

Uncertainty of Access: U.S. Citizen Children of Undocumented Immigrant Parents and In-State Tuition for Higher Education

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When one thinks of the privileges and protections accorded to United States citizens, one would like to believe that all citizens are treated equally. However, such equality has not necessarily been the case. As policymakers focus on immigration reform, U.S. citizen children of undocumented immigrant parents are in danger of becoming collateral victims of state policies meant to deter illegal immigration. At least one state's interpretation of eligibility for in-state tuition to institutions of higher education penalizes dependent citizen children for the immigration status of their parents by making it more burdensome to prove in-state eligibility. Citizen children should be afforded equitable access to in-state tuition, regardless of the status of their parents. This Note argues against differential treatment and for the clarification of state policies on in-state tuition eligibility for citizen children of undocumented immigrants.

I. INTRODUCTION

Within the past year, the debate over birthright citizenship has taken off. In early 2011, the legislature of Arizona — a main battleground on immigration issues — introduced bills that would deny U.S. citizenship to children of undocumented¹ immigrant

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1. The term “undocumented” is used throughout this Note to describe immigrants who reside illegally in the United States.

parents² and mark them with a different birth certificate.³ However, throughout the growing debate over denying birthright citizenship to discourage illegal immigration, the question of how these proposals may collaterally affect existing U.S. citizen children⁴ of undocumented parents has gone unaddressed.

Legislators and policymakers focused on controlling illegal immigration should be careful about the effects that policies and proposed legislation may have on the U.S. citizen children of undocumented parents. Increasingly, citizen children are in danger of becoming the unsuspecting victims of state and federal policies aimed at addressing illegal immigration.⁵ This Note seeks to address this issue of how policies meant to deter illegal immigration may adversely affect citizen children; it will address this issue in the context of higher education and will explore the potential inequities manifested in policies concerning in-state tuition and access to post-secondary education.

Consider the following: Jane is born in the United States and is a U.S. citizen. A high school senior, Jane has applied to her state's public universities, expecting to pay in-state tuition.⁶ Her acceptance letter arrives, but there's one catch: she must pay the out-of-state tuition rate. Jane has lived in-state all her life, so how can this be? Although Jane is a U.S. citizen, her parents are not; they are undocumented immigrants, unauthorized to be in the country.

Jane, a U.S. citizen, has been penalized on account of the immigration status of her parents — she has become collateral damage in her state's effort to regulate illegal immigration. This

2. H.B. 2561, 50th Leg., 1st Reg. Sess. (Ariz. 2011); S.B. 1309, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

3. H.B. 2562, 50th Leg., 1st Reg. Sess. (Ariz. 2011); S.B. 1308, 50th Leg., 1st Reg. Sess. (Ariz. 2011); see Alia Beard Rau, *Birthright Citizenship Fight Begins in Arizona*, ARIZ. REPUBLIC (Phoenix), Jan. 28, 2011, at A1. The Arizona Senate recently rejected both S.B. 1308 and 1309, in addition to other legislation that had been introduced to challenge birthright citizenship. Alia Beard Rau, *5 Migrant Bills Rejected*, ARIZ. REPUBLIC (Phoenix), Mar. 18, 2011, at A1.

4. The terms "U.S. citizen children" and "citizen children" are used interchangeably throughout this Note to refer to citizens of the United States of America born to undocumented immigrants, who are of minority age or dependent status as defined under relevant in-state tuition statutes; unless otherwise indicated in the text.

5. Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 36 (1988).

6. The term "in-state tuition" is used throughout this Note refer to in-state tuition rates for public institutions of post-secondary education.

hypothetical situation illustrates the real potential consequences⁷ facing U.S. citizen children of undocumented parents. Among the potentially adverse effects that public policies may have on the citizen children of undocumented immigrants,⁸ the question of access to in-state tuition for institutions of public higher education⁹ is just another piece in the long-existing puzzle of inequitable treatment facing citizen children of undocumented parents.¹⁰

Federal and state policies initially created or proposed to combat the tide of illegal immigration include controlling the availability of public benefits for undocumented immigrants.¹¹ These policies raise a question about the availability of in-state tuition for citizen children: Can a state deny in-state tuition to a U.S. citizen who has resided in state for much or all of her life on the basis that her parents are undocumented immigrants in the United States? While two states have concluded that citizen children may not be treated differently because of the status of

7. See Susan Kinzie, *The University of Uncertainty; Va. Children of Illegal Immigrants Lack In-State Status*, WASH. POST, Mar. 14, 2008, at B1. For example, one student, a U.S. citizen living in Virginia, enrolled at George Mason University in 2006, only to find out that, because her mother was an undocumented immigrant, she had to pay out-of-state tuition. *Id.* Unable to pay the higher tuition rate, she left the university after one year. *Id.*

8. See, e.g., John A. Castro, Note, *Second-Class Citizens: The Schism Between Immigration Policy and Children's Health Care*, 37 HASTINGS CONST. L.Q. 199 (2009) (discussing the effects of immigration law policy on healthcare for citizen children of undocumented parents); Larry M. Leaman, *The Citizen Child and Undocumented Parents*, PUB. WELFARE, Spring 1994, at 20 (discussing the complications confronting a citizen child with an undocumented parents, when moving through the federal welfare system); Piatt, *supra* note 5 (discussing the effects of deportation policy on citizen children).

9. The terms "post-secondary education" and "higher education" are used interchangeably throughout this Note to refer to education levels beyond secondary education.

10. See Piatt, *supra* note 5, at 36 (indicating that courts have responded inconsistently to protect citizen children when their educational and economic circumstances are made more difficult because of the undocumented status of their immigrant parents); see, e.g., *supra* note 8.

11. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 411, 8 U.S.C. § 1621 (2010) (creating a statutory method for determining whether aliens are eligible for local or state public benefits); see also *infra* Part III.B.

their parents,¹² one state came to a conclusion that left open the possibility for unequal treatment.¹³

This Note will focus on two states with divergent perspectives on this issue: Virginia and Colorado. In 2008, the Office of the Attorney General in Virginia published a memorandum indicating that the undocumented status of parents could effectively disqualify their U.S. citizen children from receiving in-state tuition, if such children were unable to independently prove eligibility.¹⁴ In contrast, the Office of the Attorney General in Colorado addressed the same question and came to the opposite conclusion: U.S. citizen children of undocumented parents could be granted in-state tuition if their parents, without regard to their immigration status, could satisfy the eligibility requirements for their child's in-state tuition.¹⁵ Under this scheme, the residency of citizen children would not depend upon the immigration status of their parents. Given this context, this Note argues against the differential treatment of these citizen children and for states to clarify their policies on in-state tuition eligibility. Policies which could be interpreted to deny or burden a citizen child's access to in-state tuition on account of the undocumented status of his or her parent are not viable and should not be pursued, as these policies suffer from two serious problems: constitutional issues of equal protection and issues of potentially erroneous statutory interpretation.

The in-state tuition policies at issue here could affect a large number of U.S. citizens. As birthright citizenship is granted to children born in the United States to undocumented parents, a significant number of "mixed-status family groups" — in which at least one parent is an undocumented immigrant and at least one

12. California and Colorado. See Consent Decree, *Students Advocates for Higher Educ. v. Bd. of Trs. of the Cal. State Univ.*, No. CPF-06-506755 (Cal. Super. Ct. Apr. 19, 2007) (California); John W. Suthers, Office of the Attorney General of Colo., Formal Opinion (Aug. 14, 2007) [hereinafter Colorado Opinion] (Colorado), available at LexisNexis 2007 Colo. AG LEXIS 3 (2007).

13. Virginia. See Memorandum from Ronald C. Forehand, Senior Assistant Attorney General, Commonwealth of Va., to Lee Andes, State Council of Higher Educ. for Va. (Mar. 6, 2008) [hereinafter Virginia Memorandum], available at <http://acluva.org/wp-content/uploads/2009/12/20080306AGmemoInStateTuition.pdf>; see also H.B. 28, 80th Leg., Reg. Sess. (Tex. 2006).

14. See Virginia Memorandum, *supra* note 13.

15. See Colorado Opinion, *supra* note 12.

child was born a U.S. citizen — exist.¹⁶ As of 2008, there were about 8.8 million people in mixed-status family groups;¹⁷ according to an April 2009 study by the Pew Hispanic Center, there were approximately 4 million citizen children born to undocumented immigrant parents in the United States.¹⁸ As a result, the issue of in-state tuition and citizen children should be addressed — not just for the constitutional and statutory issues involved but also for its potential impact on a large subset of U.S. citizens.

Part II provides a brief introduction to birthright citizenship in the United States. Part III introduces the legal and statutory framework for access to higher education and in-state tuition. Part IV presents the constitutional issues and equal protection analysis implicated by this Note. Finally, Part V addresses the issues of statutory interpretation involved in in-state tuition eligibility determinations and recommends that state policies should be clarified to prevent interpretations supporting the differential treatment of citizen children.

II. BIRTHRIGHT CITIZENSHIP IN THE UNITED STATES

Birthright citizenship is the practice of granting U.S. citizenship to children born on U.S. soil. To fully understand the issue of denying or hindering access to in-state tuition for a subset of U.S. citizens, it is necessary to provide some background on the concept of birthright citizenship: (i) its development and application in the United States, and (ii) the debate surrounding its existence.

As the law currently stands, all children born in the United States, including those to undocumented immigrants, are granted U.S. citizenship — commonly known as birthright citizenship.¹⁹

16. THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1295 (6th ed. 2008).

17. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, *A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES* 8 (2009). As of 2008, 73% of all children of undocumented immigrant parents were U.S. citizens. *Id.* at i.

18. *Id.* at ii. From 2003 to 2008, the number of citizen children of undocumented immigrant parents grew from 2.7 million to 4 million. *Id.*

19. See U.S. CONST. amend. XIV, § 1, cl. 1; 8 U.S.C. § 1401(a) (2010); see generally *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898) (holding that under the Fourteenth Amendment, a child born in the United States to non-citizen parents who have a

This type of citizenship is conceptually based on a version of the *jus soli* (“citizenship by right of the soil”) rule, where the alien parent’s status does not matter in granting citizenship to the child.²⁰ Birthright citizenship is grounded in the Citizenship Clause of the Fourteenth Amendment, which states, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”²¹

While birthright citizenship is not explicitly stated in the text of the Fourteenth Amendment, it has been generally assumed and extended from the Supreme Court’s interpretation of the Fourteenth Amendment in *United States v. Wong Kim Ark*.²² In *Wong Kim Ark*, the Court held that, under the language of the Fourteenth Amendment, a child born in the United States to non-citizen parents, who have a permanent domicile and residence in the country, is granted U.S. citizenship at birth.²³ This holding has since been understood to cover children born in the United States to undocumented immigrant parents²⁴ and has also been incorporated into federal law.²⁵ Citizenship at birth is codified under Section 301 of the Immigration and Nationality Act,²⁶ which states, “The following shall be nationals and citizens of the United States at birth: a person born in the United States, and subject to the jurisdiction thereof”²⁷

Although in-depth background and analysis of the birthright citizenship debate is beyond the scope of this Note, an introduction to the arguments involved provides a useful context for con-

permanent domicile and residence in the States will be granted U.S. citizenship at birth); ALEINIKOFF ET AL., *supra* note 16.

20. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 165 (1996). The United States inherited the *jus soli* rule from England. *Id.*

21. U.S. CONST. amend. XIV, § 1, cl. 1; *see also* 2 AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION LAW AND BUSINESS § 5:17 (2010), *available at* Westlaw IMLB § 5:17.

22. ALEINIKOFF ET AL., *supra* note 16, at 30.

23. *Wong Kim Ark*, 169 U.S. at 705.

24. *See* Perkins v. Elg, 307 U.S. 325, 328–29 (1939); U.S. DEP’T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., INTERPRETATION 301.1(a), *available at* <http://www.uscis.gov/portal/site/uscis/> (follow “LAWS” hyperlink, then follow “Interpretations” hyperlink, then follow “Interpretations” hyperlink again) (last visited Mar. 18, 2011).

25. 8 U.S.C. § 1401 (2010).

26. *See* FRAGOMEN, JR. ET AL., *supra* note 21.

27. 8 U.S.C. § 1401(a) (2010).

sidering the policies affecting undocumented immigrants and their citizen children. The debate centers on two main viewpoints: those for birthright citizenship argue that it was constitutionally intended²⁸ while those against birthright citizenship argue that it encourages illegal immigration.²⁹ Proponents of birthright citizenship for children born to undocumented immigrants maintain that the Citizenship Clause of the Fourteenth Amendment intended to include such children.³⁰ In response, some opponents who view birthright citizenship as encouraging illegal immigration argue for a reinterpretation of the Fourteenth Amendment;³¹ others argue for a constitutional amendment³² to exclude children of illegal immigrants from receiving citizenship by birth. State policies that treat citizens differently based upon the immigrant status of their parents comport more with arguments against the current conception of birthright citizenship, like those of Peter H. Schuck and Rogers M. Smith, proponents of re-interpreting the Fourteenth Amendment. Schuck and Smith argue that citizen children are not granted birthright citizenship, as their undocumented parents did not receive the nation's consent to be members of the nation.³³

28. See ALEINIKOFF ET AL., *supra* note 16, at 36–40; see also NEUMAN, *supra* note 20, at 165.

29. See ALEINIKOFF ET AL., *supra* note 16, at 35, 43 (quoting Rep. Tom Tancredo's support for legislation limiting birthright citizenship: "The current system of granting citizenship to children born to illegal immigrants is not only an affront to common sense and a senseless rewarding of unlawful behavior, it also is an assault on the meaning and value of citizenship itself"); see, e.g., R.G. Ratcliffe, *2007 Texas Legislature; Immigration Sure to Be Front-and-Center Topic*, SAN ANTONIO EXPRESS-NEWS, Jan. 3, 2007, at 1B (describing Texas Rep. Leo Berman's position against the current interpretation of birthright citizenship).

30. See NEUMAN, *supra* note 20, at 165; see also ALEINIKOFF ET AL., *supra* note 16, at 36–41.

31. See PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 116, 119 (1985).

32. See NEUMAN, *supra* note 20, at 165.

33. SCHUCK & SMITH, *supra* note 31, at 118. Schuck and Smith base their argument on the principle of "government by consent," *id.* at 23, a consent principle by which membership in a polity is acquired only through personal and mutual consent. *Id.* at 24, 37 (citing John Locke's idea that political membership can only be acquired in adulthood through an "act of personal consent"). Schuck and Smith further conclude that "[a] child, then, could not be a government's subject because subjectship must be based on the tacit or explicit consent of an individual who had reached the age of rational discretion." *Id.* at 25.

Schuck and Smith endorse the consent principle in contrast to the ascriptive principle, which essentially describes citizenship by birth. *Id.* at 13 (stating that under the principle of ascription, "One's political identity is automatically assigned by the circumstances of

While current law authorizes birthright citizenship, it remains contested. In July 2010, Senator Lindsey Graham rekindled the birthright citizenship debate when he suggested amending the Fourteenth Amendment to exclude children of illegal immigrants from birthright citizenship,³⁴ and the debate continues.³⁵ Prior to this renewal, Congress has engaged in the birthright citizenship debate through hearings and proposed legislation.³⁶ In 1995, the House of Representatives held a Joint Hearing on several proposed bills which would limit birthright citizenship to the children of parents who were legally in the United States,³⁷ to determine whether it was “time for [Congress] to reconsider our policy of granting birthright citizenship to the children of illegal aliens.”³⁸ Similarly in 2005, legislation was again introduced in the House to limit birthright citizenship to children born to U.S. citizen or legally resident parents.³⁹ The bill garnered 87 co-sponsors, yet stalled in the Subcommittee on Immigration, Border Security, and Claims.⁴⁰ Most recently, in April 2011, Senator David Vitter along with 3 co-sponsors introduced a bill to amend Section 301 of the Immigration and Nationality Act to limit birthright citizenship to children born to at least one parent who is a U.S. citizen, permanent resident, or alien serving in the armed

one’s birth.”). Schuck and Smith derive the ascriptive principle from Sir Edward Coke’s opinion in *Calvin’s Case*, where Coke supported birthright membership to a state. *Id.* at 21. *Calvin’s Case*, in 1608, was the first case in England to articulate a theory of state membership. *Id.* at 12. Under the ascriptive principle, membership depends upon the child being born where the sovereign has the power “to provide protection to the subject and was actually exercising it to at least some minimal degree.” *Id.* at 14. Accordingly, “[a]ll individuals’ obligations were determined by the extent of protection that they had received at birth, not by their parents’ allegiance per se.” *Id.* at 14–15.

34. See *Citizenship and Birth Tourism: Amending the Amendment — A Challenge to an American Birthright*, THE ECONOMIST, Aug. 19, 2010, available at http://www.economist.com/node/16846798?story_id=16846798&fsrc=rss.

35. See *infra* note 43.

36. See *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents: J. Hearing on H.R. 705, H.R. 363, H.J. Res. 56, H.J. Res. 64, H.J. Res. 87, H.J. Res. 88 & H.J. Res. 93 Before the Subcomm. on Immigration and Claims & the Subcomm. on the Constitution of the Comm. on the Judiciary*, 104th Cong. (1995) [hereinafter *Hearing*]; ALEINIKOFF ET AL., *supra* note 16, at 43–44.

37. *Hearing*, *supra* note 36, at 4–17.

38. *Hearing*, *supra* note 36, at 2 (opening statement of Rep. Lamar Smith, Chairman, H. Subcommittee on Immigration & Claims).

39. See ALEINIKOFF ET AL., *supra* note 16, at 43 (citing H.R. 698, 109th Cong. (2005)).

40. See *Bill Summary & Status: H.R. 698*, LIBRARY OF CONGRESS THOMAS, thomas.loc.gov (under “Search Bill Summary & Status,” toggle “Bill Number” and search for “H.R. 698”) (last visited Mar. 18, 2011).

forces.⁴¹ As of the writing of this Note, the bill has been referred to the Committee on the Judiciary.⁴²

Though prior Congressional inaction on proposed legislation may reflect the divisiveness of this issue, it may also reflect a conscious decision not to change the status quo. Regardless of Congress's future intentions, the current policy is that citizen children of undocumented immigrant parents are granted the same U.S. citizenship as all other individuals granted U.S. citizenship. Therefore, state policies that undercut the privileges of citizenship, such as in-state tuition policies unfavorable to citizen children, would be in direct conflict with current federal policy. Accordingly, this Note analyzes policies affecting in-state tuition and access to higher education for citizen children of undocumented immigrants from the default view that such students are accorded the same U.S. citizenship as others. Recently some state legislatures have been pursuing measures to challenge birthright citizenship in federal courts — measures that may also impose unequal treatment on citizen children who have already been granted birthright citizenship.⁴³

III. ACCESS TO HIGHER EDUCATION AND IN-STATE TUITION ELIGIBILITY

This Part introduces the legal precedents and statutory provisions relating to the issue of in-state tuition eligibility. Part III.A presents the seminal case of *Plyler v. Doe* as a foundation for this Note's equal protection analysis. Parts III.B and C address relevant federal laws and state policies regarding public benefits and in-state tuition eligibility.

41. Birthright Citizenship Act of 2011, S. 723, 112th Cong. (2011).

42. See *Bill Summary & Status: S. 723*, LIBRARY OF CONGRESS THOMAS, thomas.loc.gov (under "Search Bill Summary & Status," toggle "Bill Number" and search for "S. 723") (last visited Apr. 14, 2011).

43. See Laura Litvan, *More States to Follow Arizona Push for Tougher Immigration Laws*, BLOOMBERG (Dec. 28, 2010), <http://www.bloomberg.com/news/2010-12-28/more-states-seeking-to-follow-arizona-s-push-for-tougher-immigration-rules.html> (noting that "[s]ome states want to advance legislation that denies children of illegal immigrants access to state benefits."); see also Jeremy Duda, *Pearce, Allies Will Ring in the New Year with Birthright Citizenship Bill*, STRIKE EVERYTHING (Dec. 7, 2010), <http://azcapitoltimes.com/strike-everything/2010/12/07/pearce-allies-will-ring-in-the-new-year-with-birthright-citizenship-bill/>.

It is important to note that education has not yet been found to be a fundamental right under the Constitution.⁴⁴ If education were a right guaranteed by the Constitution, then denial of access to education for citizen children would be a clearer constitutional question. However, in *San Antonio Independent School District v. Rodriguez*,⁴⁵ the Supreme Court concluded that “[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”⁴⁶ Although the Court in *Rodriguez* made clear that it would not view education as a constitutionally guaranteed right, it continued to emphasize the importance and “vital role of education in a free society,” stating that its holding would not “in any way detract from [the Court’s] historic dedication to public education.”⁴⁷ The Court’s dedication to public education was again on display less than ten years later in the seminal case of *Plyler v. Doe*, which dealt with the question of whether undocumented immigrant children could be denied access to public elementary and secondary education.⁴⁸

A. *PLYLER V. DOE*: A FOUNDATION FOR SEPARATING ACCESS TO EDUCATION FROM PARENTAL IMMIGRATION STATUS

Although courts have yet to deal extensively with the issue of in-state tuition for citizen children of undocumented immigrants, courts have confronted issues relating to the accessibility of education for undocumented immigrant children for some time.

44. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); see also JAMES A. KUSHNER, *GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION* § 6:19 (2010), available at Westlaw GOVDISCRIM § 6:19.

45. 411 U.S. 1 (1973). *Rodriguez* dealt with a class action lawsuit brought by minority parents on behalf of their children attending elementary and secondary schools in a low-income school district in San Antonio, Texas. *Id.* at 4–5. Their lawsuit challenged Texas’ system of funding public education in part through local funds from local property taxes. *Id.* at 9–10.

46. *Id.* at 35. In focusing its analysis on whether education was explicitly or implicitly guaranteed under the Constitution, the Court declined to compare the “relative societal significance of education as opposed to subsistence or housing” or “the right to travel” in determining whether education was a fundamental right. *Id.* at 33. The Court also rejected arguments that education is a fundamental right on account of its close relation to other rights of speech and voting. *Id.* at 35–36.

47. *Rodriguez*, 411 U.S. at 30 (listing opinions that demonstrate the Court’s belief in the importance of education).

48. 457 U.S. 202, 206 (1982).

While the situation addressed by this Note differs from that of undocumented students, the Supreme Court's reasoning in *Plyler v. Doe* — both in its separation of the child from the parent's immigration status and in its consideration of education — provides a relevant foundation for considering the circumstances facing citizen children of undocumented parents.

In *Plyler*, the Court held that a state could not deny free elementary and secondary public education to undocumented immigrant children.⁴⁹ In *Plyler*, a class of undocumented immigrant children living in Texas⁵⁰ challenged a Texas statute that prohibited the state from providing funds for the public education of undocumented aliens,⁵¹ therefore compelling undocumented immigrant students who wanted to attend public school to pay tuition.⁵² In finding the state's denial of access to public elementary and secondary education unconstitutional under the Fourteenth Amendment,⁵³ the Court made two main determinations: first, the applicability of the Equal Protection Clause to undocumented immigrants; and second, the appropriate standard for equal protection analysis.

In *Plyler*, the Court determined that equal protection under the Fourteenth Amendment included undocumented immi-

49. *Id.* at 230.

50. *Id.* at 205–06.

51. *Id.* at 205. The statute in question was § 21.031 of the Texas Education Code, which stated:

(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 person or his parent, guardian or person having lawful control resides within the school district.

Id. at 205 n.1 (quoting TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981), *invalidated* by *Plyler v. Doe*, 457 U.S. 202 (1982)).

52. *Id.* at 206 n.2.

53. *Id.* at 230.

grants.⁵⁴ The Court cited *Yick Wo v. Hopkins*,⁵⁵ an influential equal protection case, which stated that the Fourteenth Amendment's "provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . ."⁵⁶ This determination was based on the premise that the Fourteenth Amendment's protection extended to anyone subject to the laws of the State.⁵⁷ Since undocumented immigrants, though not citizens nor legally in the country, were fully subject to the laws of Texas, the Court held that they were protected by the Fourteenth Amendment.⁵⁸

Having determined the applicability of the Fourteenth Amendment's protections to undocumented immigrants, the Court next determined the standard of review for its equal protection analysis. The Court noted that discrimination against a suspect class or interference with a fundamental right was generally considered a presumptively undesirable classification,⁵⁹ and required that a valid classification be specifically tailored to serve a compelling interest.⁶⁰ However, the Court noted that undocumented children did not constitute a suspect class and that education was not a fundamental right.⁶¹ Although *Plyler* did not apply strict scrutiny, the Court, citing the importance of public education⁶² and the possibilities for "lifetime hardship" due to the denial of education,⁶³ determined that the classification involved in the Texas statute could be rational only if it furthered some substantial state goal.⁶⁴ Thus the Court applied a standard of heightened scrutiny, rather than simply rational basis. Deter-

54. *Id.* at 215.

55. 118 U.S. 356 (1886).

56. *Id.* at 369; *Plyler*, 457 U.S. at 202, 212 (quoting *Yick Wo*, 118 U.S. at 369). *Yick Wo* dealt with a claim brought by Chinese immigrants who alleged discrimination in the granting of petitions to continue running their businesses — petitions had been denied to all except one petitioner who was not Chinese. *Yick Wo*, 118 U.S. at 365–66. The Supreme Court determined that the Fourteenth Amendment's Equal Protection Clause had been violated by discriminatory treatment of non-citizen immigrants residing in California. *Id.* at 374.

57. *Plyler*, 457 U.S. at 215.

58. *Id.*

59. *Id.* at 216–17.

60. *Id.* at 217.

61. *Id.* at 223.

62. *Id.* at 221.

63. *Id.* at 223.

64. *Id.* at 223–24.

mining that the state made no showing of a substantial state goal, the Court held that the statute's denial of public elementary and secondary education to undocumented children was unconstitutional under the Fourteenth Amendment.⁶⁵

In applying its equal protection analysis to Texas's statute, the Court acknowledged "[p]ersuasive arguments" that states could legally deny benefits to those in the United States illegally.⁶⁶ However, placing these arguments aside,⁶⁷ the Court determined that the undocumented minors in *Plyler* were differently situated than undocumented adults who could rectify their illegal presence within the United States: "[T]he children who are plaintiffs in these cases 'can affect neither their parents' conduct, nor their own status.'⁶⁸ Accordingly, the Court found the importance of education combined with the involuntary status of the undocumented children was compelling enough to apply a more stringent standard of review under the Equal Protection Clause.

B. FEDERAL LAWS GOVERNING IN-STATE TUITION ELIGIBILITY

Federal laws regarding public benefits and immigration status also provide background for this Note's discussion. In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA")⁶⁹ and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"),⁷⁰ two federal immigration statutes containing provisions which constrain the eligibility of aliens for state and local public benefits.⁷¹ These regulations inform the policy intersection of immigration, education, and in-state tuition.

65. *Id.* at 230.

66. *Id.* at 219.

67. *Id.* at 219–20 ("These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants.").

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

69. Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Reform Act) of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, 21, and 42 U.S.C.). The most relevant section is § 411, 8 U.S.C. § 1621 (2010).

70. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.). The most relevant section is § 505, 8 U.S.C. § 1623 (2010); see also WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 839 (4th ed. 2007).

71. KAPLIN & LEE, *supra* note 70, at 839.

The PRWORA creates a statutory method for determining whether aliens are eligible for local, state, or federal public benefits.⁷² Under PRWORA, undocumented immigrants are not eligible for state or local public benefits,⁷³ which are defined to include “postsecondary education.”⁷⁴ Instead, only “qualified alien[s]” may be granted public benefits.⁷⁵ As defined, “qualified alien” does not include undocumented immigrants who are unlawfully in the United States.⁷⁶ Accordingly, under PRWORA, undocumented immigrants are ineligible for post-secondary education public benefits.⁷⁷

Similar to PRWORA, yet more specific in its application, the IIRIRA provides eligibility requirements by which undocumented immigrants may receive post-secondary education benefits.⁷⁸ Under this statute, undocumented immigrants may not take advantage of post-secondary education benefits based on residency, unless all U.S. citizens are afforded the same benefits regardless of their state residency.⁷⁹ This federal requirement regulates the

72. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 411, 8 U.S.C. § 1621 (2010); *see also* Colorado Opinion, *supra* note 12, at *4–5.

73. 8 U.S.C. § 1621(a) (2010). The subsection states:

In general

Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an alien who is not —

(1) a qualified alien (as defined in section 1641 of this title),

(2) a nonimmigrant under the Immigration and Nationality Act [8 U.S.C. § 1101 et seq.], or

(3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. § 1182(d)(5)] for less than one year, is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

Id.; *see also* KAPLIN & LEE, *supra* note 70, at 839.

74. 8 U.S.C. § 1621(c)(1)(B); *see also* KAPLIN & LEE, *supra* note 70, at 839.

75. 8 U.S.C. § 1621(a)(1); *see also* Colorado Opinion, *supra* note 12, at *4–7 (quoting 8 U.S.C. § 1621).

76. 8 U.S.C. § 1641(b) (2010). While the definition of “qualified alien” covers those that have been lawfully admitted, granted asylum, paroled into the United States, had their deportation withheld, granted conditional entry, and, under specific circumstances, battered, it does not include aliens unlawfully in the United States. *Id.* § 1641(b)–(c).

77. KAPLIN & LEE, *supra* note 70, at 839.

78. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1623 (2010); Emily Wexler Love et. al., *Ending the DREAM of Plyler v. Doe: Examining Democratic Participation and Educational Opportunity Through the Language of Plyler*, in CURRENT ISSUES IN EDUCATIONAL POLICY AND THE LAW 173, 176–77 (Kevin G. Welner & Wendy C. Chi eds., 2008).

79. 8 U.S.C. § 1623(a) (“In general — Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education bene-

circumstances under which states may offer in-state tuition to undocumented immigrants. However, for all other students not subject to this regulation — including the citizen children discussed in this Note — states still retain the power to set residency qualifications for in-state tuition and to determine who qualifies as an in-state resident.⁸⁰

C. STATE POLICIES GOVERNING IN-STATE TUITION ELIGIBILITY

Although this Note focuses its discussion on the policies of Virginia and Colorado, a broader overview of in-state tuition policies in the United States provides a useful context. Surveying the in-state tuition eligibility and residency requirements of the 50 states, it is unclear, with a few exceptions, how these states would classify the citizen children of undocumented parents. As indicated previously, the citizen children at issue in this Note are generally un-emancipated minors, dependent on their parents.⁸¹ Many states indicate that these dependent students are classified based on the domicile or residency of the parent.⁸² However, es-

fit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.”).

80. 15A AM. JUR. 2D *Colleges and Universities* § 23 (2010).

81. See *supra* note 4.

82. These states include Alabama, ALA. CODE § 16-64-2(2) (2009); Arizona, ARIZ. REV. STAT. ANN. § 15-1802(C) (2010); Arkansas, *Operating Policies and Procedures Manual: Residency Regulations*, ARK. ST. U. (Aug. 1997), http://finance.astate.edu/policies/AA_Residency_Regulations.htm; Connecticut, CONN. GEN. STAT. § 10a-29(2) (2010); Delaware, Office of the Registrar, *Residency Classification Requirements* (issued under the authority of DEL. CODE ANN. tit. 14, § 5106 (2010)), U. OF DEL. (Feb. 2008), <http://www.udel.edu/registrar/residncy.html>; Florida, FLA. STAT. § 1009.21(2)(a) (2010); Georgia, *Board of Regents Policy Manual: Student Residency* § 4.3.2.2, U. SYS. OF GA., http://www.usg.edu/policymanual/section4/policy/4.3_student_residency/ (last visited Mar. 18, 2011); Hawaii, HAW. CODE R. § 20-4-9(b) (LexisNexis 2010); Idaho, IDAHO CODE ANN. § 33-2110B (2010); Iowa, IOWA ADMIN. CODE r. 681-1.4 (2010); Kentucky, 13 KY. ADMIN. REGS. 2:045 § 6(1)(a) (2010); Massachusetts, Mass. Board of Higher Education, *Residency Status for Tuition Classification Purposes* Part II.2.1 (Apr. 2007), available at <http://www.mass.edu/library/Motions/2007/FAAP07-24.pdf>; Missouri, MO. CODE REGS. ANN. tit. 6, § 10-3.010(4) (2010); New Hampshire, Board of Trustees, *Board of Trustees* tit. IV, § F.6.2, 8.1 (issued under the authority of N.H. REV. STAT. ANN. § 187-A:16.XIX (2011)), U. SYS. OF N.H. (Nov. 27, 2007), <http://www.usnh.edu/olpm/BOT/IV.Fin/F.htm>; New Jersey, N.J. ADMIN. CODE § 9A:5-1.1(f) (2011); Ohio, OHIO ADMIN. CODE 3333-1-10(C)(1) (2010); Oregon, OR. ADMIN. R. 580-010-0030(4)–(5) (2010); Pennsylvania, 22 PA. CODE § 507.3 (2011); Rhode Island, *Board of Governors for Higher Education Policy Manual: Residency Policy* § B.1 (2009) (issued under the authority of R.I. GEN. LAWS § 16-59-4(3) (2010)), R.I. BOARD OF GOVERNORS FOR HIGHER EDUC. (2009), <http://www.ribghe.org>

residency1.pdf; South Carolina, S.C. CODE ANN. § 59-112-20(D) (2010); Washington, WASH. REV. CODE § 28B.15.012(2)(b) (2010); and West Virginia, *Residency Classification for Admission and Fee Purposes* § 4.1 (issued under the authority of W. VA. CODE § 18B-1-6 (2011)), W. VA. HIGHER EDUC. POLY COMMISSION (Aug. 2002), available at <http://wvhpcdoc.wvnet.edu/resources/133-25.pdf>.

Tennessee also indicates that the domicile of an unemancipated student is that of the parent. *Regulations for Classifying Students In-State and Out-of-State for the Purposes of Paying College or University Fees and Tuition and for Admission Purposes* § III(3), TENN. BOARD OF REGENTS, <http://www.tbr.state.tn.us/policies/default.aspx?id=1532> (last visited Mar. 18, 2011). However, Tennessee explicitly provides that undocumented aliens cannot establish domicile in the state. *Id.* § II(3) (“Undocumented aliens cannot establish domicile in Tennessee, regardless of length of residence in Tennessee.”).

North Carolina presents an interesting case: although a statute provides that students who would otherwise be classified as domiciled out of state may be considered as having an in-state residence if they have resided for five consecutive years in state, N.C. GEN. STAT. § 116-143.1(e) (2010), the N.C. Classification Manual interprets the statute to require the student to have lived with an in-state relative, THE UNIVERSITY OF NORTH CAROLINA & N.C. COMMUNITY COLLEGES, NORTH CAROLINA STATE RESIDENCE CLASSIFICATION MANUAL 13, 15 (2010), available at http://www.northcarolina.edu/legal/residence/committee/manual/Residence_Manual_Aug_2010.pdf.

Not included in the above list are those states which allow students to establish residency independent of their parent’s domicile so long as the student graduates from high school in the state or receives a graduate equivalency degree (“GED”) in the state. These states include Alaska, *Tuition and Student Fees*, in REGENT’S POLICY: FINANCE AND BUSINESS MANAGEMENT § P05.10.050 (2001), available at <http://www.alaska.edu/bor/policy/05-10.doc>; Idaho, IDAHO CODE ANN. § 33-3717B(1)(c) (2010); Kansas, KAN. ADMIN. REGS. § 88-3-10 (2010); Mississippi, MISS. CODE ANN. § 37-103-7 (2010); Nevada, BOARD OF REGENTS HANDBOOK tit. IV, § 4.4 (2010) (issued under the authority of NEV. REV. STAT. 396.540 (2010)), available at <http://system.nevada.edu/Board-of-R/Handbook/TITLE-4---/T4-CH15---Regulations-for-Determinin.pdf>; New Mexico, STATE OF N.M. HIGHER EDUC. DEPT, ESTABLISHING NEW MEXICO RESIDENCY OR ELIGIBILITY FOR REDUCED TUITION RATES OR IN-STATE TUITION § 9.L. (2005) (issued under the authority of N.M. STAT. ANN. § 21-1-4 (2010)), available at <http://www.hed.state.nm.us/uploads/files/Residency.pdf>; North Dakota, N.D. CENT. CODE § 15-10-19.1(2)(c) (2010); Texas, TEX. EDUC. CODE ANN. § 54.052(a)(3) (West 2009); Utah, UTAH CODE ANN. § 53B-8-106 (LexisNexis 2010); and Wyoming, *University of Wyoming Regulation 8-1* § C.1(b) (issued under the authority of WYO. STAT. ANN. § 21-17-203 (2010)), U. OF WYO. BOARD OF TRUSTEES (2008), <http://www.uwyo.edu/generalcounsel/support/clean%20uw%20regulations/UW%20Reg%208-1.pdf>, and WYOMING COMMUNITY COLLEGE COMMISSION RULES ch. 3, § 5(c)(i) (2010) (issued under the authority of WYO. STAT. ANN. § 21-18-202(a)(ii) (2010)), available at <http://www.commission.wcc.edu/business/Rules/WCCC%20Rules%20Chapter%203.pdf>. Similarly, New York allows graduates of a New York high school or New York GED recipients to receive in-state tuition, if not initially classified as an in-state resident. N.Y. EDUC. LAW § 355(2)(h)(8) (McKinney 2010).

In allowing students to establish in-state residency status independent of their parents’ domicile through graduating from high school or receiving a GED, some states also impose an additional requirement that the student reside with a parent or legal guardian while completing such requirements, or that the custodial parent has also lived in the state for a specified period of time, or both. These states include: Illinois, 110 ILL. COMP. STAT. 305/7e-5 (2010), 110 ILL. COMP. STAT. 520/8d-5 (2010), 110 ILL. COMP. STAT. 660/5-88 (2010), 110 ILL. COMP. STAT. 665/10-88 (2010), 110 ILL. COMP. STAT. 670/15-88 (2010), 110 ILL. COMP. STAT. 675/20-88 (2010), 110 ILL. COMP. STAT. 680/25-88 (2010), 110 ILL. COMP. STAT. 685/30-88 (2010), 110 ILL. COMP. STAT. 690/35-88 (2010); Montana, MONT. CODE

tablishing domicile or residency generally involves multiple factors,⁸³ and many tuition policies further indicate that any particular factor is not necessarily sufficient or conclusive in establishing domicile,⁸⁴ thus leaving a final residency determination up to the school.

ANN. § 20-25-503(6) (2010); Nebraska, NEB. REV. STAT § 85-502(8) (2010); Oklahoma, Oklahoma State Regents for Higher Education, *Policy and Procedures Manual* ch. 3, § 3.17.3(E) (June 2010) (issued under the authority of OLKA. STAT. tit. 70, § 3218.2 (2010)), available at <http://www.okhighered.org/state-system/policy-procedures/Pages%20from%20Chapter%203-new%203.17%20policy%20june%202010.pdf>; and South Dakota, S.D. CODIFIED LAWS § 13-53-6.3 (2010), see *Policy Manual* § 3.6, S.D. BOARD OF REGENTS (2007), http://www.sdbor.edu/policy/3-Student_Affairs/documents/3-2.pdf.

Other states also allow for independent classification of students, separate from their parents. These states include Maryland, Board of Regents, *Policies and Procedures* § VIII-2.70, U. SYS. OF MD. (Sept. 2009), <http://www.umsa.umd.edu/regents/bylaws/SectionVIII/VIII270.html>; and Wisconsin, WIS. STAT. § 36.27(2)(a)(4) (2011) (classifying as eligible for in-state tuition “[a]ny minor student who has resided substantially in this state during the years of minority and at least 12 months next preceding the beginning of any semester or session for which such student registers at an institution”).

Also not included in the first list are those states that leave residency classifications up to each state institution. These states include Indiana, IND. CODE § 21-27-1-1 (2010), see *Guide to State Residency Requirements: Policy and Practice at U.S. Public Colleges and Universities* [hereinafter *Guide to State Residency*]: Indiana, THE COLLEGE BOARD (2001), http://www.collegeboard.com/about/association/international/pdf/sr_IN01.pdf; Louisiana, *Guide to State Residency: Louisiana*, THE COLLEGE BOARD (2001), http://www.collegeboard.com/about/association/international/pdf/sr_LA01.pdf; Maine, *Guide to State Residency: Maine*, THE COLLEGE BOARD (2001), http://www.collegeboard.com/about/association/international/pdf/sr_ME01.pdf; Michigan, Office of the Registrar, *University of Michigan Residency Classification Guidelines*, U. OF MICH., <http://ro.umich.edu/resreg.php> (last visited Sept. 18, 2010); Minnesota, MINN. STAT. § 135A.04 (2011); Vermont, *Guide to State Residency: Vermont*, THE COLLEGE BOARD (2001), http://www.collegeboard.com/about/association/international/pdf/sr_VT01.pdf.

83. For an example of the information requested during residency determination, see *infra* note 210.

84. See e.g., Alabama, see ALA. CODE § 16-64-3(b) (2010); Arizona, see ARIZONA BOARD OF REGENTS, POLICY MANUAL § 4-205(a) (2007), available at <https://azregents.asu.edu/rre/Policy%20Manual/4-205-Evidence%20to%20be%20Considered.pdf>; Delaware, see Office of the Registrar, *Residency Classification Requirements* § 4, U. OF DEL. (Feb. 2008), <http://www.udel.edu/registrar/residency.html#section4>; Florida, see FLA. STAT. § 1009.21(3) (2010); Hawaii, see HAW. CODE R. § 20-4-7 (LexisNexis 2010); Iowa, see IOWA ADMIN. CODE r. 681-1.4(3) (2010); Kentucky, see 13 KY. ADMIN. REGS. 2:045 § 10 (2010); Massachusetts, see Mass. Board of Higher Education, *Residency Status for Tuition Classification Purposes* Part III.3.1, MASS. DEP'T OF HIGHER EDUC. (Apr. 2007), <http://www.mass.edu/library/Motions/2007/FAAP07-24.pdf>; Missouri, see MO. CODE REGS. ANN. tit. 6, § 10-3.010(9) (2010); New Hampshire, see Board of Trustees, *Board of Trustees* tit. IV, § F.6.5, U. SYS. OF N.H. (Nov. 27, 2007), <http://www.usnh.edu/olpm/BOT/IV.Fin/F.htm>; New Jersey, see N.J. ADMIN. CODE § 9A:5-1.2 (2010); Ohio, see OHIO ADMIN. CODE 3333-1-10(D) (2010); Oregon, see OR. ADMIN. R. 580-010-0031 (2010); Washington, see WASH. REV. CODE § 28B.15.013(3) (2010); and West Virginia, see *Residency Classification*

While the proffered definitions of domicile appear both relatively straightforward and similar from state to state, some existing state policies demonstrate the pitfalls of statutory interpretation. For example, a memorandum from the Virginia Attorney General's office ("Virginia Memorandum") concluded that undocumented immigrant parents could not be domiciled in the state of Virginia for purposes of a citizen child's in-state tuition determination.⁸⁵ Accordingly, this determination created different standards for citizen children seeking to establish in-state residency. In contrast, Colorado's Attorney General addressed the same issue and yet reached the opposite conclusion. Undocumented parents could establish domicile in Colorado based on factors outlined in state law,⁸⁶ and in-state tuition determinations would be made without regard to immigration status.⁸⁷ In fact, Colorado went one step further in 2008 by promulgating a law intended to reach citizen children of undocumented immigrants.⁸⁸

for Admission and Fee Purposes § 3.1, W. VA. HIGHER EDUC. POL'Y COMMISSION (Aug. 2002), <http://wvhpcdoc.wvnet.edu/resources/133-25.pdf>.

85. See Virginia Memorandum, *supra* note 13.

86. Colorado Opinion, *supra* note 12, at *10–14 (citing various subsections of COLO. REV. STAT. § 23-7-103(2) (2010)).

87. Colorado Opinion, *supra* note 12, at *14.

88. See COLO. REV. STAT. § 23-7-110 (2010); see also N.C. CMTY. COLL. SYS., STUDY ON THE ADMISSION OF UNDOCUMENTED STUDENTS INTO THE NORTH CAROLINA COMMUNITY COLLEGE SYSTEM 54 (2009), available at <http://www.nccommunitycolleges.edu/Reports/undocumented%20students/Study%20on%20the%20Admission%20of%20Undocumented%20Students.pdf>. The Colorado statute states in full:

(1) Notwithstanding any other provision of this article to the contrary, a student who is a United States citizen shall be classified as an in-state student for tuition purposes if:

(a) The student graduated from a public or private high school in this state; and

(b)

(I) The student attended a public or private high school in this state for at least three years immediately preceding the date the student enrolled in a Colorado institution of higher education; or

(II) The student completed a general equivalency diploma in this state and resided in this state for at least three years immediately preceding the date the student enrolled in a Colorado institution of higher education.

(2) Any information provided to satisfy the criteria specified in this section shall be confidential unless disclosure is explicitly required by law.

(3) This section provides an additional option for a student seeking to be classified as an in-state student for tuition purposes. This section shall not be interpreted to impose additional requirements upon a student seeking to be classified as an in-state student for tuition purposes under any other section of this article.

COLO. REV. STAT. § 23-7-110 (2010).

The law provides an alternate means for U.S. citizens to establish in-state residency for tuition purposes without regard to parental domicile. Rather than focusing upon a list of factors, the law focuses instead upon two things: first, whether the student either attended and graduated from public or private high school in the state,⁸⁹ or, alternatively, achieved a graduate equivalency degree in-state;⁹⁰ and second, whether the student had attended high school or, for GED recipients, had resided in-state for at least three years prior to matriculating into Colorado post-secondary education.⁹¹

Similarly, California clarified its financial aid laws following a suit challenging the state's policies on financial aid and residency determinations for higher education, which prevented U.S. citizen children of undocumented immigrant parents from receiving benefits.⁹² The petitioner, Jennie Doe, alleged that despite her U.S. citizenship, lifetime residence in California, and "multiple documented ties to the State," she was denied in-state tuition because of her parents' status as undocumented immigrants.⁹³ According to Doe's pleading, she would not be able to afford her college tuition if classified as a non-resident and thus denied in-state tuition.⁹⁴

At issue was California's interpretation of California Education Code § 68062, which set forth the state's requirements for determining a student's place of residence.⁹⁵ When Doe ques-

89. COLO. REV. STAT. § 23-7-110(1)(a)-(b)(I).

90. *Id.* § 23-7-110(1)(b)(II).

91. *Id.* § 23-7-110(1)(b)(I)-(II) (Subsection (b)(I) covers students who attended public or private high school; subsection (b)(II) covers those who earned a GED.).

92. Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1768-69 (2009).

93. Petition for Writ of Mandate, para. 3, *Student Advocates for Higher Educ. v. Bd. of Trs. of the Cal. State Univ.*, No. CPF-06-506755 (Cal. Super. Ct. Nov. 3, 2006) [hereinafter *Petition for Writ of Mandate*].

94. *Id.*

95. Consent Decree, *Students Advocates for Higher Educ. v. Bd. of Trs. of the Cal. State Univ.*, No. CPF-06-506755 (Cal. Super. Ct. dismissed Apr. 19, 2007). California Education Code § 68062 states:

In determining the place of residence the following rules are to be observed:

(a) There can only be one residence.

(b) A residence is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose.

(c) A residence cannot be lost until another is gained.

tioned her classification as a non-resident, the University informed her it was based on the undocumented immigrant status of her parents.⁹⁶ Although Doe was able to file a non-resident tuition exemption, waiving the non-resident tuition in whole or part,⁹⁷ the classification cost her the other education grants that she had received.⁹⁸ The state ultimately changed course, and the case was resolved by a consent decree concluding that “an unmarried minor child may achieve California residency without reference to the immigration status of his/her parents.”⁹⁹

Therefore, without a clear policy statement on the interpretation of domicile, it remains uncertain how officials will classify citizen children of undocumented parents. California and Colorado have taken positive steps forward, although some bureaucratic challenges have been reported in Colorado.¹⁰⁰ Given the recent attention and debate surrounding birthright citizenship, it would be best to clarify the status of citizen children with respect to accessing in-state tuition.

(d) The residence can be changed only by the union of act and intent.

(e) A man or woman may establish his or her residence. A woman's residence shall not be derivative from that of her husband.

(f) The residence of the parent with whom an unmarried minor child maintains his or her place of abode is the residence of the unmarried minor child. When the minor lives with neither parent his or her residence is that of the parent with whom he or she maintained his or her last place of abode, provided the minor may establish his or her residence when both parents are deceased and a legal guardian has not been appointed.

(g) The residence of an unmarried minor who has a parent living cannot be changed by his or her own act, by the appointment of a legal guardian, or by relinquishment of a parent's right of control.

(h) An alien, including an unmarried minor alien, may establish his or her residence, unless precluded by the Immigration and Nationality Act (8 U.S.C. 1101, et seq.) from establishing domicile in the United States.

(i) The residence of an unmarried minor alien shall be derived from his or her parents pursuant to the provisions of subdivisions (f) and (g).

CAL. EDUC. CODE § 68062 (West 2010).

96. Petition for Writ of Mandate, *supra* note 93, para. 16.

97. *Id.* at paras. 17, 29.

98. *Id.* at para. 17.

99. Consent Decree, *supra* note 95, at 2.

100. See Susan Greene, Op-Ed, *DMV Throws Roadblock in Students' Path*, DENV. POST, Jan. 21, 2010, at B1. In order to obtain “in-state tuition and scholarships at certain state colleges” students must show a state identification card. *Id.* In applying for the cards, the state DMV has been requiring a signed affidavit by the parent of the student. *Id.* However, if the parent is an undocumented immigrant, the DMV has been denying the signed affidavits, thereby preventing the student from receiving a state ID, and thus establishing residency for in-state tuition to certain colleges. *Id.*

The need for clarification is demonstrated by the stance taken in 2010 by the Republican gubernatorial candidate in Iowa, Bob Vander Plaats, who expressed his support for denying citizen children of undocumented immigrants from receiving in-state tuition for public post-secondary education.¹⁰¹ Likewise, in Texas, such sentiments have existed even prior to the recently renewed birthright citizenship debate. In 2006, legislation was introduced in Texas to deny state public benefits to citizen children of undocumented immigrant parents, thus obstructing access to higher education in addition to other state benefits.¹⁰² An author of the bill, Representative Leo Berman,¹⁰³ was cited as stating that he wanted to use the bill “to test birthright citizenship in the federal courts.”¹⁰⁴ While the validity of birthright citizenship itself is beyond the scope of this Note, children already granted U.S. citizenship under existing federal policy should not be used as test cases for immigration policy. The creation or interpretation of policies to the detriment of citizen children produces questions of citizens’ rights and constitutional equal protection issues.

101. Thomas Beaumont, *Branstad Flips View on Linking Benefits, Kids’ Status*, DES MOINES REGISTER, May 5, 2010, at A1. Iowa’s former Governor Terry Branstad also indicated that he would support denying in-state tuition benefits to citizen children but retracted his statement several days later: “If they are born here, they are legal residents,” Branstad spokesman Tim Albrecht said. “If they are, they should be afforded every opportunity as every legal resident of the state.” *Id.*

102. H.B. 28, 80th Leg., Reg. Sess. (Tex. 2006). Section 2352.002 of the proposed legislation states, “This chapter applies only to an individual: (1) who is born in this state on or after the effective date of this chapter; and (2) whose parents are illegal aliens at the time the individual is born.” *Id.* § 2352.002. The proposed legislation then defines eligibility for state benefits: “An individual to whom this chapter applies is not entitled to and may not receive any benefit provided by this state or a political subdivision of this state, including: . . . (9) instruction from a public institution of higher education . . .” *Id.* § 2352.003(9).

103. Leo Berman is the Representative to District 6 of Texas. *Texas House of Representatives: Rep. Berman*, <http://www.house.state.tx.us/members/dist6/berman.php> (last visited Mar. 29, 2010). District 6 encompasses Tyler, Texas, which also includes the Tyler Independent School District, which was subject to the Equal Protection claim in *Plyler*. Texas House of Representatives, *District Map*, <http://www.fyi.legis.state.tx.us/fyiwebdocs/PDF/House/dist6/m1.pdf> (last visited Mar. 29, 2010); see also *supra* Part III.A.

104. R.G. Ratcliffe, *supra* note 29.

IV. CONSTITUTIONAL ISSUES: CITIZENS' RIGHTS AND EQUAL PROTECTION

The state policies considered above present the troubling possibility that U.S. citizens could be treated differently due to the immigration status of their parents. A citizen child's eligibility for in-state tuition rates should not change based on the collateral effects of policies aimed at illegal immigrants. As citizens, their rights should be considered separately from the immigration policies targeted at their undocumented parents.

Courts have already demonstrated a willingness to at least consider citizens' rights in the face of immigration policy. For example, in *Kleindienst v. Mandel*, the Court considered on the merits a claim made by U.S. citizens that their First Amendment rights had been violated by the denial of a third party's visa.¹⁰⁵ Likewise, in *American Academy of Religion v. Napolitano*, the Second Circuit allowed U.S. citizens to challenge a third party's visa denial as a possible violation of the citizens' First Amendment rights, notwithstanding the U.S. government's argument that such decisions are ordinarily free from judicial review.¹⁰⁶

That being said, a body of case law also exists regarding citizen children rights in the context of immigration deportations where courts have been less reluctant to overrule immigration

105. 408 U.S. 753 (1972). *Kleindienst* presented a challenge to the denial of a foreign scholar's visa by American scholars, all U.S. citizens, who alleged that their First and Fifth Amendment rights had been violated. *Id.* at 759–60. The Court considered the plaintiffs' argument on whether the First Amendment gave them the power to overturn the denied visa. *Id.* at 762. Although the ultimate disposition of the case was not favorable to the scholars, *id.* at 760, the Supreme Court's willingness to consider the citizens' rights as affected by immigration law is relevant to this Note's argument.

106. 573 F.3d 115 (2d Cir. 2009). This case involved a challenge by U.S. citizen scholars regarding the denial of a visa for a visiting scholar. *Id.* at 117. The court cited *Kleindienst* as providing a foundation for limited judicial review of an alleged constitutional violation, notwithstanding immigration issues. *Id.* at 124.

In *American Academy of Religion* the court reviewed whether the doctrine of consular non-reviewability prevented the District Court from considering the claim, *id.* at 123; in its opinion below, the District Court had indicated that the doctrine prevents federal courts from having jurisdiction over an alien's challenge to a denied visa. *Id.* at 121 (citing *Am. Acad. of Religion v. Chertoff*, No. 06 CV 588, 2007 WL 4527504, *5–*7 (S.D.N.Y. Dec. 20, 2007), *vacated sub nom.* *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115 (2d Cir. 2009)). Determining that the district court had jurisdiction in spite of the doctrine, *id.* at 118, the court deemed the claim reviewable, as it was based on the violation of the appellants' First Amendment rights. *Id.* at 123, 125.

law.¹⁰⁷ In spite of this, one study has found that courts are more likely to intervene where citizen children are discriminated against on account of the status of their parents.¹⁰⁸ This Part thus presents case law supporting the argument that courts will find a constitutional equal protection violation in treating citizen children differently for in-state tuition determinations.

The Supreme Court has stated that the Equal Protection Clause requires that “all persons similarly circumstanced shall be treated alike.”¹⁰⁹ However, a double standard emerges when citizen children — who would otherwise qualify for in-state tuition — are treated differently than other citizens who do not have undocumented parents. Such differential treatment is based solely upon the immigration status of a citizen child’s parents. Equal protection case law shows that such classifications are likely to be found unconstitutional.¹¹⁰

Three points of reasoning emerge from equal protection case law that are particularly applicable to this Note’s arguments. First, courts have held that under the Equal Protection Clause, citizen children may not be discriminated against based on the immigration status of their parents.¹¹¹ Second, courts have emphasized that public benefits are sought for the benefit of the citizen child, rather than the undocumented parent.¹¹² Finally, the courts’ determination of alienage as suspect classification could be extended to the issues addressed in this Note.

A. CITIZEN CHILDREN MAY NOT BE DISCRIMINATED AGAINST ON THE BASIS OF THEIR PARENTS’ IMMIGRATION STATUS

While directly applicable case law on higher education and in-state tuition is sparse, equal protection case law exists regarding the denial of other public benefits to citizen children of undocu-

107. See Piatt, *supra* note 5.

108. *Id.* at 36.

109. Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)) (internal quotations omitted).

110. See, e.g., Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972); Lewis v. Thompson, 252 F.3d 567 (2d Cir. 2001); Doe v. Reivitz, 830 F.2d 1441 (7th Cir. 1987), amended by 842 F.2d 194 (7th Cir. 1998).

111. See, e.g., Lewis, 252 F.3d 567 (holding in the context of Medicare benefits); Reivitz, 830 F.2d 1441 (holding in the context of welfare benefits).

112. Reivitz, 830 F.2d at 1451.

mented parents. Courts have endorsed the concept of separating the parents' conduct and status from the child's in the context of public benefits. Case law regarding other public benefits is appropriate for analysis here, as education is generally regarded as a public benefit — particularly since federal law has defined state public benefits to include higher education.¹¹³ Accordingly, these public benefit cases may be analogized to the situation faced by citizen children seeking the public benefit of in-state tuition for public post-secondary education.

In *Lewis v. Thompson*,¹¹⁴ a case dealing with a suit filed on behalf of individuals who had been denied Medicaid on the basis of their alienage,¹¹⁵ the Second Circuit determined that citizen children were denied a “social welfare benefit, itself unrelated to immigration . . . on a discriminatory basis that violates the Equal Protection Clause.”¹¹⁶ Under the statute at issue,¹¹⁷ undocumented mothers were denied from qualifying for medical assistance, thus precluding any coverage of her citizen child.¹¹⁸ The court held that citizen children of undocumented mothers were entitled to automatic eligibility for Medicaid benefits, equal to the automatic eligibility given to citizen children of citizen mothers.¹¹⁹

Similarly, the district court in *Doe v. Reivitz*¹²⁰ — although affirmed only on its statutory grounds, as the appellate court did not reach the constitutional issue¹²¹ — held in its equal protection analysis that citizen children could not be denied benefits under the Aid to Families with Dependent Children–Unemployed Parent (“AFDC-UP”) program, solely because the relevant parent under the statute was an undocumented alien.¹²² In *Reivitz*, a

113. See *supra* Part III.B.

114. *Lewis*, 252 F.3d 567.

115. *Id.* at 571–72.

116. *Id.* at 591. In addition, one author found that courts have generally intervened in cases where citizen children have been punished as a consequence of state policies aimed at discouraging illegal immigration. See Piatt, *supra* note 5, at 38.

117. The statute at issue in *Lewis* was the 1996 Welfare Reform Act. *Lewis*, 252 F.3d at 569; see generally *supra* Part III.B.

118. *Lewis*, 252 F.3d at 588.

119. *Id.* at 591.

120. 830 F.2d 1441 (7th Cir. 1987), amended by 842 F.2d 194 (7th Cir. 1988).

121. *Id.* at 1442.

122. See *id.* at 1442–45. The AFDC-UP is a component of the broader Aid to Families with Dependent Children program, which provides financial assistance to single parent homes so that single parents may stay home and take care of their children, rather than go to work. *Id.* at 1443 (citing 42 U.S.C. § 601 (1982) (current version at 42 U.S.C. § 601

Wisconsin policy denied AFDC-UP program benefits to citizen children if the unemployed primary earner of the household was an undocumented alien.¹²³ Accordingly, in cases involving public benefits other than education, courts have held in favor of citizen children on the basis that children should not be denied benefits because of their parents' undocumented immigration status.

As in public benefit cases, the Court in *Plyler* also endorsed the concept of separating the parents' conduct and status from that of the child's.¹²⁴ The Court in *Plyler* emphasized the fact that the parents' status was beyond the child's control¹²⁵ and highlighted the injustice of penalizing the citizen child for the status of his parent: "Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."¹²⁶

The above reasoning is applicable to state policies that would burden a citizen child's access to in-state tuition on the basis of a parent's status. Under the Virginia Memorandum's construction, as in *Reivitz*,¹²⁷ citizen children may be treated differently solely due to their parents' undocumented status; yet the *Reivitz* court had reasoned that such treatment was a violation of the Equal Protection Clause.¹²⁸ Furthermore, under the Virginia interpretation, the lack of differentiation between the citizen child and his or her undocumented parent is made in the context of an education benefit that is "itself unrelated to immigration."¹²⁹ This point was also noted in the *Lewis* court's reasoning, which ultimately found an Equal Protection Clause violation.¹³⁰ Thus, it would seem that a policy of differential treatment for citizen children

(2010))). As a part of this larger program, the AFDC-UP expanded financial assistance coverage to families with two parents where the primary wage earner was unemployed. *Id.* at 1443 (citing 41 U.S.C. § 607 (1982) (current version at 42 U.S.C. § 607 (2010))).

123. *Id.*

124. *Plyler v. Doe*, 457 U.S. 202, 220 (1982) ("Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual — as well as unjust — way of deterring the parent." (internal quotation marks omitted) (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972))).

125. *Id.*

126. *Id.*

127. *Reivitz*, 830 F.2d at 1451.

128. *Id.* at 1442, 1451.

129. *Lewis v. Thompson*, 252 F.3d 567, 591 (2d Cir. 2001).

130. *Id.* at 589–90.

based on the undocumented status of their parents is more likely to be found unconstitutional than not. Likewise, the American Civil Liberties Union of Virginia (“ACLU”) highlighted a similar point in a response letter to the Virginia Memorandum sent to the presidents of the various public colleges and universities of Virginia.¹³¹

In its letter, the ACLU concluded that the Virginia Memorandum’s interpretation violated a “fundamental tenet” of United States law that children should not be punished for the actions of their parents.¹³² The letter drew on two cases: *Plyler v. Doe*, where the Supreme Court held that children may not be discriminated against due to the status of their parents,¹³³ and *Weber v. Aetna Casualty & Surety Co.*, which dealt with the discriminatory treatment of illegitimate children.¹³⁴ Quoting *Weber*, the ACLU noted that the principle of not punishing children for the actions of their parents was also applied to the children in *Plyler*: “Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual — as well as unjust — way of deterring the parent.”¹³⁵

B. THE CITIZEN CHILD AS RECIPIENT OF THE PUBLIC BENEFIT

Also important in these cases is the fact that the citizen child receives the public benefit, and not the parent. In *Lewis*, the court determined that a stricter standard of review was necessary in cases involving a citizen’s claim, as opposed to a non-citizen’s immigration claim.¹³⁶ While the court acknowledged that the claim involved benefits denied to a mother based on her undocumented immigration status, it noted that it would not apply the “highly deferential standard” usually used in immigration mat-

131. Letter from ACLU of Va. to Presidents of Pub. Univs. in Va. (Mar. 25, 2008) [hereinafter ACLU], available at <http://www.acluva.org/wp-content/uploads/2009/12/20080325ACLULettertoCollegesInStateTuition.pdf>.

132. *Id.* (citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Plyler*, 457 U.S. 202).

133. *Id.* (stating that the Court “repeatedly recognized that individuals may not be discriminated against on the basis of who their parents are”); see also *supra* Part III.A.

134. 406 U.S. 164, 165 (1972).

135. ACLU, *supra* note 131 (quoting *Weber v. Aetna*, 406 U.S. 164, 175 (1972)). The letter states that children of undocumented immigrants “can affect neither their parents’ conduct nor their own status” (quoting *Plyler v. Doe*, 457 U.S. 202 (1982)).

136. *Lewis v. Thompson*, 252 F.3d 567, 590 (2d Cir. 2001).

ters.¹³⁷ Rather, since the case involved a claim for the benefit of a citizen child, the court applied a rational basis test in its equal protection analysis, which imposed a higher standard of justification for the government to overcome.¹³⁸

Furthermore, in equal protection claims resolved by statutory interpretation, courts have also reasoned that such statutory benefits are actually provided to the citizen child, rather than the undocumented parent. For example, in *Reivitz* the court stated that “[t]he illegal alien parents of these children are not seeking benefits for themselves,” and cautioned that “[the court does] not think that the intent to exclude citizen . . . children from the AFDC-UP program should be lightly imputed to Congress.”¹³⁹ Likewise, in *Ruiz v. Blum*, the child’s status as a U.S. citizen factored into the court’s conclusion that a denial of day care benefits to an undocumented immigrant parent was impermissible.¹⁴⁰

However, arguments may also be made that the preceding equal protection reasoning does not extend to the issue of in-state tuition for citizen children. Both *Reivitz* and *Lewis*, and even *Plyler*, dealt primarily with a complete denial of benefits, rather than a separate means of accessing benefits; for example, the Virginia Memorandum provides citizen children with the option of rebutting their presumption of non-domicile in order to receive in-state tuition.¹⁴¹ One could argue that a complete denial of benefits is more egregious than a separate means of access, and thus more readily found to be a violation of the Equal Protection Clause. However, as stated in *Lewis*, “a disadvantage need not be especially onerous to merit assessment under the Equal Protection Clause.”¹⁴²

137. *Id.*

138. *Id.*

139. *Doe v. Reivitz*, 830 F.2d 1441, 1451 (1987), amended by 842 F.2d 194 (7th Cir. 1988).

140. 549 F. Supp. 871, 875–77 (1982) (“If [the child], a native born citizen who is otherwise eligible is denied, on the ground of his mother’s status, day care services which are granted to all other eligible native born children, as well as to non-citizen children who are legally present in the United States, it clearly penalizes him solely by reason of his mother’s status.” *Id.* at 877.). *Ruiz* dealt with an equal protection claim in the administration of a state public day care program where citizen children who were otherwise eligible for the program were denied day care benefits because their parents could not provide the requisite identification for eligibility due to their undocumented immigration status. *Id.* at 872–74.

141. See Virginia Memorandum, *supra* note 13, at 2.

142. *Lewis*, 252 F.3d at 590.

Furthermore, one could claim that citizen children under the Virginia Memorandum have the same opportunities for in-state tuition as their peers, just under a different process.¹⁴³ Yet the fact that such a process exists, with the burden falling exclusively on the citizen child student, appears patently inequitable. The Supreme Court has stated that under the Equal Protection Clause, “all persons similarly circumstanced shall be treated alike.”¹⁴⁴ As indicated in the earlier discussion of *Plyler*, the Supreme Court cited “one of the goals of the Equal Protection Clause [as] the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”¹⁴⁵ Thus, under the Equal Protection Clause, a separate means of access that is more burdensome than that encountered by other similarly situated citizens, except for the immigration status of their parents, could be viewed as an “unreasonable obstacle.”¹⁴⁶ This is further supported by the principle enunciated in *Lewis*: “the government harms minority individuals, and violates the Equal Protection Clause . . . [w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group.”¹⁴⁷

C. ALIENAGE AS SUSPECT CLASSIFICATION: A CITIZEN CHILD’S STRONGER CLAIM

The status of these children as citizens bolsters their equal protection claim.¹⁴⁸ With regard to the strength of citizen children claims, *Lewis* stated that in comparison to claims made by undocumented children, “[citizen children plaintiffs] claim is stronger in that . . . it is asserted on behalf of citizen children.”¹⁴⁹ This reasoning can also be used to extend application of equal protection

143. See Virginia Memorandum, *supra* note 13, at 2.

144. *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (internal quotation marks omitted) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920)).

145. *Id.* at 221–22.

146. *Id.*

147. *Lewis*, 252 F.3d at 590 (alteration in original) (internal quotation marks omitted) (quoting *Comer v. Cisneros*, 37 F.3d 775, 793 (2d Cir. 1994)).

148. See *Lewis*, 252 F.3d at 591.

149. *Id.* (comparing claims made in the case by citizen children to those made by undocumented immigrant children in *Plyler*).

analysis regarding higher education benefits for documented immigrants to citizen children.

In *Nyquist v. Mauclet*, a case dealing with a claim by documented immigrants challenging the limitation of state financial aid to U.S. citizens,¹⁵⁰ the Supreme Court determined that alienage is a suspect classification with regard to post-secondary education benefits.¹⁵¹ Alienage is essentially the classification of being a non-citizen.¹⁵² Accordingly, under *Nyquist*, if a public institution were to deny post-secondary education benefits to a documented immigrant, it would likely violate the Equal Protection clause.¹⁵³ Applying the previously stated *Lewis* reasoning to the *Nyquist* holding, one could likewise draw the conclusion that alienage may be a suspect classification with regards to post-secondary education benefits to citizen children, particularly since a citizen's claim will be stronger than a non-citizen documented immigrant's claim.

However, because the alienage of the student was at issue in *Nyquist*, rather than that of the parent, *Nyquist's* holding may not be applicable in the context of citizen children seeking in-state tuition. In the context of in-state tuition, emphasis has consistently fallen on the alienage of the parent.¹⁵⁴ Nevertheless, the argument could be made that tuition policies linking a dependent citizen child's eligibility for in-state tuition to their parents' domicile, necessarily links the alienage of the parent to the benefits denied to the citizen child. As indicated earlier in the survey of the fifty states' in-state tuition statutes, many states define the domicile or residency of an unemancipated student as that of their parent.¹⁵⁵ This definition makes the student's residency qualification a function of the parent's status, turning a parent's alienage, into the student's issue; thus directly penalizing the student for his or her parents' status. This argument supports the finding of an Equal Protection violation in classifying citizen children differently for in-state tuition residency determinations.

150. 432 U.S. 1, 5 (1977).

151. *Id.* at 8–9; see also KAPLIN & LEE, *supra* note 70.

152. BLACK'S LAW DICTIONARY 79 (8th ed. 2004).

153. See KAPLIN & LEE, *supra* note 70.

154. See *infra* Part V.

155. See *supra* Part III.C.

* * *

Although education is not a fundamental right, the lack of a fundamental right has not prevented courts from finding an equal protection violation when a benefit has been denied. The Medicaid benefits at issue in *Lewis*¹⁵⁶ fall under the category of healthcare, which, like education, has never been conclusively found to be a fundamental right. Yet as discussed in Part IV.A, the court in *Lewis* found that citizen children could not be denied a welfare benefit solely on account of the immigration status of their parent.¹⁵⁷ Again, it could be argued that the urgency inherent in health care, which is generally not a factor in education, could have made a difference in the court's willingness to find an equal protection violation. However, as noted in *Plyler* and the analysis in Part III.A, denying education to a subset of children can violate the Equal Protection Clause.¹⁵⁸

While the holding of *Plyler* has been limited to the availability of elementary and secondary public education for undocumented minor children,¹⁵⁹ the Court's emphasis on the importance of education in its equal protection analysis is equally applicable in the context of higher education. *Plyler* stated that education, though not a fundamental right, was more than just a public benefit or a "for[m] of social welfare legislation."¹⁶⁰ The Court's reasoning has direct implications for not just elementary and secondary education but also for higher education:

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmen-

156. *Lewis v. Thompson*, 252 F.3d 567 (2d Cir. 2001).

157. *Id.*

158. *Plyler v. Doe*, 457 U.S. 202, 221-22 (1982).

159. In *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988), the Supreme Court indicated that application of *Plyler* "has not been extended beyond its unique circumstances." *Id.* at 459. See Emily Wexler Love et al., *supra* note 78, at 182 (indicating that the Supreme Court has refused to extend the holding of *Plyler* to other cases).

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

tal barriers presenting unreasonable obstacles to advancement on the basis of individual merit.¹⁶¹

While this evaluation of the Equal Protection Clause is made in the context of *Plyler* and its limited holding, the goals of equal protection are arguably consistent in varying situations — only the application would differ. Although the holding of *Plyler*, if extended to post-secondary education, would still not directly apply to the citizen children discussed in this Note, *Plyler*'s supporting analysis is directly applicable to the problem examined here.

For citizen children of undocumented parents who have lived in one state for their entire lives, or who are properly considered legal residents of that state, their classification as in-state residents for tuition should be obvious. Why does uncertainty still exist for these citizen children, and how could states justify treating them differently for purposes of in-state tuition? The following Part revisits the stated policies of Virginia and Colorado and considers how each state came to different conclusions in the interpretation of their respective statutes regarding in-state tuition.

V. STATUTORY INTERPRETATION: VIRGINIA AND COLORADO REVISITED

As introduced in Part III.C, both Virginia and Colorado have addressed the question of whether citizen children of undocumented immigrants are eligible for in-state tuition under certain state statutory provisions. In both states, the general determination of eligibility for in-state tuition for dependent or minority age students depends upon the domicile of the parent.¹⁶² From this, the issue of the undocumented immigrant parent arises — whether an undocumented immigrant parent may be considered

161. *Id.* at 221–22.

162. See VA. CODE ANN. § 23.7-4(C) (2010) (“The domicile of a dependent student shall be *rebuttably presumed* to be the domicile of the parent . . . claiming him as an exemption on federal or state income tax returns currently and for the tax year prior to the date of the alleged entitlement or providing him substantial financial support.” (emphasis added)); COLO. REV. STAT. § 23-7-103(1)(a) (2010) (“Unless the contrary appears to the satisfaction of the registering authority of the institution at which a student is registering, it shall be presumed that [t]he domicile of an unemancipated minor is that of the parent with whom he or she resides . . .”).

domiciled in the state. If the answer is yes, then the citizen child may be granted in-state tuition just as any other dependent student. However, if the answer is no, then the citizen child encounters additional obstacles or is possibly precluded from in-state tuition altogether,¹⁶³ even if they are otherwise eligible, save for the interpretation of their parents' domiciliary status.

Interpreting the meaning of "domicile," the State Attorney General Offices of Virginia and Colorado arrived at opposite conclusions: Virginia found that undocumented immigrant parents may not be considered domiciled in the state,¹⁶⁴ while Colorado determined that such parents could be domiciled in state.¹⁶⁵

A. THE VIRGINIA MEMORANDUM: A FINDING OF NON-DOMICILE

On March 6, 2008, the Office of the Attorney General of Virginia released a memorandum addressing the following question: whether a student who is a U.S. citizen, but a child of undocumented immigrant parents is "categorically barred from establishing domicile in Virginia and being afforded in-state tuition."¹⁶⁶ Not unlike the facts of *Student Advocates*,¹⁶⁷ the issue first arose when a high school senior born in the United States and residing in Alexandria, Virginia, was denied in-state tuition to the University of Virginia.¹⁶⁸ While the student eventually received in-state tuition status from the University,¹⁶⁹ the Virginia Memorandum advised that dependent citizen children of undocumented immigrants would have to rebut a presumption of non-domicile, established by their parents' illegal immigration status; the memo did not foreclose the possibility that if these students could not establish domicile independent of their parents, in-state tuition could simply be denied.¹⁷⁰

163. See *supra* text accompanying note 7. Although some of the anecdotal examples presented in this Note were eventually resolved favorably for the citizen child student, they are referred to here as examples of state policies that, as applied, initially precluded citizen children from in-state tuition.

164. See Virginia Memorandum, *supra* note 13.

165. See Colorado Opinion, *supra* note 12.

166. See Virginia Memorandum, *supra* note 13, at 1.

167. See *supra* Part III.C.

168. See Kinzie, *supra* note 7.

169. *Id.*; see also Susan Kinzie, *Update: U-Va. Accepts Residency Claim*, WASH. POST, Mar. 24, 2008, at B5.

170. See Virginia Memorandum, *supra* note 13.

In its analysis, the Virginia Memorandum made two determinations: first, whether an undocumented immigrant parent may be domiciled in the state of Virginia; and second, whether the citizen child of such parent may be eligible for in-state tuition.¹⁷¹ On the first question, the Virginia Memorandum found that undocumented parents¹⁷² who are not “lawfully present in the United States . . . may not be domiciled in Virginia.”¹⁷³ This is simply stated with no further elaboration, indicating that “[the memorandum] need not go into further analysis of this point.”¹⁷⁴ Given this conclusion, the memo then turns to the second question of whether a citizen child of undocumented parents is eligible for in-state tuition.

Answering the question of eligibility, the memorandum determined that dependent citizen children would be responsible for rebutting a presumption of non-domicile by showing evidence of independent domicile which could then be considered on a case-by-case basis.¹⁷⁵ In its analysis, the memorandum relies upon relevant provisions of the Virginia Code¹⁷⁶ and State Council of Higher Education for Virginia (“SCHEV”) Domicile Guidelines.¹⁷⁷ Under Virginia law, “dependent students” are eligible for in-state tuition only if their parents are domiciled in Virginia.¹⁷⁸ As pre-

171. *Id.* (defining the term “parents” as “the parent(s) or other person upon whom a student is dependent and through which the student claims, or would ordinarily claim, domicile.” *Id.* at 1 n.1.)

172. *Id.* at 1.

173. *Id.*

174. *Id.* In attempting to determine how the Virginia State Attorney General’s office came to the conclusion that undocumented immigrants could not establish Virginia domicile without any further analysis or elaboration, the SCHEV Domicile Guidelines also indicate that undocumented immigrants are not eligible to establish domicile in the state. STATE COUNCIL OF HIGHER EDUC. FOR VA., DOMICILE GUIDELINES 3 add. A (2010), available at <http://www.schev.edu/finaid/GuidelinesAddendumA.pdf>. The SCHEV is “[Virginia’s] coordinating body for higher education. SCHEV was established by the Governor and General Assembly in 1956. Then as now, [its] mission, which is outlined in the Code of Virginia, is to promote the development of an educationally and economically sound, vigorous, progressive, and coordinated system of higher education’ in Virginia.” *About SCHEV*, STATE COUNCIL OF HIGHER EDUC. FOR VA. (internal quotation marks omitted), http://www.schev.edu/About_SCHEV.asp (last visited Mar. 20, 2011).

175. Virginia Memorandum, *supra* note 13, at 2.

176. *Id.*; see also VA. CODE ANN. § 23.7-4 (2010).

177. Virginia Memorandum, *supra* note 13; see also STATE COUNCIL OF HIGHER EDUC. FOR VA., DOMICILE GUIDELINES (2009), available at <http://www.schev.edu/students/VAdomicileguidelines.asp>.

178. Virginia Memorandum, *supra* note 13; see also VA. CODE ANN. § 23.7-4(B) (“To become eligible for in-state tuition, a dependent student or unemancipated minor shall

sented above, the memorandum determined that undocumented parents could not be domiciled in Virginia.¹⁷⁹ Accordingly, their dependent citizen children are presumably ineligible for in-state tuition.

Despite such facial ineligibility, in concluding a case-by-case determination of domicile is appropriate, the memo states that students may rebut the presumption that their domicile is that of their parents.¹⁸⁰ Nevertheless, even in spite of such case-by-case determinations, the memo also notes that the presumption of dependent student domicile “has been treated as an extremely strong presumption in Virginia.”¹⁸¹ Consequently, although students may have the procedural option of establishing domicile separate from their parent, the memo concludes that “[o]vercoming the presumption is a difficult burden to meet, and instances of overcoming it will be rare.”¹⁸²

While the memorandum emphasizes the fact that *any* student seeking in-state tuition, and not just citizen children of undocumented parents, may establish domicile separate from their parents,¹⁸³ the disparate impact upon citizen children is apparent. Citizen children of undocumented parents face a vastly different

establish by clear and convincing evidence that for a period of at least one year prior to the date of the alleged entitlement, *the person through whom he claims eligibility* was domiciled in Virginia and had abandoned any previous domicile, if such existed.” (emphasis added)).

179. Virginia Memorandum, *supra* note 13 at 1.

180. *Id.* at 2. The Virginia Memorandum cites Virginia Code § 23.7-4(C), which states: The domicile of a dependent student shall be *rebuttably presumed* to be the domicile of the parent or legal guardian claiming him as an exemption on federal or state income tax returns currently and for the tax year prior to the date of the alleged entitlement or providing him substantial financial support.

VA. CODE ANN. § 23.7-4(c) (emphasis added).

Additionally, citing the SCHEV Domicile Guidelines, the memo states that the student by “clear and convincing evidence” may establish domicile in Virginia, even if the student’s parents are domiciled elsewhere. The relevant section states in its entirety:

A dependent student 18 years of age or older may also rebut the presumption that the student has the domicile of the parent claiming the student as a dependent for income tax purposes by showing that Virginia domicile was established independent of the parents. The burden is on the student to show by *clear and convincing evidence* that he has established a Virginia domicile independent of the out-of-state parents despite the fact that the parents are claiming the student as a dependent for income tax purposes or providing substantial financial support.

STATE COUNCIL OF HIGHER EDUC. FOR VA., *supra* note 177, at 11 (emphasis added).

181. Virginia Memorandum, *supra* note 13, at 2.

182. *Id.*

183. *Id.* at 2.

eligibility requirement for in-state tuition than that faced by similarly situated citizen children of U.S. citizens. In justifying the Virginia memo, it would be erroneous to compare the circumstance of a citizen child with an out-of-state citizen parent, to that of a citizen child who would otherwise be considered domiciled in Virginia, but for the undocumented status of his parents. All else being equal, citizen children of undocumented parents could be treated differently than their citizen peers, under the policy interpretation provided by the Virginia Memorandum. While Colorado addressed a similar question, its conclusion focused on the *parent's* burden to show domicile, rather than that of the student.¹⁸⁴

B. THE COLORADO OPINION: A FINDING OF DOMICILE

The formal opinion released by the Colorado Attorney General's office in 2007 ("Colorado Opinion") stands in stark contrast to the conclusion drawn by the Virginia Memorandum.¹⁸⁵ The formal opinion addressed the question of whether a U.S. citizen dependent student was eligible for in-state tuition to a public higher education institution, if his or her parents, though undocumented immigrants, lived in Colorado with the intention of staying for at least 12 continuous months before the student enrolled in school.¹⁸⁶ The question arose in response to confusion over reconciling Colorado's requirements for in-state tuition and a state immigration law passed in 2006 — one of the nation's strictest, which prohibited the use of taxpayer money to benefit unauthorized immigrants.¹⁸⁷

Like Virginia, the Colorado Attorney General's Office came to the conclusion that domicile should be determined on a case-by-case basis.¹⁸⁸ However, the key difference between Colorado's and

184. Colorado Opinion, *supra* note 12, at *14–15.

185. *Id.* The formal opinion by the Colorado Attorney General was written in response to a request by David Skaggs, the Executive Director of the Colorado Department of Higher Education. *Id.* at *1.

186. *Id.* at *1.

187. Allison Sherry, *Immigration Law Hits Students: Some U.S.-Born Colorado Students Are Being Charged Out-of-State Tuition Because Their Parents Are Here Illegally*, DENVER POST, July 22, 2007, at C-6; *see also* COLO. REV. STAT. §§ 24-76.5-101 to -103 (2010).

188. Colorado Opinion, *supra* note 12, at *14–15.

Virginia's interpretations is that Colorado's conclusion focused upon the domicile of the parent, indicating that such domicile would be determined without regard to the parent's immigration status.¹⁸⁹ In support of its conclusion, the opinion provided an analysis of two considerations, slightly different than the Virginia Memorandum's: first, the applicability of state and federal law regarding public benefit eligibility; and second, the interpretation of domicile under state law.¹⁹⁰

To determine whether citizen children of undocumented parents are eligible for in-state tuition, the Colorado opinion first addressed whether such students are eligible for public benefits under state and federal law.¹⁹¹ Under Colorado state law, it is unlawful to provide a local, state, or federal public benefit to any individual over the age of 18 years old who is not lawfully in the United States.¹⁹² The Colorado opinion indicates that "state or local public benefit" and "federal public benefit" are defined consistently with the definitions found in two federal immigration statutes — the PRWORA and IIRIRA.¹⁹³

Using these federal statutes, the Colorado Opinion determined that in-state tuition, as referenced under Colorado law, was a public benefit.¹⁹⁴ Additionally, it determined that in-state tuition eligibility was restricted to those who could prove lawful presence in the United States.¹⁹⁵ Within this statutory framework, the Colorado Opinion concluded that citizen children of undocumented parents were still eligible for in-state tuition because, first, the student is a U.S. citizen, thus meeting all state and federal requirements,¹⁹⁶ and second, tuition is granted to a student as an individual — not to the household or family.¹⁹⁷ Thus, the parents' status does not factor into the student's eligibility for in-

189. *Id.* at *2–4.

190. *Id.* at *3.

191. *Id.*

192. *Id.* at *4. Under Colorado law, the state must confirm the immigration status of all individuals 18 years of age or older who apply for local, state, or federal public benefits; it is unlawful to provide a public benefit to anyone who does not qualify and to qualify, one must be a U.S. citizen, legal permanent resident, or otherwise lawfully within the United States. *Id.* (citing COLO. REV. STAT. § 24-76.5-103 (2006)).

193. Colorado Opinion, *supra* note 12, at *4–5; *see also supra* Part III.B.

194. Colorado Opinion, *supra* note 12, at *8.

195. *Id.*

196. *Id.* at *9.

197. *Id.* at *10.

state tuition.¹⁹⁸ On the latter point, the Opinion reasoned “[t]hat in-state status may, in some cases, incidentally benefit the student’s parents does not alter the fact that it is the student who applies for and receives classification as an in-state student.”¹⁹⁹ This reasoning echoes the equal protection analysis of *Reivitz* which emphasized the fact that undocumented parents did not seek public benefits for themselves, but for their citizen children,²⁰⁰ and ultimately held that citizen children could not be denied certain federal program benefits on account of the immigration status of their parents.²⁰¹

Having determined that citizen children of undocumented parents are eligible for in-state tuition, the formal opinion next considered the proper application of state domicile requirements for in-state tuition.²⁰² To receive in-state tuition in Colorado, a dependent student must establish domicile in Colorado through his parent.²⁰³ Unlike Virginia, however, Colorado determined that an undocumented parent may be considered domiciled in the state.²⁰⁴

In making this determination, the Colorado Opinion relied upon a plain meaning interpretation of its state statute. Under Colorado law, domicile is defined as “a person’s true, fixed, and permanent home and . . . place of habitation. It is the place where he intends to remain and to which he expects to return when he leaves without intending to establish a new domicile elsewhere.”²⁰⁵ Interpreting this provision, the opinion determined that there was nothing in the tuition classification statute which

198. *Id.* at *8.

199. *Id.*

200. *Doe v. Reivitz*, 830 F.2d 1441, 1451 (7th Cir. 1987), *amended by* 842 F.2d 194 (1988); *see also supra* Part IV.B.

201. *Reivitz*, 830 F.2d at 1442.

202. Colorado Opinion, *supra* note 12, at *10–14.

203. *Id.* at *11 (citing COL. REV. STAT. § 23-7-102(5) (2006)). Under Colorado law, if a student is under the age of 22, the student’s domicile must be established through the parent. COLO. REV. STAT. § 23-7-103(1)(a) (2010) (“Unless the contrary appears to the satisfaction of the registering authority of the institution at which a student is registering, it shall be presumed that [t]he domicile of an unemancipated minor is that of the parent with whom he or she resides . . .”). Under Colorado law, “[a] minor is unemancipated.” COLO. REV. STAT. § 23-7-103(1)(g). A minor is defined as “a male or female person who has not attained the age of twenty-two years.” COLO. REV. STAT. § 23-7-102(7) (2010).

204. Colorado Opinion, *supra* note 12, at *11.

205. *Id.* at *10–11 (internal quotation marks omitted) (quoting COLO. REV. STAT. § 23-7-102(2)).

would prohibit an undocumented immigrant from being considered a domiciliary of the state.²⁰⁶ Furthermore, citing case law, the opinion determined that undocumented immigration status was not a bar to establishing domicile in Colorado.²⁰⁷

Accordingly, the opinion determined that undocumented immigrant parents may establish in-state domicile based on the factors outlined in Colorado law, indicating that this would be “a factual determination and one that will vary with each student and his or her family.”²⁰⁸ Based on this factual determination, citizen children could be entitled to in-state tuition “[i]f the parents have been physically present in Colorado for twelve months prior to the student’s registration, have the requisite intent to establish domicile, and if other applicable portions of the tuition classification statute have been satisfied.”²⁰⁹ These are the same requirements as those of other citizen students with citizen or documented immigrant parents.²¹⁰ Thus, as long as the parent

206. *Id.* at *11.

207. *Id.* (citing *Seren v. Douglas*, 489 P.2d 601 (Colo. App. 1971)). In *Seren*, a foreign student overstayed a visa, which disqualified him from receiving in-state tuition. *Seren v. Douglas*, 489 P.2d 601, 602 (Colo. App. 1971). The visa stated that the student lived in a foreign country and had no intention of leaving the former residence. *Id.* at 603. However, the court held that once the visa expired, the foreign student was then capable of fulfilling the intent to establish domicile in the state and receive in-state tuition. *Id.* at 604. From the court’s holding in *Seren*, the Colorado Opinion inferred that the court did not consider the student’s undocumented immigration status to be an insurmountable obstacle. Colorado Opinion, *supra* note 12, at *12.

208. Colorado Opinion, *supra* note 12, at *14 (citing various subsections of COL. REV. STAT. § 23-7-103(2)).

209. *Id.* at *14–15

210. In Colorado, tuition classification and determinations of domicile for each student are made by each higher education institution when the student applies, based on information about the student and the parent provided on the student’s admissions application. The information requested for tuition classification includes the following for both the student and his or her parent, when the student is under the age of 23:

- Dates of continuous physical presence in Colorado
- Date Colorado Driver’s License was issued
- Colorado Driver License #
- Vehicle License #
- Exact years of Colorado Motor Vehicle registration
- Date of Colorado Voter Registration
- Date of purchase of any Colorado residential property
- Dates of employment in Colorado
- Dates of military service, if applicable
- All years in which Colorado income taxes have been filed
- . . .
- If your parents are separated or divorced, which one lives in Colorado?
- Dates of extended absences (more than one month) from Colorado

established domicile in the state, the student would be eligible for in-state tuition, regardless of the parent's immigration status.²¹¹ Although Colorado has since passed a statute which clarifies its state policy and provides citizen children an alternate means of qualifying for in-state tuition,²¹² the initial policy determinations of the Colorado Opinion remain relevant in considering the workability of the policy, as other states have statutes similar to Colorado's original statute.²¹³

One could argue that the information requested in the admissions applications, such as voter registration, driver's license number, and income tax filings,²¹⁴ could be a deterrent for undocumented immigrant parents whose information is also requested. However, as stated under the Colorado statute, "no one of these criteria, if taken alone, may be considered as conclusive evidence of domicile."²¹⁵ Furthermore, such a deterrent effect would also depend on whether providing such information to the university would have ramifications for undocumented immigrants under federal immigration laws. If so, then applicants may not be inclined to attempt to apply for in-state tuition, for fear of jeopardizing their parents' residence in the United States. Consequently, while Colorado has created a more equal process through which citizen children of undocumented parents may apply for in-state tuition, issues remain in affording eligible children equal access.

- Reason for absence

UNIVERSITY OF COLORADO AT COLORADO SPRINGS, APPLICATION FOR ADMISSION TO THE UNIVERSITY OF COLORADO, available at <http://www.uccs.edu/~admrec/SIS%20Forms/Application.pdf> (last visited Mar. 28, 2010); see also, e.g., UNIVERSITY OF COLORADO AT BOULDER, UNDERGRADUATE APPLICATION FOR ADMISSION, available at <http://www.colorado.edu/prospective/freshman/admission/forms/2010UndergradApp.pdf> (last visited Mar. 28, 2010).

211. Colorado Opinion, *supra* note 12, at *14–15.

212. See COLO. REV. STAT. § 23-7-110 (2010); see also *supra* notes 88–91 and accompanying text.

213. See *supra* note 84. Like Colorado, these statutes and regulations state that dependent students are classified based on the domicile or residency of their parents and provide multiple factors by which one could prove domicile or residency. See *supra* notes 82–84 and accompanying text.

214. See *supra* note 210.

215. COLO. REV. STAT. § 23-7-103(2)(f) (2010).

C. COMPARATIVE STATUTORY INTERPRETATION: THE
IMPORTANCE OF CLARITY

Comparing the differing conclusions drawn by the Virginia Memorandum and the Colorado Opinion, the pivotal point appears to be the determination of parental domicile — an issue of statutory interpretation. While the Colorado Opinion reasoned that an undocumented immigrant parent could be domiciled in state, the Virginia Memorandum simply stated its contrary conclusion without further explanation. The ACLU has argued that the Virginia Attorney General's office misinterpreted "domicile" as written under the Virginia Code.²¹⁶

In presenting its interpretation of the Virginia Code, under a plain meaning reading of the statute, in which "[t]he definition of domicile [in the Virginia Code] contains no mention of immigration status,"²¹⁷ the ACLU concluded that an undocumented immigrant who resides in Virginia and intends to stay there for an indefinite period of time, as indicated in the Virginia Code, should be deemed a domiciliary of Virginia.²¹⁸ Accordingly, an undocumented parent's child should also be considered a domiciliary of Virginia.²¹⁹

The ACLU's interpretation is consistent with Colorado's reading of its state statute defining domicile for purposes of in-state tuition, reasoning that "[t]here is no prohibition in the tuition classification statute preventing an undocumented alien from establishing domicile."²²⁰ As discussed in Part V.B, the Colorado Opinion came to a conclusion more amenable to the equal treatment of citizen children. In addition, a close review of the SCHEV Domicile Guidelines, upon which the Virginia Memorandum relies, reveals an interpretation that supports the argument that "domicile," for purposes of in-state tuition eligibility, does not require a determination of immigration status.

216. ACLU, *supra* note 131. The Virginia Code defines "domicile" as "the present, fixed home of an individual to which he returns following temporary absences and at which he intends to stay indefinitely. No individual may have more than one domicile at a time. Domicile, once established, shall not be affected by mere transient or temporary physical presence in another jurisdiction." VA. CODE ANN. § 23-7.4(A) (2010).

217. ACLU, *supra* note 131.

218. *Id.*

219. *Id.*

220. Colorado Opinion, *supra* note 12, at *11.

The SCHEV Domicile Guidelines define “domicile” in the same terms as the Virginia Code.²²¹ Like the Virginia Code, the Guidelines contain no mention of the immigration status of parents.²²² The only mention of illegal immigration status within the Guidelines is in reference to the status of the student, not the parent.²²³ The guidelines indicate that if a student is an “ineligible alien,” defined as “an alien not in a valid current immigrant or nonimmigrant visa status that permits the lawful development of immigrant intent,”²²⁴ then he or she may not be domiciled in Virginia. Applying the *expressio unius* principle of statutory interpretation,²²⁵ the reference only to the “ineligible alien” status of the *student*, implies that while the status of the student was intentionally included, parental immigration status was meant to be excluded. Accordingly, under this analysis, the immigration status of the parents should have no bearing or effect upon the in-state tuition eligibility of their child.

In the context of in-state tuition eligibility, the clarity of state statutes and their subsequent interpretation appears to make a large difference. For example, in the *Students Advocates* case discussed above, University of Houston Law Professor Michael Olivas, who participated in the litigation and settlement discussions of the *Students Advocates* case,²²⁶ noted that the controversy arose “in part because the California statute was not precisely

221. STATE COUNCIL OF HIGHER EDUC. FOR VA., *supra* note 177, at 1 (“‘Domicile’ means the present, fixed home of an individual to which he returns following temporary absences and at which he intends to stay indefinitely. No individual may have more than one domicile at a time. Domicile, once established, shall not be affected by mere transient or temporary physical presence in another jurisdiction.”). The analysis in this section is limited to the use of “domicile” as it applies to in-state tuition and education under the SCHEV Domicile Guidelines. A broader interpretation of the general use of “domicile,” as it is used in the Virginia Code, is beyond the scope of this Note.

222. *Id.*

223. *Id.* at 2, 3, 14.

224. *Id.* at 2.

225. *Expressio unius est exclusio alterius* is “[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.” BLACK’S LAW DICTIONARY 620 (8th ed. 2004).

226. Olivas, *supra* note 92, at 1768 n.45 (noting Professor Olivas’s membership on the Board of the Mexican American Legal Defense and Educational Fund, a party to the litigation and his participation in the discussions). Professor Olivas is also the Director of the University of Houston Law Center’s Institute of Higher Education Law & Governance. *University of Houston Law Center Faculty*, UNIVERSITY OF HOUSTON LAW CENTER (2009), <http://www.law.uh.edu/faculty/main.asp?PID=31>.

drawn (or was being imperfectly administered).”²²⁷ By closing statutory holes through which citizen children may be discriminated against, states will be able to avoid equal protection violations against its citizens. It is in states’ best interests to revise and clarify state policies in order to prevent both interpretations adverse to the interests of U.S. citizens and attempts to insert the birthright citizenship debate into in-state tuition policies.

VI. CONCLUSION

In whatever way that states wish to approach the problem, the bottom line is clear — citizens, once granted citizenship, should not be treated differently for purposes of in-state tuition eligibility determinations on account of the immigration status of their parents. In-state tuition policies that deny or create additional hurdles for citizen children, in order to access in-state tuition, are inequitable and likely to be found unconstitutional. As argued in this Note, policies allowing for the differential treatment of otherwise eligible citizen children, solely on account of the undocumented status of their parents, implicate the protection of the Equal Protection Clause under the Fourteenth Amendment. While the determination of eligibility for in-state tuition relies heavily upon the statutory interpretation of governing state laws, many states have statutes with similar provisions that are ambiguous as to the treatment of citizen children. This Note recommends the clarification and revision of such policies in the interests of ensuring equal access to in-state tuition and equal treatment of the citizen children of undocumented parents.

227. *Id.* at 1768.