

**DEFINING RESIDENCY: IN-STATE TUITION  
IMPLICATIONS FOR UNITED STATES CITIZENS WHO  
ARE CHILDREN OF UNDOCUMENTED IMMIGRANT  
PARENTS**

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## I. INTRODUCTION

Rojas Rodriguez, an aspiring entrepreneur, wanted nothing more than to attend the College of Charleston in South Carolina.<sup>1</sup> When he received his acceptance letter in Spring 2015, it seemed as if that dream was about to become a reality.<sup>2</sup> However, about a month after receiving his acceptance letter, disaster struck: the college informed Rojas that he would be classified as an out-of-state student.<sup>3</sup> For Rojas, this meant the annual cost of tuition skyrocketed from \$10,558 to \$27,548 per year.<sup>4</sup> It also meant that Rojas would not be eligible for state-administered academic scholarships and grants.<sup>5</sup> Plainly stated, Rojas was no longer able to afford to attend the College of Charleston.

At first, Rojas was confused by this classification. Although born in Mississippi, Rojas lived in South Carolina for the past ten years.<sup>6</sup> His family and friends all resided in South Carolina; he had a South Carolina driver's license; he attended and graduated from a South Carolina high school.<sup>7</sup> South Carolina, however, classifies students for in-state tuition purposes based on the domicile, or residency, of their parents.<sup>8</sup> Although Rojas was a United States citizen, his mother was undocumented; therefore, South Carolina classifies Rojas, and others in similar situations, as "out-of-state residents" for tuition purposes.<sup>9</sup>

This note examines the constitutionality of state actions that deny in-state tuition to United States citizens, like Rojas, based solely on the undocumented immigration status of their parents. Notwithstanding constitutional guarantees of equal treatment, state practice varies and the issue remains controversial.

The denial of in-state tuition for children born as United States citizens to undocumented parents is closely related to issues surrounding in-state tuition for undocumented residents themselves. The issue of

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<sup>1</sup> CLASS ACTION REPORTER, *South Carolina: Education Commission Sued over Student Discrimination*, BANKR. CREDITORS' SERVICE, INC. & BEARD GROUP, INC. (Aug. 19, 2015).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> CLASS ACTION REPORTER, *supra* note 1.

<sup>8</sup> S.C. CODE ANN. § 59-112-20(D) (2010).

<sup>9</sup> CLASS ACTION REPORTER, *supra* note 1.

whether undocumented students should be treated as in-state residents for higher education purposes is at the intersection of immigration and education policy.<sup>10</sup> Students who are classified as in-state residents receive preferential treatment throughout the admissions process and ultimately pay significantly lower tuition rates than students who are classified as “out-of-state” residents.<sup>11</sup> Denying in-state tuition to students “essentially puts college out of reach . . . by doubling or in some cases, nearly tripling the cost of attendance.”<sup>12</sup>

Public opinion on the issue varies greatly. Proponents of access to in-state tuition note the benefits of higher education for both the individual and society. A more educated society can benefit the economy as a whole; it leads to increased earning potential and decreased reliance on public assistance.<sup>13</sup> Additionally, proponents note that denying children of undocumented immigrants access to education punishes the children for the so-called wrongdoing of the parents, and it creates a population whose opportunities to advance are limited.<sup>14</sup>

Opponents of in-state tuition for undocumented immigrants, on the other hand, claim that providing such a benefit rewards illegal behavior and creates additional encouragement for individuals to enter the United States illegally.<sup>15</sup> They hypothesize that allowing undocumented students to receive an in-state tuition benefit is unfair to citizen students from other states that are unable to take advantage of the benefit.<sup>16</sup> Opponents further object to providing a benefit to undocumented immigrants at the cost of citizen taxpayers and claim that the students will

<sup>10</sup> See Stephen L. Nelson, Jennifer L. Robinson & Kara Hetrick Glaubitiz, *States Taking Charge: Examining the Role of Race, Party Affiliation, and Preemption in the Development of In-State Tuition Law for Undocumented Immigrant Students*, 19 MICH. J. RACE & L. 247, 248-49 (2014).

<sup>11</sup> Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1323 (S.D. Fla. 2012).

<sup>12</sup> CLASS ACTION REPORTER, *supra* note 1.

<sup>13</sup> Stephen L. Nelson, Kara Hetrick Glaubitiz & Jennifer L. Robinson, *Reduced Tuition Benefits for Undocumented Immigrant Students: The Implications of a Piecemeal Approach to Policymaking*, 53 SANTA CLARA L. REV. 897, 931 (2013) [hereinafter “*Reduced Tuition Benefits*”]; Alejandro Portes & Patricia Fernandez-Kelly, *No Margin for Error: Educational and Occupational Achievement Among Disadvantaged Children of Immigrants*, 620 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 17 (2008).

<sup>14</sup> Plyler v. Doe, 457 U.S. 202, 219-220 (1982); *Reduced Tuition Benefits*, *supra* note 13, at 930.

<sup>15</sup> *Reduced Tuition Benefits*, *supra* note 13, at 931; Melissa Cook, *A High Stakes Game Texas can’t Afford to Lose: Interpreting Federal Immigration Law on In-State Tuition for Undocumented Students*, 11 TEX. TECH. ADMIN. L.J. 225, 238 (2009); Kathleen A. Connolly, *In Search of the American Dream: An Examination of Undocumented Students, In-State Tuition, and the DREAM Act*, 55 CATH. UNIV. L. REV. 193, 213-14 (2005).

<sup>16</sup> *Hearing on L.B. 745, L.B. 956, L.B. 1001, and L.B. 1061 Before the Comm. on Educ.*, 101st Leg., 2d Sess. 16 (Neb. 2010) (statement of Kris Kobach, Professor of constitutional law and immigration law, Univ. of Mo.-Kan. City).

not be able to contribute to the economy in the future because they will be ineligible for legal employment.<sup>17</sup>

Taking this discussion one step further, this note examines an issue currently facing United States citizens who are children of undocumented immigrants. Certain states currently have legislation that classifies individuals as residents or non-residents in order to determine eligibility for in-state tuition at public colleges and universities.<sup>18</sup> Some of these statutes can be interpreted in such a way as to bar United States citizens from being eligible to receive in-state tuition at public institutes of higher education.<sup>19</sup> In states that take this position, an individual (or their parents, if that individual is a dependent) must establish legal residency in the state.<sup>20</sup> Because many students entering college are classified as dependents, they must establish their parents' legal residency in the state, a task that proves impossible for many students. As a result, United States citizen students who would otherwise qualify for in-state tuition are denied it on the basis of their parents' immigration status.<sup>21</sup> Those that argue against this interpretation assert that these policies discriminate against United States citizens in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>22</sup> People defending this practice claim that they are complying with federal law and cite concerns regarding the state's limited financial means and the quality of public postsecondary education.<sup>23</sup>

This note argues that policies that deny or burden United States citizens who are children of undocumented immigrants blatantly disregard guarantees of equal protection.<sup>24</sup> Such policies, which are a dangerous outgrowth of denial of in-state tuition to undocumented students, are not viable and should not be pursued. Citizens should not be treated differently with regard to in-state tuition eligibility based on their parents' immigration status. As this note will explain, such practice is unconstitutional.

Federal legislation is needed to resolve the issue of unfair treatment

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<sup>17</sup> *Reduced Tuition Benefits*, *supra* note 13, at 931-32.

<sup>18</sup> *See, e.g., Ruiz*, 892 F. Supp. at 1322-23 (noting that Florida regulations classify students who are United States citizens and reside in Florida as "out of state" residents because their parents are undocumented).

<sup>19</sup> *Id.* at 1326.

<sup>20</sup> *See id.* at 1325-26.

<sup>21</sup> *See id.*

<sup>22</sup> CLASS ACTION REPORTER, *supra* note 1; *see also Ruiz*, 892 F. Supp. 2d at 1326.

<sup>23</sup> *Ruiz*, 892 F. Supp. 2d at 1331-32.

<sup>24</sup> Michelle J. Seo, *Uncertainty of Access: U.S. Citizen Children of Undocumented Immigrant Parents and In-State Tuition for Higher Education*, 44 COLUM. J.L. & SOC. PROBS. 311, 314 (2011).

with regards to in-state tuition for United States citizens who are children of undocumented immigrants. Creating the Development, Relief, and Education for Alien Minors Act (“DREAM Act”), legislation which conditions federal funds allocated for public higher education on a specified construction of “in-state” residency, could resolve this issue. Additionally, including specifications regarding residency requirements in any legislation concerning “free” tuition for public colleges or universities could resolve this issue.

Section II of this note will discuss undocumented immigrants’ access to education, including historical background, federal legislation, and current state legislation. Section III will describe the educational access of United States citizens who are the children of undocumented immigrants. Section III surveys the history of access to education, constitutional concerns, current legislation, and examples of United States citizens being denied access to in-state tuition. Section IV examines the implications of these unconstitutional policies and presents possible solutions to this issue, which will likely require federal legislation to be enacted.

## II. UNDOCUMENTED IMMIGRANTS’ LEGAL ACCESS TO EDUCATION

### A. Access to Education

There is no fundamental right to education under the United States Constitution.<sup>25</sup> In *San Antonio Independent School District v. Rodriguez*, the parents of children who attended lower-income school districts challenged the state’s allocation of school funds, which hinged on local property taxes.<sup>26</sup> In deciding the case, the Supreme Court noted, “[E]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution.”<sup>27</sup> Therefore, undocumented immigrants’ access to education is governed by federal, state, and local legislation.<sup>28</sup>

The Supreme Court has never directly addressed the issue of undocumented students’ access to in-state tuition at public institutions of higher education.<sup>29</sup> However, the Court has addressed the question of undocumented immigrant childrens’ access to primary and secondary education in *Plyler v. Doe*.<sup>30</sup> The question presented in *Plyler* was

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<sup>25</sup> *Id.* at 320.

<sup>26</sup> *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 4-5 (1971).

<sup>27</sup> *Id.* at 35.

<sup>28</sup> Nelson, *supra* note 10, at 251.

<sup>29</sup> *Reduced Tuition Benefits*, *supra* note 13, at 900.

<sup>30</sup> *Plyler*, 457 U.S. at 202.

whether Texas “may deny . . . undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.”<sup>31</sup> The Texas Legislature revised education laws to withhold state funds from educating children illegally admitted to the United States.<sup>32</sup> Additionally, the law authorized public schools to deny enrollment to children illegally admitted to the country.<sup>33</sup> The statute was challenged under the Equal Protection Clause of the Fourteenth Amendment.<sup>34</sup> Using a rational review standard, the Court held that the statute’s denial of public elementary and secondary education to undocumented immigrant children was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.<sup>35</sup>

In addition to the Court’s discussion of undocumented immigrants, the Court noted that failure to prevent immigrants from entering the country illegally and failure to establish an effective bar to employment of undocumented immigrants created a “shadow population” of illegal migrants.<sup>36</sup> This shadow population resulted in a “permanent caste of undocumented resident aliens . . . [who are] denied the benefits that our society makes available to citizens and lawful residents.”<sup>37</sup> The Court described this shadow population as an “underclass.”<sup>38</sup> The Court noted that withholding benefits from undocumented students “direct[s] the onus of a parent’s misconduct against his children.”<sup>39</sup> Such legislation does not comport with fundamental conceptions of justice.<sup>40</sup>

Moving to education, the Court noted the “importance of education” and the “lasting impact of its deprivation on the life of the child.”<sup>41</sup> Among other factors, the Court noted the fundamental role education plays in maintaining the fabric of society, the uniqueness of education as a government benefit, and the “lifetime hardship” that would be imposed

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 223-24. Although the majority in *Plyler* stated that it was applying rational basis review, many commentators have interpreted this standard as an application of “heightened” rational review. See, e.g., Linda E. Carter, *Intermediate Scrutiny Under Fire: Will Plyler Survive State Legislation to Exclude Undocumented Children from School?*, 31 U.S.F. L. REV. 345, 371-80 (1997); Peter S. Smith, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a “Sliding Scale” Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475, 488 (1997).

<sup>36</sup> *Plyler*, 457 U.S. at 218.

<sup>37</sup> *Id.* at 218-19.

<sup>38</sup> *Id.* at 219.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 221.

on undocumented immigrants if they were denied the opportunity to receive an education.<sup>42</sup> Citing *Brown v. Board of Education*, the Court quoted,

Today, education is perhaps the most important function of state and local governments . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>43</sup>

Although the Court's decision in *Plyler* is limited to primary and secondary education, scholars argue that it should be extended to include higher education.<sup>44</sup> These arguments focus on the "new educational floor" required to achieve economic advancement, which often requires a college degree in today's society.<sup>45</sup>

### *B. Federal Legislation*

#### *i. Personal Responsibility and Work Opportunity Reconciliation Act*

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") as a form of welfare reform.<sup>46</sup> A part of the Act limits undocumented immigrants' eligibility for state, local, and federal benefits, including postsecondary education.<sup>47</sup> With respect to higher education benefits, the PRWORA states that only "qualified aliens" are eligible for public benefits.<sup>48</sup> Undocumented immigrants unlawfully present in the United States are not considered "qualified aliens."<sup>49</sup> Specifically, according to PRWORA,

A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible . . . only through the enactment of a State law after [August 22, 1996], which affirmatively provides for such eligibility.<sup>50</sup>

<sup>42</sup> *Plyler*, 457 U.S. at 221, 223.

<sup>43</sup> *Id.* at 222-23 (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)).

<sup>44</sup> See Debra Urteaga, *California Dreaming: A case to give States Discretion in Providing In-State Tuition to its Undocumented Students*, 38 HASTINGS CONST. L.Q. 721, 741 (2011).

<sup>45</sup> See *id.* at 741. As a Florida District Court stated in *Ruiz v. Robinson*, "[T]he needs of the labor force have changed dramatically and the importance of postsecondary education has increased significantly." 892 F. Supp. 2d 1321, 1329 (S.D. Fla. 2012).

<sup>46</sup> Personal Responsibility and Work Opportunity Reconciliation (Welfare Reform) Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>47</sup> *Id.* §§ 401, 402, & 411.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* § 431(b); 8 U.S.C. § 1641(b) (2016).

<sup>50</sup> 8 U.S.C. § 1621(d) (2016).

Accordingly, under the PRWORA, undocumented immigrants are ineligible for in-state tuition at public institutes of higher education unless the state passed a law providing otherwise at some point after August 22, 1996.<sup>51</sup>

## ii. Illegal Immigration Reform and Immigrant Responsibility Act

While state law ordinarily governs awards of public benefits, such as in-state tuition, the federal government is the ultimate authority for regulating immigration in the United States.<sup>52</sup> The Constitution does not explicitly enumerate a power to regulate immigration; instead it establishes the power of naturalization and the right to citizenship.<sup>53</sup> Congress derives its power to regulate immigration through the Supreme Court, which established Congress' "plenary power to legislate in immigration" on numerous occasions.<sup>54</sup> Congress used that power to enact the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").<sup>55</sup>

Soon after enacting the PRWORA, Congress passed the IIRIRA, which further limited the eligibility of undocumented immigrants for state and local public benefits.<sup>56</sup> In relation to postsecondary education, the Act states that

any alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit 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

<sup>51</sup> *Id.*

<sup>52</sup> Andrew R. Verblow, Ruiz v. Robinson: *Stemming the U.S. Citizen Casualties in the War of Attrition Against Undocumented Immigrants*, 45 UNIV. MIAMI INTER-AM. L. REV. 195, 198 (2013); see Nelson, *supra* note 10, at 254.

<sup>53</sup> Jessica Portmess, *Until the Plenary Power do us part: Judicial Scrutiny of the Defense of Marriage Act in Immigration After Flores-Villar*, 61 AM. U. L. REV. 1825, 1831 (2012); U.S. Const. art. I, § 8, cl. 4 (granting Congress the power "to establish a uniform Rule of Naturalization"); U.S. Const. amend. XIV, § 1 (stating that "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").

<sup>54</sup> See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (holding that the legislative department can exclude aliens from the country); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1982) (holding that Congress, through its officers, is the sole and exclusive judge over immigration, and that other branches of government cannot interfere with that power); *Fong Yue Ting v. United States*, 149 U.S. 698, 707, 705, 713-714 (1893) (reaffirming the holdings in *Chae Chan Ping* and *Ekiu*; further noting that Congress has the power to exclude aliens and may do so through its executive officers).

<sup>55</sup> WILLIAM M. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 839 (4<sup>th</sup> ed. 2007).

<sup>56</sup> The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).



whether the citizen or national is such a resident.<sup>57</sup>

Generally, IIRIRA mandates that undocumented immigrant students may not receive postsecondary education benefits on the basis of their residency within a state unless all United States citizens are eligible for the same benefits, regardless of their residency status.<sup>58</sup>

### iii. The DREAM Act

The Development, Relief, and Education for Alien Minors Act, commonly known as the DREAM Act, was originally introduced in 2001.<sup>59</sup> Drawing from the same plenary power used to enact IIRIRA, the DREAM Act purports to permit qualified undocumented immigrant students to obtain conditional permanent residency and eventual citizenship.<sup>60</sup> The DREAM Act would allow undocumented immigrants who entered the United States at a young age and who meet certain requirements—primarily educational or military—to become lawful permanent United States residents.<sup>61</sup> The DREAM Act has been amended and reintroduced unsuccessfully several times.<sup>62</sup> The DREAM Act would amend existing federal regulations that restrict a state's ability to grant in-state tuition benefits to undocumented immigrants, but it

<sup>57</sup> 8 U.S.C. § 1623(a) (2016).

<sup>58</sup> Nelson, *supra* note 10, at 255; John Goodwin, *Legally Present, but not yet Legal: The State Attorney General's Role in Securing Public Benefits for Childhood Arrivals*, 46 COLUM. HUM. RTS. L. REV. 340, 346 (2014) (stating IIRIRA “effectively precludes an unlawfully present immigrant from receiving in-state tuition unless that state also provides in-state tuition to out-of-state U.S. citizens”).

<sup>59</sup> Development, Relief, and Education for Alien Minors Act (DREAM Act of 2001), S. 1291, 107th Cong. (2001).

<sup>60</sup> S. 1291, 107th Cong. (2001); John J. Long, Jr., *More than just a DREAM: The Legal and Practical Implications of a North Carolina DREAM Act*, 36 CAMPBELL L. REV. 359, 359-60 (2014).

<sup>61</sup> See, e.g., Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113<sup>th</sup> Cong., § 245D(b)(1)(A) (2013). Individuals must meet certain requirements to qualify under the most recent DREAM Act; the applicant must prove that he or she:

- (i) has been a registered provisional immigrant for at least 5 years;
- (ii) was younger than 16 years of age on the date on which the alien initially entered the United States;
- (iii) has earned a high school diploma or obtained a general education development certificate in the United States;
- (iv)(I) has acquired a degree from an institution of higher education or has completed at least 2 years, in good standing, in a program for a bachelor's degree or higher degree in the United States; or (II) has served in the Uniformed Services for at least 4 years and, if discharged, received an honorable discharge; and
- (v) has provided a list of each secondary school (as that term is defined in section 9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801)) that the alien attended in the United States. *Id.*

<sup>62</sup> Long, *supra* note 60, at 364.

would not require states to offer those students in-state tuition.<sup>63</sup> The decision to offer undocumented students in-state tuition would remain within each individual state's discretion under the original DREAM Act.<sup>64</sup> In 2014, a new version of the DREAM Act, the IN-STATE for Dreamers Act, was introduced.<sup>65</sup> This Act proposes providing money to states that offer in-state tuition or financial aid to undocumented immigrants.<sup>66</sup> As of November 2016, Congress has not passed any version of the DREAM Act.

### C. Current State Legislation

In the absence of federal legislation, states have taken their own approaches to the issue of access to in-state tuition and financial aid for undocumented students, which has led to a lack of uniformity.<sup>67</sup> This section will examine different types of legislation states have enacted regarding in-state tuition for undocumented immigrant students.

States fall into one of three categories of current legislation regarding undocumented immigrants who wish to attend public institutes of higher education. First, there are states that allow undocumented immigrants to benefit from in-state tuition at public postsecondary institutions. Second, there are states that deny in-state tuition benefits to undocumented immigrant students. Finally, there are some states that deny undocumented immigrant students admission to public higher education completely. States that grant in-state tuition do so through various methods, such as the legislative process or allowing a higher education governing body to make the decisions.<sup>68</sup> States that have denied in-state tuition have utilized similar means.<sup>69</sup>

#### i. States that Offer In-State Tuition to Undocumented Immigrants

Currently, twenty states offer in-state tuition to unauthorized immigrant students.<sup>70</sup> Of those twenty states, sixteen grant in-state tuition

<sup>63</sup> Verblow, *supra* note 52, at 206; Long, *supra* note 60, at 366.

<sup>64</sup> Verblow, *supra* note 52, at 206; Long, *supra* note 60, at 366.

<sup>65</sup> IN-STATE for Dreamers Act of 2014, S. 1943, 113th Cong. (2014).

<sup>66</sup> *Id.* The proposed bill was assigned to a congressional committee again in March 2015. IN-STATE for Dreamers Act of 2015, S. 796, 114th Cong. (2015).

<sup>67</sup> See Nelson, *supra* note 10, at 267.

<sup>68</sup> See *Reduced Tuition Benefits*, *supra* note 13, at 911.

<sup>69</sup> See *Reduced Tuition Benefits*, *supra* note 13, at 911.

<sup>70</sup> Gilberto Soria Mendoza & Noor Shaikh, *Tuition Benefits for Immigrants*, NAT'L CONF. OF STATE LEGS. 1 (July 15, 2015), [http://www.ncsl.org/documents/immig/InStateTuition\\_july212015.pdf](http://www.ncsl.org/documents/immig/InStateTuition_july212015.pdf).

to undocumented students through the legislative process.<sup>71</sup> The remaining four states establish such policies through their university systems.<sup>72</sup> Five states offer state-backed financial assistance to undocumented students.<sup>73</sup> Several states allow public universities to use private sources of funding to support financial aid for unauthorized immigrants.<sup>74</sup>

States that offer in-state tuition to undocumented immigrants enacted laws that enable undocumented immigrant students to qualify for in-state tuition rates, using the loopholes in IIRIRA and PRWORA.<sup>75</sup> Federal legislation on this topic theoretically “create[s] a framework that prevents aliens who lack legal presence from receiving in-state tuition in any of the fifty states.”<sup>76</sup> While IIRIRA and PRWORA attempt to prohibit undocumented immigrants from receiving public benefits, they also include important exceptions.<sup>77</sup> States can circumvent the IIRIRA requirement by basing in-state tuition eligibility on criteria other than residency, such as high school graduation in that particular state.<sup>78</sup> Additionally, any state law that provides undocumented immigrants with in-state tuition would be valid under PRWORA as long as the legislation was passed after August 22, 1996.<sup>79</sup> Legislation granting in-state tuition to undocumented students falls into two categories: the California Model and the Texas Model.<sup>80</sup>

Under the California Model, undocumented students are not classified as residents.<sup>81</sup> Other states that fall into the California Model

<sup>71</sup> *Id.* (noting these sixteen states are California, Colorado, Connecticut, Florida, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oregon, Texas, Utah, and Washington).

<sup>72</sup> *Id.* (noting these four university systems are the University of Hawaii Board of Regents, University of Michigan Board of Regents, Oklahoma State Regents for Higher Education, and Rhode Island’s Board of Governors for Higher Education).

<sup>73</sup> *Id.* (noting these five states are California, New Mexico, Minnesota, Texas, and Washington).

<sup>74</sup> *Id.*

<sup>75</sup> Angela M. Banks, *Members Only: Undocumented Students & In-State Tuition*, 2013 BYU L. REV. 1425, 1428 (2013).

<sup>76</sup> Goodwin, *supra* note 58, at 346.

<sup>77</sup> Banks, *supra* note 75, at 1428.

<sup>78</sup> Goodwin, *supra* note 58, at 362.

<sup>79</sup> 8 U.S.C. § 1621(d) (2016); Alexander F.A. Rabanal, *Educating the Underground: The Constitutionality of Non-Residence Based Immigrant In-State Tuition Laws*, 88 CHI.-KENT L. REV. 1059, 1070 (2013).

<sup>80</sup> *Reduced Tuition Benefits*, *supra* note 13, at 913.

<sup>81</sup> *Reduced Tuition Benefits*, *supra* note 13, at 914; CAL. EDUC. CODE § 68130.5 (West 2012). Notwithstanding any other law:

(a) A student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, who meets all of the following requirements shall be exempt from

category include Maryland, New Mexico, New York, Oklahoma, and Utah.<sup>82</sup>

The California Model is not preempted by either IIRIRA or PRWORA. Statutes falling under the California Model were enacted after August 22, 1996, so they are valid under PRWORA.<sup>83</sup> Additionally, these statutes base in-state tuition eligibility on a students' attendance and graduation from an in-state high school instead of classifying students as "residents"; in this sense, these statutes do not violate IIRIRA.<sup>84</sup> The California Supreme Court has held that the California law granting undocumented immigrants in-state tuition rates at public institutes of higher education was not preempted by IIRIRA and PRWORA.<sup>85</sup> Additionally, the Court found that the requirements in the California statute did not function as *de facto* residency requirements since nonresident United States citizens and lawful immigrants could qualify

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paying nonresident tuition at the California State University and the California Community Colleges:

(1) Satisfaction of either of the following:

(A) High school attendance in California for three or more years.

(B) Attainment of credits earned in California from a California high school equivalent to three or more years of full-time high school coursework and a total of three or more years of attendance in California elementary schools, California secondary schools, or a combination of those schools.

(2) Graduation from a California high school or attainment of the equivalent thereof.

(3) Registration as an entering student at, or current enrollment at, an accredited institution of higher education in California not earlier than the fall semester or quarter of the 2001-02 academic year.

(4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.

(b) A student exempt from nonresident tuition under this section may be reported by a community college district as a full-time equivalent student for apportionment purposes.

(c) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall prescribe rules and regulations for the implementation of this section.

(d) Student information obtained in the implementation of this section is confidential. *Id.*

<sup>82</sup> MD. CODE ANN., EDUC. § 15-106.8 (LexisNexis 2012); N.M. STAT. ANN. § 21-1-4.6(B) (LexisNexis 2012); N.Y. EDUC. LAW § 355(2)(h)(8) (Consol. 2012); OKLA. STAT. tit. 70, § 3242(B)(2) (2012); UTAH CODE ANN. § 53B-8-106 (LexisNexis 2012); *see also Reduced Tuition Benefits*, *supra* note 13, at 914.

<sup>83</sup> Rabanal, *supra* note 79, at 1070-71.

<sup>84</sup> Rabanal, *supra* note 79, at 1070-71.

<sup>85</sup> *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 864-65 (Cal. 2010); *see also* Rabanal, *supra* note 79, at 1072.

for in-state tuition rates as well.<sup>86</sup>

The Texas Model presents a more difficult situation. Texas passed the first legislation addressing in-state tuition for undocumented students in 2001.<sup>87</sup> Under the Texas Model, the law classifies qualified undocumented students as Texas residents for tuition purposes.<sup>88</sup> Other states that fall under the Texas Model include Connecticut, Illinois, Kansas, Nebraska, Rhode Island, and Washington.<sup>89</sup> Although statutes that follow the Texas Model are valid under PRWORA since they were passed after August 22, 1996, it is uncertain whether such statutes are valid under IIRIRA.<sup>90</sup> The Texas statute classifies undocumented students as residents, but it does not offer in-state tuition rates to out-of-

<sup>86</sup> *Martinez*, 241 P.3d at 864; *see also* Rabanal, *supra* note 79, at 1072.

<sup>87</sup> H.R. 1403, 2001 Leg., 77th Sess. (Tex. 2001).

<sup>88</sup> TEX. EDUC. CODE ANN. § 54.052 (West 2015). The statute, Determination of Resident Status, states,

(a) Subject to the other applicable provisions of this subchapter governing the determination of resident status, the following persons are considered residents of this state for purposes of this title:

(1) a person who:

(A) established a domicile in this state not later than one year before the census date of the academic term in which the person is enrolled in an institution of higher education; and

(B) maintained that domicile continuously for the year preceding that census date;

(2) a dependent whose parent:

(A) established a domicile in this state not later than one year before the census date of the academic term in which the dependent is enrolled in an institution of higher education; and

(B) maintained that domicile continuously for the year preceding that census date; and

(3) a person who:

(A) graduated from a public or private high school in this state or received the equivalent of a high school diploma in this state; and

(B) maintained a residence continuously in this state for:

(i) the three years preceding the date of graduation or receipt of the diploma equivalent, as applicable; and

(ii) the year preceding the census date of the academic term in which the person is enrolled in an institution of higher education.

(b) For purposes of this section, the domicile of a dependent's parent is presumed to be the domicile of the dependent unless the person establishes eligibility for resident status under Subsection (a)(3). *Id.*

<sup>89</sup> CONN. GEN. STAT. § 10a-29(9) (2012); 110 ILL. COMP. STAT. 305/7e-5(a) (2012); KAN. STAT. ANN. § 76-731a(a) (2012); NEB. REV. STAT. § 85-502(9) (2012); R.I. Bd. OF GOVERNORS OF HIGHER EDUC., *Policy Manual: Residency Policy S-5.0* (amended Sept. 26, 2011), <http://www.ribghe.org/residency1.pdf>; WASH. REV. CODE § 28B.15.012(4)(b) (2012). *See also Reduced Tuition Benefits*, *supra* note 13, at 914.

<sup>90</sup> The statutes are valid under PRWORA because they were passed after August 22, 1996. 8 U.S.C. § 1621(d) (2016).

state United States citizens.<sup>91</sup> This seems to be in direct conflict with IIRIRA.<sup>92</sup> Not many cases have been brought regarding this issue because plaintiffs often lack standing.<sup>93</sup> However, in 2005, the Washington Legal Foundation filed a complaint with the United States Department of Homeland Security, challenging the Texas statute and alleging that it violated IIRIRA.<sup>94</sup> The Department of Homeland Security has not responded to the complaint, nor has it filed any formal challenges or sought to invalidate the Texas statute (or any other statutes falling under the Texas Model).<sup>95</sup>

ii. States that Deny Undocumented Immigrants Access to In-State Tuition and Higher Education

Six states currently bar undocumented immigrant students from in-state tuition benefits.<sup>96</sup> Alabama, Georgia, Indiana, Missouri, and South Carolina created such policies through state legislative bodies.<sup>97</sup> Arizona's law was passed through citizen initiative.<sup>98</sup>

Three of these states which bar unauthorized immigrant students from in-state tuition also passed legislation which denies undocumented immigrant students admission to public higher education.<sup>99</sup> In 2008, South Carolina passed the South Carolina Illegal Immigrant Reform Act.<sup>100</sup> The Act prohibits undocumented students from enrolling in and receiving financial aid at the state's public colleges and universities.<sup>101</sup>

<sup>91</sup> TEX. EDUC. CODE ANN. § 54.052 (West 2015).

<sup>92</sup> Nelson, *supra* note 10, at 255 (explaining that the IIRIRA stated, "Undocumented immigrant students thus may not receive postsecondary education benefits on the basis of their residency within a state, unless all U.S. citizens are eligible for the same benefits regardless of their residency status").

<sup>93</sup> See, e.g., Day v. Sebelius, 376 F. Supp. 2d 1022, 1039-40 (D. Kan. 2005).

<sup>94</sup> Letter from Wash. Legal Found. to Daniel Southerland, Office of Civil Rights and Liberties, Dep't of Homeland Sec. (Aug. 9, 2005), *available at* [www.wlf.org. upload/INSTATE.pdf](http://www.wlf.org/upload/INSTATE.pdf); see also Jennifer Joy Lee, *In-State Tuition for Undocumented Students: Fueling the State-Federal Battleground*, 19 VA. J. SOC. POL'Y & L. 365, 377 (2012).

<sup>95</sup> *Reduced Tuition Benefits*, *supra* note 13, at 923-4.

<sup>96</sup> Mendoza, *supra* note 70, at 1 (noting that these six states are Alabama, Arizona, Georgia, Indiana, Missouri, and South Carolina).

<sup>97</sup> Mendoza, *supra* note 70, at 1.

<sup>98</sup> *Reduced Tuition Benefits*, *supra* note 13, at 263-64.

<sup>99</sup> Banks, *supra* note 75, at 1426-27.

<sup>100</sup> South Carolina Illegal Immigrant Reform Act, S.C. CODE ANN. § 59-101-430 (2008).

<sup>101</sup> *Id.*

(A) An alien unlawfully present in the United States is not eligible to attend a public institution of higher learning in this State, as defined in Section 59-103-5. The trustees of a public institution of higher learning in this State shall develop and institute a process by which lawful presence in the United States is verified. In doing so, institution personnel shall not attempt to independently verify the immigration status of any alien, but shall verify any

Additionally, in 2011, Alabama passed legislation that prohibits “an alien who is not lawfully present in the United States” from being able to enroll in or attend any public postsecondary institution.<sup>102</sup> Finally, Georgia prohibits admission of undocumented students into any school that has not accepted all academically eligible students in the prior two years.<sup>103</sup>

#### *D. In-State Tuition Justification for Undocumented Immigrants*

Access to in-state tuition provides many students the opportunity to receive a college education when they otherwise may not have been able to afford it. As one scholar notes, “[A]ccess to lower in-state tuition rates is generally justified as providing a benefit to members of the community based on their past or to encourage future contributions to the state.”<sup>104</sup> Specifically, access to in-state tuition is justified on the theory that either residents or their families pay taxes which support public institutions, or residents will have a closer affinity to the state and contribute more to its economic well-being.<sup>105</sup>

Many assume that undocumented immigrants do not pay taxes and; therefore, should not be entitled to in-state tuition benefits. However, this is a common myth.<sup>106</sup> It is estimated that between fifty percent and seventy-five percent of undocumented immigrants pay federal, state, and local taxes.<sup>107</sup> A study by the Institute on Taxation and Economic Policy entitled *Undocumented Immigrants’ States and Local Tax Contributions* found that, as of 2016, the 11 million undocumented immigrants living in the United States collectively paid \$11.64 billion in state and local taxes.<sup>108</sup> Some studies have concluded the tax revenue generated by

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alien’s immigration status with the federal government pursuant to 8 USC Section 1373(c).

(B) An alien unlawfully present in the United States is not eligible on the basis of residence for a public higher education benefit including, but not limited to, scholarships, financial aid, grants, or resident tuition.). *Id.*

<sup>102</sup> ALA. CODE § 31-13-8 (2014).

<sup>103</sup> GA. CODE. ANN. § 20-3-66 (2013); *see also* Mendoza, *supra* note 70, at 4 (summarizing the implementation of this Georgia law as “any institution that has not admitted all academically qualified applicants in the two most recent years is not allowed to enroll undocumented students”).

<sup>104</sup> Banks, *supra* note 75, at 1447; *see also* Michael A. Olivas, *Administering Intentions: Law, Theory, and Practice of Postsecondary Residency Requirements*, 59 J. HIGHER EDUC. 263, 263 (1988) (noting the justification for lower in-state tuition rates).

<sup>105</sup> Banks, *supra* note 75, at 1447-48.

<sup>106</sup> Banks, *supra* note 75, at 1448.

<sup>107</sup> CONG. BUDGET OFFICE, Pub. No. 2500, *The Impact of Unauthorized Immigrants on Budgets of State and Local Governments* 6 (Dec. 2007), <https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/12-6-immigration.pdf>; Banks, *supra* note 75, at 1448.

<sup>108</sup> Lisa Christensen Gee, Matthew Gardner & Meg Wiehe, INST. ON TAXATION & ECON.

unauthorized migrants does not offset the total costs of services provided to them.<sup>109</sup> Others conclude that unauthorized migrants pay more in taxes than they use in services.<sup>110</sup> Even if the first conclusion is correct, the mismatch may be due to low wages unauthorized migrants tend to earn, which results from both lower levels of education and larger percentages of low-skilled occupations.<sup>111</sup>

Regardless of the tax consequences of allowing undocumented immigrants access to in-state tuition, there are benefits to allowing them access to it. For example, “States allowing illegal immigrants to pay in-state tuition have seen, on average, a thirty-one percent increase in that population’s college attendance rate, as well as a fourteen percent decline in undocumented high school dropouts.”<sup>112</sup> A more educated society can benefit the nation’s economy by increasing earning potential and decreasing reliance on public assistance.<sup>113</sup> Providing qualifying undocumented immigrants with access to in-state tuition will only benefit the students and the nation as a whole.

### III. ACCESS TO HIGHER EDUCATION: UNITED STATES CITIZEN CHILDREN OF UNDOCUMENTED IMMIGRANT PARENTS

#### A. Birthright Citizenship and Access to In-State Higher Education Tuition Rates

The Citizenship Clause of the Fourteenth Amendment of the Constitution states that “[a]ll 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.”<sup>114</sup> All children born in the United States, including those born to undocumented immigrants, are granted United States citizenship on the basis of birthright citizenship.<sup>115</sup>

The Fourteenth Amendment does not explicitly mention birthright

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POLICY, *Undocumented Immigrants’ State and Local Tax Contributions* 1 (Feb. 2016), <http://www.itep.org/pdf/immigration2016.pdf>.

<sup>109</sup> Banks, *supra* note 75, at 1448-49; Robin Baker & Rich Jones, *Costs of Federally Mandated Services to Undocumented Immigrants in Colorado*, BELL POLICY CTR. 6 (June 30, 2006), <http://www.bellpolicy.org/sites/default/files/PUBS/IssBrf/2006/06ImmigCosts.pdf>.

<sup>110</sup> Banks, *supra* note 75, at 1449.

<sup>111</sup> Banks, *supra* note 75, at 1449.

<sup>112</sup> Goodwin, *supra* note 58, at 362; see Katherine Mangan, *In-State Tuition for Illegal Immigrants can be a plus for both States and Students*, THE CHRONICLE OF HIGHER EDUC. (May 18, 2011), <http://www.chronicle.com/article/In-State-Tuition-For-Illegal/127581/>.

<sup>113</sup> *Reduced Tuition Benefits*, *supra* note 13, at 931.

<sup>114</sup> U.S. CONST. amend. XIV, § 1, cl. 1.

<sup>115</sup> Seo, *supra* note 24, at 315.



citizenship. However, the Supreme Court in *United States v. Wong King Ark* interpreted the Fourteenth Amendment in such a way as to hold that a child born in the United States to noncitizen parents, who have a permanent domicile and residence in the country, is granted United States citizenship at birth.<sup>116</sup> This holding has been expanded to include children born in the United States to undocumented immigrant parents.<sup>117</sup> This interpretation has also been incorporated into federal law; the Immigrant and Nationality Act states that citizens of the United States include “a person born in the United States.”<sup>118</sup>

This interpretation of the Fourteenth Amendment inspires some debate. While some argue that birthright citizenship was constitutionally intended, others claim that it encourages illegal immigration.<sup>119</sup> In fact, Congress engaged in the debate through hearings and proposed legislation to address the controversy.<sup>120</sup> The current policy remains the same, however, as “citizen children of undocumented immigrant parents are granted the same U.S. citizenship as all other individuals granted U.S. citizenship.”<sup>121</sup> Therefore, state policies that restrict the privileges of citizen children of undocumented immigrants are in direct conflict with federal policy.<sup>122</sup>

### B. Current Legislation

Statutes regarding access to in-state tuition for United States citizens were originally enacted to ensure that students from other states did not take advantage of this benefit.<sup>123</sup> Some of these statutes, however, have been interpreted in such a way as to deny United States citizens access to in-state tuition, which they would otherwise be eligible for, because of their parents’ immigration status.<sup>124</sup> This section will examine the

<sup>116</sup> *United States v. Wong King Ark*, 169 U.S. 649, 705 (1898).

<sup>117</sup> *See Perkins v. Elg*, 307 U.S. 325, 328-29 (1939).

<sup>118</sup> 8 U.S.C. § 1401a (2010).

<sup>119</sup> THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 35-43 (6th ed. 2008).

<sup>120</sup> *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.R.J. Res. 64, H.R.J. Res. 88 and H.R.J. Res. 93 Before the S. Comm. on Immigration and Claims & the S. Comm. on the Constitution of the Comm. of the Judiciary*, 104th Cong. (1995) (proposing several bills which would limit birthright citizenship to children of parents who were legally in the United States); Birthright Citizenship Act of 2011, S. 723, 112th Cong. (2011) (proposing to limit birthright citizenship to children born to at least one parent who is a United States citizen, permanent resident, or alien serving in the armed forces).

<sup>121</sup> Seo, *supra* note 24, at 319.

<sup>122</sup> Seo, *supra* note 24, at 319.

<sup>123</sup> Seo, *supra* note 24, at 319.

<sup>124</sup> Seo, *supra* note 24, at 319.

different types of state legislation that have arisen regarding in-state tuition for United States citizens who are children of undocumented immigrants.

While PRWORA and IIRIRA govern the circumstances under which states may offer in-state tuition to undocumented immigrants (with some exceptions), states still retain full power to set guidelines establishing who qualifies as an in-state resident for tuition purposes.<sup>125</sup> States typically fall into three categories of classification for in-state tuition purposes: states that classify students based on the residency of their parents; states that classify students based on their graduation from an in-state high school; and states that allow the higher education institutions to determine residency classifications. United States citizens who are children of undocumented immigrants may be “in danger of becoming the unsuspecting victims of state and federal policies aimed at addressing illegal immigration.”<sup>126</sup> These students may be penalized due to the immigration status of their parents.<sup>127</sup>

#### i. Classification Based on Parents’ Residency

Many states classify students for in-state tuition purposes based on the domicile or residency of the parent if the student is a dependent.<sup>128</sup> Undocumented immigrants are not considered residents of the state in which they reside because they are unlawfully in the United States.<sup>129</sup>

There are twenty-five states that classify students based on the domicile or residency of the parent (or some variation of this classification). These states are: Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kentucky, Massachusetts, Missouri, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Washington, and West Virginia.<sup>130</sup> This type of

<sup>125</sup> Seo, *supra* note 24, at 325.

<sup>126</sup> Seo, *supra* note 24, at 312.

<sup>127</sup> Seo, *supra* note 24, at 312.

<sup>128</sup> Seo, *supra* note 24, at 326.

<sup>129</sup> Seo, *supra* note 24, at 326.

<sup>130</sup> ALA. CODE § 16-64-2(2) (2009); ARIZ. REV. STAT. ANN. § 15-1802(C) (2010); ARK. STATE UNIV. *Operating Policies and Procedures Manual: Residency Regulations* (Aug. 1997); CONN. GEN. STAT. § 10a-29(2) (2010); DEL. CODE ANN. tit. 14, § 5106 (2010); FLA. STAT. § 1009.21(2)(a) (2010); UNIV. SYSTEM OF GA., *Board of Regents Policy Manual: Student Residency* § 4.3.2.2, [http://www.usg.edu/policymanual/section4/C329/#p4.3.2\\_classification\\_of\\_students\\_for\\_tuition\\_purposes](http://www.usg.edu/policymanual/section4/C329/#p4.3.2_classification_of_students_for_tuition_purposes) (last updated Jan. 23, 2015); HAW. CODE R. § 20-4-9(b) (LexisNexis 2010); IDAHO CODE ANN. § 33-2110B (2010); IOWA ADMIN. CODE r. 681-1.4 (2010); 13 KY. ADMIN. REGS. 2:045 § 6(1)(a) (2010); MASS. BD. OF HIGHER ED., *Residency Status for Tuition Classification Purposes Part II.2.1*, <http://www.mass.edu/bhe/lib/documents/2008-11-12ResidencyStatusforTuition>

classification may cause United States citizen students who are the children of undocumented immigrants to lose access to in-state tuition. The “pitfalls of statutory interpretation” may deny United States citizens their right to affordable education.<sup>131</sup>

#### ii. Classification Based on High School Attendance

Eighteen states allow students to establish residency through completion of high school or a qualified General Educational Development (“GED”) program in that state. These states include: Alaska, California, Colorado, Idaho, Illinois, Kansas, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, South Dakota, Oklahoma, Texas, Utah, and Wyoming.<sup>132</sup> Other states, such as Maryland and Wisconsin, allow for an independent classification of students, separate from their parents.<sup>133</sup>

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ClassificationPurposeswithForm.pdf (last updated Nov. 12, 2008); MO. CODE REGS. ANN. tit. 6, § 10-3.010(4) (2010); N.H. REV. STAT. ANN. § 187-A:16.XIX (2011); N.J. ADMIN. CODE § 9A:5-1.1(f) (2011); N.C. GEN. STAT. § 116-143.1(e) (2010); OHIO ADMIN. CODE 3333-1-10(C)(1) (2010); OR. ADMIN. R. 580-010-0030(4)-(5) (2010); 22 PA. CODE § 507.3 (2011); R.I. BD. OF GOVERNORS OF HIGHER EDUC., *Policy Manual: Residency Policy S-5.0* § B(1), (amended Sept. 26, 2011), <http://www.ribghe.org/residency1.pdf>; S.C. CODE ANN. § 59-112-20(D) (2010); TENN. BD. OF REGENTS, *Regulations for Classifying Students In-State and Out-of-State for the Purposes of Paying College or University Fees and Tuition and for Admissions Purposes* § II, <https://policies.tbr.edu/policies/policy-classifying-students-state-out-state-paying-college-or-university-fees-tuition#Out-of-State-Students-who-are-Not-Required-to-Pay-Out-of-State-Tuition> (last accessed Nov. 10, 2016); WASH. REV. CODE § 28B.15.012(2)(b) (2010); W. VA. HIGHER EDUC. POL’Y COMM’N, *Residency Classification for Admission and Fee Purposes* § 133-25-4.1 (effective May 21, 2015), <http://www.wvhepc.edu/wp-content/uploads/2015/05/HEPC-Series-25-SOS-Final-File-2015-04-21.pdf>; see Seo, *supra* note 24, at 326-27 n.82.

<sup>131</sup> Seo, *supra* note 24, at 328.

<sup>132</sup> UNIV. OF ALASKA, *Regent’s Policy: Fin. and Bus. Mgmt. – Tuition and Student Fees* § P05.10.050, available at <http://www.alaska.edu/bor/policy/05-10.pdf> (updated Jun. 8, 2001); IDAHO CODE ANN. § 33-3717B(1)(c) (2010); 110 ILL. COMP. STAT. 305/7e-5 (2010); KAN. ADMIN. REGS. § 88-3-10 (2010); MISS. CODE ANN. § 37-103-7 (2010); MONT. CODE ANN. § 20-25-503(6) (2010); NEB. REV. STAT. § 85-502(8) (2010); NEV. SYSTEM OF HIGHER EDUC., *Bd. of Regents Handbook*, tit. IV, ch. 15, § 4.4 (updated 2015) [http://system.nevada.edu/tasks/sites/Nshe/assets/File/BoardOfRegents/Handbook/T4CH15RegulationsforDeterminingResidencyandTuitionCharges\(3\).pdf](http://system.nevada.edu/tasks/sites/Nshe/assets/File/BoardOfRegents/Handbook/T4CH15RegulationsforDeterminingResidencyandTuitionCharges(3).pdf); STATE OF N.M. HIGHER EDUC. DEP’T, *Establishing New Mexico Residency, Eligibility for Reduced Tuition Rates or In-State Tuition* (2014), [http://www.hed.state.nm.us/uploads/FileLinks/f27e42585b094f08b6de789f237f6a3b/Residency\\_Brochure.pdf](http://www.hed.state.nm.us/uploads/FileLinks/f27e42585b094f08b6de789f237f6a3b/Residency_Brochure.pdf); N.Y. EDUC. LAW § 355(2)(h)(8) (2010); N.D. CENT. CODE § 15-10-19.1(2)(c) (2010); S.D. CODIFIED LAWS § 13-53-6.3 (2010); TEX. EDUC. CODE ANN. § 54.052(a)(3) (West 2009); OKLA. STATE REGENTS FOR HIGHER EDUC., *Policy and Procedures Manual* ch. 3, § 3.17.3(E), <http://www.okhighered.org/state-system/policy-procedures/2016/Chapter%203-%20March%202016.pdf> (updated Mar. 2016); UTAH CODE ANN. § 53B-8-106 (LexisNexis 2010); WYO. STAT. ANN. § 21-18-202(a)(ii) (2010); see Seo, *supra* note 24, at 326-27 n.82.

<sup>133</sup> UNIV. SYS. OF MD., *USM Bylaws, Policy and Procedures of the Bd. of Regents*, § VIII-

These eighteen states seem to have avoided the possibility of denying in-state tuition to citizen children of undocumented immigrants. By providing an alternative means for United States citizens to establish in-state residency for tuition purposes, without reference to parental domicile, these states can provide in-state tuition to United States citizen—and occasionally undocumented immigrant—students that have resided in the state for a sufficient number of years and have graduated from a high school or GED program within the state.

### iii. Classification by State Institutions

Several states allow state institutions to determine residency classification. These states include: Indiana, Louisiana, Maine, Michigan, Minnesota, and Vermont.<sup>134</sup> This type of classification can lead to inconsistencies within the state. Some institutes of higher education may deny access to in-state tuition benefits for undocumented immigrants while others may allow it.

### C. Constitutional Concerns

The Supreme Court has stated that the Equal Protection Clause requires that “all persons similarly circumstanced shall be treated alike.”<sup>135</sup> As citizens, children’s eligibility for in-state tuition, as well as their constitutional rights, should be considered separately from the immigration policies directed at their undocumented parents.<sup>136</sup> Differentiating citizen children due to the immigration status of their parents violates the rights provided by the Equal Protection Clause.<sup>137</sup>

Proponents of the theory that the Equal Protection Clause prohibits

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2.70, at 2-3, <http://www.usmd.edu/regents/bylaws/SectionVIII/pdf> (effective until June 30, 2015); WIS. STAT. § 36.27(2)(a)(4) (2015); *see* Seo, *supra* note 24, at 326-27 n.82.

<sup>134</sup> IND. CODE ANN. § 21-14-2-1 (LexisNexis 2007); LA. STATE UNIV. UNDERGRADUATE ADMISSIONS, *Residency*, available at <http://sites01.lsu.edu/wp/admissions/costs-aid/residency/> (last accessed Nov. 10, 2016); THE UNIV. OF ME. BURSAR’S OFFICE, *Residency Guidelines*, available at <https://umaine.edu/bursar/residency-guidelines/> (last accessed Nov. 10, 2016); UNIV. OF MICH. OFFICE OF THE REGISTRAR, *University of Michigan Guidelines for Qualifying for In-State Tuition*, available at <http://ro.umich.edu/resreg.php> (last accessed Sept. 14, 2016); MINN. STAT. § 135A.04 (1983); THE UNIV. OF VT. OFFICE OF THE REGISTRAR, *Residency*, available at [http://www.uvm.edu/registrar/?Page=policiesandprocedures/p\\_residency.html&SM=p\\_menu.html](http://www.uvm.edu/registrar/?Page=policiesandprocedures/p_residency.html&SM=p_menu.html) (last accessed Nov. 10, 2016). *See* Seo, *supra* note 24, at 326-27 n.82.

<sup>135</sup> *Plyer v. Doe*, 457 U.S. 202, 215 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

<sup>136</sup> Seo, *supra* note 24, at 332.

<sup>137</sup> So far, one district court has held that citizen children may not be discriminated against on the basis of their parents’ immigration status under the Equal Protection Clause. *Lewis v. Thompson*, 252 F.3d 567 (2d. Cir. 2001) (finding that denying citizen children Medicaid on the basis of their undocumented parents was a violation of the Equal Protection Clause).

this type of discrimination have relied on *Plyler v. Doe* for support. *Plyler*, “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.”<sup>138</sup> Therefore, it seems that any “policy of differential treatment for citizen children based on the undocumented status of their parents” is likely to be found unconstitutional in future cases.<sup>139</sup>

The statutes governing access to in-state tuition are often unclear. Even if they are not meant to deny United States citizens this benefit, erroneous statutory interpretation can lead to that result.<sup>140</sup>

#### *D. Current Issues*

In 2006, Jennie Doe, a United States citizen and lifelong resident of California, was denied in-state tuition to a California college.<sup>141</sup> California Education Code section 68062 classified Doe as a non-resident based on the undocumented immigrant status of her parents.<sup>142</sup> Doe was able to file a non-resident tuition exemption, which allowed her to receive in-state tuition, but she was not able to receive other education grants for which she qualified for based on her classification as a non-resident.<sup>143</sup> Doe brought a suit challenging her classification as a non-resident. As a result of the suit, the Court issued a consent decree that stated, “[A]n unmarried minor child may achieve California residency without reference to the immigration status of his/her parents.”<sup>144</sup> California courts paved the way for United States citizens to receive access to in-state tuition.

In 2010, five students were accepted into postsecondary Florida public institutions.<sup>145</sup> These students, all born in the United States, were denied in-state tuition to two Florida public colleges because they were dependents whose parents could not prove they were legal residents of Florida.<sup>146</sup> The students were unable to afford enrollment at the out-of-state tuition rate.<sup>147</sup> They brought suit claiming that the relevant part of

<sup>138</sup> Seo, *supra* note 24, at 321.

<sup>139</sup> Seo, *supra* note 24, at 335-36.

<sup>140</sup> Seo, *supra* note 24, at 314.

<sup>141</sup> Seo, *supra* note 24, at 329.

<sup>142</sup> CAL. EDUC. CODE § 68062 (West 2010); Seo, *supra* note 24, at 329.

<sup>143</sup> Student Advocates for Higher Educ. v. Reed, No. CPF-06-506755 (Cal. Super. Ct. Apr. 19, 2007) (ordering a consent decree).

<sup>144</sup> *Id.* at 2.

<sup>145</sup> Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1323-24.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

the Florida Administrative Code violated the Equal Protection Clause and impermissibly classified United States citizens based on the federal immigration status of their parents.<sup>148</sup> Plaintiffs argued that, under this system, they could not be considered residents of any state.<sup>149</sup> Each of the plaintiffs could have qualified for in-state tuition benefits by virtue of his or her own residency in Florida.<sup>150</sup> The Court granted summary judgment in favor of the plaintiffs.<sup>151</sup> In response to the holding of *Ruiz v. Robinson*, the Florida Legislature enacted legislation to extend in-state tuition to United States citizen students who are dependents of undocumented immigrants.<sup>152</sup>

Currently, a similar issue is being presented in South Carolina. Rojas Rodriguez is one of three named plaintiffs in a class-action lawsuit alleging South Carolina discriminates against its college-bound students who are United States citizens but are unable to prove their parents' legal immigration status.<sup>153</sup> There is no state law that explicitly precludes these children from receiving in-state tuition or state-administered scholarships; however, because dependent students are classified based on their parents' residency, they fail to qualify for in-state classification.<sup>154</sup> Plaintiffs claim this classification denies them their right to equal protection under the Constitution.<sup>155</sup> Both public colleges and the South Carolina Commissioner on Higher Education have adopted policies that define these students as non-residents.<sup>156</sup>

These policies affect a large number of United States citizens throughout the country. There are a significant number of "mixed-status family groups" in which at least one parent is an undocumented immigrant and at least one child is a United States citizen.<sup>157</sup> Between 2009 and 2013, approximately 3.3 million undocumented immigrants, or eighty-four percent of all undocumented immigrants, resided with at least one United States citizen under the age of eighteen.<sup>158</sup> During the same

<sup>148</sup> *Ruiz v. Robinson*, 892 F. Supp. 2d 1321, 1326.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1333.

<sup>152</sup> *Mendoza*, *supra* note 70, at 1.

<sup>153</sup> CLASS ACTION REPORTER, *supra* note 1.

<sup>154</sup> S.C. CODE ANN. § 59-112-20(D) (2008).

<sup>155</sup> CLASS ACTION REPORTER, *supra* note 1.

<sup>156</sup> In the same year, Tennessee also enacted legislation that extended in-state tuition to United States citizen students who are dependents of unauthorized immigrants. *Mendoza*, *supra* note 70, at 1.

<sup>157</sup> Seo, *supra* note 24, at 314-15.

<sup>158</sup> Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLICY INST. (Apr. 14, 2016), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and->

time period, approximately 4.1 million United States citizen children under the age of eighteen lived with at least one unauthorized-immigrant parent.<sup>159</sup>

Access to in-state tuition results in benefits for multiple entities, not just for the student personally. One scholar noted that the “long-term benefits of increased education among state residences include a boon to that state’s economy that more than offsets the taxpayer subsidy involved in expanding reduced tuition eligibility.”<sup>160</sup> It remains unclear how officials in various states will choose to classify United States citizens who are children of undocumented parents.<sup>161</sup> Therefore, they could be treated differently because of the immigration status of their parents, which gives rise to equal protection concerns.<sup>162</sup> Considering the constitutional concerns, the large number of citizens this issue could affect, and the benefits of higher education, all states should expand access to in-state tuition to citizen children of undocumented immigrants.

#### IV. IMPLICATIONS AND SOLUTIONS

##### A. Implications

It is clear that state action which denies citizen children residency benefits because of the immigration status of their parents violates the Constitution; however, states have engaged in this practice since at least 1990.<sup>163</sup> This issue suffers from a lack of attention; the practice has not been widely challenged nor highlighted in immigration reform efforts.<sup>164</sup> Some scholars believe this lack of attention stems from the absurdity of the issue and hope that it will resolve itself once brought to light.<sup>165</sup> This issue may also go unchallenged because activist groups may not be willing to divert resources away from the issue of undocumented college students’ access to in-state tuition.<sup>166</sup>

While *Ruiz* is a step in the right direction, it does not solve the overall

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<sup>159</sup> *Id.*

<sup>160</sup> Goodwin, *supra* note 58, at 364-65.

<sup>161</sup> Seo, *supra* note 24, at 330.

<sup>162</sup> Seo, *supra* note 24 at 332.

<sup>163</sup> Verblow, *supra* note 52, at 216; Michael A. Olivas, *Higher Education, Financial Aid, Residency, and Undocumented Parents of U.S. Citizen College Students*, UNIV. OF HOUS. L. CTR. INST. FOR HIGHER EDUC. & GOVERNANCE, <http://www.law.uh.edu/ihelg/undocumentedparents/homepage.asp> (last accessed Nov. 11, 2016).

<sup>164</sup> Olivas, *supra* note 163.

<sup>165</sup> Olivas, *supra* note 163.

<sup>166</sup> Verblow, *supra* note 52, at 216 (“Activist groups for immigration reform may be disinclined to take their resources away from the problem of tuition for undocumented college students . . . and focus on the plight of U.S. citizen children of undocumented immigrants.”).

problem of states denying United States citizen students in-state tuition based on the residence of their parents. This problem may arise in any state that bases in-state classification on the residency of the parent or in states that allow public institutions to make the residency determination. States that classify students for purposes of in-state tuition based on their graduation from an in-state high school have avoided this problem; however, only eighteen states currently classify student residency in this way. That is not to say that states that classify students based on the residency of their parents will deny United States citizens, or even undocumented immigrant students, access to in-state tuition. New Jersey, for example, classifies the residency of a dependent according to the residency of the parent.<sup>167</sup> New Jersey's education statute first lists a standard residency requirement in order to qualify for in-state tuition.<sup>168</sup> However, in 2013, New Jersey added a statute entitled, "Certain students to qualify for in-State tuition at public institutions of higher education."<sup>169</sup>

<sup>167</sup> N.J. ADMIN. CODE § 9A:5-1.1(f) (2011).

<sup>168</sup> N.J. STAT ANN. § 18A:62-4 (West 2016). The residency requirement reads: Persons who have been resident within this State for a period of 12 months prior to enrollment in a public institution of higher education are presumed to be domiciled in this State for tuition purposes. Persons who have been resident within this State for less than 12 months prior to enrollment are presumed to be nondomiciliaries for tuition purposes. Persons presumed to be nondomiciled or persons who are presumed to be domiciled, but whose domiciliary status is challenged by the institution, may demonstrate domicile according to rules and regulations established for that purpose by the Commission on Higher Education. Residence established solely for the purpose of attending a particular educational institution is not domicile for the purposes of this act. *Id.*

<sup>169</sup> N.J. STAT ANN. § 18A:62-4.4 (West 2016). The statute reads:

- a. Notwithstanding the provisions of any law or regulation to the contrary, a student, other than a nonimmigrant alien within the meaning of section 101(a)(15) of the "Immigration and Nationality Act" (8 U.S.C. § 1101(a)(15)), shall be exempt from paying out-of-State tuition at a public institution of higher education if the student:
  - (1) attended high school in this State for three or more years;
  - (2) graduated from a high school in this State or received the equivalent of a high school diploma in this State;
  - (3) registers as an entering student or is currently enrolled in a public institution of higher education not earlier than the fall semester of the 2013-2014 academic year; and
  - (4) in the case of a person without lawful immigration status, files an affidavit with the institution of higher education stating that the student has filed an application to legalize his immigration status or will file an application as soon as he is eligible to do so.
- b. Student information obtained in the implementation of this section shall be confidential.
- c. The Secretary of Higher Education shall adopt rules and regulations pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-



This statute allows any student to qualify for in-state tuition based on attendance and graduation from an in-state high school.<sup>170</sup> The statute contains an additional requirement for undocumented immigrants to sign an affidavit that the student either has or will apply to obtain legal immigration status as soon as the student is eligible to do so.<sup>171</sup> On the other hand, states, such as South Carolina, have utilized statutory interpretation to hold that their residency requirements bar United States citizens who are children of undocumented immigrants from receiving the benefit of in-state tuition.

This piecemeal approach to policymaking has led to significant differences across the United States.<sup>172</sup> Both undocumented immigrants and United States citizens who are children of undocumented immigrants may face different opportunities and obstacles depending on the state in which they live.<sup>173</sup> Future state action in this area is difficult to predict.<sup>174</sup> Currently, the only way this problem can be remedied is through individual lawsuits against the states that deny students this benefit. This is a costly and unnecessary expenditure, since denying in-state tuition to United States citizens on the basis of the immigration status of their parents is unconstitutional.

### *B. Solutions*

The need for federal legislation to resolve this issue is obvious. Some version of a federal DREAM Act could encourage states to offer both undocumented immigrants and United States citizens who are children of undocumented immigrants access to in-state tuition.<sup>175</sup> An IN-STATE for Dreamers Act, or some version of that act, would provide funding to states that offer in-state tuition or financial aid to undocumented immigrants.<sup>176</sup> A variation of the IN-STATE DREAM Act could remedy the issues facing both United States citizens and undocumented immigrants.

Additionally, states could enact their own DREAM Act legislation. Many states have done so in response to the failure of the federal government to pass a DREAM Act.<sup>177</sup> Texas was the first to enact such

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1 et seq.), necessary to effectuate the provisions of this section. *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> See *Reduced Tuition Benefits*, *supra* note 13, at 933.

<sup>173</sup> See *Reduced Tuition Benefits*, *supra* note 13, at 933.

<sup>174</sup> See *Reduced Tuition Benefits*, *supra* note 13, at 934.

<sup>175</sup> See Long, *supra* note 60, at 368.

<sup>176</sup> IN-STATE for Dreamers Act of 2015, S. Res. 796, 114th Cong. (2015).

<sup>177</sup> See Long, *supra* note 60, at 373; Ann Morse, *In-State Tuition and Unauthorized Immigrant Students*, NAT'L CONF. STATE LEGS., <http://www.ncsl.org/research/>

legislation in June 2001.<sup>178</sup> This legislation allows for “an alien living in the U.S. . . . to be treated the same as an American citizen for the purpose of those who qualify for resident status for tuition and fee purposes.”<sup>179</sup> These types of legislation have the potential for great success and would result in both undocumented and United States citizen students gaining access to in-state tuition rates.<sup>180</sup> The University of California has taken this theory one step further by offering a student loan program to undocumented undergraduate students through the California DREAM Loan Program.<sup>181</sup> Legislators should proceed with caution to avoid perpetuating the trend of piecemeal legislation since states may choose not to adopt a DREAM Act.

Another possible solution to this issue would be to condition federal funds for higher education on states guaranteeing in-state tuition rates to eligible United States citizens who are children of undocumented immigrants. While state and federal government funding for higher education are currently comparable in size, they channel resources into the higher education system in different ways.<sup>182</sup> The state government mainly funds the general operation of public institutions, while the federal government provides financial assistance to students and research projects.<sup>183</sup> However, the federal government does provide some assistance to the general operation of public institutions. In 2013, the federal government invested \$45.6 billion in higher education, \$3.8 billion of which was apportioned to “[g]eneral-purpose appropriations.”<sup>184</sup> Also in 2013, federal revenue funding made up sixteen percent of public college and university budgets.<sup>185</sup> In recent years, state funding for higher education has declined, while federal funding has increased.<sup>186</sup> If this trend continues, federal funding will continue to make up a significant percentage of public higher education budgets and may even provide a larger percentage of the budget.

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immigration/in-state-tuition-and-unauthorized-immigrants.aspx (last updated Feb. 19, 2014).

<sup>178</sup> Long, *supra* note 60, at 373.

<sup>179</sup> Long, *supra* note 60, at 373.

<sup>180</sup> See Long, *supra* note 60, at 373.

<sup>181</sup> Immigration Prof., *University of California Sponsors DREAM Loan Program to Help Undocumented Students*, IMMIGRATIONPROF BLOG (Jan. 31, 2016), <http://lawprofessors.typepad.com/immigration/2016/01/university-of-california-sponsors-dream-loan-program-helps-undocumented-students.html>.

<sup>182</sup> *Federal and State Funding of Higher Education: A Changing Landscape*, THE PEW CHARITABLE TRUSTS (June 11, 2015), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/06/federal-and-state-funding-of-higher-education>.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

Conditioning a percentage of the federal funding provided to public institutes of higher education on a requirement that eligible United States citizens who are children of undocumented immigrants receive the benefit of in-state tuition could solve the issue presented in this note. Furthermore, this solution could solve the larger issues of qualifying undocumented immigrants who are denied access to in-state tuition.

Some attention has been given to the idea of “free” or “affordable” college tuition.<sup>187</sup> Including language indicating that residency requirements must be based on high school attendance and graduation or the student’s individual residence in such legislation would ensure that states offer the benefit of public higher education to both United States citizens and qualifying undocumented immigrants.

#### V. CONCLUSION

Statutes regarding access to in-state tuition have been interpreted by several states in such a way as to deny United States citizens access to in-state tuition. Citizens, such as Rojas Rodriguez, are innocent victims of this classification system. This unconstitutional interpretation is a dangerous outgrowth of the denial of in-state tuition to undocumented youth in the United States. Federal legislation is necessary to resolve this issue. Enacting the DREAM Act or conditioning federal funding for higher education on certain interpretations of state statutes would solve the problem of states denying in-state tuition access to United States citizens who are children of undocumented immigrants and could go even further in requiring states to extend the same benefit to undocumented students.

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<sup>187</sup> Maureen Sullivan, *Clinton and Sanders Promise ‘Free’ College Tuition at Democrats’ Debate*, FORBES (Oct. 14, 2015), <http://www.forbes.com/sites/maureensullivan/2015/10/14/clinton-and-sanders-promise-free-college-tuition-at-democrats-debate/#13110ca35e1d>.