Rptr. 210, 212 (Cal. Ct. App. 1976) (eligibility of undocumented aliens for disability payments).

102. "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV §1.

103. *Wong Wing*, 163 U.S. at 228.

104. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (Fourteenth Amendment provisions "are universal in their application, to all persons.").

105. *Plyler*, 457 U.S. at 211.

106. *Id.* at 214 (citations omitted).

107. *Id.* at 213. In the dissent, Chief Justice Burger concurred that the Equal Protection Clause applies to undocumented aliens. *Id.* at 243 (Burger, C.J., dissenting).

108. *Id.* at 219 & n.19. The Supreme Court did not address the issue of preemption. For a review of the current state of preemption doctrine, see Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217 (1995).

109. *Id.* at 221.

110. *Id.* at 223-24.

111. 429 U.S. 190 (1976), cited in *Plyler*, 457 U.S. at 218 n.16; see also *Plyler*, 457 U.S. at 218 n.16, 224. ("Only when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases do we employ this standard to aid us in

statute did not advance any "substantial state interest,"<sup>112</sup> thus affirming the district and appellate courts' judgments invalidating the statute.<sup>113</sup>

To reach this conclusion, Justice Brennan was forced to stretch both the suspect classification and the fundamental right rationales. Though he rejected undocumented alienage as a suspect class, by analogizing undocumented alienage to legitimacy classifications,<sup>114</sup> Justice Brennan concluded that undocumented children were not responsible for their own citizenship status and that treating them as Texas law envisioned would "not comport with fundamental conceptions of justice."<sup>115</sup> However, he was more emphatically concerned with education and elaborating the nature of that putative entitlement. While he reaffirmed *San Antonio Independent School District v. Rodriguez*<sup>116</sup> in finding public education not to be a fundamental right,<sup>117</sup> he recited a litany of cases holding education to have "a fundamental role in maintaining the fabric of our society."<sup>118</sup> Moreover, he felt that "[i]lliteracy is an enduring disability,"<sup>119</sup> one that would disadvantage the individual and society. This analysis enabled him to rebut the State's assertions, which the Burger dissent had found persuasive, that the policy was legislatively related to protecting the fiscal economy of the State.<sup>120</sup>

The role of education in national policy-making seems to have been a more important factor to the *Plyler* Court than it had been to the *Rodriguez* Court.<sup>121</sup> Further, while Justice Brennan did not reach the claim of federal preemption,<sup>122</sup> he did draw a crucial distinction between what states and the federal government may do in legislating

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determining the rationality of the legislative choice."); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17 (1972).

112. *Plyler*, 457 U.S. at 230.

113. *Id.*

114. *Id.* at 220 (citing *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

115. *Id.*

116. 411 U.S. 1 (1975).

117. *Plyler*, 457 U.S. at 221.

118. *Id.* (citations omitted).

119. *Id.* at 222.

120. *Plyler*, 457 U.S. at 219 & n. 19 (citing *De Canas v. Bica*, 424 U.S. 351 (1976)).

121. *Id.* at 221-22 (construing *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963); *Ambach v. Norwick*, 441 U.S. 68, 76, 77 (1979); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

122. *Plyler*, 457 U.S. at 210. *Toll v. Moreno*, 458 U.S. 1 (1982), in contrast, turned on preemption.

treatment of aliens.<sup>123</sup> Additionally, while the Court has upheld state statutes governing alien employment<sup>124</sup> and welfare benefits,<sup>125</sup> these narrow areas mirrored federal classifications and congressional action governing immigration.<sup>126</sup> For example, in *De Canas v. Bica*,<sup>127</sup> the Supreme Court held that if Congress had addressed an immigration issue and delegated aspects of its administration to states, the states could enact their own legislation to regulate the area.<sup>128</sup> In the area of public education, however, Justice Brennan wrote, "we perceive no national policy that supports the State in denying these children an elementary education."<sup>129</sup>

The framework employed by the majority in *Plyler*, couched as it was in moral tones, seems to be the very type of "legislating" then-Justice Rehnquist feared in *Craig v. Boren*, the earliest use of heightened scrutiny.<sup>130</sup> The Court in *Plyler* could have found undocumented alienage of children to be a suspect classification or, more satisfactorily, provided criteria for measuring the "enduring disability."<sup>131</sup> Had the Court articulated those standards the legislatures could have fashioned more acceptable ends-means formulations for their statutes. Heightened scrutiny may have developed from either or both of two different lines of legal reasoning: one suggested by Judge Seals in *In re Alien Children Education Litigation*,<sup>132</sup> which apparently was not considered by the Court but was discussed in the *Rodriguez* case;<sup>133</sup> and a second, an outgrowth of race, national origin, and alienage cases in which the Court employed stricter scrutiny.<sup>134</sup>

123. *Id.* at 224.

124. *De Canas v. Bica*, 424 U.S. 351 (1976).

125. *Mathews v. Diaz*, 426 U.S. 67 (1976).

126. *See, e.g.*, 26 U.S.C. § 3304(a)(14)(A) (1988); and 8 U.S.C. § 1101 (1988).

127. 424 U.S. 351 (1976).

128. *Id.* at 356.

129. *Plyler*, 457 U.S. at 226.

130. 429 U.S. 190, 221 (Rehnquist, J., dissenting). At the time, Justice Rehnquist was the only member of the Burger Court who had not approved the use of the heightened or intermediate scrutiny standard.

131. *Plyler*, 457 U.S. at 222.

132. 501 F. Supp. 544, 582 (S.D. Tex. 1980). This case was later consolidated with the *Plyler* litigation. *Plyler*, 457 U.S. at 209.

133. *Rodriguez*, 411 U.S. at 37 ("Whatever merit appellees' argument might have[,] if a State's financing system occasioned an *absolute denial of educational opportunities to any of its children*, that argument [would not prevail in this setting]." (emphasis added)).

134. For example, in *Mathews v. Diaz*, 426 U.S. 67 (1976), the Supreme Court struck down a residency requirement that necessitated a five year wait for a Medicare benefit using intermediate scrutiny. *Id.* at 86. While this case is widely regarded as having import for the condition of permanent residents, the plaintiffs also included two parolees. *Id.* at 69-71. Parolees, who have not even effected an entry into the United States, may physi-

In *In re Alien Children*, Judge Seals applied "strict judicial scrutiny" in his district court opinion, "when the absolute deprivation [of education] is the result of complete inability to pay for the desired benefit."<sup>135</sup> Such a standard would have required the State show a "compelling governmental interest."<sup>136</sup> In contrast to the *Rodriguez* fact pattern, which involved a concededly unequal funding base for Texas minority school children but did not constitute "an absolute deprivation,"<sup>137</sup> the charges to undocumented aliens were substantial.<sup>138</sup> The district court had found "the effect of the new statute is to exclude undocumented children from the Texas public schools."<sup>139</sup> Therefore, one of the "fundamental right" ingredients, missing in *Rodriguez*, the denial of minimum access to education, was present in *Plyler*.

Another way in which the Supreme Court could have employed strict scrutiny was to hold that undocumented alien children are a "suspect class." Justice Brennan categorized these classifications as reflecting "deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective."<sup>140</sup> Although the record seemed replete with such animus towards undocumented aliens in Texas,<sup>141</sup> he found that undocumented entry is "the product of voluntary action"<sup>142</sup> and therefore "not irrelevant to any proper legislative goal."<sup>143</sup> This reasoning, while arguably applicable to the parents, was repudiated by Justice Brennan himself as inapplicable to undocu-

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cally reside here. 8 U.S.C. § 1182 (d)(5)(1988); see also *Matter of Castellon*, 17 I. & N. Dec. 616, 619-20 (1981) (analyzing discretionary nature of parole). Undocumented aliens, in contrast, have entered the United States, giving rise both to an ability to establish domicile and to the right to a deportation hearing if apprehended and given a show-cause order by immigration officials. While *Mathews*, absent more, does not render the undocumented eligible for Medicare provisions, they have made more of an entry than have parolees. For excellent discussions of alien eligibility, see NAT'L IMMIGRATION LAW CTR., *infra* note 270, at 36-39; Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395 (1987-88).

135. *In re Alien Children*, 501 F. Supp. at 582 (citing *In re Griffiths*, 413 U.S. 717 (1973)).

136. *Id.*

137. *Rodriguez*, 411 U.S. at 37.

138. *Plyler*, 458 F. Supp. at 571 (\$1000 per year in Tyler Independent School District).

139. *In re Alien Children*, 501 F. Supp. at 555.

140. *Plyler*, 457 U.S. at 216 n.14.

141. See, e.g., Jorge C. Rangel & Carlos M. Alcalá, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307 (1972); Guadalupe Salinas & Isaias D. Torres, *The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis*, 13 HOUS. L. REV. 863, 865 & n.4 (1976); see generally SAN MIGUEL, *supra* note 82; DE LEÓN, *supra* note 82.

142. *Plyler*, 457 U.S. at 219 n.19.

143. *Id.* at 220.

mented children.<sup>144</sup> The children's surreptitious entries were not effected voluntarily by the children; in traditional domicile terms, children's domiciles are those of their parents.<sup>145</sup> Justice Brennan failed, therefore, to provide an internally consistent reason for not holding that these children were members of a suspect class.

Justice Brennan also could have reviewed the classification in light of the Court's previous national-origin and alienage cases.<sup>146</sup> When read together, these cases provide a considerable record of the "deep-seated prejudice" so manifestly evident in Texas' and other states' treatment of undocumented aliens.<sup>147</sup> The Court identified the scrutiny due aliens generally in two other cases the same term, with which *Plyler* would have been consistent had it adopted a more searching standard of review.<sup>148</sup>

In 1982, the Court decided *Toll v. Moreno*.<sup>149</sup> *Toll* was the first postsecondary residency case construing a state statute affecting non-immigrants and aliens with permission to remain only temporarily in the United States.<sup>150</sup> Justice Brennan also wrote the majority opinion

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144. *Id.* ("[L]egislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."). He also suggests that being undocumented is not an "absolutely immutable characteristic," as aliens may seek reclassification; this would also not apply for children who cannot themselves seek reclassification. *Id.*

145. Josephs, *supra* note 49; see also *Martinez v. Bynum*, 461 U.S. 321, 325-30 (1983) (reviewing residence and domicile of undocumented aliens).

146. See generally *Castaneda v. Partida*, 430 U.S. 482 (1977) (race and national origin classification are suspect); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage classification is independently suspect); *Oyama v. California*, 332 U.S. 633 (1948) (national origin classifications are suspect); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). See also *Juan F. Perea, Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & M. L. REV. 805 (1993-94).

147. See *supra* note 140 and accompanying text.

148. See *Toll v. Moreno*, 458 U.S. 1 (1982); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (citizenship is "not a relevant ground for the distribution of economic benefits"); see also *Bernal v. Fainter*, 476 U.S. 216 (1984) (alienage as suspect class).

149. *Toll v. Moreno*, 458 U.S. 1 (1982). This case went through several different incarnations. The following is a complete history of the *Toll* case: *Moreno v. University of Md.*, 420 F. Supp. 541 (D. Md. 1976), *aff'd without op. sub nom.*, *Moreno v. Elkins*, 556 F.2d 573 (4th Cir. 1977), *question certified*, 435 U.S. 647 (1978), *certified question answered, sub nom.*, *Toll v. Moreno*, 397 A.2d 1009 (Md.), *answer conformed to*, 441 U.S. 458 (per curiam), *on remand*, 480 F. Supp. 1116 (D.Md. 1979), *later proceeding*, 489 F. Supp. 658 (D. Md. 1980), *aff'd sub nom.*, *Moreno v. University of Md.*, 645 F.2d 217 (4th Cir. 1981)(per curiam), *aff'd sub nom.*, *Toll v. Moreno*, 458 U.S. 1 (1982).

150. *Id.* at 1-3. *Nyquist v. Mauclet*, 432 U.S. 1 (1977), was the first Supreme Court postsecondary education case construing a state statute affecting permanent resident college students. *Nyquist* struck down a New York State statute that prohibited permanent resident aliens from receiving college tuition assistance benefits. *Id.* at 12.

in *Toll*. After reviewing the confusing history of the case,<sup>151</sup> Justice Brennan struck down the University of Maryland's policy of denying domiciled treaty organization individuals, or "G-4" aliens, the opportunity to pay reduced, in-state tuition on Supremacy Clause<sup>152</sup> grounds.<sup>153</sup> The Court therefore did not reach the questions of due process or equal protection, which had been considered by both the district<sup>154</sup> and appellate courts.<sup>155</sup> The Supreme Court based its opinion on the premise that the federal government is preeminent in matters of immigration policy and states may not enact alienage classifications, except in limited cases of political and government functions.<sup>156</sup>

In 1976, when the case was first brought, the district court held that the original policy denying residency was a violation of due process and constituted an irrebuttable presumption.<sup>157</sup> In reviewing that case, the Supreme Court noted that it had previously held in 1978 that G-4 visa holders could be United States domiciliaries,<sup>158</sup> and had certified a question to the Maryland Court of Appeals to determine whether G-4 aliens and dependents could be Maryland domiciliaries.<sup>159</sup> The Maryland court determined that these individuals were capable of acquiring domicile,<sup>160</sup> thus rendering the University's previous reliance upon nonestablishment of domicile incorrect. However, before the Supreme Court could render its opinion on this interpretation, the University's Board of Regents issued a "Reaffirmation of In-State Policy."<sup>161</sup> That statement actually constituted a substantial retreat from its previous position, although it still did not allow residency tuition for Moreno.<sup>162</sup> The Supreme Court, noting that the University's action had "fundamentally altered" the domicile issue, remanded the case to the district court.<sup>163</sup>

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151. *Toll*, 458 U.S. at 310; see also Olivas, *Enduring Disability*, *supra* note 16, at 29-33 (reviewing the several *Toll* cases).

152. In pertinent part: "This Constitution, and the laws of the United States . . . shall be the supreme Law of the Land . . ." U.S. CONST. art. VI, cl. 2.

153. *Toll*, 458 U.S. at 17, 20.

154. *Moreno v. Toll*, 489 F. Supp. 658 (D. Md. 1980).

155. *Moreno v. University of Md.*, 645 F.2d 217 (4th Cir. 1981) (per curiam).

156. *Toll*, 458 U.S. at 13-17, 20.

157. *Moreno v. University of Md.*, 420 F. Supp. 541, 544, 548, 554 (D. Md. 1976).

158. *Elkins v. Moreno*, 435 U.S. 647 (1978).

159. *Id.* at 668-69.

160. *Toll v. Moreno*, 397 A.2d 1009, 1019 (Md. 1979).

161. *Toll v. Moreno*, 441 U.S. 458 (1979) (per curiam).

162. *Id.*

163. *Id.* at 461-62.

On remand, the University lost once again. The district court held that, though domicile was no longer of "paramount consideration," the revised policy was defective on Equal Protection and Supremacy Clause grounds.<sup>164</sup> In the lower court's view, the "revised" policy concerning alienage (which made domicile only one of several criteria) could not survive strict scrutiny,<sup>165</sup> and further, it impermissibly encroached upon federal immigration prerogatives.<sup>166</sup> The appellate court affirmed on the same grounds.<sup>167</sup> Thus, though Justice Brennan's opinion in *Toll* only reached the issue of the Supremacy Clause,<sup>168</sup> his opinion in *Plyler*, decided upon equal protection grounds with less-than-strict scrutiny for undocumented aliens,<sup>169</sup> suggests that he also would have found the revised policy in *Toll* invalid on equal protection grounds as well.

In *Toll*, Justice Brennan reviewed *Takahashi*,<sup>170</sup> *Graham*,<sup>171</sup> and *De Canas*,<sup>172</sup> reading them for the principle that "state regulation[,] not congressionally sanctioned that discriminates against aliens lawfully admitted to the country[,] is impermissible if it imposes additional burdens not contemplated by Congress."<sup>173</sup> He found both that Congress had allowed G-4 visa holders to establish domicile in the United States,<sup>174</sup> and also had conferred tax exemptions upon G-4 aliens "as an inducement for these [international] organizations to locate significant operations in the United States."<sup>175</sup> Therefore, Justice Brennan reasoned, it was clearly the congressional intent that G-4 visa holders not bear the "additional burdens" Maryland sought to impose: "The State may not recoup indirectly from respondents' parents the

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164. *Moreno v. Toll*, 489 F. Supp. 658 (D. Md. 1980).

165. *Id.* at 668.

166. *Id.* at 667-68.

167. *Moreno v. University of Md.*, 645 F.2d 217, 220 (4th Cir. 1981) (per curiam).

168. *Toll v. Moreno*, 458 U.S. 1, 9-10 (1982).

169. *Plyler*, 458 U.S. at 230; see generally *supra* notes 80-148 and accompanying text (discussion of *Plyler*).

170. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (states cannot impose discriminatory burdens on aliens), cited in *Toll*, 458 U.S. at 10-11.

171. *Graham v. Richardson*, 403 U.S. 365 (1971) (states may not impose regulations upon aliens if the burdens are not contemplated by Congress), cited in *Toll*, 458 U.S. at 12.

172. *De Canas v. Bica*, 424 U.S. 351 (1976) (Court upheld state law regulating employment of undocumented aliens), cited in *Toll*, 458 U.S. at 13.

173. *Toll*, 458 U.S. at 12-13 (quoting *De Canas*, 424 U.S. at 358 n.6). Justice Brennan agreed that the Court had previously upheld legislation limiting the "participation of noncitizens in the States' political and governmental functions." *Id.* at 12 n.17 (citations omitted).

174. *Id.* at 14.

175. *Id.* at 16 (citations omitted). Moreover, Maryland law tracked the federal exemption. See *id.* at 15 n.22.

taxes that the Federal Government has expressly barred the State from collecting."<sup>176</sup>

On the merits of the case, Brennan mustered a seven to two vote, with Justice O'Connor concurring in the result.<sup>177</sup> Justice Blackmun's concurring opinion<sup>178</sup> was aimed at rebutting the dissent by then-Justice Rehnquist that argued at length that treaty organization aliens should not be strictly scrutinized, as they were an advantaged group, not the disadvantaged aliens envisioned as requiring protection in *Graham v. Richardson*.<sup>179</sup> Additionally, then-Justice Rehnquist found the majority's preemption analysis flawed:

First, the Federal Government has not barred the States from collecting taxes from many, if not most, G-4 visa holders. Second, as to those G-4 nonimmigrants who are immune from state income taxes by treaty, Maryland's tuition policy cannot fairly be said to conflict with those treaties in a manner requiring its preemption.<sup>180</sup>

Then-Justice Rehnquist's dissent does not help clarify the problems glossed over in the majority opinions. First, it is not disadvantage per se that provokes the need for strictly scrutinizing alienage statutes, but rather aliens' conceded powerlessness in political disputes.<sup>181</sup> Treaty organization aliens, like all other nonimmigrant classes, cannot vote or participate in the electoral process. However wealthy or advantaged World Bank employees may be (and these plaintiffs surely could not invoke the same moral claims as did undocumented alien children),<sup>182</sup> the University's additional charges for nonresidents clearly constituted a burdensome extra cost which the

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176. *Id.* at 16. Justice O'Connor dissented from this characterization, but concurred in the opinion "insofar as it holds that the state may not charge out-of-state tuition to nonimmigrant aliens who, under federal law, are exempt from both state and federal taxes, and who are domiciled in the State." *Id.* at 24. (O'Connor, J., concurring in part and dissenting in part).

177. *Id.* at 24-28 (O'Connor, J., concurring in the result).

178. *Id.* at 19-24 (Blackmun, J., concurring).

179. *Id.* at 29-30 (Rehnquist, J., dissenting) (construing *Graham v. Richardson*, 403 U.S. 365 (1971)).

180. *Id.* at 33 (Rehnquist, J., dissenting) (emphasis deleted).

181. *See, e.g.*, *Vance v. Bradley*, 440 U.S. 93 (1979) (early retirement age for Foreign Service officers held not to violate equal protection component of the Due Process Clause of Fifth Amendment); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (Civil Service Commission regulation which barred noncitizens from employment was invalidated).

182. *See* Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy* 28 UCLA L. REV. 615 (1981); *see also* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9 (1990) (examining discrepancies in treatment of aliens in equal protection theory); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989) (criticizing judicial deference toward immigration legislation); Gerald M. Rosberg, *The*



University was ultimately required to refund.<sup>183</sup> Moreover, in attempting to suggest that the Maryland tuition policy was not in conflict with the State's tax exemption,<sup>184</sup> Rehnquist was simply wrong. Not only did the University concede openly that the surcharges were calculated in an attempt at "granting a higher subsidy" and "achieving equalization,"<sup>185</sup> both of which are tax terms, but in their brief the University noted that the nonresident tuition differential was "roughly equivalent to the amount of state income tax [a G-4 alien] is spared by [the state] treasury each year."<sup>186</sup>

What Rehnquist might have queried was the extent to which public universities may appropriately regulate their admissions policies concerning residence, particularly policies concerning foreign nationals following *Toll*. A significant number of states have residency requirements that functionally resemble Maryland's practice. Not all have granted G-4 alienage tax exemptions. Given the complexity of administration in foreign student affairs, it is likely that many administrators in public and private universities frequently do not understand their legal responsibilities to foreign nationals who apply for admission, in-state tuition, or state financial assistance.<sup>187</sup> Therefore, the majority's broad language<sup>188</sup> is unhelpful to guide admissions officers in drafting acceptable guidelines. For example, how can a state university "track" relevant federal immigration statutes in admissions and financial aid, so as to meet the requirements of the preemption doctrine? How may states regulate tuition charges for other similarly situated nonimmigrants who are not G-4 aliens?<sup>189</sup>

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*Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275 (1977) (same).

183. *Toll*, 458 U.S. at 17-18.

184. MD. REV. CODE ANN., TAX-GEN. § 280a (1977).

185. *Toll*, 458 U.S. at 7 (quoting App. to Pet. for Cert. 173a-174a).

186. *Toll*, 458 U.S. at 16 (quoting Brief for Petitioners 23).

187. Olivas, *Enduring Disability*, *supra* note 16; NATIONAL ASS'N OF FOREIGN STUDENT ADVISORS, ADVISER'S MANUAL OF FEDERAL REGULATIONS AFFECTING FOREIGN STUDENTS AND SCHOLARS (Alex Bedrosian ed. 1992) [hereinafter NAFSA].

188. "[W]e cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminatory tuition charges and fees solely on account of the federal immigration classification." *Toll*, 458 U.S. at 17.

189. IRCA provided additional independent nonimmigrant status for relatives of employees of international organizations, or long-term (16 years or more) G-holders. 8 U.S.C.A. § 1101(a)(15)(N) (West 1995); 8 U.S.C.A. § 1101(a)(27)(I) (West 1995). *See, e.g.*, *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (State financial aid program requirement cannot compel resident alien to become citizen). *See generally*, Comment, *An Alien's Constitutional Right to Loan, Scholarships and Tuition Benefits at State Supported Colleges and Universities*, 14 CAL. W. L. REV. 514 (1979).

Read with *Plyler*, *Toll* raises several important questions concerning the "residency clock" for undocumented adults: Does the proper determination for establishing domicile begin when they enter the country? When they apply for a formal status? When they receive formal, adjusted status?<sup>190</sup> What happens if the state has no common law on alien domicile? While *Toll* may have resolved the narrow issue of domiciled G-4 aliens in states that grant tax exemptions, it is clear its significance lies beyond this narrow setting.<sup>191</sup>

Soon after *Plyler* and *Toll* were decided, their postsecondary applications were tested in the California case, *Leticia "A" v. Board of Regents of the University of California (Leticia "A" I)*.<sup>192</sup> Five undocumented students who had been admitted into the University of California (UC) for the 1984 fall term were notified by the University that they were required to pay nonresident tuition and fees because they were not entitled to California in-state resident status.<sup>193</sup> The five plaintiffs had graduated from California high schools and had resided continuously in California for an average of seven years each, ranging from three years to eleven years. All were brought to the United States as children by their parents.<sup>194</sup>

In 1983, the California Legislature had revised its residency statute, including an amended reference to aliens: "[A]n alien, including an unmarried minor alien, may establish his or her residence, unless precluded by the Immigration and Nationality Act<sup>195</sup> from establish-

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190. *Wong v. Board of Trustees*, 125 Cal. Rptr. 841 (1st Dist. 1975) (omitted in official reporter by order of California Supreme Court, 15 January 1976) (denying equal protection challenge to requirement that aliens hold permanent resident status for one year prior to determination of residence).

191. In Texas, as in many states, nonimmigrants such as K-visa holders (fiancees or fiances) and L-holders (intracompany transferees) are more easily accorded residence for tuition purposes, since federal immigration law does not require them to maintain a domicile in their home country. 8 U.S.C.A. § 1101 (a) (15) (K)-(L) (West 1995). Nonimmigrants on student visas set out in §(F), on the other hand, are required to maintain their original domicile in their home country. 8 U.S.C.A. §1101(a)(15)(F)(West 1995). Thus, by the terms of the F-visa application, they are not accorded permission to relinquish this domicile.

192. Tentative Decision, No. 588982-5, (Cal. Super. Ct., Alameda Cty., April 3, 1985); Judgment (May 7, 1985); Statement of Decision (May 30, 1985) (*Leticia "A" I*); Clarification (May 19, 1992) (*Leticia "A" II*). All subsequent references are to the May 30, 1985 Statement of Decision, unless otherwise denoted.

193. *Id.* at 1-4. The California State University and College System, which had also employed the University of California System practice, was also enjoined from continuing in that practice. *Id.* at 9. The reinstated judgment, however, allocated the trial costs to the UC system. *Id.* at 7.

194. *Id.* at 6.

195. Immigration and Naturalization Act of 1952, Pub. L. No. 82-44, 66 Stat. 163 (codified and amended at 8 U.S.C. § 1101-1525 (1995)).

ing domicile in the United States.”<sup>196</sup> The UC read this statute as precluding undocumented aliens from establishing California residence. The California statute defined a resident for purposes of in-state tuition as “a student who has a residence, pursuant to Article 5 (commencing with Section 68060) of the Chapter in the state for more than one year immediately preceding the residency determination date.”<sup>197</sup> A nonresident, under the California statute, is a person who does not meet this code definition.

The statutes, though using the term “residence,” actually exacted the traditional criteria for establishing a “domicile.” For example, a resident could only maintain “one residence”<sup>198</sup> and “residency [could] be changed only by the union of act and intent.”<sup>199</sup> Section 68061 stated that “every person who is married or 18 years of age, or older, and under no legal disability to do so, may establish residence.”<sup>200</sup> The UC argued that the undocumented students were under a legal disability and thus, could not establish the requisite intent.

The University’s position was buttressed by a state Attorney General’s Opinion which stated that the University could deny resident status to the students because, in adopting Section 68062(h), the California Legislature had only intended to make the statute conform to *Toll*, and had not intended to grant residency to undocumented aliens.<sup>201</sup> The California Superior Court judge in *Leticia “A,”* the Honorable Ken W. Kawaichi, however, was not persuaded by the University’s argument or the Attorney General’s Opinion. Instead, he held the UC’s policy of “precluding undocumented alien students . . . from establishing California residency in the same manner and on the same term as United States citizens” invalid under the California Constitution.<sup>202</sup> He quickly dismissed the State’s “clean hands” argument,<sup>203</sup> noting that the plaintiffs had been brought into California as

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196. CAL. EDUC. CODE § 68062(h) (West 1995)(citations deleted). This section draws upon Michael A. Olivas, *Enduring Disability*, *supra* note 16.

197. CAL. EDUC. CODE § 68018 (West 1995).

198. CAL. EDUC. CODE § 68062 (a) (West 1995).

199. CAL. EDUC. CODE § 68062 (d) (West 1995).

200. CAL. EDUC. CODE § 68061 (West 1995).

201. “The legislative history of Education Code section 68062, subdivision (h), demonstrates that the Legislature did not intend to, and the subdivision does not, permit undocumented aliens to establish residence for tuition purposes in California’s public institutions of higher education.” 67 Op. Cal. Att’y Gen. 241, 241 (1984).

202. *Leticia “A,”* No. 588982-4, slip. op. at 2 (May 7, 1985).

203. “It is neither applicable to the facts nor appropriate to the legal issues in this case.” *Leticia “A” I*, No. 588982-4, slip op. at 6 (April 3, 1985).

children.<sup>204</sup> The United States Supreme Court had similarly dismissed this line of reasoning in *Plyler*,<sup>205</sup> although not as clearly as did Judge Kawaichi.

As the Court did in *Plyler*,<sup>206</sup> Judge Kawaichi found education to be more than a minimal interest requiring a mere rational relationship.<sup>207</sup> Noting the "importance of [public] higher education in California,"<sup>208</sup> he stated that applied heightened scrutiny as the appropriate standard.<sup>209</sup> The judge, however, did not find it necessary to apply the elevated standard, because he found that the policy did not serve any rational government basis whatsoever.<sup>210</sup> Unlike the Attorney General's Opinion, which did not even attempt to mount a constitutional justification for its result,<sup>211</sup> Judge Kawaichi showed a sophisticated grasp of immigration law relative to student residency issues. He discerned that not all undocumented aliens are similarly situated. For example, during the trial one of the plaintiffs was in the process of becoming a permanent resident.<sup>212</sup> In fact, several of the undocumented students became eligible to apply for permanent resident status and were not subject to deportation.<sup>213</sup>

Judge Kawaichi pointed to the difficulty in employing federal immigration residency laws as criteria for determining students' domiciles:

The policies underlying the immigration laws and regulations are vastly different from those relating to residency for student fee purposes. The two systems are totally unrelated for purposes of administration, enforcement and legal analysis. The use of unrelated policies, statutes, regulations or case law from one system to govern portions of the other is irrational. The

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204. *Id.*

205. *Plyler*, 457 U.S. at 227 n.22.

206. "In sum, education has a fundamental role in maintaining the fabric of our society." *Plyler*, 457 U.S. at 221.

207. *Leticia "A" I*, No. 588982-4, slip op. at 4.

208. *Id.* at 8.

209. *Id.* (Emphasis deleted from original.)

210. *Id.* at 5.

211. 67 Op. Cal. Att'y Gen. 241 n. 11. In footnote 11, the Attorney General's Opinion notes, "It is possible that this interpretation of the statute raises constitutional issues of equal protection. (See *Plyler*, 457 U.S. 202.) We have not been asked and have not considered such questions." *Id.*

212. *Leticia "A,"* No. 588982-4, slip op. at 9.

213. *Id.* Several of the original plaintiffs, including Leticia "A," had changed their status during the course of the litigation. The original eight plaintiffs thereby shrank to four. By 1993, all had adjusted their status by one or another means. Telephone interviews with Multicultural Education, Training, and Advocacy (META) and Mexican American Legal Defense and Educational Fund (MALDEF) staff in San Francisco, CA (October 12, 1993).

incorporation of policies governing adjustment of status of undocumented aliens into regulations and administration of a system for determining residence for student fee purposes is neither logical nor rational.<sup>214</sup>

Under this reasoning, it would be a difficult legislative task for a state to track federal immigration law for purposes of student residency requirements, without violating principles of Equal Protection or Preemption.<sup>215</sup>

*Plyler*, *Toll*, and *Leticia "A"* all seemed to erode states' ability to employ federal immigration criteria irrebuttably to their postsecondary residency determinations. However, in an unusual resuscitation of the issue in California, an employee of the University of California at Los Angeles (UCLA) refused to administer the residency policy, claiming it was encouraging illegal immigration, and then filed a taxpayer suit challenging the position in *Bradford v. Board of Regents of the University of California (Bradford I)*.<sup>216</sup> Bradford asserted that the California Attorney General's opinion overruled in *Leticia "A"* was correct and that the Education Code residency provision struck down by *Leticia "A"* should be considered valid.<sup>217</sup> To do so would restore the state provision that had provoked the *Leticia "A"* case and would make it impossible for undocumented students to be considered California "residents" for tuition purposes.

By this time, state higher education officials had become converts to Judge Kawaichi's ruling. The state and the universities had not appealed his 1985 ruling and had since decided that some of the alien students deserved to be considered as residents, provided they met all the other tests for in-state status.<sup>218</sup> For one thing, several undocumented students in state institutions did quite well in school and further, allowing the undocumented to declare residency had not loosed the floodgates: In a public postsecondary education system of several hundred thousand students, UC and CSU officials estimated fewer than 1000 students in the two systems were undocumented when ad-

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214. *Leticia "A" I*, No. 588982-4, slip op. at 9-10 (Apr. 3, 1985).

215. *Id.* at 10.

216. No. C607748, (Cal. Super. Ct., L.A. Cty. May 30, 1990), *aff'd sub nom*, Board of Regents of the Univ. of Cal. v. Superior Ct. (Bradford II), 276 Cal. Rptr. 197 (Cal. Ct. App. 1990), *rev. den.*, 1991 Cal. LEXIS 1367 (Cal. 1991). Bradford argued he had been forced to resign for his action, but the court held that he had "voluntarily quit his position" over the policy. Carol McGraw, *UC Worker Who Quit Over Fees Policy Loses Bid to Get Job Back*, L.A. TIMES, Aug. 29, 1990, at B3.

217. *Id.* (citing CAL. EDUC. CODE § 68062(h) (West 1995)).

218. Brief for Appellant at 12-13, *Leticia "A,"* No. 588982-2; interviews with CSU legal staff (July 11, 1992) (discussing the CSU's long-standing policy of allowing undocumented to establish domicile, dating back to 1985) (identities withheld upon request).

mitted, fewer than one half of one percent of the total enrollment.<sup>219</sup> One San Diego study, the city closest to the border, estimated that only 80-90 of the 35,000 students in the San Diego campus of CSU, and only one student at the new CSU-San Marcos campus, were undocumented.<sup>220</sup> Even the open door community college system estimated that fewer than 1% of their 1.5 million students were undocumented.<sup>221</sup>

Even so, on May 30, 1990, the Los Angeles County Superior Court ruled against UCLA and in favor of Bradford.<sup>222</sup> The court ruled that the original Education Code provisions (pre-*Leticia "A"*) were constitutional and that the state was required to charge the aliens nonresident tuition, since they did not have the legal capacity to establish domicile, as required by the Code.<sup>223</sup>

With this ruling, the public colleges attempted a new tactic, seeking to dismiss the action or to have it transferred to Alameda County, where Judge Kawaichi sat, in effect, to consolidate it with *Leticia "A."*<sup>224</sup> Judge David Yaffe denied both the motion to dismiss and to transfer the case, and scolded the University for its tactics:

You have this action pending in this court. You litigate it through to a decision against you, and then, at that point, you claim that the court should yield its jurisdiction because there's another action that is still pending, in essence, up in Alameda County . . . . It doesn't seem to me that there is any sound rule of judicial policy that would permit a litigant to do that.<sup>225</sup>

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219. Larry Gordon, *Immigrants Face Cal State Fee Hike*, L.A. TIMES, Sept. 9, 1992, at A3, A20 (decision "could affect 800 of the 361,000 Cal State students"); Gary Libman, *Losing Out on a Dream?*, L.A. TIMES, Jan. 23, 1992, at E3, E11 ("The [Bradford] decision will affect only about 100 UC students but about 14,000 at state community colleges, officials estimate."). California public college students total over 2 million, including over 1.5 million in the community colleges. Fonseca & Andrews, *supra* note 28.

220. AUDITOR GENERAL OF CALIFORNIA, A FISCAL IMPACT ANALYSIS OF UNDOCUMENTED IMMIGRANTS RESIDING IN SAN DIEGO COUNTY 119-20 (1992) [hereinafter SAN DIEGO STUDY]. The report did not estimate the undocumented students in the UC or community colleges in San Diego County, because those students were being required to pay out-of-state tuition. *Id.* at 120.

221. Gordon, *supra* note 219, at A3 (estimating that only 14,000 of 1.5 million CCC students were undocumented). MALDEF officials have insisted that even these numbers overestimate the true enrollment, as most undocumented students cannot afford to pay either in-state or out-of-state tuition and are hesitant to enroll in college, possibly subjecting themselves to detection by the INS.

222. No. C607748 (Cal. Super. Ct., L.A. Cty. May 30, 1990) (David P. Yaffe, J.), cited in *Bradford II*, 276 Cal. Rptr. 197, 199 (Cal. Ct. App. 1990). All references to the *Bradford I* opinion are as they are cited in *Bradford II*.

223. *Id.*

224. *Bradford II*, 276 Cal. Rptr. at 199.

225. *Id.*

At that point, the University was in for a penny, in for a pound. They had brought in outside counsel to assist, and filed a writ of mandate in an attempt to reverse Judge Yaffe's original ruling that found for Bradford and his subsequent denial of the motions to dismiss and transfer.<sup>226</sup> The appellate court upheld the trial judge's opinion, finding that he had not abused his discretion in refusing to transfer and consolidate *Bradford* with *Leticia "A"* in Alameda County.<sup>227</sup> In addition, the appellate court held that the original section 68062(h) properly excluded undocumented students from becoming in-state residents for tuition purposes and that the statute was constitutional.<sup>228</sup>

In the meantime, Judge Kawaichi was petitioned by the original *Leticia "A"* plaintiffs to reconsider his decision and order, in light of the competing *Bradford* Superior Court decision.<sup>229</sup> He issued a modified holding, retaining jurisdiction and affirming his original decision which struck down Sec. 68062(h).<sup>230</sup> Despite Judge Kawaichi's ruling,<sup>231</sup> however, both parties found themselves mousetrapped: Because the original defendant had not appealed the judge's 1985 decision, neither party had an appellate decision on which to rely. By this time, the institutions had come to see the issue as one where they could accommodate the wishes of the original undocumented plaintiffs. However, with the ostensibly competing decisions, the state institutions did not wish to be whipsawed on this issue, especially when they were being criticized for management practices and were bracing for financial cutbacks.<sup>232</sup>

The conflict between the two cases was finally addressed by a collateral taxpayer case, *American Association of Women (AAW) v. Cali-*

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226. *Id.* See also interviews with California State University legal staff, Long Beach, CA (June, 1992).

227. *Id.* at 200.

228. *Id.* at 201-02.

229. *Leticia "A" II*, No. 588982-4 (May 19, 1992) (as clarified).

230. *Id.* Judge Kawaichi ordered that the CSU be enjoined from denying in state residency benefits "to persons solely on the basis of their undocumented immigration status . . ." *Id.* He also reiterated his earlier ruling that the undocumented students "shall be afforded a full and fair opportunity to demonstrate the *bona fides* [sic] of their residency." *Id.*

231. I and others encouraged the then CSU chancellor Dr. W. Ann Reynolds not to appeal the 1985 ruling, but to begin enrolling the students who were otherwise eligible to attend. During the pendency of the *Leticia "A"* litigation, UC officials did not charge nonresident tuition to the plaintiffs or others in their same status. Interview with Dr. W. Ann Reynolds, CSU Chancellor, in Long Beach, CA (1985).

232. See, e.g., *infra* note 235.

for *nia State University*.<sup>233</sup> The Federation for American Immigration Reform (FAIR), an immigration restrictionist group, brought the suit to force the state's hand on this issue.<sup>234</sup> In *AAW*, Judge Robert O'Brien of the Los Angeles County Superior Court considered the discrepancies between *Leticia "A"*, as clarified, and *Bradford*, and decided there were no conflicts.<sup>235</sup> He held that Judge Kawaichi's "clarification" constituted a substantive shift in the holding:

Unlike the original injunction the *Leticia "A"* clarification no longer requires CSU automatically to treat undocumented students the same as U.S. citizens. Thus, although the trial court does not specifically follow the law established by *Bradford*, it has tempered its original holding so that it in effect gives credence to *Bradford*, as well as the process required by Section 68062(h).<sup>236</sup>

By creating a distinction without a difference, Judge O'Brien found that the modified *Leticia "A"* decision was *res judicata*, completely tried and determined on its merits and that there was no "substantial identity of parties or those who are in privity with a party."<sup>237</sup> Judge O'Brien held that *Bradford* was "the only relevant California appellate court decision, [and] controls this case on the legal issues involved."<sup>238</sup> Finally, he enjoined the CSU system "from violating Education Code sections 68050 and 68062(h) or from treating undocumented aliens as residents, for purposes of tuition, without first estab-

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233. American Ass'n. of Women (AAW) v. Board of Trustees of the Cal. St. Univ., No. BC061221, slip op. at 7 (Cal. Super. Ct., L.A. Cty. Sept. 28, 1992), *aff'd* 38 Cal. Rptr. 2d 15 (Cal. Ct. App. 1995). By this time, Dr. Barry Munitz was Chancellor of the CSU system. I and others urged him not to appeal Judge Kawaichi's clarification. CSU also chose not to appeal *Leticia "A" II*.

234. *Id.* at 1.

235. *Id.* at 6-7. Essentially, Judge O'Brien held that because the CSU had not appealed the original *Leticia "A"* ruling to an appellate court, the appellate *Bradford* decision should trump the trial court. *Id.* at 7. At the time the *Leticia "A" II* and *AAW* cases were occurring, the UC was in the papers on a regular basis for the exorbitant retirement package paid the retiring UC President, and for pending cuts in the UC proposed state budget. For a small sampling of the negative press stories, see a series of articles by Louis Freedberg in the San Francisco Chronicle: *UC Retirement Deal for Gardner Assailed*, S.F. CHRON., Apr. 3, 1992, at A1; *How UC Regents Tried to Downplay the Gardner Deal*, S.F. CHRON., Apr. 16, 1992, at A1; *Gardner Successor Gets Similar Pay Package, UC Compensation Over \$400,000 a Year*, S.F. CHRON., July 30, 1992; *Gardner Leaves UC With Plan to Close Huge Budget Gap*, S.F. CHRON., Sept. 19, 1992, at A1. See also, Debra Saunders, *Fat Left to Trim on Wilson's Plate*, S.F. CHRON., Nov. 2, 1992, at A14.

236. *AAW*, No. BC061221, slip op. at 9.

237. *Id.* at 7, 8 ("Bradford has cast a different light on CSU's process and Section 68062(h) which should be decided at the appellate level . . . [and] *Leticia 'A'* is essentially a finished case with different parties and a different threshold issue relating to Section 62062(h)" [*sic*]).

238. *Id.* at 9.



lishing them as such in accordance with Education Code section 68062(h).<sup>239</sup>

At this point, the UC considered itself bound by *Bradford*,<sup>240</sup> while the CSU System appealed *Leticia "A" I*, as modified, in order to have an appellate court resolution of the conflict.<sup>241</sup> Thus, in Summer 1994, undocumented students were able to establish residency for CSU purposes, but not for the UC or the 110 public CCC campuses.

*Leticia "A"* is quintessentially a residency dispute, since it turns on factual findings of *intent*: *Bradford* and *AAW* hold that the undocumented cannot establish the requisite intent,<sup>242</sup> while *Leticia "A"* holds that they are not prevented from establishing residence.<sup>243</sup> Judge Kawaichi's holding in *Leticia "A"* and its clarification, is clearly the more correct of the two competing versions for two reasons: First, *Bradford* and *AAW* misrepresented the elements of domicile and residence, and second, neither opinion carefully distinguished among the different types of undocumented alienage, including those who are able to establish domicile in the state.

For example, the *Bradford* appellate court inverts the Education Code's statutory language by requiring undocumented aliens to prove they *are permitted* to adjust their status.<sup>244</sup> The court deftly reversed the burden set out under the statute, which affirms aliens' rights to establish residence unless they are specifically not allowed to do so.<sup>245</sup> To slip this knot, the *Bradford* court mocked the University's argument as "Daedalian but unpersuasive" and as "senseless."<sup>246</sup> Further, by equating the acts of "not precluding" with "authorizing," the court ignored the precedent of *Toll*, where the U.S. Supreme Court had certified the question of whether Maryland state law enabled long term nonimmigrant employees' children to establish domicile for post-secondary tuition purposes.<sup>247</sup> By requiring the state court to answer

239. *Id.*

240. Telephone interview with UC legal office (January 10, 1993) (identities withheld upon request).

241. *Id.* at 9.

242. *Bradford II*, 276 Cal. Rptr at 200-01; *AAW*, No. BC061221, slip op. at 4-6.

243. *Leticia "A" II*, No. 588982-4, slip op. at 18 (May 19, 1992).

244. *Bradford II*, 276 Cal. Rptr. at 201 ("We do not interpret the federal immigration statutes, therefore, as *authorizing, or not precluding*, the establishment of domicile here by those whose very presence is unlawful.") (emphasis added).

245. CAL. EDUC. CODE § 68062(h) (West 1995). ("An alien, including an unmarried minor alien, may establish his or residence, *unless precluded* by the Immigration and Nationality Act from establishing domicile in the United States" (emphasis added; citations omitted)).

246. *Bradford II*, 276 Cal. Rptr. at 200-01.

247. *Toll v. Moreno*, 435 U.S. 647 (1978).

this technical question, it is clear that the Supreme Court envisions the acquisition of postsecondary residency as a matter of *state* law, not federal statute. If, as in California, the controlling state statute incorporates a federal classification (“unless precluded by the INA”), a state court cannot invert the statute’s presumption so as to defeat an alien’s ability to establish domicile under state law.<sup>248</sup>

This error then enabled the *Bradford* court to misapply California law concerning residency. In *Cabral v. State Board of Control*,<sup>249</sup> a California appellate court held that undocumented aliens are state “residents” for purposes of establishing standing for state benefits. The *Bradford* court held that *Cabral* was not controlling because it “arose under a statute which contain[ed] no definition of the term ‘resident.’”<sup>250</sup> However, the court misapplied the *Toll* test for interpreting California Education Code 68062(h),<sup>251</sup> by acting as if federal law controlled for one purpose (i.e., finding that congressional language was “unremarkable” but controlling)<sup>252</sup> while state law controlled for another (i.e., the existence of a state residence statute distinguished what would have otherwise been a controlling construction of state domicile).<sup>253</sup>

Moreover, even if federal law were controlling for determination of domicile purposes, the *Bradford* and *AAW* courts misunderstood the extent to which the INA enables and in some cases requires domicile in the United States for long-term undocumented aliens who eventually apply for the various forms of relief from deportation. First, once aliens *enter* the United States, either surreptitiously or through actions that render them out of legal status, they may be removed only through an elaborate proceeding of deportation, where the government has the burden of proof by “clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.”<sup>254</sup> The Supreme Court has further held that this standard

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248. See *Elkins v. Moreno*, 435 U.S. 647, 668-69 (1978) (G-4 holders can be U.S. domiciliaries).

249. *Cabral v. State Bd. of Control*, 169 Cal. Rptr. 604 (Cal. Ct. App. 1980) (undocumented can establish California residency for purposes of state Victims of Violent Crimes Act standing).

250. *Bradford II*, 276 Cal. Rptr. at 201.

251. See *supra* notes 149-191 and accompanying text.

252. *Bradford II*, 276 Cal. Rptr. at 201.

253. In the *Toll* case’s earlier incarnation, *Elkins v. Moreno*, 397 A.2d 1009 (Md. 1979), the Maryland court certified that under state law G-4 aliens were able to acquire and demonstrate domicile. *Id.* at 1019.

254. In *Plyler*, the Court held that the undocumented “might be granted federal permission to continue to reside in this country, or even to become a citizen . . . [and enjoy] an inchoate federal permission to remain.” 457 U.S. at 226. In addition, the Court struck

“applies to all deportation cases, regardless of the length of time the alien has resided in this country.”<sup>255</sup> Additionally, several statutory means of gaining legal status are available only to long-term undocumented residents, as is an array of discretionary reliefs from deportation. For example, suspension of deportation, the relief provision at issue in *INS v. Chadha*,<sup>256</sup> requires “a continuous period of not less than seven years immediately preceding the date of such application,”<sup>257</sup> while registry provisions are available only to undocumented persons who entered the U.S. before January 1, 1972 and have resided in the United States “continuously since such entry.”<sup>258</sup> In both of these situations, statutes and practice have evolved to ensure that the aliens had established residence in the United States and *had not* maintained domicile elsewhere or even physically left the country for more than brief periods of time.<sup>259</sup> Federal immigration law contemplates relief for long-term residents, but only for those who remain in

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down the Texas statute that functionally resembled the California provision, noting, “A State may not, however, accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group as nonresident. And illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State.” *Id.* at 227 n.22.

255. *Woodby v. INS*, 385 U.S. 276, 286 n.19 (1966).

256. 462 U.S. 919 (1983) (finding that legislative veto provisions violated separation of powers).

257. 8 U.S.C.A. § 1254(a)(1) (West 1995). In *INS v. Phinpathya*, 464 U.S. 183 (1984), the Court upheld the strict residence requirements, even though the holding meant that a three month absence constituted ineligibility for suspension of deportation. This harsh result led to the Fifth Circuit denying suspension to an alien who had resided in the United States for twelve consecutive years, minus one night. *Sanchez-Dominguez v. INS*, 780 F.2d 1203 (5th Cir. 1986). Congress in turn decided that the “continuous” standard was being construed too literally, and amended section 1254 to enable aliens to have “brief, casual and innocent” absences, as long as they “did not *meaningfully interrupt* the continuous physical presence.” 8 U.S.C.A. § 1254(b)(2) (West 1995). In short, it is clear that Congress not only assumes that domicile can be acquired by deportable aliens, but *requires* that domicile be established in the United States for these adjustments or reliefs from deportation.

258. 8 U.S.C.A. § 1259 (West 1995). The 1972 cutoff date was established by IRCA. Unlike the other “legalization” provisions, registry enables the alien to become a permanent resident immediately without the intermediate “Temporary Resident Status.” 8 U.S.C.A. § 1255a (West 1995).

259. Suspension of deportation and registry provisions are two excellent devices to regularize the status of an otherwise deportable alien, but they are by no means the only such provisions. For several excellent textbook treatments of reliefs from deportation, see ALEXANDER ALEINIKOFF AND DAVID MARTIN, *IMMIGRATION PROCESS AND POLICY* 597-688 (2d ed. 1991); STEPHEN LEGOMSKY, *IMMIGRATION LAW AND POLICY* 515-605 (1992); RICHARD BOSWELL AND GILBERT CARRASCO, *IMMIGRATION AND NATIONALITY LAW* 517-89 (2d ed. 1991).

the country in uninterrupted fashion.<sup>260</sup> Thus, *Bradford* and *AAW* misconstrue federal law concerning undocumented domicile as well as California state law determining residence.

In its most recent undocumented student case, *Martinez v. Bynum*,<sup>261</sup> the U.S. Supreme Court affirmed *Plyler*, upholding a post-*Plyler* Texas statute<sup>262</sup> as applied, in which undocumented Mexican parents could establish residence only if the children were not residing in a Texas school district primarily for the purpose of attending school.<sup>263</sup>

In order for the undocumented students in *Leticia "A"* to be denied residency under the *Martinez* rationale, they would have had to enter surreptitiously in order to attend college or, in the alternative, would have had to have nonimmigrant status as students and then done something in violation of their visa requirements (e.g., holding unauthorized employment while in student status).<sup>264</sup> However, the record makes it clear that the plaintiff students in *Leticia "A"* were long-term residents that had graduated from California high schools, a number of whom had become permanent residents during the course of the trial.<sup>265</sup> Furthermore, there is no indication that higher education is a factor in attracting illegal entry to the country and every indi-

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260. *Castillo-Felix v. INS*, 601 F.2d 459, 464 (9th Cir. 1979) ("To establish domicile, aliens must not only be physically present here, but must intend to remain"); *Lok v. INS*, 681 F.2d 107, 109 (2d Cir. 1982) (finding undocumented alien established domicile "when he established an intent to remain") (citations omitted).

261. 461 U.S. 321 (1983).

262. TEX. EDUC. CODE ANN. § 21.031 (Vernon's 1995).

263. *Martinez*, 461 U.S. 321 (holding that Texas could charge tuition to alien children if families were not domiciled in the State). See also *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980) (eligibility for suspension of deportation requires establishment of domicile in U.S.).

264. The various forms of relief do not distinguish among the various forms of becoming undocumented. For example, under INA § 212 (c), 8 U.S.C. § 1182(c), relief would be available to undocumented aliens whether they entered illegally under their own power, were brought here illegally by their parents, or entered as a nonimmigrant and then did something to violate the terms of their visa (e.g., switching schools without permission or not maintaining full time student status). While this argument exceeds the scope of this article, it seems clear that the greatest moral and legal claims to equitable relief can be made by aliens whose parents surreptitiously brought them into the country. The children in this example have the domicile of their parents (or custodial parent, if only one), and once they reach majority age, can establish their own independent domicile through operation of law. Thus, if there is a "clean hands" argument to be made either in court or a legislature, these children are innocent of any illegal entry. *Plyler* mooted this point, in any event. 457 U.S. at 228-30 (striking down state's rationales for regulating immigration).

265. *Leticia "A" II*, No. 588982-4, slip op. at 4-5.

cation that the aliens intended to reside in the United States.<sup>266</sup> This intention, combined with actual presence, constitutes residence or domicile in California.

That federal law does not preclude the undocumented from establishing domicile is clear from careful readings of *Plyer* and *Martinez*, as well as the INA provisions.<sup>267</sup> Even *Toll* appears to rule out such arbitrary residency requirements with regard to nonimmigrants: “we cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminating tuition charges and fees solely on account of the federal immigration classification.”<sup>268</sup>

As a final piece to this puzzle, the treatment of legalization benefits also suggests that federal law does not preclude aliens from establishing domicile under state laws that incorporate the INA. The *Bradford* appellate court attempted to trump the *Leticia “A”* analysis by arguing that even the generous amnesty to legalize the undocumented status of some aliens under IRCA did not contemplate generosity toward the undocumented:

Federal law, too, discriminates against undocumented aliens in the most basic way: it forbids their entry into the country and authorizes their arrest and deportation. Even undocumented aliens given preferred status under federal law — those authorized under the Immigration Reform and Control Act of 1986 to become lawful temporary residents and thereafter permanent residents — are disqualified for five years from most federal programs of financial assistance to the needy. If federal financial assistance may be withheld from newly legalized aliens who, under the 1986 amnesty law, ‘are to be welcomed as full and productive members of our nation,’ surely the state is not constitutionally required to subsidize the university education of other aliens who have never legalized their status.<sup>269</sup>

But the *Bradford* Court, in its pell-mell rush to close every door, got it wrong: IRCA does allow legalizing students to receive its benefits. The only public benefits legalizing aliens were entitled to during their probationary status were those considered most essential, and these specifically included access to the various college student financial aid provisions of the Higher Education Act of 1965. Moreover, the INS

266. Testimony of Dr. Leo Chavez, anthropology professor at UC Irvine, in *Leticia “A” I*, No. 588982-4, Transcript at 26-34; and *Leticia “A” II*, No. 588982-4, slip op. at 2-4 (children are brought to U.S. without any plans for them to enroll in college).

267. See *supra* notes 257-259.

268. *Toll*, 458 U.S. at 17.

269. *Bradford II*, 276 Cal. Rptr. at 201 (citations omitted).

promulgated 1994 guidelines, noting that no federal legislation had ever been enacted "that would permit states or state-owned [sic] institutions to refuse admission to undocumented aliens or to disclose their records" to the INS.<sup>270</sup> Thus, financial aid eligibility was available to these "welcomed" aliens. In their attempt to show otherwise, the appellate court misread the very benefits statute they were using to buttress their argument that federal law did not reference undocumented aliens.<sup>271</sup> In this light, it is not "senseless" but sensible and possible to interpret the California Education Code provision literally, and to find that undocumented aliens are not precluded from establishing residence.

#### IV. The Social Science of Alienage

This Part reviews the social science literature on residency determinations, research on alien students, and alien benefit studies. These areas pose significant research problems, as studying undocumented students presents unusual ethical and social science limitations.<sup>272</sup>

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270. 8 U.S.C.A. § 1255a(h) (West 1995). See generally NATIONAL IMMIGRATION LAW CENTER, GUIDE TO ELIGIBILITY FOR FEDERAL PROGRAMS 53 (1992); see also Calvo, *supra* note 134. The U.S. Department of Education has attempted to construe Title IV financial aid eligibility narrowly and has denied eligibility to aliens undergoing legalization in the Family Fairness Program/Family Unity Program (FUP), the scheme by which mixed undocumented, permanent resident/citizen families could stay together in the United States. Pub. L. No. 101-649, 104 Stat. 4978 (1990). Following a successful federal court challenge to this interpretation, the Department notified colleges that aliens being legalized under FUP who were beneficiaries of an INS approved "Immigrant Petition for Spouse or Relative" would be eligible to apply for Title IV funds. Gonzalez v. Wanda Gaines, No. 9-92CV12 (E.D. Tex. June 9, 1993); see also Dear Colleague Letter, Div. of Pol'y Dev., U.S. Dep't of Educ. (March 4, 1993) (on file with author).

271. *INS Issues Guidelines on School Approval Petitions*, INTER. REL. 347-48, 361-67 (March 14, 1994) (Revised INS School Approval Guidelines).

272. This growing body of work subdivides into two major areas, which I label for shorthand use, "how many are there/technical" and "how many are there/conceptual." The former includes issues of measurement error, population data, sampling techniques, and the like. For examples of this genre, see Vernon Briggs, *Methods of Analysis of Illegal Immigration into the United States*, 18 INT'L MIGR. REV. 623 (1984); Frank Bean, Hanley L. Brown, and W. Parker Frisbie, *The Sociodemographic Characteristics of Mexican Immigrant Status Groups: Implications for Studying Undocumented Mexicans*, 18 INT'L MIGR. REV. 672 (1984). While the two areas overlap, the latter body of research concentrates more upon the underlying legal definitions and conceptual issues, such as how statutes and regulations define these properties. Classic examples include Kristin Couper and Ulysses Santamaria, *An Elusive Concept: The Changing Definition of Illegal Immigrant in the Practice of Immigration Control in the United Kingdom*, 18 INT'L MIGR. REV. 437 (1984); MANUEL GARCIA Y GRIEGO, *EL VOLUMEN DE LA MIGRACION DE MEXICANOS NO DOCUMENTADOS A LOS ESTADOS UNIDOS: NUEVAS HYPOTESIS* (1979); Alejandro Portes, *Toward a Structural Analysis of Illegal (Undocumented) Immigration*, 12 INT'L MIGR. REV. 469 (1978).

Even the most obvious questions — such as how many undocumented aliens there are in the United States — are mixed social science and political questions.<sup>273</sup> There has been a long-standing history of overestimating the number of aliens for political purposes and “law enforcement” expediencies, and these questionable research findings often gain receptive public audiences and even traffic as authoritative “evidence” for judges in immigration cases.<sup>274</sup> Therefore, great scrutiny must be accorded any social science research that is used to buttress an immigration case or to establish the effect of undocumented immigration upon U.S. labor markets, public benefits, or social services. Not only are there technical difficulties in measurement, documentation, and survey research, but there are serious theoretical and cultural deficiencies in capturing both the migrants’ views and the receiving community’s attitudes about the sojourners in their midst.<sup>275</sup> For example, as the demographer Murray Chapman has noted,

One clear implication of all these [immigration] terms and distinctions is that the concept of internal migration only faintly captures the full meaning of territorial mobility . . . . The data from national censuses and regional surveys, the primary sources for migration analysis, fail to capture this circularity be-

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273. Daniel B. Levine, Kenneth Hill, and Robert Waner, *IMMIGRATION STATISTICS: A STORY OF NEGLECT* (1985).

274. See, e.g. Estevan Flores, *The Impact of Undocumented Migration on the U.S. Labor Market*, 5 HOUS. J. OF INT’L L. 287, 294-302 (reviewing uncritical acceptance by courts of flawed immigration studies). Flores reviews the flawed work of economist Donald Huddle, particularly his methodology in determining who was undocumented. His research stands in contrast to Julian Simon’s, *infra* note 355, and appears to overestimate services and costs. DONALD HUDDLE, *THE COSTS OF IMMIGRATION, EXECUTIVE SUMMARY* (1993) [hereinafter HUDDLE, COSTS]. For example, he does not provide data for his contention that immigrants (what he calls “legal immigrants”) cost \$2.11 billion in public higher education for 1992 alone. *Id.* at 9. He also assumes that bilingual education and “language deficiency instruction” costs (estimated to be \$1.07 billion in 1992) are attributable solely to the undocumented population. *Id.* at 10. For higher education participation rates, he averaged the San Diego County Study, see *supra* note 220, and L.A. County Study, see *supra* note 334, and assumed from the only metropolitan border county in the country (as Los Angeles County did not measure higher education) that the undocumented constituted 0.97% of the postsecondary population. He then extrapolated to the entire U.S. postsecondary population. HUDDLE, COSTS, *supra*, at 4-5 Exhibit 5. He also estimates that of “Legal Immigrants,” refugees, and asylees entering in 1992, a quarter (25.45%) of the college-aged attended postsecondary institutions and 7.3% received federal Pell Grants. *Id.* at 11-12. These figures, premised upon his re-calculation of San Diego’s data, are without support and are likely, inordinately high.

275. See, e.g., Portes, *supra* note 272 (reviewing problems of terminology and theory in immigration policy research).

cause they yield only cross-sectional snapshots of forms of behavior that are exceedingly sensitive to time . . . .<sup>276</sup>

And attitudes of the receiving community towards immigrants can fluctuate, either welcoming and integrating them into the community and polity, or blaming them for other unrelated economic ills. In a perceptive review of U.S. nativism in the U.S.-Mexico context, demographer Wayne A. Cornelius has written,

[if] surges of anti-Mexican nativism are viewed as a cyclical phenomenon — something that seems to happen at least once in a generation — it could be argued that the U.S. is now overdue for another such nativist spasm. The point is that the attitudes, perceptions, fears and prejudices that underlie such movements do not go away once the immediate stimulus of an economic recession or international reverse of some kind passes. They remain latent in the body politic, waiting to be tapped and manipulated by politicians and special interest groups that have no reservations about appealing to the baser instincts of their constituents. Indeed, we may be entering a period in which such appeals to nativism are increasingly respectable, because they can be cloaked in an aura of protecting our basic values as a society, the hard won living standards of the middle class, or even the national security.<sup>277</sup>

Cornelius, writing a decade ago, may have been anticipating the recent events which demonstrated the political expedience of demonizing undocumented aliens: the cynical manipulation of the war on drugs to justify the detention of unaccompanied refugee minors in dreadful, Dickensian conditions in INS detention facilities in Texas and California;<sup>278</sup> appeals to national security in the interdiction at sea of Haitian boat people desperately fleeing poverty and political oppression in their country;<sup>279</sup> and legislative proposals to make asylum claims more difficult to advance and easier to deny, enacted following

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276. Murray Chapman, *On the Cross-Cultural Study of Circulation*, 12 INT'L MIGR. REV. 559, 560 (1978).

277. Wayne A. Cornelius, *America in the Era of Limits: Migrants, or Nativists, and the Future of U.S.-Mexican Relations*, in MEXICAN-U.S. RELATIONS, CONFLICT, AND CONSEQUENCE 1373-74 (Vasquez and Garcia y Griego eds., 1983).

278. Michael A. Olivas, *Unaccompanied Refugee Children in the United States: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159 (1990) (examining shameful conditions of confinement for refugee children in INS custody); *but see* *Reno v. Flores*, 113 S. Ct. 1439 (1993) (allowing INS to continue custodial practices).

279. *Jean v. Nelson*, 472 U.S. 846 (1985) (holding that 11th Circuit should not have decided constitutional question of racial/national origin discrimination in treatment of Haitians). For an account of the Clinton Administration's disappointing handling of this matter, *see* Larry Rohter, *The Supreme Court: Rights Groups Fault Decision, As Do Haitians*, N.Y. TIMES, June 22, 1993, at A18.



the first domestic terrorist attack on U.S. soil, alleged to have been perpetrated by Islamic aliens.<sup>280</sup>

Against this background, the manipulation of social science data for advancing anti-immigrant arguments has reached fever pitch in the case made against the undocumented in the United States. This discourse, as I will note in the last section of Part IV, has dire consequences for the issue of undocumented college students.

The area of college residency determinations is in need of fresh insights, as no ethnographic study and few administrative law studies have emerged to shed light on the important role administrators play in interpreting residency rules and making residency determinations. The gap is considerable because significant redefinition and reinterpretation can occur between the enactment of statutes or promulgation of regulations, and the institutional determination of a student's residency status. As one knowledgeable scholar of residency practices noted, "most classification officers would be likely to stress that the difficulties of making either/or decisions in individual cases should not be underestimated."<sup>281</sup>

One scholar who has begun to examine the administrative law of residency determinations is Richard Padilla, who has written a doctoral dissertation and undertaken two studies on the discretionary aspects of residency.<sup>282</sup> In his 1989 study, Padilla asked registrars and residency officials in a state where all institutions were required to employ the same criteria and procedures to review twelve "cases" of student transcripts, applications, and residency information.<sup>283</sup> Even using a very carefully controlled interview protocol, he could not get

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280. Mary Tabor, *Specter of Terror: U.S. Indicts Egyptian Cleric as Head of Group Plotting "War of Urban Terrorism,"* N.Y. TIMES, August 26, 1993, at A1 (immigration issues in 1993 World Trade Center bombing). Another myth involves the criminal proclivities of aliens. In 1992, for example, the alien prison population in California was 10.4%, less than the state's 15% alien population and many of the aliens were in prison on immigration-related charges. John Miller, *Immigrant-Bashing's Latest Falsehood,* WALL ST. J., Mar. 8, 1994, at A14.

281. CARBONE, BORDERS, *supra* note 40, at 8.

282. Richard Padilla, *Residency Classification in Texas Colleges: The Application of Complex Legislation to the Complex Circumstances of Students* (1988) (unpublished Ph.D. dissertation, University of Houston) (on file with author); Richard Padilla, *Postsecondary Residency Classification: The Application of Complex Legislation to the Complex Circumstances of Students*, University of Houston, Institute for Higher Education Law and Governance, Monograph 89-6 (1989) [hereinafter Padilla, 1989 Study]; Richard Padilla, *Immigration Status and Residency Determination for Tuition Purposes*, University of Houston, Institute for Higher Education Law and Governance, Monograph 91-4 (1991) [hereinafter Padilla, 1991 Study].

283. Padilla, 1989 Study, *supra* note 282. The application packages resembled those traditionally reviewed by the officials.

all the administrators to agree on any of the cases, except one in which all would have denied residency status.<sup>284</sup> In five of the twelve cases, no majority could conclusively agree on whether to deny or grant residency.<sup>285</sup>

Most tellingly, the administrators split 5-4 on the case of a student who had been granted political asylum in the United States. In the case facts, the student had been in the state for six months as an applicant for asylum, and an additional eight months after he had received formal asylum status.<sup>286</sup> Under the state's law, he was clearly entitled to be treated as a resident student.<sup>287</sup>

In two other hypotheticals, facts were given for undocumented students. In one hypothetical, the student was brought surreptitiously into the country as a child.<sup>288</sup> In the other, the individual had had student status on an F-1 visa but had left school several years before in violation of the terms of his visa, and a second student had lived and worked in the state for six years since leaving school and owned a home in the state.<sup>289</sup> When polled on these hypothetical cases, two officials voted nonresident for the former, and seven would have requested more information, while for the latter, seven voted nonresident and two would have sought additional information.<sup>290</sup> In neither case did any official agree to grant residency status to the undocumented students, even though the state law concerning undocumented college students is vague enough to permit the granting of residency. Virtually all the registrars considered the undocumented students to be "foreign students," even though in the first case, the facts would likely not permit the applicant to obtain "residency" in his former "home" country.<sup>291</sup> These students may have been nonresidents, but they were certainly not foreign students.

These cases point to another complexity, that of the variegations of "foreign students," ranging from the more traditional F-visa holder to other immigrant and nonimmigrant visa categories. In Texas, the state where Padilla conducted his studies, the state specifies the possibility of obtaining residency for foreign students who hold visas with

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284. *Id.* at 11 Table 2.

285. *Id.*

286. *Id.*

287. TEX. EDUC. CODE § 54.057(a) (West Supp. 1995), as applied by the Texas Higher Education Coordinating Board, RULES AND REGULATION: RESIDENCE STATUS (1991).

288. Padilla, 1989 Study, *supra* note 282, at 11 Table 2, 18.

289. *Id.* at 18.

290. *Id.*

291. *Id.* at 11 Table 2.

A-1 or A-2 (diplomatic),<sup>292</sup> G-1, G-2, G-3, G-4 (treaty organization),<sup>293</sup> K (finances or fiancées),<sup>294</sup> and OP-1 (qualified immigrants from underrepresented countries) classifications,<sup>295</sup> as well as those who have been classified as refugees,<sup>296</sup> asylees,<sup>297</sup> parolees,<sup>298</sup> conditional permanent residents,<sup>299</sup> or temporary residents (i.e., undergoing amnesty under IRCA).<sup>300</sup> In addition, there is a special provision for aliens who are part of NATO forces<sup>301</sup> and a reciprocity agreement for Mexican nationals who reside in Mexican border states to attend Texas colleges in border counties and to pay in-state tuition.<sup>302</sup> Moreover, these provisions are not unique to Texas: a 1986 study of residency exemptions found more than seventy different alienage provisions in the fifty states and the District of Columbia.<sup>303</sup> As an additional twist, public institutions in fifteen states each devise their own residency criteria, including alienage requirements.

Moreover, it is not always clear who is undocumented and who may be eligible for a more permanent category or adjustment of status. *Leticia "A"* and her colleagues eventually adjusted to become permanent residents.<sup>304</sup> The INA is full of safe havens, exceptions, loopholes, and interstices that may render yesterday's undocumented alien today's permanent resident or citizen. These categories and opportunities exist quite apart from any legislative or executive amnesty provisions.<sup>305</sup> For example, Chinese students in the United States re-

292. 8 U.S.C. § 1101(a)(15)(A) (1995).

293. 8 U.S.C. § 1101(a)(15)(G) (1995).

294. 8 U.S.C. § 1101(a)(15)(K) (1995).

295. 8 U.S.C. § 1153 (1995).

296. 8 U.S.C. § 1101(a) (1995).

297. 8 U.S.C. § 101, 1158 (1995).

298. 8 U.S.C. § 1182 (1995).

299. 8 U.S.C. § 1255(a)-(h) (1995).

300. 8 U.S.C. § 1101(a)(15)(K) (1995).

301. TEX. EDUC. CODE ANN. § 54.057(b) (West Supp. 1995).

302. TEX. EDUC. CODE ANN. § 54.060 (West Supp. 1995).

303. Olivas, *Postsecondary Requirements*, *supra* note 58.

304. *Leticia "A" II*, No. 588982-4, slip op. at 4-5.

305. For example, the collapse of the Soviet Union has prompted several statutory schemes for accommodating Soviet scientists and other highly desirable aliens. See Lautenberg Amendment, Pub. L. No. 102-511, 106 Stat. 3349 (1992) and the Commonwealth and Baltic Scientists Immigration and Exchange Act of 1992, Pub. L. No. 102-509, 106 Stat. 3317 (1992). I do recognize that there is disagreement on the extent to which the undocumented can establish domicile. See, e.g., Nadine Wettstein, *Lawful Domicile For Purposes of INA § 212 (c): Can It Begin with Temporary Residence?*, INTER. REL., Sept. 26, 1994, at 1273. However, she and others she cites do not address *Plyler's* footnote 22, which appears to allow domicile. *Plyler*, 457 U.S. at 227 n. 22.

ceived a gift in the form of the Chinese Student Protection Act.<sup>306</sup> To paraphrase Tolstoy, not all the undocumented are alike, and each may be unique in a different way. The length of time in the United States is an important criterion of eligibility for a number of these reclassifications, and, according to the *Plyler* Court, many undocumented aliens may have "inchoate permission" to remain in this country, virtually forever.<sup>307</sup>

In order to measure the change in residency practices triggered by the IRCA amnesty legislation and other immigration statutes and regulations, Padilla readministered his case study portfolios in 1991 to registrars at the same nine Texas public colleges he had surveyed earlier.<sup>308</sup> His respondents included five of the same subjects and three new ones.<sup>309</sup> One was unable to participate.<sup>310</sup> Padilla's findings further revealed the confusion and imprecision inherent in making discretionary judgments on complex evidence and unclear categories.

Four of the five original respondents reversed course concerning the asylum-seeker applicant in the follow-up study, but there was still no consensus on whether or not he would be eligible for resident status.<sup>311</sup> This was all the more surprising because, as Padilla notes, the Texas Attorney General's office had since issued an opinion indicating that a student with these facts clearly was eligible for residency reclassification.<sup>312</sup> In the two hypothetical cases involving undocumented students, one brought to the country as a child by his parents and another who violated the terms of his original student status, the respondents again overwhelmingly indicated they would not reclassify them as residents.<sup>313</sup> Indeed, in extramural remarks, two respondents emphatically indicated that they would report the latter student to the INS, despite no obligation to do so, and that they would not admit him even as a nonresident, international student.<sup>314</sup>

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306. Pub. L. No. 102-404, 106 Stat. 1971 (1992). For an analysis of the events leading up to the statute, see Jean LaRocque, *The Pro-Democracy Movement in the People's Republic of China and Its Immigration Implications for Chinese Students in the United States*, 9 WIS. INT'L L.J. 257 (1991).

307. *Plyler*, 457 U.S. at 226 ("It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.")

308. Padilla, 1991 Study, *supra* note 282, at 6-7.

309. *Id.* at 8.

310. *Id.*

311. *Id.* at 8-9.

312. *Id.* at 18-19 (citing 1985 Tex. AG LEXIS 56).

313. Padilla, 1991 Study, *supra* note 282, at 14-16.

314. *Id.* at 15.

Padilla again found substantial disagreement among the respondents on the issue of when resident "clocks" began to toll. He concluded:

[T]here can be little doubt that immigration status has a direct impact on the practice of residency determination for tuition purposes. The complex circumstances of students are made even harder to understand and interpret when viewed through the two hazy windows of immigration and the residency laws, rules, and regulations. Consequently, similarly situated students receive inconsistent residency classifications.<sup>315</sup>

These are important findings, which reveal the inconsistencies in administering postsecondary residency, make the attempt to restrict the flow of undocumented college students as "ludicrously ineffectual"<sup>316</sup> as the Texas efforts had been in controlling undocumented alien children's immigration in *Plyler*. *AAW's* reasoning also flies in the face of this practicality test: it, like *Bradford*, ignores the administrative aspects of establishing domicile.<sup>317</sup>

In a more recent study, a Houston demographer, Nestor P. Rodriguez, confirmed the earlier findings by Padilla.<sup>318</sup> Of the twelve Houston-area colleges surveyed, admissions officials from only one institution acknowledged a practice of admitting undocumented students, and then only if they paid international student fees.<sup>319</sup>

315. *Id.* at 17.

316. *Plyler*, 457 U.S. at 228 ("[c]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration." (quoting *Plyler v. Doe*, 458 F. Supp. 569, 585 (1978)).

317. For example, Judge O'Brien misreads *Leticia "A" II* as *not* being in conflict with *Bradford II*, because Judge Kawaichi modified his *Leticia "A" I* holding. Judge O'Brien stated: "Unlike the original injunction, the *Leticia "A"* clarification no longer requires CSU automatically to treat undocumented students the same as U.S. citizens. Thus, although the trial court does not specifically follow the law established by *Bradford*, it has tempered its original holding so that it in effect gives credence to *Bradford*, as well as the process required by Section 68062(h)." *AAW*, No. BC061221, slip op. at 6 (citations omitted). This is completely wrong, both because the "automatic" language is a false issue, and because *Leticia "A" II* cannot be read as "giv[ing] credence" to *Bradford I* or *Bradford II*. *Bradford II* holds that the undocumented cannot become residents, 276 Cal. Rptr. at 201, while both *Leticia "A"* opinions hold that they can become residents. *Leticia "A" I*, No. 588982-4, slip op. at 10 (Apr. 3, 1985); *Leticia "A" II*, No. 588982-4, slip op. at 18. This is an extraordinary misreading of Judge Kawaichi's clear language in both opinions.

318. Nestor P. Rodriguez, *Undocumented Immigrant Students and Higher Education: A Houston Study*, University of Houston, Institute for Higher Education Law and Governance, Monograph 90-10 4 (1990).

319. See Rodriguez, *supra* note 318, at 47. This finding may be due to fear of disclosure, as I have personal knowledge of undocumented students attending at least five Houston colleges, public and private. See also Nestor P. Rodriguez, *Economic Restructuring and Latino Growth in Houston*, in *IN THE BARRIOS, LATINOS AND THE UNDERCLASS DEBATE* 101, (Joan Moore & Raquel Pinderhughes eds., 1993) (noting the role of Latinos in Hous-

Rodriguez found the same inconsistencies as had Padilla, and even probed within institution discrepancies:

Interestingly, in two universities where upper- and mid-level administrators had indicated earlier that they would be receptive to undocumented students, lower-level staff contacted by the study responded they would exclude undocumented students. The lower-level staff were ignorant of upper-level decisions. In one of the two cases, an admissions office worker indicated that his response to applicants seeking admission varied by the characteristics of the applicants. The office worker simply directed applicants who 'look immigrant' or spoke with a marked accent to the admissions office for international students. Hispanics and Asians were usually the applicants sent by the office worker to the international student admissions office.<sup>320</sup>

The practice employed by this worker resembles discriminatory hiring practices, such as those prohibited by the IRCA.<sup>321</sup> Nor does this worker's action appear to be an isolated occurrence. In a 1990 Government Accounting Office study, nearly 20% of the employers surveyed conceded they had discriminated against job applicants or employees either by engaging in illegal national origin discriminatory practices or by deliberately not hiring "foreign-appearing" or "foreign-sounding" job applicants — even if the applicants had employment authorization documents or were otherwise eligible to work in the United States.<sup>322</sup>

The Rodriguez study also uncovered enrollment inconsistencies, depending upon the funding sources of the programs. Area colleges, particularly community colleges, enrolled students without regard to their citizenship status in federally and state-funded citizenship, English, and General Equivalent Diploma (GED) courses, but required immigration eligibility for enrolling in English as a Second Language (ESL), adult basic education, and GED coursework supported by other federal funds.<sup>323</sup> When the IRCA funds for citizenship classes began to flow, the Houston Community College received so many funds that a scandal arose over its enrollment tactics and lavish curric-

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ton growth during the 1980s); ARNOLDO DE LEON, *ETHNICITY IN THE SUNBELT, MEXICAN AMERICANS IN HOUSTON 1989* (historical review of Latinos in Houston); JOE FEAGIN, *FREE ENTERPRISE CITY: HOUSTON IN POLITICAL AND ECONOMIC PERSPECTIVE* (1988) (same).

320. See Rodriguez, *supra* note 318, at 47-48.

321. 8 U.S.C. §1324(a) (1995).

322. UNITED STATES GENERAL ACCOUNTING OFFICE, *IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION* 38-39 (1990).

323. Rodriguez, *supra* note 318, at 40-43. In both 1989 and 1990, HCC enrolled between 23,000 and 25,000 students in federally-funded amnesty programs. By 1991, that number had declined to 10,000. *Reject HCCS Bonds*, HOU. CHRON., Oct. 19, 1993, at B10.

ulum purchases.<sup>324</sup> Despite the abundance of funding, once the aliens who had completed these citizenship classes prior to having gained permanent residence were not allowed to attend regular academic credit or technical courses in the same institution.<sup>325</sup>

*Martinez v. Bynum*,<sup>326</sup> the follow-up case to *Plyler v. Doe*, made it clear that aliens whose families did move solely for taking advantage of education benefits without residing in the district could be legitimately denied those benefits.<sup>327</sup> However, not one of the students in the Rodriguez study, even those with some college experience outside the United States, entered the United States in the hope of attending college. All had either come to avoid war in their country, to make a better life with their families, or for another related reason.<sup>328</sup>

A casual reader of newspapers and other materials might think that aliens were overrunning the whole United States, and California in particular.<sup>329</sup> This climate of hysteria has been fueled by California's economic recession, false impressions created by inaccurate studies, and shameless attempts to scapegoat undocumented aliens as a greedy and dangerous population.<sup>330</sup> While closer examination reveals these claims to be incorrect or exaggerated, the discourse of this campaign has largely succeeded in halting any genuine reform efforts or counterstories to place the issue in a more balanced light.

324. Karen Roebuck, *HCC Investigating Amnesty Ed Program, Unexpected Layoffs, High-Priced Tapes Subjects of Probe*, *HOU. POST*, Sept. 9, 1990, at A28 (former superintendent and state legislator overpricing materials for legalization classes).

325. In most cities, English as a Second Language courses and naturalization classes are filled to overflowing. See, e.g., Deborah Sontag, *English is Precious: Classes are Few*, *N.Y. TIMES*, August 29, 1993, at 6Y (with estimated New York City need to serve 1.36 million limited English proficiency residents, classes available for only 30,000).

326. 461 U.S. 321 (1983).

327. *Id.* at 333.

328. See Rodriguez, *supra* note 318, at 24-26.

329. An entire clipping service would be necessary to report all the media attention paid this topic. For a small sample, see James Clad, *Slowing The Wave*, 95 *FOR. POL.* 151 (Summer, 1994); Jerry Gillam & John Schwada, *Wilson Defiant Over Immigration Issue*, *L.A. TIMES*, Aug. 19, 1993, at A3 (article suggesting Gov. Wilson is gaining political favor by anti-immigrant remarks); Dan Morain & Mark Gladstone, *Racist Verse Stirs Up Anger in Assembly*, *L.A. TIMES*, May 19, 1993, at A3 (state legislator circulates anti-immigrant poem in Sacramento); Andrew Murr, *A Nasty Turn on Immigrants: Wilson Declares the State 'Under Siege'*, *NEWSWEEK*, Aug. 23, 1993, at 28 (article suggesting Gov. Wilson is immigrant-bashing due to poor political standing in polls); Robert Novak, *The Latest Entitlement*, *WASH. POST*, May 24, 1993, at A19 (claiming Mexican women enter U.S. to have their babies in Los Angeles County); Daniel M. Weintraub, *Wilson Shifts Tack on Illegal Immigration*, *L.A. TIMES*, Aug. 25, 1993, at A3 (analysis of Gov. Wilson's efforts to strike down sanctuary ordinances).

330. See *supra* note 20 and accompanying text.

California Governor Pete Wilson is the chief cheerleader for anti-immigrant sentiment.<sup>331</sup> In a variety of settings he has preached his message of how California's troubles have been caused by undocumented aliens in the areas of public services, jobs and employment, prisons and the criminal justice system, health care and hospitals, and education in public schools and colleges, specifically targeting undocumented alien college students.<sup>332</sup> His inflammatory remarks have been widely reported in the media.<sup>333</sup>

To document his charges, Governor Wilson has drawn from several studies, particularly one conducted to measure the relative costs and benefits of immigration for Los Angeles County, California.<sup>334</sup> This ambitious 1992 project, the *Impact of Undocumented Persons and Other Immigrants on Costs, Revenues, and Services in Los Angeles County*, is one of the more comprehensive governmental analyses of immigration economic costs and benefits. The study concluded that immigrant groups — which constitute 25% of the Los Angeles County population — consumed \$947 million worth of county services, which was 30.9% of the total net Los Angeles County costs for the 1991-92 year.<sup>335</sup> The study also estimated that immigrants contributed only \$139 million to the County.<sup>336</sup> While these figures seem lopsided against the County, this group of immigrants also generated 9 times more California State revenue and 18 times more federal revenue than they did Los Angeles County revenue, totalling \$4.3 billion.<sup>337</sup> These data show a net contribution by immigrant groups to tax revenues but an inefficient reimbursement/outlay distribution of costs to the County from other tax entities.<sup>338</sup> However, the discrepancy between County revenue and outlay was seized upon by Gov. Wilson

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331. See *supra* note 329.

332. *Id.* In addition, Gov. Wilson vetoed a bill passed by the legislature on May 24, 1991 that would have clarified the *Bradford/Leticia* "A" confusion by allowing undocumented students to establish residency. See veto message accompanying A.B. 592 (June 21, 1991) (on file with author). He also has allies in Congress. See, e.g., *House Considers More Immigration in Emotional Debate*, INTER. REL., Mar. 14, 1994, at 345 (Remarks of Rep. Rohrabacher).

333. See *supra* note 329.

334. LOS ANGELES COUNTY BOARD OF SUPERVISORS, *THE IMPACT OF UNDOCUMENTED PERSONS AND OTHER IMMIGRANTS ON COSTS, REVENUES, AND SERVICES IN LOS ANGELES COUNTY* (1992) [hereinafter *IMPACT*].

335. See *IMPACT*, *supra* note 334, at 4.

336. *Id.* at 4, 7.

337. *Id.* at 8. A federal study also concluded that immigrant education programs are underfunded. U.S. GOV'T ACCOUNTING OFF., *IMMIGRANT EDUCATION: FEDERAL FUNDING HAS NOT KEPT PACE WITH STUDENT INCREASES* (1994).

338. See *IMPACT*, *supra* note 334, at 6.



and others to fan a campaign of inaccurate anti-alien sentiment generally, to veto legislation aimed at solving the college residency problem,<sup>339</sup> and to introduce restrictionist legislation designed to make aliens ineligible for other public benefits.<sup>340</sup>

The study, even though it documented a substantial net contribution paid by the immigrant groups, was confusing because it lumped together permanent residents since 1980 with aliens who legalized their status since the 1986 IRCA amnesty, citizen children of undocumented parents, and the undocumented.<sup>341</sup> Of course, these groups bear little relationship to each other except in a vague, undifferentiated sense of dispossessed immigration shorthand. Lumping together these distinct categories distorted the study's findings in several ways. Permanent residents since 1980 are persons who either came to the United States by family relationships or employment preferences, who adjusted status from non-immigrant visas to become permanent residents, or who employed one of a number of other legal means to remain permanently in the United States.<sup>342</sup> After five years,

339. See *supra* note 332. See also Renee Koury, *School Denial Bills Stir Debate: A Movement to Ban Illegal Immigrant Children From Public Schools is Increasingly Being Discussed*, SAN JOSE MERCURY NEWS, May 10, 1993, at B1.

340. Gillam & Schwada, *supra* note 329, at A3; Dan Morain, *Bill to Bar Illegal Immigrants From Schools is Defeated*, L.A. TIMES, Apr. 1, 1993, at A21; Gov. Wilson, *About Time We Stopped Rewarding Illegals*, HOU. CHRON., Aug. 29, 1993, at F1 (editorial) [hereinafter *Wilson*]. Interestingly, Donald Huddle, in a companion editorial, noted that Gov. Wilson was wrongly attributing all immigrant costs to the undocumented. Donald L. Huddle, *Debate Must Begin With True View of the Costs*, HOU. CHRON., Aug. 29, 1993, at F1 (editorial) [hereinafter *Huddle, True View*.]

See also Huddle, *supra* note 274. But see Joel Kotkin, *Immigrants Lead a Recovery*, WALL ST. J., Apr. 22, 1994, at A12 (immigrants in California substantially contributing to California economic recovery).

341. Each of these groups was separated out for measurement purposes, but the data were reported in a confusing way. First, there was no attempt to measure the context of costs. Immigrants with children "cost" more than do immigrants without children, yet no such comparative, contextual data are given. Moreover, the distributional data for several agencies are not explained, (e.g., the calculations for property tax estimates), where rental payments are not analyzed fully for their tax payments. For a brief reply to the LA County study, see the Urban Institute response (Aug. 26, 1992), included in the study's appendix; see also Greg Miller, *Report Alleges Misleading Data on Immigrants to Los Angeles*, HOU. CHRON., Sept. 4, 1993, at A19; Barbara Vobejda, *Study of Immigration in L.A. County Challenges Government View of Costs*, WASH. POST, Sept. 4, 1993, at A9 (study criticizing L.A. County data). For an analysis of the particular problems faced by citizen children of undocumented parents, see Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*. 63 NOTRE DAME L. REV. 35 (1988).

342. 8 U.S.C.A. § 1427 (West Supp. 1995). After an immigrant obtains permanent residence, a lawful "residence" is required. Residence is defined as "the place of general abode, . . . [which is the alien's] principal, actual dwelling place in fact, without regard to intent." 8 U.S.C.A. § 1101(a)(33) (West Supp. 1995). This requirement is not the "domicile" that undocumented persons can acquire by abandoning their domicile in the native

permanent residents can, in most instances, become naturalized citizens.<sup>343</sup> Therefore, this group was "thinned out" by post-1980 permanent residents who chose to become citizens, and who would be statistically indistinguishable from the citizen population.<sup>344</sup> In addition, aliens, who legalized their status, overlap with the first group, as they have begun adjusting status through the amnesty provisions of IRCA, after a brief classification period of Temporary Resident Status.<sup>345</sup> By 1992-93, many of the persons had begun to naturalize. Thus, one year after the Los Angeles County study, this group would have begun to overlap with the citizen population. In addition, the true 1992 undocumented population of Los Angeles County was estimated to be 140,000 minors and 559,000 persons 18 or older, or 7.6% of the total County population of 9.187 million persons.<sup>346</sup> This group was estimated to "cost" \$308 million in County services, or approximately 10% of the total.<sup>347</sup> Finally, citizen children of the undocumented were also included as part of the "immigrant" population, even though as U.S.-born residents they have all the rights accorded other citizens.<sup>348</sup>

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country on some other place that had been their domicile. *See generally, Plyler*, 457 U.S. at 227 n.22; *Martinez v. Bynum*, 461 U.S. 321 (1983); *Corson*, *supra* note 46.

343. 8 U.S.C.A. § 1427 (West Supp. 1995).

344. For example, The National Association of Latino Elected and Appointed Officials' response to the Los Angeles County Study, reproduced in the Study's appendix, was critical of this point:

The number of non-citizen foreign-born residents in the Los Angeles-Long Beach SMSA as reported in the 1980 Census includes some number of undocumented immigrant residents of the SMSA who responded to the Census. However, it also fails to include some number of residents in the SMSA, the "undercount" of the 1980 Census; additionally, because legal permanent residents share some of the characteristics of those residents most likely to be undercounted (for example, low income and education levels, fear of responding to the Census because of their own or other family members' immigration status, and difficulties completing English-language questionnaires), the number of those undercounted residents includes some number of legal permanent residents. On the national level, according to estimates of demographers such as Warren and Passell, approximately 2.1 million undocumented immigrants were counted in the 1980 Census. However, the total number of undocumented residents of the nation, approximately 2.6 million exceeded the number of undocumented included in that Census. Consequently, we believe that at the very least, the number of undocumented immigrants included in the 1980 Census figure for non-citizen foreign born residents equals the number of legal permanent residents not included in that same figure because of the undercount, and we believe that it is very likely the number not included because of the undercount could even exceed the number of undocumented who were included. Assuming, at the very least, that those two numbers are equal, the 1980 Census figure for non-citizen foreign-born is a reasonable estimate of the legal permanent resident population because the number of undocumented included in that figure is offset by the number of legal permanent residents who are not included.

345. 8 U.S.C.A. § 1255(a) ("Temporary Resident Status").

346. *IMPACT*, *supra* note 334, at 25 (Table 2).

347. *Id.* at 29.

348. *See generally Piatt*, *supra* note 341.

The loose definition of “illegal alien” or “immigrant,” including such diverse groups as longtime permanent residents, intending citizens, and actual citizens, renders the study less helpful in understanding the true costs of the undocumented. For undocumented children, presumably the most needy consumers of services and least likely tax contributors, the study found only 117,000 welfare recipients in a county population of 2.505 million children under the age of 18.<sup>349</sup> The study’s findings are consistent with other studies that showed virtually no participation in welfare programs by the undocumented. For example, in studies of California IRCA amnesty applicants, only 2% of the formerly undocumented aliens had received welfare services, 1.2% had received general assistance, and 4.2% had received food stamps.<sup>350</sup> These data inflated the undocumented participation rates, as they counted even citizen members of undocumented families as undocumented. An Urban Institute reanalysis of the same LA County data further throws doubt on the validity of the study, finding that the 1992 County report overestimated costs by \$140 million and underestimated tax revenues paid by immigrants by \$848 million.<sup>351</sup>

To be sure, Governor Wilson and others are not arguing elegant econometric models, arithmetic calculations, or fine-grained immigration status distinctions. Instead, he inaccurately lumped together various immigration categories to inflate their social service participation — as when he incorrectly averred that “two thirds of all babies born in Los Angeles public hospitals are born to parents who have illegally entered the United States.”<sup>352</sup> In his most cynical discourse, he waxes eloquent about how allocating resources to the undocumented deprives legally resident children of services.<sup>353</sup>

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349. IMPACT, *supra* note 334, at 25 (Table 1). See Sam H. Verhovek, *Stop Benefits for Aliens? It Wouldn't Be That Easy*, N.Y. TIMES, June 8, 1994, at A1 (noting complexity of groups and regulations).

350. IMPACT, *see supra* note 334, at 33 (citing comprehensive Adult Student Assessment System study; Westat study).

351. Jenifer M. Bosco, *Undocumented Immigrants, Economic Justice, and Welfare Reform in California*, 8 GEO. IMMIG. L.J. 71 (1994); Miller, *supra* note 341 (citing Urban Institute study); Vobejda, *supra* note 341 (same).

352. Wilson, *supra* note 340, at F1 (proposing to eliminate eligibility for all public services to undocumented). This figure vastly overstates the number of undocumented births and misleadingly lumps together the variegated groups. For careful studies of this issue, see San Diego Study, *supra* note 220, at 85-107. See also Leo R. Chavez, Wayne A. Cornelius, & Oliver W. Jones, *Mexican Immigrants and the Utilization of U.S. Health Services: The Case of San Diego*, 21 SOC. SCI. MED. 93 (1985); JANET CALVO, IMMIGRANT STATUS AND LEGAL ACCESS TO HEALTH CARE (1993).

353. Wilson, *supra* note 340, at F1, F4. See Seth Mydans, *California Trying to Bar Service to Aliens*, N.Y. TIMES, May 23, 1994, at A10.

The Los Angeles County data, whatever the assumptions and data flaws, corroborate virtually all other studies conducted since the 1970's that measure undocumented alien benefit rates and tax contributions.<sup>354</sup> Julian L. Simon, one of the leading scholars in this field, estimated in 1985 that undocumented aliens pay five to ten times greater taxes than they consume in services.<sup>355</sup> A 1984 study conducted on Texas undocumented aliens showed a substantial net gain of revenues over expenses,<sup>356</sup> as did a California State Department of Finance 1991-92 study<sup>357</sup> and a 1990 U.S. Department of Labor study.<sup>358</sup> Virtually all the thorough and nonpartisan studies show the same result.<sup>359</sup>

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354. More than most fields of study, this field is susceptible to bias. Every person, whether young or old, documented or citizen, healthy or ill, is a composite of cross-subsidization, tax relief, subsidy, abatement, and social service. I certainly believe that substantial quantitative skills should be brought to bear upon this problem of "economic costs," but I do not believe very many people fully pay for their own "costs." Pay-as-you-go is a high standard for the undocumented to bear, even though most studies show they do so. See, e.g., Larry Rohter, *Revisiting Immigration and the Open Door Policy*, N.Y. TIMES, September 19, 1993, at 4E (reviewing competing claims).

355. See generally JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* (1989) [hereinafter SIMON, CONSEQUENCES]; JULIAN L. SIMON, *POPULATION MATTERS: PEOPLE, RESOURCES, ENVIRONMENT, AND IMMIGRATION* (1989) [hereinafter SIMON, POPULATION MATTERS]; but see Huddle, *supra* note 274, at 4.

356. Sidney Weintraub, *Illegal Immigrants in Texas: Impact on Social Services and Related Considerations*, 18 INT'L MIGR. REV. 733 (1984) (Texas). However, in 1994, Texas was required to return \$90 million in unexpended federal funds designed to reimburse the state for costs of illegal immigration. James Cullen, *Blame the Newcomers*, TEX. OBSERVER, Aug. 19, 1994, at 2, 3.

357. COMPREHENSIVE ADULT STUDENT ASSESSMENT SYSTEM, *A SURVEY OF THE NEWLY LEGALIZED IN CALIFORNIA* (1989). See DONALD HUDDLE, *THE NET COSTS OF IMMIGRATION TO TEXAS* (1994) (finding substantial job displacement by aliens). See generally Leif Jensen, *Patterns of Immigration and Public Assistance Utilization, 1970-1980*, 22 INT'L MIGR. REV. 51 (1988).

358. MICHAEL GREENWOOD AND JOHN MCDOWELL, *THE LABOR MARKET CONSEQUENCES OF U.S. IMMIGRATION: A SURVEY* (1990).

359. See GEORGE BORJAS, *FRIENDS OR STRANGERS* (1990) (slight differences in welfare benefits to immigrant families are due to location of aliens); GEFREY PASSEL & MICHAEL FIX, *Myths About Immigrants*, 95 FOR. POL. 151 (1994) (collective advantages of increased immigrants); CHRIS HOGELAND AND KAREN ROSSEN, *DREAMS LOST, DREAMS FOUND: UNDOCUMENTED WOMEN IN THE LAND OF OPPORTUNITY* (1991) (Study of undocumented, Latina women showing one quarter had citizen children eligible for AFDC but only 5% received the welfare benefits for which their children were eligible); MARTA TIENDA AND LEIF JENSEN, *IMMIGRATION AND PUBLIC ASSISTANCE PARTICIPATION: DISPELLING THE MYTH OF DEPENDENCY* (1985) (refugees and immigrants participate in welfare plans with less frequency than do natives); RICHARD VEDDER ET AL., *IMMIGRATION AND UNEMPLOYMENT: NEW EVIDENCE* (1994) (de Tocqueville Institution study concluding that immigrants create jobs in the aggregate); U.S. DEP'T OF JUSTICE, *IMMIGRATION REFORM CONTROL ACT: REPORT ON THE LEGALIZED ALIEN POPULATION* (1992) (Costs for health

Careful scholars have even shown how entire markets are created or restructured by immigrants, many of whom bring traditional American values of hard work, beliefs in family and achievement, and a willingness to undertake tasks not considered attractive to U.S. workers. For example, a recent housing study conducted in Houston revealed that during the city's economic downturn of the early 1980's, the overbuilt condominium, housing, and rental apartment industry was kept from collapsing entirely by the influx of undocumented immigrant populations who were recruited to the formerly Anglo, middle class tenant markets.<sup>360</sup> The former regimes of strict rules, limits on the number of children, and restrictions on multiple-family housing arrangements were relaxed or ignored in order to accommodate the undocumented and other immigrant communities. In the late 1980's, once the city rebounded and began to recover from its recession, another market restructuring occurred, ratcheting the rules to be more selective, raising rents to reconstitute the "mix" of the tenants, and attracting more Anglo, higher income tenants.<sup>361</sup>

The studies of the impact of immigration concentrate upon more basic benefits of housing, welfare, health care, and elementary/secondary education, with virtually no data on higher education participation. Those that do include data estimates or measure negligible rates. For example, in San Diego, California's second largest city and largest border community, a State Auditor study reported from CSU estimates that only 86 students were undocumented, 85 at CSU-San Diego and 1 at CSU-San Marcos.<sup>362</sup> The CSU system overall estimated as few as 1% and as high as 3% of their students on some campuses were undocumented,<sup>363</sup> while the more selective University of California system estimated that only 100-125 of their nearly 165,000 students were affected by *Bradford*.<sup>364</sup> The most accessible public system in the State is the 110-campus, open admissions California Community

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care for legalized aliens was reimbursed by U.S. government at half the rate reimbursed for remainder of population); *but see* Huddle, Costs, *supra* note 274.

360. Nestor P. Rodriguez & Jacqueline Hagan, *Apartment Restructuring and Latino Immigrant Tenant Struggles: A Case Study of Human Agency*, 4 COMPAR. URB. AND COMMUNITY RES. 164 (1992); *see also* Rodriguez, *Economic Restructuring*, *supra* note 319, at 101-127; Nestor P. Rodriguez, *Undocumented Central Americans in Houston: Diverse Populations*, 21 INT'L MIGR. REV. 4 (1987).

361. Rodriguez and Hagan, *supra* note 360.

362. *San Diego Study*, *supra* note 220, at ix.

363. *Id.* at 218. In fact, these estimates were later determined to be extreme overestimates. *See*, IMPACT, *supra* note 334, at 4-6.

364. *See infra*, Table 3.

College (CCC) System. Officials of that system estimated that fewer than "several hundred" students were undocumented.<sup>365</sup>

TABLE 3  
University of California  
Fall 1993 Enrollment  
By Campus by Citizenship Status

Campus	U.S. Citizens	Noncitizen U.S. Residents <sup>366</sup>	International Students <sup>367</sup>	Other <sup>368</sup>	Total
Berkeley	24,266	4,074	1,924	77	30,341
Davis	19,065	2,748	650	23	22,486
Irvine	12,347	3,796	497	175	16,815
Los Angeles	27,137	5,528	1,703	79	34,447
Riverside	8,339	62	263	13	8,677
San Diego	15,262	1,980	600	9	17,851
San Francisco	3,285	321	125	0	3,731
Santa Barbara	16,492	1,584	502	3	18,581
Santa Cruz	9,271	745	138	19	10,173
Total	135,464	20,838	6,402	398	163,102

Source: UC System Office data, February, 1994 (on file with author).

The small numbers of undocumented students involved and the perceived inequity in denying them the benefits of residency had led the California State Legislature to pass a *Bradford/Leticia* "A" bill that would have resolved the issue and allowed the undocumented students to establish domicile after a waiting period. Governor Wilson vetoed the bill, in a state where legislative overrides are extremely rare.<sup>369</sup> Some states have either settled lawsuits,<sup>370</sup> enabling the undocumented to establish residency, or have determined without litigation that undocumented students who can meet all other residency

365. Press reports estimated that 14,000 or 1% of the 1.5 million total were undocumented. See Libman, *supra* note 219.

366. "Noncitizen U.S. Residents" category includes students in the following categories: permanent resident, refugee, amnesty recipient defined by INS, approved petitioner for immigrant visa, awaiting immigrant visa number, political/religious asylee as defined by INS.

367. "International Students" category includes students in the following visa categories: A1, A2, A3, B1, B2, C1, C2, C3, E1, E2, F1, F2, G1, G2, G3, G4, G5, H, H1, H2, H3, H4, I, J1, J2, K1, K2, L1, L2, M1, and M2.

368. "Other" category includes students who: are in the process of establishing permanent residency, but not currently maintaining a visa status (e.g., their former visa status may have expired and permanent residency status is imminent so another visa is not issued); are in the process of changing visa type where the initial visa has lapsed; have an unusual visa type that the University generally does not track; have asked for but not yet been granted political asylum; are undocumented; whose status is unknown.

369. See *supra* note 332.

370. See *supra* note 19 (*Judith A. Alarcon* cases in Arizona and Illinois).

criteria may establish residence for tuition purposes.<sup>371</sup> Other states and institutions treat this issue on an *ad hoc*, discretionary basis. For example, one college treats undocumented students as residents if 1) they were brought to the country surreptitiously by their parents, 2) they otherwise are residing in the state for the requisite period of time, and 3) they attended high school in the state.<sup>372</sup> This same school excludes the undocumented who came on a visa but violated the terms of the visa (e.g., for holding unauthorized employment while in a tourist or student category).

## V. Conclusion: The Discourse and the Danger

I have been actively involved in residency reform and study since 1975, when I was a doctoral student and campus recruiter at Ohio State University. As a chicano student, I was drawn to recruit other Latinos to campus, but in Ohio, the only communities with residents of Mexican origin were located in the northern part of the state, where tomatoes and other perishable crops were grown and processed. I discovered that a number of talented Mexican American and Puerto Rican farmworkers were interested in attending college, especially since the tomato and pickle crops were being mechanized and Latinos were not being hired in the canneries that ringed the northern border of the state. However, each year these students and their families followed the crops, from Texas onions up through the midwest vegetables to tree fruits in Michigan. These travels meant they could not establish residency in any state, even those at either end of the migrant stream (such as Texas or Ohio) where they maintained a legal domicile. In my typical graduate student way, I did not know the complexity of the interstate residency systems, and so I asked, "why not?" I formed a group of advocates in Columbus, and we convinced the state legislature and coordinating board to enact a change in Ohio law that enabled agricultural workers to accumulate the residence period of twelve months over the space of three years.<sup>373</sup> Breaking up the time period

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371. The CCC system first faced this issue in a 1981 case, *Gurfinkel v. Los Angeles Community C. Dist.*, 175 Cal. Rptr. 201 (1981) and was considered to be bound by *Bradford II*, 225 Cal. App. 3d 972 (1990).

372. See, e.g., *supra* note 28 (New York State). For an account of how undocumented college students fare in New York, see Jeanine Amber, *Illegal Ed: The High Cost of Going to College*, VILLAGE VOICE, April 19, 1994, at 10.

373. OHIO REV. CODE ANN. § 3333.31 (Anderson 1994) ("Rules for determining residence"); OHIO ADMIN. CODE § 3333-1-10 (1994) ("Ohio student residency for state subsidy and tuition surcharge purposes").

seemed, in my amateur's way at the time, a fair way to allow these farmworkers a chance at college.

To this day, I remember our big meeting with Ohio Board of Regents officers. We showed them "Harvest of Shame," the classic Edward R. Murrow investigation into the plight of U.S. farmworkers. Their biggest fear was that nonfarmworkers would pose as the new "protected class" in order to avail themselves of this benefit. That someone, not a migrant, would try and pass had never occurred to me: not even Cesar Chavez had ever glamorized the profession enough to make it fashionable. I whipped out an application I had brought in my files, and showed the administrators what a migrant academic transcript looked like: grading periods for the same 7 high schools, for the same 4 weeks over each of 4 years. Once administrators saw the transcript, once the discourse was in terms they could understand, their concerns were allayed. When the migrant students were admitted, they were entitled to other grants and curricular benefits as well, and, through a formal interstate compact agreement, to residency benefits in other reciprocal states.<sup>374</sup>

This was my first professional taste of how benefits are accorded by place and duration and my first high-level political success. In the years since, I have established residency as my subfield of study, by conducting research, litigating cases, serving on campus residency appeals committees,<sup>375</sup> being an expert witness in residency cases.<sup>376</sup> In an ironic twist, I was sued for my university committee's denial of the residency appeal by one of my law students,<sup>377</sup> and served both as a hostile fact witness and expert in that case. I know residency.

But others do not, or they misperceive it. The undocumented students at issue have met all admissions criteria, have met all traditional residence requirements, and displace no one. Except for the different fee bills they receive, they are indistinguishable from other college students. Even in California where 40% of all undocumented residents are assumed to live, undocumented college students constitute an almost invisible minority of students. The colleges have accus-

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374. OHIO REV. CODE ANN. § 3333.18 (Anderson 1994).

375. I have served on the University of Houston's Residency Appeals Committee since its inception in 1987, and as a consultant to its University of Wisconsin counterpart during my year there as a Visiting Professor of Law, 1989-90. Each institution considers hundreds of appeals each year.

376. I have served as a witness or consultant to plaintiffs in the *Leticia "A"* cases, *Bradford* cases, and the *Alarcon* case, and, with the help of several Texas colleagues, will try or assist in trying a case challenging the Texas treatment of undocumented college students.

377. *Smith v. Board of Regents of the Univ. of Houston System*, 874 S.W. 2d 706 (Tex. App. 1994).



tomed themselves to the students' presence, and, since 1985, have administered their enrollment without incident — even though federal financial aid funds are unavailable to this population.<sup>378</sup> No study has shown them to be a substantial number, even in border area colleges. Through expert testimony and research, it is evident that the lure of college is not a “pull” factor to attract illegal immigration.<sup>379</sup>

Although the Supreme Court has never faced the question squarely, *Toll v. Moreno*,<sup>380</sup> *Plyler v. Doe*,<sup>381</sup> and a host of other residency cases<sup>382</sup> make it clear that California cannot exclude long-term undocumented aliens from establishing postsecondary residency if they have met all the traditional tests for establishing domiciles. Even as harsh an opinion as *AAW* concedes the students may be admitted into colleges, albeit as non-residents.<sup>383</sup> *Leticia “A”* is a well-reasoned, careful opinion that grasps the essential issue. The California Court of Appeals, early in 1995 ruled against the CSU System: *Bradford II* rather than *Leticia “A”* is now California law.<sup>384</sup> Further, although litigation has tied up enforcement of Proposition 187, if it were enforced, it would bar the undocumented from attending college, even as nonresidents.<sup>385</sup>

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378. Between 1985 (*Leticia “A”*) and 1990 (*Bradford I*), the California Postsecondary Financial Aid Commission allowed resident undocumented students to receive State grants. However, as soon as *Bradford I* was decided, the Commission reversed itself and ruled them ineligible. Interview with Rafael Magallan, Commissioner of Cal. Postsecondary Financial Aid Commission in Washington, DC (June 12, 1992).

379. See *supra* note 266.

380. 458 U.S. 1 (1982).

381. 457 U.S. 202 (1982).

382. See, e.g., *Martinez v. Bynum*, 461 U.S. 321 (1983).

383. *AAW*, No. BC061221, slip op. at 4 (“The Plaintiffs herein do not seek to ban undocumented aliens from attending CSU . . .”).

384. *AAW*, 38 Cal. Rptr 15 (Call. App. 1995) (affirming *Bradford II*).

385. Proposition 187 prompted a flurry of litigation in state and federal court to enjoin the provisions that would have resembled those Texas had enacted, which were struck down by *Plyler*. Ultimately, seven cases were consolidated and are now pending before a federal district court in Los Angeles, California: five cases that had been filed in Los Angeles and one that was transferred from Sacramento, challenging the constitutionality of the Proposition, and Governor Wilson’s state suit to force implementation of Proposition 187. The consolidation was challenged and the Ninth Circuit ruled, under a new provision facilitating preliminary injunction appeal, that the district court had acted properly in accepting the cases and granting an injunction. *Gregorio T. v. Wilson*, 54 F.3d 599 (9th Cir. 1995) (retaining jurisdiction under Ninth Circuit Rule 3-3); *Gregorio T. v. Wilson*, 54 F.3d 1002 (9th Cir. 1995) (district court’s preliminary injunction not an abuse of discretion). This had the practical effect of enjoining virtually all the provisions of Proposition 187, pending the federal trial, scheduled for late Fall, 1995.

In state court, four cases have been filed, three to enjoin the Proposition’s provisions concerning elementary and secondary education, and one to enjoin the postsecondary provisions that would have barred the undocumented from attending California public institu-

But this analysis turns on whether objections to undocumented alienage and higher education are rooted in careful research and analytic study. My reading of the discourse leads me to believe that the David Bradfords of the world do not object on meritocratic or substantive grounds: Governor Wilson's objections that the money used for serving undocumented aliens deprives lawfully resident aliens of their benefits ring hollow, even as presidential politics.<sup>386</sup> Not only is there considerable resistance even to permanent residents receiving benefits — so much so that there is an entire legal literature devoted to the topic<sup>387</sup> — but the imprecise, undifferentiated, and broad-brush swipes at “illegals,” “immigrants,” and “aliens” generally tar all the groups. One is reminded of how racist Japan-bashing led to the murder of Vincent Chin, a Chinese-American.<sup>388</sup> Free-floating racial animus often leads to a generalized resentment against all people of color, or “others.” Governor Wilson has even been so mean-spirited as to advocate a “repealing” of *Plyler v. Doe*<sup>389</sup> and the constitutional provisions that enable native born children to be U.S. citizens,<sup>390</sup> irrespective of their parents' immigration status. All of these arguments, mixed in a cauldron amidst shrill warnings about the rights of “real Americans,” lead inevitably to a sense of divisiveness, racial superiority, and undifferentiated prejudice. In California, dozens of anti-alien bills have been introduced,<sup>391</sup> as if the aliens were the source of the

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tions of higher education. These four cases have been consolidated into one court case, pending hearings scheduled before Judge Stuart Pollack for Fall, 1995.

386. Wilson, *supra* note 340.

387. *See supra* note 20.

388. Vincent Chin, a Chinese-American died as a result of anti-Japanese sentiment, when unemployed white autoworkers beat him to death: “It’s because of you fucking Japs that we’re out of work!” *See generally*, Mari J. Matsuda, *supra* note 11 at 2330 n.55 (reciting news stories on anti-Asian violence). Of course, his death would not have been excusable had he been Japanese, or a Japanese auto manufacturer. Professor Matsuda’s well-made point is that a climate of racist violence and intimidation leads to undifferentiated violence and intimidation. *Id.* A recent study by a Quaker group similarly noted that most border violence occurs against U.S. citizens and permanent residents of Mexican origin. ROBERT KOULISH, ET. AL., FINAL REPORT OF THE BORDER INTERACTION PROJECT 22 (1994) (95% of respondents reporting mistreatment by Border Patrol were citizens or permanent residents).

389. David Lauter & John Broder, *Clinton Differs with Wilson Ideas on Immigration*, L.A. TIMES, Aug. 13, 1993, at A1.

390. *Id.*; Gillam & Schwada, *supra* note 329, at A3.

391. Scott Armstrong, *California Melting Pot Boils Over as Illegal Immigrants Enter State*, CHRIS. SCI. MONITOR, Apr. 6, 1993, at 1 (describing legislative proposals); Frank Acosta and Bong Hwan Kim, *Race-Baiting in Sacramento*, L.A. TIMES, May 4, 1993, at B7 (describing “flood” of anti-alien bills in State Assembly).

sputtering economy, even though government studies have shown that immigrants — however defined — are net economic contributors.<sup>392</sup>

Much is made of the detrimental effects of immigration: that criminals are not deterred from entering the country, that aliens are stubbornly monolingual in languages other than English, that they take jobs and services from citizens, that they undercut or depress wages, that they do not understand the American character, that their unlawful presence is itself a sign of an unwillingness to abide by rules or accept responsibility for their actions.<sup>393</sup> Of course, these traits, to the extent that they are accurate, do describe some aliens in legal status or in undocumented status, just as they surely describe some natives. However, if there were a group that holds promise to become productive, long-term residents and citizens, alien college students would surely be that group. With the generally dismal schooling available to these students,<sup>394</sup> that even a small percentage could meet the extremely high standards of the University of California or moderately high standards of the California State University is extraordinary. Given their status and struggle, each represents a success story of substantial accomplishment.

The truth is that the United States needs this talent pool. In many highly technical fields, foreign scholars enroll in high numbers and, after consuming the benefit, return to their countries.<sup>395</sup> This is as it should be, as learning respects no borders, and U.S. institutions are surely enriched by recruiting internationally. However, the undocumented have every incentive to remain in the United States, to adjust their status through formal or discretionary means, and to contribute to the U.S. economy and polity. My own experiences over the years with these students are that they are extremely loyal to the United States. Despite their undocumented status, many are more Americanized than are most native born students. They believe in the

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392. See *supra* notes 355-372 and accompanying text.

393. For an excellent analysis of this phenomenon in historical perspective, see RITA SIMON, *PUBLIC OPINION AND THE IMMIGRANT: PRINT MEDIA COVERAGE, 1880-1980* (1985). See also, Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607 (1993-94).

394. Latino students show poor educational achievement at virtually every level. See generally, M. Beatriz Arias, *The Context of Education for Hispanic Students: An Overview*, 95 AM. J. OF EDUC. 26 (1986); *LATINO COLLEGE STUDENTS* (Michael A. Olivas ed., 1986). For a useful compendium of such data, see JENNIFER DAY, *POPULATION PROJECTIONS OF THE UNITED STATES, BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1993 TO 2050* (1993) (Census population report).

395. CHANDLER, *supra* note 22; NAFSA, *supra* note 187.

immigrant success story, having lived it in most instances. Some, like "Jose" and "Manuel," the two students cited at the beginning of this article, have literally never known any other life. Why deny these students the benefit of resident tuition?

In my native New Mexico each year, Santa Feans ritualistically burn *Zozobra*, or "Old Man Gloom," a 40-foot straw figure, to expiate the year's accumulation of grief and indignities. Fiesta-goers are not aware of their culture's sociological significance, and would be astounded to find themselves the subject of an anthropologist's probing of their community norms and mores. The inner logic of their acts of expiation is not questioned or even manifest. They do it each year because the community did it the year before. The celebration is widely regarded as an Indian-Hispanic ritual, despite its origins in Santa Fe's Anglo artist traditions.<sup>396</sup>

After examining all the arguments raised by immigration restrictionists on the issues of undocumented college residence, I have come to believe that those who raise objections, particularly those who act upon these beliefs — the David Bradfords, FAIR members, conservative elected officials — do so to burn *Zozobra* and thus to expiate their own fear and loathing of the unknown. Just as 19th century California officials banned pigtailed prisoners and oppressed them through a series of measures to keep Chinese immigrants in their place,<sup>397</sup> these storytellers have resorted to false stories and scapegoating in their campaign to vilify immigrants. Their own data show negligible undocumented participation in the state's vast higher education system, far less than 1%. Unconcerned with the true data, they have told tales out of school, of massive displacement and lawlessness. Neither of these is true. On balance, immigrants, whether lawfully admitted or undocumented, are present and future contribu-

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396. For a sharp exchange on *Zozobra* and its meanings, see Michael A. Olivas, *Torching Zozobra: The Problem with Linda Chavez*, 2 RECONSTRUCTION 48 (1993) (review of LINDA CHAVEZ, *OUT OF THE BARRIO: TOWARD A NEW POLITICS OF HISPANIC ASSIMILATION* (1991)); Linda Chavez, *A Response to Olivas* 2 RECONSTRUCTION 182 (1993); Michael A. Olivas, *A Reply to Chavez*, 2 RECONSTRUCTION 184 (1993).

397. This period, approximately 100 years ago, is widely regarded as the most overtly racist period of U.S. immigration policy. In addition to the petty harassments directed at Chinese workers, a more substantial federal legislative onus was directed at all Asians: the "Chinese Exclusion" case. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-54 (1990); Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425, 434-35 (1990).

tors. California, for its part, benefits tremendously by their stories and loyalties. Precluding their incorporation into California society through higher education is a foolishly short-sighted policy, and those who actively oppose the integration of long-term undocumented college students should be ashamed of themselves for their actions. Important public policy should not be premised upon such prejudice.