IIRIRA, THE DREAM ACT, AND UNDOCUMENTED COLLEGE STUDENT RESIDENCY

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In a series of articles beginning twenty years ago, I began to review the complex practices and conflicting policies to track college residency issues. This arcane field of interest has grown into a cottage industry, especially as the stakes have increased: when tuitions were low, the differences between charges to in-state resident students and out-of-state nonresident students were modest in scope, and need-based financial aid programs and fee waivers often made up these differences on a student’s fee bill. As tuitions have increased, especially nonresident tuitions, and as need-based assistance has given way to increased use of loans to finance student assistance, however, these issues of who is eligible to receive resident tuition have ratcheted up.

College residency issues have become so complex and contentious that I once likened them to the movie Rashomon:

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

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virtually all their lives in the United States and who want to attend
college and enjoy the upward mobility a college degree provides.\(^2\)

This characterization is even more true today, as the issue has taken on national
security implications as well. On that fateful September 11 date, planes piloted by
hijackers crashed into the ground and were flown into buildings; these hijackers
included international college students, and several of them were undocumented.\(^3\)
The extraordinary events that have unfolded since, as chronicled in other articles in
this Symposium, have affected the entire world, and higher education in the United
States is a part of that world.

This article reviews the events concerning undocumented college students,
college students and applicants to institutions whose parents brought them to the
United States as children and who grew up in this society but who do not have
immigrant status.\(^4\) To many college administrators and public officials, this is an
issue that flew under the radar for many years, until it forced itself onto the public

\(^2\) Michael A. Olivas, Storytelling Out of School: Undocumented College Residency, Race,

\(^3\) For an excellent survey of the terrorists, including those who were hapless college
students, see Leonard M. Baynes, Racial Profiling, September 11, and the Media: A Critical Race
Theory Analysis, 2 VA. SPORTS & ENT. L. J. 1, 17–21 (2002) (detailing accounts of several
hijackers). There is a growing literature on the racial profiling and civil liberties issues following
September 11. For a small sampler, see Susan Akram & Kevin Johnson, Race, Civil Rights, and
ANN. SURV. AM. L. 295 (2002); Raquel Aldana-Plendent, The 9/11 “National Security” Cases:
Three Principles Guiding Judges’ Decision-Making, 81 OR. L. REV. 985 (2002); Kevin R.
Johnson, September 11 and Mexican Immigrants: Collateral Damage Comes Home, 52 DEPAUL
L. REV. 849 (2003); Thomas Joo, Presumed Disloyal: Executive Power, Judicial Deference, and
the Construction of Race Before and After September 11, 34 COLUM. HUM. RTS. L. REV. 1
(2002); Victor C. Romero, Proxies for Loyalty in Constitutional Immigration Law: Citizenship
and Race After September 11, 52 DEPAUL L. REV. 871 (2003); Leti Volpp, The Citizen and the
Terrorist, 49 UCLA L. REV. 1375 (2002). Of course, it did not help when the student visas of
two of the hijackers were actually approved exactly six months after they took over the planes.
See generally Laura Khatchadurian, FERPA and the Immigration and Naturalization Service: A
Guide for University Counsel on Federal Rules for Collecting, Maintaining and Releasing
of the terrorists were actually students, any reasonable observer will be struck at how far-reaching
the response to higher education has been.

\(^4\) These persons are EWIs, or persons who “entered without inspection.” The second
common way to become undocumented is to effect legal entry and then engage in behavior that
renders the person removable, such as overstaying a visa, engaging in unauthorized employment,
or committing certain crimes. In legal terms, the presence of both types may be unauthorized or
undocumented, but for strictly analytic purposes, I examine the status of aliens who were EWIs as
children, on the grounds that they themselves were innocent sojourners. For excellent treatment
of these issues, see Thomas Alexander Aleinikoff et al., Immigration and Citizenship: Process and
problem, as with the Goizueta Foundation, a charity in Atlanta, established with Coca-Cola stock,
which has provided scholarships for undocumented Georgia high school graduates to attend
college. See Bridget Gutierrez, Illegal Immigrants Get a Shot at College with Scholarships,
agenda. This article reviews this complex issue in three parts: 1) undocumented college residency before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"); 2) IIRIRA and postsecondary residency benefits; and 3) post-September 11 developments: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), the DREAM Act, and international students. In the conclusion, I summarize the developments, review the research issues that have arisen, and note the current developments at the state and federal levels. In my own personal experience, this topic of concern, which grew from my experience in northern Ohio tomato fields recruiting migrant students, has now assumed international status and national security concerns.5

I. UNDOCUMENTED COLLEGE RESIDENCY BEFORE IIRIRA OF 1996

As difficult as it is to negotiate the application and admissions process to college, it is even more daunting to navigate the residency process, as thousands of students discover each year. Then, add to this mix the overlay of immigration and nationality law, and you have a patchwork of dissimilarity and injustice, prompting one early commentator to conclude: "this heterogeneity is neither in the interest of the students, of the states, nor of the nation."6 In many respects, the residency laws, implementing regulations, and state and institutional practices are often illogical, inconsistent, and confusing. Applicants and students forum shop among colleges in the same state and even in the same public college multi-campus system to exploit loopholes and inconsistencies; most domiciliary criteria are difficult to administer and verify and they virtually invite manipulation or deceit.7 Additionally, these complicated technical requirements almost always work against aliens, especially undocumented aliens, who may have had no reason to know or confront their unauthorized status until they apply for college. Plyer v. Doe.8 the 1982 Supreme Court decision allowing undocumented children—children whose entry into the country was illegal—to attend public elementary and secondary schools, has smoothed the way for many undocumented children to participate in mandatory schooling. But for these children, their lives in the shadows will likely meet the sharp light of the college application process, where substantial paperwork and documentation are prerequisites.9

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5. Olivas, Storytelling, supra note 2, at 1080–81 (recounting experience recruiting migrant workers in Ohio). I rely upon this earlier research for much of what follows in Sections I and II of this article.


Citizen students who have lived in a single state for many years are easily defined as residents. Conversely, a student who moves from State A to State B solely for the purpose of attending college in State B is clearly a nonresident, at least at first. The wide space between these two situations, however, is the problem. As a general rule, states will allow a person who moves to a state to become reclassified as a resident after a specified period of time. This time period used by nearly all the states ranges from ninety days to twelve months.\(^\text{10}\) In a few states, it is possible to become reclassified immediately upon arrival.\(^\text{11}\)

Absent other exceptions or complications, when the specified time passes, states with a simple durational requirement will allow a citizen-student to pay resident tuition as a resident. The standard to pay resident tuition is usually objective, with evidence of continuous presence required for the reclassification.\(^\text{12}\) To be sure, this objective standard is subject to measurement problems, as even the seemingly simple standard of counting a particular number of days can become complicated: Do holidays away from the state count? Does the “clock” begin when the person moves to the state? When s/he applies to college? When s/he obtains employment? When s/he registers to vote? When s/he buys a house? It is easy to imagine many possible variations on these themes, and an experienced registrar is bound to have heard them all; complex cases have arisen in these and other areas.\(^\text{13}\) Immigration makes these rules particularly difficult, as it so often does in other areas.

As difficult as this “objective” measurement becomes, a number of states have complicated matters by requiring more than mere duration:\(^\text{14}\) these states also require that residents establish domicile, which entails forming the legal intention of making that state their “true, permanent, and fixed abode.”\(^\text{15}\) This is a very complicated requirement, both conceptually and operationally. Instead of merely counting days in the requisite waiting period (already noted as deceptively complicated), states that employ domicile also require a legal declaration and evidence to prove that residents consider the state their principal establishment.\(^\text{16}\) Confusion frequently arises because the terms “residence” and “domicile” are used interchangeably, or “domicile” is measured with language denoting intentionality.

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\(^{11}\) N.Y. EDUC. LAW § 680(1)(c) (McKinney 2004); TENN. CODE ANN. § 49-8-102(c)(2) (2003); see generally Olivas, Administering Intentions, supra note 7, at app. 287–90.

\(^{12}\) See Olivas, Administering Intentions, supra note 7, at app. 287–90.


\(^{14}\) 14 TEX. EDUC. CODE ANN. § 54.052 (Vernon 2003).

\(^{15}\) See BLACK’S LAW DICTIONARY 501 (7th ed. 1999).

which is generally not required for mere residence. 17 In this area of law, "domicile" includes "residence," but has a more specific meaning than does mere "residence." 18

To establish a domicile, students must prove two elements: (1) residence and (2) an intention to make that residence their permanent, fixed abode. 19 Persons may maintain more than one residence, but only one domicile. For example, many students plausibly maintain several residences, some simultaneously (summer state, their divorced mother's and father's states, and the state in which they live and vote). Incidentally, the place where students vote is not necessarily their domicile, as mere residence and brief waiting periods are the requirements to register for voting in local or federal elections. 20

As difficult as the concept of domicile is for U.S. citizens, it is even more difficult in the immigration context. Quite apart from the sensitive issue of undocumented status, many if not most international students enter the United States on non-immigrant visas that require them to maintain their domicile in their home country. Thus, most international students cannot establish the requisite intent to establish a state domicile. There are many non-immigrant classifications, ranging from Ambassadors (A) to spouses of permanent residents (V) categories.

To make matters worse, most states require the establishment of domicile and a waiting period, while some states require domicile with no specified durational period. 21 Yet other states exact pure durational requirements. 22 Upon closer examination, however, the rationales for the widespread practice of exacting declarations of intention fail to advance any substantial guarantees for establishment of domicile beyond those provided by mere durational requirements. The cost of administering intentions is high, both in dollar terms

17. Id.
18. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11(2) (1971) ("Every person has a domicil [sic] at all times and, at least for the same purpose, no person has more than one domicil [sic] at a time.").
20. Dunn v. Blumstein, 405 U.S. 330 (1972) (striking down one-year voter registration residency requirement); Joseph A. Bollhofer, Comment, Disenfranchisement of the College Student Vote: When a Resident is Not a Resident, 11 FORDHAM URB. L.J. 489 (1983) (reviewing voting practices affecting students who live in campus housing). For a recent example of this issue of students voting on campus, see Scott McLemee, Justice Department to Look Into Alleged Threat to Students' Voting Rights, CHRON. OF HIGHER EDUC., Feb. 6, 2004, at A30 (Texas county district attorney challenging right of students at historically black institution to vote in local elections); Harvey Rice, Prairie View Students Sue Again Over Voting, HOU. CHRON., Feb. 18, 2004, at A18 (second suit alleging Voting Rights Act violations that affect students).
and in the considerable ill will it exacts.\(^23\) None of the reasons for domiciliary requirements truly guarantees loyalty or tax contributions. In fact, nothing assures states that the newly arrived nonresidents have been transformed into genuine residents. This problem is as true for citizens or permanent residents as it is for undocumented aliens. First, the fact that students establish a legitimate principal home and abode is no guarantee that as graduates they will remain in the state beyond commencement or contribute to the tax system while they are enrolled in school. In all likelihood, students will move wherever employment is available or the quality of life, family considerations, and circumstances allow. Moreover, a variety of permutations is possible for students, and more than one legal residence can be maintained, which can give sufficient evidence for students to meet residency requirements in more than one state. A greater problem is the possibility that students may have to relinquish residence or domicile in the “home” state to establish sufficient contacts in a new state; this can even lead to citizen-students having no one state in which they can successfully claim a domicile for tuition purposes (as happened in Frame v. Residency Appeals Committee of Utah State University,\(^24\) where Utah State students conducted graduate research in Africa, only to discover they could not prove residence anywhere).

Despite the demonstrable defects of domiciliary requirements, particularly those that also include waiting periods, states and institutions persist in requiring them. In addition, more than lower tuition for residents lies in the balance, as many other benefits may accrue to state residents in public (or private) colleges, such as preferential admissions, scholarship or loan assistance, inclusion in quota programs, eligibility for consortia or exchange programs, and participation in specialized programs negotiated among states in legislative compacts.\(^25\) There is even a residency advantage in some private colleges, who use state residency as a


\(^{24}\) 675 P.2d 1157 (Utah 1983). In this case, graduate students moved to Utah, relinquishing their residences elsewhere, and then went to Africa for several years of thesis research. Id. at 1159–60. The court found that they could not establish Utah residence for tuition purposes. Id. at 1165–66.

In certain circumstances, permanent resident aliens can find themselves assigned outside the country, which could affect durational requirements that they maintain a continuous residency within the United States in order to remain eligible for naturalization. Section 316 of the Immigration and Nationality Act [hereinafter “INA”], Pub. L. No. 82-414, ch. 477 [Title III, ch. 2] 316, 66 Stat. 163, 242 (1952) (codified as amended at 8 U.S.C. § 1427 (2000)), sets out this requirement and also contains a waiver that allows such permanent residents who are engaged overseas working for higher education institutions to count a year of this work towards the five-year time period. See General Requirements for Naturalization, 8 C.F.R. § 316 (2002). For an example of this “registry” of eligible colleges, see Adding and Removing Institutions to and From the List of Recognized American Institutions of Research, 68 Fed. Reg. 61,333 (Oct. 28, 2003) (announcing additions and deletions from approved list).

\(^{25}\) For example, with fewer than twenty schools of optometry in the United States, the University of Houston (“UH”) School of Optometry reserves a number of its places for residents of other states, who “contract” with UH for those places in each year’s class. Interview with Dr. Sam Quintero, UH Optometry Professor (Fall 2003).
recruiting device.26 These stakes, not merely the tuition differentials (which, in certain instances, can be “equalized” by need-based aid formulae)27 have contributed to the overall rise in residency litigation.

To complicate matters, there is an extraordinary number of exemptions, exceptions, and waivers to state residency practices. The most common areas singled out for special treatment are dependents or minors, marital status, military personnel, and alienage, four areas in which nearly all states make some special mention in their practice.28 States also employ special treatment for a wide range of categories, totaling thousands of exceptions to residency requirements. Other groups frequently singled out for special treatment include university employees, families relocating for certain employment, and senior citizens.

Particularly troubling are the many discretionary means to confer residency upon the advantaged, as in the instance of scholarship recipients or children of employees of choice industries lured to states by such special treatment as exemptions and (for the companies) tax abatements.29 As weak a system as has been erected to regulate the migration of out-of-state students, these arbitrary and unprincipled waivers and exemptions undermine the system even further.

Although there had been court decisions on residency reaching back to the nineteenth century,30 the issue first was considered by the Supreme Court in 1972 in *Vlandis v. Kline.*31 In this important case, the Court struck down the practice of public institutions in Connecticut, which had treated all applicants from out of state as presumptively nonresidents, with no opportunity to rebut the presumption, on the grounds that such an irrefutable presumption violated due process.32

The Supreme Court first considered the issue of educational residency in the context of immigration in *Plyler v. Doe,*33 a case that stands at the apex of immigrant rights in the United States. With this decision, the Court struck down

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26. For a very clever example of this unusual practice, see RONALD G. EHRENBERG, *Tuition Rising: Why College Costs So Much* 84 (2002), where the author describes how the University of Rochester, a private institution, has begun to award scholarships targeted to area students in New York.

27. For a discussion of financial aid issues, see id., especially Ch. 5, “Admissions and Financial Aid Policies,” at 70–90.


30. Priest v. Regents of Univ. of Wis., 11 N.W. 472 (Wis. 1882) (upholding institution’s right to charge out-of-state surcharge).


32. Id. at 453–54.

Texas' attempt to deny free public education to alien children. The Texas Legislature had sought to deny a free public education by charging alien children tuition to attend elementary and secondary schools. Justice Brennan, in his majority opinion striking down the statute, characterized the Texas argument for charging tuition as "nothing more than the assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools." He employed an equal protection analysis to find that a State could not enact a discriminatory classification "merely by defining a disfavored group as nonresident."

Justice Brennan dismissed the State's first argument that the classification or subclass of undocumented Mexican children was necessary to preserve the State's "limited resources for the education of its lawful residents." This line of argumentation had been rejected in an earlier case, Graham v. Richardson, where the Court had held that the concern for preservation of Arizona's welfare resources alone could not justify an alienage classification used in allocating those resources. In addition, the findings of fact from the Plyler v. Doe litigation were that the exclusion of all undocumented children would eventually result in some small savings to the State, but since both state and federal governments based their allocations to schools primarily on the number of children enrolled, those savings would be uncertain and barring those children would "not

34. Id. at 230.
35. Id. at 206 n.2.
36. Id. at 227. It is not surprising that such anti-Mexican legislation would have originated in Texas, a jurisdiction widely regarded to have "a legacy of hate engendered by the Texas Revolution and the Mexican American War." Guadalupe San Miguel, Let Them All Take Heed: Mexican Americans and the Campaign for Educational Equality in Texas, 1910–1981 32 (1987). According to San Miguel, this history of conflict has:

[Generated distrust and dislike between Anglos and Texas Mexicans. Most important, it shaped Anglo attitudes toward Mexicans by . . . legitimizing the stereotype of Mexicans as "eternal enemies" of the state, and . . . encouraging their denigration. Additionally this legacy undergirded the historical attitude of Anglo disparagement of Mexican culture and the Spanish language.

Id. (citing Rodolfo Acuna; Occupied America (1981)). See also Arnoldo De Leon, They Called Them Greasers (1983).

37. Plyler, 457 U.S. at 227. In this regard, Professor Stephen Legomsky has usefully reminded me in personal communications that the starting point for any analysis of this issue is to recognize that the rules that restrict in-state resident status for undocumented students are an exception to the general rule. In every sense of the word, the undocumented are residents of the state. They live in the state, are physically present, and intend to remain. So the question is not whether we should be granting special privileges to the undocumented, which is how restrictionists like to present it. The real question is whether we should carve out a special exception to otherwise eligible state residents simply because their parents have violated federal immigration laws.

38. Id. at 229.
40. Id. at 375. The classification involved state welfare benefits. Id. at 366.
42. Id. at 576–77.
necessarily improve the quality of education.\textsuperscript{43}

The State also argued that it had enacted the legislation in order to protect itself from a putative influx of undocumented aliens.\textsuperscript{44} The Court acknowledged the concerns of the State due to any increase in the undocumented population, but found that the statute was not tailored to meet this objective: "Charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration."\textsuperscript{45} The Court also noted that immigration and naturalization policy is within the exclusive powers of the federal government.\textsuperscript{46}

Finally, the State maintained that undocumented children were singled out because their unlawful presence rendered them less likely to remain in the United States and therefore to be able to use the free public education they received in order to contribute to the social and political goals of the U.S. community.\textsuperscript{47} Brennan distinguished the subclass of undocumented aliens who had lived in the United States as a family and for all practical purposes, permanently, from the subclass of adult aliens who enter the country alone and whose intent was to earn money and stay temporarily.\textsuperscript{48} For those who remained with the intent of making the United States their home, "[i]t is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."\textsuperscript{49}

Prior to \textit{Plyler}, the Supreme Court had never taken up the question of whether undocumented aliens could seek Fourteenth Amendment equal protection.\textsuperscript{50} The Court had earlier held that undocumented aliens are "persons,"\textsuperscript{51} and that undocumented persons are protected by the due process provisions of the Fourteenth Amendment.\textsuperscript{52} The State of Texas, however, argued that because undocumented children were not "within its jurisdiction,"\textsuperscript{53} they were not entitled to equal protection. Justice Brennan rejected this line of reasoning, concluding that there "is simply no support for [the] suggestion that 'due process' is somehow of greater stature than 'equal protection' and therefore available to a larger class of persons."\textsuperscript{54}

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\textsuperscript{43} \textit{Plyler}, 457 U.S. at 229 (citing \textit{Plyler}, 458 F. Supp. at 577).
\textsuperscript{44} \textit{Id.} at 229–30.
\textsuperscript{45} \textit{Id.} at 228 (citing \textit{Plyler}, 458 F. Supp. at 585).
\textsuperscript{46} \textit{Id.} at 225–26.
\textsuperscript{47} \textit{Id.} at 226–30.
\textsuperscript{48} \textit{Id.} at 230.
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
\textsuperscript{51} \textit{Wong Wing v. United States}, 163 U.S. 228 (1896).
\textsuperscript{52} \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 369 (1886) (stating that Fourteenth Amendment provisions "are universal in their application to all persons").
\textsuperscript{53} \textit{Plyler}, 457 U.S. at 211.
\textsuperscript{54} \textit{Id.} at 213. In the dissent, Chief Justice Burger concurred that the Equal Protection Clause applies to undocumented aliens. \textit{Id.} at 243.
\end{small}
Although Justice Brennan rejected undocumented alienage as a suspect class, he concluded that the children were not responsible for their own citizenship status and that treating them as Texas law envisioned would “not comport with fundamental conceptions of justice.” Justice Brennan, however, was more emphatically concerned with education and elaborating the nature of the entitlement: while he recited a litany of cases holding education to have “a fundamental role in maintaining the fabric of our society,” he reaffirmed the earlier *Rodriguez* finding that public education was not a fundamental right. Justice Brennan noted that “[i]lliteracy is an enduring disability,” one that would plague the individual and society. This analysis enabled him to rebut the State’s assertions, which Chief Justice Burger’s dissent had found persuasive, that the policy was legislatively related to protecting the fiscal economy of the State.

The nature of education seems to have been a more important factor to the *Plyler* Court than it appears to have been to the *Rodriguez* Court, where the manner of public school finance was crucially at issue. Further, while the *Plyler* Court did not reach the claim of federal preemption, it did draw a crucial distinction between what states and the federal government may do in legislating treatment of aliens. Additionally, while the Court has upheld state statutes governing alien employment and welfare benefits, these narrow areas mirrored federal classifications and congressional action governing immigration. In *DeCanas v. Bica,* the Supreme Court held that if Congress had addressed an immigration issue and delegated particular aspects of its administration to states, the states could enact their own legislation to regulate the area. In public education, however, Brennan wrote, “we perceive no national policy that supports the State in denying these children an elementary education.” *Plyler* addressed the issue of public school children in the K–12 setting, but was silent on the issue of whether the protections extended to the college setting.

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55. *Id.* at 220 (citing Trimble v. Gordon, 430 U.S. 762, 770 (1977)).
56. *Id.* at 221 (internal citations omitted).
59. *Id.* at 219 n.19 (citing *De Canas v. Bica,* 424 U.S. 351 (1976)).
62. *Id.* at 224.
67. *Id.* at 356.
69. In an earlier article, I argued that the principles of *Plyler* did apply to the college level. Olivas, *Enduring Disability,* supra note 9. *Nyquist v. Mauclet,* 432 U.S. 1 (1977), was the first
Also in 1982, the Court decided *Toll v. Moreno,* the first postsecondary residency case construing a state statute affecting non-immigrants, or aliens with permission to remain only temporarily in the United States. Justice Brennan also wrote the majority opinion in *Toll.* After reviewing the confusing history of the case, he held that the University of Maryland's policy of denying treaty organization aliens the opportunity to pay reduced, in-state tuition constituted a violation of the Supremacy Clause, and therefore did not reach the questions of Due Process or Equal Protection, which had been considered by the District Court and Court of Appeals. The opinion follows a simple logic: the federal government is preeminent in matters of immigration policy and states may not enact alienage classifications, except in limited cases of political and government functions, or where the states are given such jurisdiction as a feature of the federal scheme.

When the case was first brought, the district court had held that the original postsecondary education case construing a state statute affecting permanent resident college students. *Nyquist* struck down a New York State statute that prohibited permanent resident aliens from receiving college tuition assistance benefits. *Nyquist,* 432 U.S. at 12.

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70. 458 U.S. 1 (1982).

71. *Toll* involved the unmarried son of a G-4 visa holder, a status conferred upon employees (and their families) of international treaty organizations, such as the World Bank, the Pan American Health Organization, and the like. *INA,* Pub. L. No. 82-414, ch. 477, 66 Stat. 166 (1952) (codified as amended at 8 U.S.C.A. § 1101 (1999 & West Supp. 2003)). In 1986, Congress created a new non-immigrant visa category for long term G-holders and their relatives: the N visa. *INA,* Pub. L. No. 99-653, 100 Stat. 3655 (1986) (codified as amended at 8 U.S.C.A. § 1101). Prior to *Toll,* G-holders were required to maintain a foreign domicile and so were not allowed to establish a U.S. domicile. *Toll,* 458 U.S. at 3. This legal disability had meant that the Moreno children were not entitled to establish Maryland state domicile, despite their long term residence in the State and infrequent contacts with Spain, their country of origin. Most categories of non-immigrants, while in the United States legally, share this inability-to-establish-domicile infirmity with the undocumented, as applied in the context of many state postsecondary residency rules. *Toll,* 458 U.S. at 31; see Olivas, *Enduring Disability,* supra note 9, at 29–33 (reviewing the several *Toll v. Moreno* cases). As a recent example of a non-immigrant category that does not allow the holders to establish domicile in the United States or in a given state for college residency purposes, see *Carlson v. Reed,* 249 F.3d 876 (9th Cir. 2001), where a student from Canada on a TD visa, a treaty-related category, was determined to be incapable of establishing domicile in the United States.


76. Moreno v. Univ. of Md., 645 F.2d 217 (4th Cir. 1981) (per curiam).

policy denying residency was a violation of Due Process and constituted an
irrebuttable presumption. In reviewing that case, the Court held in 1978 that G-4
visa holders could be U.S. domiciliaries, and certified a question to the Maryland
Court of Appeals to determine whether G-4 aliens and dependents could be
Maryland domiciliaries. The Maryland Court then determined that they were
capable of acquiring domicile, rendering erroneous the University’s previous
reliance upon their inability to establish domicile in the state. Before the Court
rendered its opinion, the University’s Board of Regents issued a “Reaffirmation of
In-State Policy” that actually constituted a substantial retreat from its previous
position, although it still did not allow residency tuition for Moreno. The
Supreme Court, noting that the University’s action had “fundamentally altered” the
domicile issue, remanded the case to the District Court.

On remand, the University lost once again. The District Court reaffirmed that
even though the University’s “paramount consideration” was no longer domicile,
the original policy had denied due process to G-4 aliens, and the revised policy
was also found to be defective on Fourteenth Amendment Equal Protection and
Supremacy Clause grounds. In the Court’s view, the “revised” policy concerning
alienage (which made domicile only one of several criteria) could not survive strict
scrutiny and, further, it impermissibly encroached upon federal immigration
privileges. The Court of Appeals affirmed, rendering both the policies invalid:
the original practice on due process and irrebuttable presumption grounds
concerning the establishment of domicile, and the revised practice on Equal
Protection (for alienage) and preemption grounds. While Justice Brennan’s
opinion only reached the issue of the Supremacy Clause, his opinion in Plyler v.
Doe, decided upon Equal Protection grounds with less-than-strict scrutiny for
undocumented aliens, suggests that he also would have found the revised policy
equally invalid under an Equal Protection analysis.

Brennan reviewed earlier immigration cases, Takahashi v. Fish & Game
Commission, Graham v. Richardson, and De Canas v. Bica, reading them for

80. Id. at 668–69.
82. Toll v. Moreno, 441 U.S. 458 (1979) (per curiam).
83. Id.
84. Id. at 461–62. For a detailed examination of nonimmigrant intent issues, see Daniel
Walfish, Note, Student Visas and the Illogic of the Intent Requirement, 17 GEO. IMMIGR. L.J. 473
86. Id. at 668.
87. Id. at 667–68.
89. Toll v. Moreno, 458 U.S. 1, 9–10 (1982).
91. 334 U.S. 410 (1948) (states cannot impose discriminatory burdens on aliens).
92. 403 U.S. 365 (1971) (states may not impose regulations upon aliens if the burdens are
not contemplated by Congress).
the principle that "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." He found both that Congress had allowed G-4 visa holders to establish domicile in the United States and also had conferred tax exemptions upon G-4 aliens "as an inducement for these [international] organizations to locate significant operations in the United States." Therefore, he reasoned, it was clearly the congressional intent that G-4 visa holders not bear the "additional burdens" Maryland sought to impose: "The State may not recoup indirectly from respondents' parents the taxes that the Federal Government has expressly barred the State from collecting.

Read with Plyler v. Doe, Toll raises several important questions concerning the "residency clock" for the undocumented: Does the proper determination for establishing domicile begin when they enter the country? When they apply for a formal status? When they receive formal, adjusted status, if at all? What happens if the state has no common law on alien domicile? While Toll may have resolved the narrow issue of domiciled G-4 aliens in states that grant tax exemptions, its significance lies beyond this narrow setting, as will be seen in

94. Toll, 458 U.S. at 12–13 (quoting De Canas, 424 U.S. at 358 n.6). Justice Brennan allowed that the Court had upheld legislation limiting the "participation of noncitizens in the States' political and governmental functions." Id. at n.17.
95. Id. at 14.
96. Id. at 16. Moreover, Maryland law tracked the federal exemption. MD. ANN. CODE art. 81, § 280(a) (1957) (repealed 1996).
97. Id. Justice O'Connor dissented from this characterization, but concurred in the opinion "insofar as it holds that the State may not charge out-of-state tuition to nonimmigrant aliens who, under federal law, are exempt from both state and federal taxes, and who are domiciled in the State." Id. at 24 (O'Connor, J., concurring in part and dissenting in part).
98. See e.g., Wong v. Bd. of Trs., 125 Cal. Rptr. 841 (Cal. Ct. App. 1975) (ordered not published by California Supreme Court order dated January 15, 1976) (denying equal protection challenge to requirement that aliens hold permanent resident status for one year prior to determination of residence). There is a real question of whether this entire issue simply puts off the day of immigration reckoning until after college graduation and attempted entry into the workplace. That is a fair and vexing question, one that is beyond the immediate reach of this project. In my sleepless dreams, I wonder whether my longstanding efforts to extend the staying power of the undocumented helps them, or if I am delaying the inevitable. At this point, I choose to do what I can and not to curse the darkness. I recall that in Letitia "A", infra note 98, case, several of the original plaintiffs were able to obtain a more secure immigration status during the pendency of the trial. I have had students who took advantage of the Texas legislation and attended college under its provisions, introduce themselves to me and tell me that their attorneys had found a way to regularize their status and negotiate the drastic IIRIRA unlawful presence provisions. As I note at the end of this article, the proposed DREAM Act, if enacted by Congress and signed into law, would moot this worry. Until then, I will do what I can.
99. In Texas, as in many states, non-immigrants such as K-visa holders (fiancées or fiancés) and L-holders (intra-company transferees) are more easily accorded residence for tuition purposes, as federal immigration law does not require them to maintain a domicile in their home country. 8 U.S.C.A. § 1101(a)(15)(K)-(L) (1999 & West Supp. 2003). Non-immigrants on student visas (F), on the other hand, are required to maintain their original domicile in their home country; thus, by the terms of the F-visa application, they are not accorded permission to
IIRIRA, after 1996. In particular, I believe its significance extends to the undocumented.

Soon after Pyle and Toll were decided, their postsecondary applications were tested in several complex California cases: Leticia “A” v. Board of Regents of the University of California (Leticia “A” I) and additional litigation (Leticia “A” II),

Bradford v. Board of Regents of the University of California (Bradford I) and additional litigation (Bradford II),

and American Association of Women v. Board of Trustees of the California State University.

By the time the smoke had cleared, in 1994, the undocumented were not allowed to establish resident status in California’s public institutions. Then, lightning struck with Proposition 187, California’s ballot initiative designed to eliminate virtually all benefits to undocumented aliens. This Draconian measure, which passed by nearly 60% of the state’s electorate, would have stripped undocumented aliens of all but the most essential health and medical services, would have overruled Pyle and denied educational benefits to these children, and would have required public officials to report aliens thought to be undocumented to police and security authorities.

100. Tentative Decision, Action No. 588982-4 (Cal. Super. Ct., Alameda County, Apr. 3, 1985); Judgment (May 7, 1985); Statement of Decision (May 30, 1985) (Leticia “A” I); Clarification (May 19, 1992) (Leticia “A” II). All subsequent references are to the May 30, 1985, Statement of Decision, unless otherwise noted. As a member of a task force to advise her on this issue, I urged then-CSU Chancellor Ann Reynolds not to appeal this decision.


102. 38 Cal. Rptr. 2d 15 (Cal. Ct. App. 1995). See also Am. Ass’n of Women v. Bd. of Trs., No. BC061221, at 7 (Cal. Super. Ct., Los Angeles County, Sept. 28, 1992) (Robert H. O’Brien, J.). It is a small world. By this time, Dr. Barry Munitz was Chancellor of the CSU system. I and others urged him not to appeal Judge Kawaichi’s clarification. For a detailed study of these cases, see Olivas, Storytelling, supra note 2, at 1051–61.

Almost immediately, declaratory and injunctive relief was granted by federal courts, and ultimately, almost all of Proposition 187's provisions were struck down by courts, although the bar on postsecondary benefits was upheld. By the mid-1990s, a number of states had also challenged what they considered failed federal immigration enforcement policy, and sought additional federal resources. Six of the major receiver states brought such suits, although all were eventually unsuccessful.

Although the suits were unsuccessful, the switch to a Republican-controlled Congress in 1995 resulted in two major 1996 laws restricting immigration and the status of immigrants: the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). These omnibus laws dramatically changed the landscape, affecting federal benefits in many areas of health and welfare, and their enactment led the judge in the Proposition 187 challenge to determine that the federal government had preempted state actions to do so, expressing the "intention of Congress to occupy the field of regulation of government benefits to aliens." When the State appealed this decision, the newly elected Governor, Gray Davis, invoked the Ninth Circuit's special arbitration and mediation provision, which resulted in a July 1999 settlement.

Even though Proposition 187's worst provisions were ruled invalid, the provision concerning postsecondary residency was intact, and worse, IIRIRA had included a provision that on its face appeared to strike down postsecondary residency authority:

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106. Chiles v. United States, 69 F.3d 1094 (11th Cir. 1995) (Florida); Padavan v. United States, 82 F.3d 23 (2d Cir. 1996) (New York); New Jersey v. United States, 91 F.3d 463 (3d Cir. 1996) (New Jersey); Arizona v. United States, 104 F.3d 1095 (9th Cir. 1997) (Arizona); California v. United States, 104 F.3d 1086 (9th Cir. 1997) (California); Texas v. United States, 106 F.3d 661 (5th Cir. 1997) (Texas). Notwithstanding these cases, with all the states lost, it was a complex issue. For example, Texas did not even spend all of its federal dollars allocated for alien support, and returned $90 million unspent to the government. See James Cullen, Editorial, Blame the Newcomers, TEX. OBSERVER, Aug. 19, 1994, at 2-3.
IIRIRA, CHAPTER 14—RESTRICTING WELFARE AND PUBLIC BENEFITS FOR ALIENS

§ 1621. Aliens who are not qualified aliens or nonimmigrants ineligible for State and local public benefits

(a) 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, or

(3) an alien who is paroled into the United States under section 212(d)(5) of such Act for less than one year,

is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

(b) Exceptions

Subsection (a) of this section shall not apply with respect to the following State or local public benefits:

(1) Assistance for health care items and services that are necessary for the treatment of an emergency medical condition (as defined in section 1396b(v)(3) of Title 42) of the alien involved and are not related to an organ transplant procedure.

(2) Short-term, non-cash, in-kind emergency disaster relief.

(3) Public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(4) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (A) deliver in-kind services at the community level, including through public or private nonprofit agencies; (B) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (C) are necessary for the protection of life or safety.

(c) "State or local public benefit" defined

(1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term "State or local public benefit" means—

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and
(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

(2) Such term shall not apply—

(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States, or to a citizen of a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99-239 or 99-658 (or a successor provision) is in effect;

(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act qualified for such benefits and for whom the United States under reciprocal treaty agreements is required to pay benefits, as determined by the Secretary of State, after consultation with the Attorney General; or

(C) to the issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States.

(3) Such term does not include any Federal public benefit under section 1611(c) of this title.

(d) State authority to provide for eligibility of illegal aliens for State and local public benefits

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 under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

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§ 1623. Limitation on eligibility for preferential treatment of aliens not lawfully present on basis of residence for higher education benefits

(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 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 whether the citizen or national is such a resident.

(b) Effective date

This section shall apply to benefits provided on or after July 1, 1998. 110

Whatever these provisions meant in practice, there is no doubt that by 1996, things looked bleak for those who advocated for undocumented college students. By then, Texas and California, the two largest immigrant-receiver states, had banned these students from in-state tuition classification as residents, and federal legislation was in place that appeared to preempt state efforts to enact such a benefit. As it turned out, however, the darkest hour was before the dawn.

II. IIRIRA AND POSTSECONDARY RESIDENCY BENEFITS

In the interim between the injunction issued to stay Proposition 187’s implementation and the appeals court settlement, as requested by Governor Davis, Congress enacted IIRIRA, which appeared to the court to preempt state efforts to allow the undocumented any residency tuition benefits. The court held that Section 505 of IIRIRA had shown that Congress intended to occupy this field, and that intent preempted the states from regulating the residency status of undocumented students. 111 Others, such as conservative commentator Dan Stein of the restrictionist group the Federation for American Immigration Reform (“FAIR”), also interpreted this provision in a similar fashion. 112 Other politicians have interpreted this provision similarly, 113 but I believe that they have mistakenly read the statute, which is, by any measure, confusingly worded.

My reading of Section 505 follows this reasoning: state residency is a state benefit, to be determined by states; the one time that the Supreme Court acted in this area, in Moreno v. Elkins, 114 it certified this issue as a state question and adopted the state’s reasoning into its own decision-making; the word “unless” in Section 1623 can only mean that Congress enacted a condition precedent for states enacting rules in this area; the word “benefit” is defined in Section 1621 in a way that makes it clear that Congress intended it as a “monetary benefit,” whereas the determination of residency is a status benefit, not a “monetary” benefit; Section 1621 says explicitly that states may provide this benefit only if they act to do so after August 22, 1996. Taken together, these strands form an interlocking logic that points toward only one reasonable conclusion: that IIRIRA, however badly written, allows states to confer (or not to confer) a residency benefit upon the


111. Wilson, 997 F. Supp. at 1253.

112. Dan Stein, Why Illegal Immigrants Should Not Receive In-State Tuition Subsidies, UNIV. BUS., Apr. 2002, at 64; but see Michael A. Olivas, Rebultal to FAIR, UNIV. BUS., June 2002, at 72, reprinted in 7 BENDER’S IMMIGR. BULL. 652 (June 1, 2002).

113. Michael A. Olivas, Rebultal to FAIR, UNIV. BUS., June 2002, at 72, reprinted in 7 BENDER’S IMMIGR. BULL. 652 (June 1, 2002). For example, the Virginia Attorney General made the same error. See also infra notes 120, 160, and accompanying text.

undocumented in their public postsecondary institutions.\textsuperscript{115}

First, in-state residency is entirely a state-determined benefit or status. There are no federal funds tied to this status (as is the case of federal highway programs, where accepting the dollars obligates the state to abide by federal speed limits, for instance). In the one instance when this jurisdictional matter was considered by the Supreme Court (the Maryland case of \textit{Moreno v. Elkins}, where the question was whether G-4 non-immigrants could establish postsecondary residency in the state for in-state tuition purposes), the Court certified this question to the Maryland State Court of Appeals.\textsuperscript{116} The Maryland State Court of Appeals held that G-4 aliens were not precluded from establishing domicile, and the Supreme Court then deferred to this finding, and adopted it in its final ruling on the issue in \textit{Toll v. Moreno}.\textsuperscript{117} Had this been a matter of federal law, the Supreme Court would have decided this issue itself, but it left the interpretation and determination of a state benefit to a state court. While \textit{Toll} concerns nonimmigrants rather than the undocumented, I believe it is instructive on this issue as well.

The provisions of IIRIRA, the 1996 federal statute, do not preclude states' abilities to enact residency statutes for the undocumented. Section 1623 reads:

\begin{quote}
[A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a state (or political subdivision) 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 whether the citizen or national is such a resident.\textsuperscript{118}
\end{quote}

Congress does not have the authority to regulate state benefits, and the Maryland case established this in the area of postsecondary residency or domicile issues. But if Congress does have such authority, Section 1623 does not preclude any state from enacting undocumented student legislation, due to the word "unless." A flat bar would not include such a modifier. The only way to read this convoluted language is: State A cannot give any more consideration to an undocumented student than it can give to a nonresident student from State B. For example, California could not enact a plan to extend resident status to undocumented students after they had resided in the state for twelve months, and then accord that same status to U.S. citizens or permanent residents from Nevada or Oregon after eighteen months. No state plan does this; indeed, several of the plans require three years of residency for the undocumented, as well as state high school attendance—neither of which is required for citizen non-residents.\textsuperscript{119} This

\textsuperscript{115} Id.

\textsuperscript{116} Id.


\textsuperscript{119} See, e.g., TEX. EDUC. CODE ANN. § 54.052 (Vernon 2003); CAL. EDUC. CODE § 68130.5 (West 2003). See generally Sara Hebel, \textit{States Take Diverging Approaches on Tuition
is the only plausible reading of Section 1623.

Several readers have also misread what constitutes a benefit. In Section 1623, the term “benefit” refers to dollars (“amount, duration, and scope”), as if prohibiting state scholarships or fellowships. The benefit actually being conferred by residency statutes, however, is the right to be considered for in-state resident status.120 This is a non-monetary benefit, and this definition lends support to my reading of the statute. Congress has enacted a separate program for federal financial aid, which limits eligibility to certain classes of aliens, including PRUCOL students, those in status such as asylees or parolees, “permanently residing under color of law.”121

Some commentators have also incorrectly read Section 1621 to prohibit residency reclassification.122 That provision reads, in pertinent part: “[An undocumented alien] . . . is not eligible for any state or local public benefit (as defined in subsection (c) of this section).”123 But a careful reading of subsection (c) confirms my interpretation, by referencing payments. It prohibits:

[119] Any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.124

Thus, the benefit of being reclassified as a resident student in a state does not

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122. For example, see the Virginia Attorney General’s Opinion of September 5, 2002, opening that granting assistance would be inconsistent with IRRIRA, at 79 Int. Rel. 1750 (Nov. 25, 2002). Although the Virginia legislature passed a bill to grant assistance, the governor vetoed the legislation on April 30, 2003. As Table, infra Section II, notes, subsequent bills have been introduced. MALDEF sued Virginia over the matter, and in the first of two 2004 cases, it was held that the undocumented students challenging the Attorney General’s memorandum on this matter could not proceed anonymously. Doe I et al. v. Merten, 219 F.R.D. 387 (E.D. Va. 2004). In the second case, which was decided just as this article was sent to press, the trial court held that the State of Virginia could enact practices which denied undocumented students admissions or residency status. Equal Access Education v. Merten, No. CIV.A. 03-1113-A, 2004 WL 369849 (E.D. Va. Feb. 24, 2004). As of mid-March 2004, the plaintiffs had not determined whether or not they would appeal. Telephone interview with James Ferg-Cadima, MALDEF staff attorney (Mar. 15, 2004).


trigger any of the prohibitions. Paragraph (1), subparagraph (B)'s reference to "postsecondary education" is modified by "or any other similar benefit for which payments or assistance are provided . . . by an agency, a state or local government or by appropriated funds of a state or local government." This clearly indicates that what is proscribed is money or appropriated funds, not the "status benefits" confirmed by the right to declare state residency.

Further, subsection (d) provides that states may provide otherwise-prohibited public benefits "only through the enactment of a State law after August 22, 1996 which affirmatively provides for such eligibility." This must allow states to do as I have urged they do. Any fair reading of this statute refutes the FAIR position on this matter. Beginning with Texas, ironically the state where Plyler originated twenty-five years earlier, a number of states have enacted statutes to allow these few students—who have broken no law themselves—to enroll in college.

The Table that follows is current through early 2004, and reveals that there has been considerable action by the states: seven have enacted statutes to allow the undocumented to establish residency, while two have acted by statute to preclude the undocumented from receiving such benefits; sixteen other states have considered the matter but have not yet taken final action. Other state institutions, such as the University of Delaware, have acted to allow these students to enroll as residents, without a law having been enacted. Some of the states have followed the California lead by not referring to "residence" in the statute, ostensibly to skirt the Section 1623 provision, but it is difficult to envision how any student, undocumented or not, could attend and graduate from a California high school without actually "residing" in the school district, especially given the holding of Martinez v. Bynum, which allows schools to bar the undocumented from public schools if the students or their parents do not reside in the district. Congress also acted to prevent the practice of "parachute kids," whose parents live outside the country and send their children to attend public schools. This practice now requires the parents to pay for the full tuition costs of their children's school attendance, and this provision has dramatically lessened the pattern of parents engaging in this behavior.

125. Id.
126. Id.
127. Id.
128. James Ferg-Cadina, Survey of Recent State Law and Legislation During the 2003-04 Legislation Term Aimed at Facilitating Undocumented Student Access to State Universities (May 18, 2003) (on file with author). He has my thanks for gathering the data that are included in Table, infra Section II; I have supplemented them with updated information.
131. IIRIRA bars F-1 visa holders (academic students) from attending public schools without reimbursement for the full, unsubsidized per capita cost of attendance. 8 U.S.C.A. §§ 1184(m)(1) (1999 & West Supp. 2003). Discussions with a Houston Independent School District official, which took place during the summer of 2003, revealed that fewer than "several dozen" such
### TABLE:

**STATE LEGISLATION CONCERNING UNDOCUMENTED COLLEGE STUDENTS**  
(JANUARY 2004)

**States That Allow Undocumented Students to Gain Resident Tuition Status**  
(by statute):
- Texas, H.B. 1403, 77th Leg., Reg. Sess. (Tex. 2001)\(^{132}\)
- Utah, H.B. 144, 54th Leg., Gen. Sess. (Utah 2002)

**States That Do Not Allow Undocumented Students to Gain Resident Tuition Status**  
(by statute):

**States That Have Formally Considered Legislation Concerning Undocumented Students and Gain Residency Tuition Status**  
(statutes introduced by November 2003):
- Arizona, California (eligibility for State financial aid), Colorado, Delaware,\(^{133}\) Florida, Hawaii, Kansas, Maryland,\(^{134}\) Massachusetts, Michigan, Nebraska, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Virginia,\(^{135}\) Wisconsin

While the Table indicates that only a few states have changed their practice post-IIRIRA and enacted statutes to allow the undocumented to attend college as resident students, the major receiver states have done so, and it is likely that political pressure will continue to fill in the spots on the map, at least the spots where the undocumented are likely to enroll.\(^{136}\) In addition, the unlikely scenario

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\(^{132}\) For text of the statute, visit The Journal of College and University Law, Symposium Webpage, available at [http://www.nd.edu/~jcul/USA_PATRIOT_Act/Olivas_Appendix_B.pdf](http://www.nd.edu/~jcul/USA_PATRIOT_Act/Olivas_Appendix_B.pdf) (last visited Apr. 4, 2004).

\(^{133}\) Public institutions in Delaware have agreed to allow undocumented students to establish residency status, in lieu of legislation that had been introduced.

\(^{134}\) Pro-immigrant bill vetoed by governor. See Jason Song, *For Salvadorean Grad, An Uncertain Future; Immigrant: A 17-Year Old's Dreams of Attending the University of Maryland Ended with the Veto of the In-State Tuition Bill*, BALT. SUN, June 3, 2003, at 1A.

\(^{135}\) Anti-immigrant bill vetoed by governor. Governor's Veto, H.B. 2339 (May 1, 2003).

of a major conservative Republican U.S. Senator from Utah (Sen. Orrin Hatch) taking on this issue after September 11 has rendered it more likely that federal action will occur, and not only accord these students federal protection, but a limited amnesty of one form or another. Section III chronicles the rise of the DREAM Act legislation and its unlikely provenance.

III. HIGHER EDUCATION AND RESIDENCY AFTER SEPTEMBER 11

Of course, September 11 changed everything. As the articles in this Symposium reveal, higher education institutions have been substantially affected by the general rise in security concerns. Literally dozens of statutes have been enacted or amended by Congress to address terrorism since the attacks against the United States, and several of these either directly implicate higher education institutions or affect colleges in substantial fashion. In addition, new legislative proposals have arisen, in areas that will affect colleges and universities should they become law. Regulations to implement this legislation have cascaded, and many more are in progress. Like an elaborate billiard game, these new statutes cross-reference, compound, and alter existing statutes, including well-established laws.

The primary statutes enacted by Congress to combat terrorism since the 2001 attacks include:

- Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA-PATRIOT Act") (October 26, 2001) [major omnibus anti-terrorism legislation, amending several statutes];
- Aviation and Transportation Security Act (November 19, 2001) [affects flight training schools];
- Enhanced Border Security and Visa Entry Reform Act of 2002,

elaborates in some detail upon these issues. His articles on the DREAM Act are very thorough, although events have moved on to date the legislative portions. This article will also age poorly, as the issues move very quickly.


("Border Security Act") (May 13, 2002) [data collection on international students and scholars] and the Border Commuter Student Act of 2002 [affecting part time, international commuter students].

- Public Health Security and Bioterrorism Preparedness and Response Act of 2002 ("BPARA") (June 12, 2002) [controls use and distribution of toxins and other biological agents used in scientific research and instruction].

Other relevant legal initiatives include the Student and Exchange Visitor Information System ("SEVIS"), a comprehensive computerized system designed to track international students and exchange scholars; the Department of State’s Technology Alert List ("TAL"), an enhanced consular official review process for detecting terrorists who seek to study sensitive technologies; the Visas Mantis, a program intended to increase security clearances for foreign students and scholars in science and engineering fields; the Interagency Panel on Advanced Science Security ("IPASS"), designed to screen foreign scholars in security-sensitive

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scientific areas;\textsuperscript{146} the Consumer Lookout and Support System ("CLASS"), a file-sharing program that incorporates crime data into immigration-screening records;\textsuperscript{147} the Interim Student and Exchange Authentication System ("ISEAS"),\textsuperscript{148} a transitional program (until SEVIS is fully operational) that replaces the previous Coordinated International Partnership Regulating Act of 1996 ("IIRIRA")\textsuperscript{149} — the major overhaul of the core Immigration and Nationality Act ("INA"). In addition, there are many Presidential Directives and other federal statutory/regulatory matters that govern the intersection of immigration, national security, and higher education.\textsuperscript{150}

As one careful immigration scholar has noted in this area:

Let us be clear: Immigration law does not revolve around national security or terrorism. As you will see, national security is merely one of many policy ingredients in the mix. Moreover, only the most minute proportion of actual immigration cases present any national security issues at all. Conversely, while many of the policy responses to September 11 have been immigration-specific, most have been generic national security strategies.

A full chapter devoted solely to national security runs the risk, therefore, of lending that subject undue prominence. This must be acknowledged. For two reasons, separate treatment of this material is useful nonetheless. First, in the aftermath of September 11, the inevitable preoccupation with terrorism and war has utterly dominated


\textsuperscript{147} For a copy of the Memorandum of Understanding, allocating agency functions on the issues between the Departments of State and Homeland Security, see MEMORANDUM OF UNDERSTANDING BETWEEN THE SECRETARIES OF STATE AND HOMELAND SECURITY CONCERNING IMPLEMENTATION OF SECTION 428 OF THE HOMELAND SECURITY ACT OF 2002, available at http://www.nafsa.org/content/publicpolicy/NAFSAontheissues/mou.htm (last visited Apr. 4, 2004).


the public discourse on immigration. Welcome or not, that reality cannot be ignored. Second, Congress and the executive branch have responded with a wave of counterterrorism initiatives. Many of them specifically target either noncitizens or particular classes of noncitizens. Synthesizing these measures makes it easier to describe, digest, and evaluate them in context.

After the planes crashed, some of these changes would have been enacted, even if some of the hijackers had never been students enrolled in U.S. flight schools. The resultant revisions have been accelerated, and breathed life into dormant statutes. For example, the SEVIS initiative had been mandated by IIRIRA in 1996, but had never been implemented. Concerned generally about overstays, Congress had ordered that an automated entry-exit system be developed, and when it was not developed, enacted two additional statutes in 1998 and 2000 to deal with this issue.

Following September 11, 2001, the USA PATRIOT Act was signed into law, including Section 414, which lent additional urgency. In 2002, Congress once again acted on this subject, enacting the Enhanced Border Security and Visa Entry Reform Act of 2002. In June 2002, the Department of Justice announced the creation of the National Security Entry-Exit Registration System (“NSEERS”). The postsecondary corollary is SEVIS, a web-based student tracking system, which has been delayed and vexing for colleges required to use it. Both NSEERS and SEVIS will be rolled into a more comprehensive database called the U.S. Visitor and Immigration Status Indication Technology System (“U.S. VISIT”), once the technical, legal, and system problems have been


152. Baynes, supra note 3.

153. Such a program was enacted as Section 641 of IIRIRA (codified as amended at 8 U.S.C.A. § 1372 (1999 & West Supp. 2003)).


resolved.\textsuperscript{158} In the meantime, campus officials have had to spend countless hours tracking and identifying international students and scholars, in an immigration regime that is extraordinarily complex and detailed. The delays have been responsible for disrupting the flow in international students and researchers to U.S. institutions, and the lags in processing the paperwork and technical requirements can require a year in advance of enrollment.\textsuperscript{159}

With regard to residency, the most important development has been the introduction and consideration of federal legislation to deal with the confusion of Section 505 of IIRIRA, the Development, Relief, and Education for Alien Minors (DREAM) Act. Senators Orrin Hatch (R-UT) and Richard Durbin (D-IL) reintroduced the DREAM Act, S. 1545, on July 31, 2003.\textsuperscript{160} By Fall 2003, it had 35 Senate co-sponsors, including a majority of the membership of the Judiciary Committee, and in November 2003, was passed out of Committee.\textsuperscript{161} In the House, Representatives Chris Cannon (R-3rd UT), Lucille Roybal-Allard (D-34th CA), and Howard Berman (D-28th CA) reintroduced the Student Adjustment Act, H.R. 1684, on April 9, 2003, which mirrors the DREAM Act, but has different provisions.\textsuperscript{162} If the DREAM Act were passed in its present form, it would have the following effect. First, it would repeal Section 505 of IIRIRA, which has come to discourage some states from offering in-state, resident tuition to all students who graduate from their high schools. The repeal would be retroactive, as if Section 505 never had been enacted. Second, it would allow eligible undocumented students (those who entered the United States before they were sixteen years old)

\textsuperscript{158} See 8 BENDER'S IMMIGR. BULL. 966 (June 1, 2003); see also Sean O'Connor, Biometrics and Identification After 9/11, 7 BENDER'S IMMIGR. BULL. 159 (Feb. 15, 2002).

\textsuperscript{159} As Associate Dean for Student Life at the University of Houston Law Center, I am responsible for the function of coordinating international students' JD/LLM admissions. The immigration/visa processing of paperwork before 2003 took approximately three to four months, while at present it takes ten to twelve months, a delay that makes it impossible to enroll students on a timely basis. See generally Jennifer Jacobson, In Visa Limbo, CHRON. OF HIGHER EDUC., Sept. 19, 2003, at A37 (describing delays in visa process, causing decline in U.S. international college enrollments); Jennifer Jacobson, U.S. Foreign Enrollments Stagnate, CHRON. OF HIGHER EDUC., Nov. 7, 2003, at A1 (describing delays in visa process, causing decline in U.S. international college enrollment). The Government Accounting Office has also studied these delays, and has issued a critical report on the matter, Border Security: Improvements Needed to Reduce Time Taken to Adjudicate Visas for Science Students and Scholars, GAO-04-371, Feb. 25, 2004, available at http://www.gao.gov/new.items/d04371.pdf.


\textsuperscript{161} Because this is a constantly moving target, observers may wish to consult a website that can help track legislation and one that I find enormously helpful. See Thomas: Legislative Information on the Internet, Bill Summary & Status, at http://thomas.loc.gov/billsearch/

\textsuperscript{162} Id. I acknowledge the assistance of James Ferg-Cadima, MALDEF Washington, D.C. staff attorney, who has carefully tracked the issues.
to begin the path toward legalization through a two-step process. In addition, there are special protections, including protection from deportation and work authorization, for certain young students (over the age of twelve) who have not yet graduated from high school. Once a student completes high school, Step One of the process would give the student conditional status lasting between six to eight years. In Step Two, upon completion of at least two years of college or two years of military service, an applicant would then apply to remove the conditional status and receive permanent resident status. The applicant could then begin to naturalize because the time under conditional status and permanent status would be credited toward the five-year wait for citizenship.

In order to qualify for the conditional status under the DREAM Act, the applicants would have to meet the following requirements: they must (1) be admitted to a four-year college, two-year college, or non-profit trade school; or (2) have earned a high school diploma; or (3) have obtained a GED. They must reside in the United States when the DREAM Act is enacted into law and have lived continuously in the United States for at least five years. They must have entered the United States when they were under sixteen years-old and must have “good moral character,” an immigration law term that translates to not having committed certain criminal offenses.

Immigration laws contain a number of grounds that could render a student ineligible for DREAM Act relief. For example, a student who failed to attend removal proceedings could be ineligible. Students cannot have made a false claim of citizenship, or made a misrepresentation about their status to receive a government benefit. There are waivers and exemptions for some of the grounds.163

To convert from DREAM Act conditional status to DREAM Act permanent relief, the applicants would have to meet the following requirements: applicants would be allowed to request permanent status 180 days before the six-year wait is finished or no later than two years after the six years of conditional relief; applicants must maintain “good moral character”;164 must avoid grounds of

163. As an adviser to Texas State Rep. Rick Noriega of Houston, who successfully sponsored the Texas law that accorded in-state residency status to eligible undocumented students, I helped draft the original bill which later included two provisions that have become models for both state and federal legislation that has followed: the three year requirement and the provision that the students promise to seek regularization of their status, once they are eligible. Both these provisions arose in the heat of legislative battle that occurred after our original bill, which contained neither provision, was introduced. I credit Rep. Noriega for the courage and tenacity that started this bill rolling. See Andrew Guy, Jr., Big Man on Campus, HOU. CHRON., June 4, 2001, at C-1 (interview with Rep. Noriega concerning legislation). In a discussion I had with Rep. Noriega in February 2004, he informed me that his office had been notified by the Texas Higher Education Commission staff that by their count, approximately 6,500 students in Texas had been reclassified as in-state students under this provision from Fall 2001 through Fall Semester 2003.

Although California’s UC and CSU Systems accord in-state tuition to the undocumented, those students in the State’s community colleges are not eligible, as then-Gov. Gray Davis vetoed a bill that would have extended this status to them. See Michael Gardner, Davis Vetoes Waiver of College Fees for Illegal Immigrants, S.D. UNION TRIB., Oct. 14, 2003, at A-4.

164. The phrase “good moral character” is an immigration term of art. See, e.g., 8 U.S.C.A.
inadmissibility and deportability; with some exceptions, must continue to live within the United States; and must (1) have completed a four-year college, two-year college, or non-profit trade school degree; or (2) remain a student in good standing for at least two years in a four-year program; or (3) have served in the U.S. armed forces for at least two years. Additional provisions would create penalties for false statements in applications for DREAM Act immigration relief and would make information provided in a DREAM Act application confidential and limited to the determination of whether someone qualifies for relief under the Act, except for terrorist-related circumstances. An important provision would render DREAM students eligible for all federal financial aid programs except Pell Grants. Finally, these students would be tracked in the SEVIS system.

CONCLUSION

There has been a surprising amount of litigation and, recently, legislation on this arcane matter, a subject that affects only a few students, but extremely vulnerable ones. Both immigration advocates and opponents have targeted this issue as an important line in the sand. Ironically, the DREAM Act provisions, introduced by a conservative Republican Senator, are more generous than any of the state laws enacted to ameliorate this problem, and, of course, the amnesty provisions to allow the undocumented students to legalize their status would be

§ 1101 (1999 & West Supp. 2003): “for the purposes of this chapter—No person shall be regarded as, or found to be, a person of good moral character who... [listing statutory bars].”

165. This is a rarely-used provision already in place. See, e.g., Florangela Davila, Army Says Illegal Immigrant-Soldier Can Stay, SEATTLE TIMES, Oct. 3, 2003, at A1; Florangela Davila, Soldier Served in Iraq, But May Be Deported, SEATTLE TIMES, Sept. 12, 2003, at U1. See also Margaret D. Stock, When Your Client Fights For Uncle Sam: “No Card” Soldiers and Expediting Citizenship, 8 BENDER’S IMMIGR. BULL. 1889 (Dec. 15, 2003).

166. These provisions are still fluid, and resulted after the committee bill was marked up in November 2003. Telephone interview with James Ferg-Cadima, MALDEF staff attorney (Dec. 1, 2003).

167. For example, advocates of the DREAM Act organized a highly visible Summer 2003 “Freedom March to Washington,” while FAIR and other opponents have organized a write-in campaign to throw sand in the gears. See Steven Greenhouse, Riding Across America for Immigrant Workers, N.Y. TIMES, Sept. 17, 2003, at A20. For the FAIR position, see FEDERATION FOR AMERICAN IMMIGRATION REFORM, ACTION ALERT: HELP STOP ILLEGAL ALIEN STUDENT AMNESTY, available at http://www.capwiz.com/fair/issues/alert/?alertid=2219951 (last visited Apr. 4, 2004). The California State Legislature passed a non-binding resolution (AJR-9) in Summer 2003, urging Congress to pass the DREAM Act. For an example of an effort in one state on this issue, see the Virginia Attorney General Opinion of September 5, 2002, opining that granting assistance would be inconsistent with IIRIRA, at 79 INT. REL. 1750 (Nov. 25, 2002). Although the Virginia legislature passed a bill to grant assistance, the governor vetoed the legislation on April 30, 2003. As Table infra Section II notes, subsequent bills have been introduced. MALDEF has sued Virginia over the matter. Mary Schaffrey, Special Report: Changes in the Cards, WASH. TIMES, Sept. 6, 2003, at 1A; Lawsuit Challenges Virginia Denial of College Enrollment Due to Immigration Status, 80 INT. REL. 1344 (Sept. 29, 2003).
generous. The Texas state statute, the first to address this problem, was signed into law by Governor Rick Perry, the Republican who succeeded to former Governor George W. Bush's term, and who was then elected to his own term.\footnote{168} It is likely that this issue will be resolved by the combination of state and federal laws, even with the specter of September 11 casting its long shadow.

\footnote{168. Clay Robinson, \textit{Budget Hits Include Judges' Pay Hike}, HOU. CHRON., June 18, 2001, at 1A (describing tuition, revenue bill details).}