PLYLER V. DOE, TOLL V. MORENO, AND
POSTSECONDARY ADMISSIONS: UNDOCUMENTED
ADULTS AND "ENDURING DISABILITY"

Monograph 84–4

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The Supreme Court in recent years has decided a variety of issues relating to residency requirements in education, political rights (voting and access to the courts), social services and health care benefits, and occupational qualifications. These cases have begun to define the rights, duties, and liabilities of aliens, flowing from their ability to establish residency and domicile. 1/ Confusion frequently arises because the term "residency" is often used interchangeably with "domicile." "Domicile" includes "residence," but has a broader and more comprehensive meaning than does "residence." 2/ In a legal sense, persons' domiciles are where they maintain their true, fixed, permanent home and principal establishment. Therefore, to constitute a domicile two elements must occur: 1) residence, and 2) an intent to make that residence the home and abode of the party. One may maintain more than one residence, but only one domicile. 3/

Confusion also arises over classifications of alienage. 4/ In the United States, an alien is "any person not a citizen or national of the United States." 5/ The Immigration and Nationality Act (INA) divides aliens into two classes. The first class, immigrant aliens, are those who are permitted to enter the United States to stay permanently. 6/ The second class of aliens, nonimmigrant aliens, 7/ are considered by the federal government to be in the United States only temporarily. For example, a nonimmigrant may be in the country on a visitor's visa, a business or student visa, a diplomatic or travel visa, or on a temporary employee visa. 8/

An alien granted permanent resident status can remain in this country indefinitely. Because of this permanancy they are able to establish considerable indicia of residency: becoming employed, establishing a home, raising a family, paying taxes. However, in some instances, nonimmigrant aliens can also do these things, even though they are technically here in the United States temporarily. 9/ Furthermore, a nonimmigrant may apply for a change in status to that of permanent resident by submitting an
application to the INA; this process, if it is possible at all for certain persons, can take many years. 10/

"Undocumented aliens" are not classified by the INA. 11/ Because they have entered the United States without documents or for a variety of reasons hold no valid documents, they may be subject to deportation in some instances. 12/ However, a person who enters illegally may seek and be granted federal permission to remain in this country or to become a citizen. 13/ In fact, data show this reclassification is common. 14/ Due to these broad discretionary powers of the federal government to grant relief from deportation, a State cannot definitively determine that any particular person will in fact be deported. 15/

In testimony during congressional hearings on Immigration and Refugee Policy, Attorney General William French Smith estimated the number of undocumented aliens to be between 3 and 6 million. He spoke of several proposals by the Reagan administration to reform the immigration laws, including one to "legalize" many undocumented entrants currently residing in the United States: he noted that the subclass in our society is "largely composed of persons with a permanent attachment to the nation and that they are unlikely to be displaced from our territory." 16/ He further testified that "[w]e have neither the resources, the capability nor the motivation to uproot and deport millions of illegal aliens, many of whom have become in effect, members of the community." 17/ The majority opinion in Plyler v. Doe 18/ relied in part on this inchoate federal permission to remain in holding that the State of Texas could not deny public education to undocumented children. The court termed the argument by the school district as "nothing more than an assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools." 19/ The court used an Equal Protection analysis to conclude that a State could not make a discriminatory classification "merely by
defining a disfavored group as non-resident." 20 / The court considered and dismissed arguments proffered by the State in support of the challenged statue.

First, the state argued, the classification or subclass of undocumented Mexican children was necessary to preserve the state's "limited resources for the education of its lawful residents." 21 / A similar argument had been rejected in Graham v. Richardson, 22 / where the court had held that the concern for preservation of resources could not justify an alienage classification used in allocating those resources. 23 / Furthermore, the findings of fact from the Plyler v. Doe litigation 24 / were that the exclusion of all undocumented children would eventually result in some small savings to the state, 25 / 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 necessarily improve the quality of education." 26 / "In terms of educational cost and need . . . undocumented children are 'basically indistinguishable' from legally resident alien children." 27 /

The State also created Section 21.031 in order to protect itself from a putative influx of undocumented aliens. 28 / The court acknowledged the concerns of the state due to any increase in the undocumented population, but found the creation of the statute was not tailored to meet the stated objective. "Charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration." 29 / Immigration and naturalization policy has always been within the exclusive powers of the federal government. 30 / A state may act to create legislation affecting aliens if it mirrors federal policy and furthers a legitimate state goal, 31 / but the court found no perceivable educational policy nor any state interests that would justify denying undocumented children an education. 32 /

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. 33/ This circular assumption about undocumented children is difficult to quantify, and the court dismissed the argument: "Even assuming that such an interest is legitimate, it is an interest that is most difficult to quantify. The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State's borders." 34/ For those who remain 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." 35/

This article considers the extension of Plyler v. Doe to higher education. It briefly summarizes Plyler's vitality for postsecondary institutions and concludes that the Texas statute governing public education does permit undocumented adults in some situations to be considered Texas residents for fee purposes. 36/ The article reviews other state statutes for Plyler-like situations, and finds many state practices to be unconstitutional. 37/ Two additional alien residency cases (Toll v. Moreno and Leticia "A") are analyzed for their holdings on alienage and postsecondary residency. 38/ Finally, courts' treatment of residency-as-a-benefit is examined.
Plyler v. Doe: Undocumented Adults
in Texas Colleges

As in many equal protection cases, the major issue in Doe v. Plyler was the level of scrutiny to be accorded the Texas statute \[39\] that denied state funds to school districts enrolling children who were not "citizens of the United States or legally admitted aliens" \[40\] -- undocumented alien children. Undocumented aliens, prior to Plyler, had won constitutional protection in Fourth, \[41\] Fifth, \[42\] and Sixth \[43\] Amendment cases, as well as in a range of civil litigation. \[44\] However, the Supreme Court had never been faced with the question of whether undocumented aliens could seek 14th Amendment equal protection. \[45\]

The Fourteenth Amendment reads, "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." \[46\] The Supreme Court had earlier held that undocumented aliens are "persons," \[47\] and that undocumented persons are protected by the due process provisions of the fourteenth amendment. \[48\] However, the State of Texas argued that because undocumented children were not "within its jurisdiction," \[49\] they were not entitled to equal protection. Justice Brennan rejected this line of reasoning, drawing upon the legislative history of the Fourteenth Amendment \[50\] and concluding that there "is simply no support for [the] suggestion that 'due process' is somehow of greater stature than 'equal protection' and therefore available to a larger class of persons." \[51\]

Once he had determined that undocumented aliens were entitled to equal protection, Brennan decided upon the extent of scrutiny to be applied in the case. He discarded strict scrutiny, noting that undocumented aliens were neither a "suspect class" \[52\] nor was education a "fundamental right." \[53\] He also rejected the minimal scrutiny inherent in a two-tiered standard. \[54\] Instead, he chose the "'intermediate' scrutiny"
standard of Craig v. Boren, and found that the statute did not advance "some substantial state interest." Therefore, he affirmed U.S. District Court and Court of Appeals judgments, invalidating the statute.

He reached this conclusion by stretching the suspect classification and the fundamental right, and, although he did not reach the claim of federal preemption, he did draw a crucial distinction between what states and the federal government may do in legislating treatment of aliens. While the opinion, and that of the concurring Justices, is persuasively argued, its framework is unclear, and the dissent by Chief Justice Burger is close to the truth in noting that the approach is inconsistent with Rodriguez, in which the Texas school finance system was upheld as not unconstitutional.

In stretching the "suspect" classification, Brennan analyzed from illegitimacy classifications that undocumented children were not responsible for their own citizenship status and to treat them as Section 21.031 envisioned "does not comport with fundamental conceptions of justice." However, he was more emphatically concerned with education and elaborating the nature of the putative right. While he reaffirmed Rodriguez in finding public education not to be a fundamental right, he recited a litany of cases holding education to have "a fundamental role in maintaining the fabric of our society." Moreover, he felt that "illiteracy is an enduring disability," one that would plague the individual and society. This weighting enabled him to rebut the State's assertions, which the Burger dissent had found persuasive, that the policy was legislatively related to protecting the fiscal economy of the State.

The nature of the right (education) seems to have more thoroughly persuaded the Court in Plyler than it had in Rodriguez. Additionally, while the Court has upheld state statutes governing alien employment and unemployment benefits, these narrow areas mirror federal classifications and congressional action
governing immigration. In DeCanas, the Supreme Court had held that if Congress had addressed an immigration issue and delegated aspects of its administration to states, the states could enact legislation to regulate the allowable area. In public education, Brennan wrote, "we perceive no national policy that supports the State in denying these children an elementary education." The framework employed by the majority, couched as it is in moral tones, seems to be the very type of "legislating" Justice Rehnquist feared in Craig v. Boren, the earliest use of heightened scrutiny. However, the Court could have, in its own terms, found undocumented alienage of children to be suspect, or, more satisfactorily, provided criteria for measuring the "enduring disability," so that legislatures could fashion more acceptable ends-means formulations in such instances. Strict scrutiny could have arisen from two different directions, one suggested by Judge Seals in the In re Alien Children Education Litigation, apparently not considered by the Court, but envisioned in the Rodriguez case; and a second, an outgrowth of race, national origin, and alienage cases in which strict scrutiny has been employed.

Judge Seals applied "strict judicial scrutiny" in his District Court opinion, "when the absolute deprivation [of education] is the result of complete inability to pay for the desired benefit." Such a standard would have required the State show a "compelling governmental interest." In contrast to the Rodriguez fact pattern that provided a minimum education for all Texas school children but did not constitute "an absolute deprivation," the charges to undocumented aliens were substantial, and the District Court had found "the effect of the new statute is to exclude undocumented children from the Texas public schools." Therefore, one of the missing "fundamental right" ingredients in Rodriguez was concededly present in Plyler.

Another way in which the Supreme Court could have employed strict scrutiny was to hold undocumented alien children as a "suspect class." Brennan categorized these classifications as reflecting "deep-seated prejudice rather than legislative rationality in
pursuit of some legitimate objective," and requiring furtherance of a "compelling governmental interest." The record seems replete with such animus towards undocumented aliens in Texas. He held, however, that undocumented entry is "the product of voluntary action" and therefore "not irrelevant to any proper legislative goal." This reasoning, while arguably applicable to the parents, is repudiated by Brennan himself on the same page as being inapplicable to undocumented children. He failed, therefore, to provide an internally consistent or satisfying reason for not holding the children to be members of a suspect class. He also could have reviewed the classification in light of the Court's previous national-origin and alienage cases, which, read together, provide a considerable record of the "deep-seated prejudice" so manifestly evident in States' treatment of undocumented aliens. The Court acknowledged the scrutiny due aliens in two other cases the same term, with which Plyler would have been consistent.

Plyler will hold precedent for the near-certain case that will arise from undocumented adults who seek admission to Texas colleges and universities. First, there is statutory ambiguity over adult education and aliens. Section 21.031 applied to school children "who are over the age of five years and not over the age of 21 years on the first day of September of any scholastic year," even though the compulsory attendance statute requires schooling only until 17 years of age. "Adult education," a non-degree, non-credit program of study, however, is for "any individual who is over the age of compulsory school attendance" -- apparently creating a window for undocumented adults aged 17-21 to participate in public adult education programs, many of which are provided by public postsecondary institutions. This requirement ostensibly obligates public postsecondary institutions to admit adults 17-21 years of age to adult basic education classes, irrespective of their immigration status. Once they successfully completed such classes or turned 22, to bar them from degree credit programs solely because of their status would be as "fatally flawed" as Mississippi
University for Women's unsuccessful attempt to allow Joe Hogan to audit, but not to enroll for credit in the University. 98/

A Texas school district's attempt to bar undocumented alien adults from an adult education program would be particularly vulnerable in a school district that also maintained a postsecondary program, such as a K-14 system. In such a district, the elected school board also functions as the community college board of trustees, while the postsecondary program generally uses the school district's facilities, support personnel, and tax base. 99/ If these comprehensive districts refused postsecondary admission to adult aliens on the basis of the aliens' immigration status, it would seem contrary to Sec. 21.031 and Sec. 11.18. To deny them admission to degree programs after successful completion of an adult education program would seem arbitrary. Moreover, the logic of Plyler itself, concentrating upon the "enduring disability" of illiteracy, 100/ would seem to apply to adults in adult education programs, as undocumented adults hold the "endured" disability of their cumulative educational disadvantage. Data show that Hispanic adult educational results are appalling, 101/ and just as surely as undocumented children are disadvantaged relative to other children, so are undocumented adults disadvantaged relative to other adults. Therefore, the weight of evidence would be in favor of a public school district's being required to allow undocumented adult aliens admission to adult education courses, and by extension, to other courses of study for which they are academically eligible. Finally, the adult alien makes a contribution to the tax rolls of the state, a point conceded even by government studies of this issue. 102/ Whereas children may have the sympathy of the court, adults have comparable equities to advance. Read with Toll v. Moreno for its preemption value, Doe v. Plyler will undoubtedly be tested for its vitality in a Texas postsecondary setting.
Toll v. Moreno: Alienage, Residency Requirements, and Preemption

Justice Brennan, after reviewing the confusing history of the case, held that Maryland's policy towards G-4 aliens and their dependents constituted a violation of the Supremacy Clause, and therefore he did not reach the questions of Due Process or Equal Protection, which had been considered by the District Court and Appeals Court. 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. By denying domiciled G-4 aliens the opportunity to pay reduced in-state tuition, the University of Maryland violated the Supremacy Clause.

The decision was predictable, in that the University had lost at every turn, and on each issue. The District Court had held in 1976 that the original policy was a violation of Due Process and constituted an irrebuttable presumption. The U.S. Supreme Court had 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 determined that they were capable of acquiring domicile, rendering erroneous the University's previous reliance upon non-establishment of domicile. Before the Court rendered its opinion, the University's Board of Regents issued a "Reaffirmation of In-State Policy," that its characterization notwithstanding, constituted a substantial retreat from its previous position. The Supreme Court, noting that the University's action had "fundamentally altered" the domicile issue, remanded the case to the District Court.

At the District Court, the University lost once again. The Court reaffirmed that even though the University's "paramount consideration" was no longer domicile, the
previous policy had denied Due Process to G-4 aliens. 116/ Moreover, the revised policy was also found to be defective on 14th Amendment Equal Protection and Supremacy Clause grounds. 117/ In the Court's view, the "revised" policy concerning alienage could not survive strict scrutiny, 118/ and, further, it impermissibly encroached upon federal immigration prerogatives. 119/ The Maryland Appeals Court affirmed, 120/ making 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, 121/ his opinion in Doe v. Plyler, decided upon Equal Protection grounds with less-than-strict scrutiny for undocumented aliens, 122/ suggests that he also would have found the revised policy invalid on Equal Protection grounds, 123/ and would have affirmed the District Court and Appeals Court.

Brennan reviewed Takahashi, 124/ Graham, 125/ and DeCanas, 126/ reading them for the principle that "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." 127/ He found both that Congress had allowed G-4 visa holders to establish domicile in the U.S., 128/ 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." 129/ Therefore, Brennan reasoned, it was clearly the congressional intent that G-4 visa holders not bear the "additional burdens" Maryland sought to impose: "The State may not recoup indirectly from respondents' parents the taxes that the Federal Government has expressly barred the state from collecting." 130/

On the merits of the case, Brennan mustered a 7-2 vote, with O'Connor concurring in the result. Blackmun's concurring opinion was aimed at rebutting the dissent by Rehnquist, in which he argued at length that G-4 aliens should not be strictly scrutinized,
as they were an advantaged group, not the disadvantaged aliens envisioned as requiring protection in *Graham v. Richardson*. Additionally, Rehnquist found the majority's preemption analysis flawed: "First, the Federal Government has not barred the States from collecting taxes from many, if not most, G-4 visa holders. Second, as to those G-4 nonimmigrants who are immune from state income taxes by treaty, Maryland's tuition policy cannot fairly be said to conflict with those treaties in a manner requiring its preemption."  

The dissent is not helpful in clarifying the problems glossed over in the majority opinions. First, it is not disadvantage per se that provokes the need for strictly scrutinizing alienage statutes, but rather aliens' conceded powerlessness in political disputes. However wealthy or advantaged World Bank employees may be -- and these plaintiffs surely cannot invoke the moral claims as did undocumented alien children -- the University's additional charges for non-residents clearly constituted a burdensome extra cost, which the University was ultimately required to refund. Moreover, in attempting to suggest that the Maryland tuition policy was not in conflict with the State's tax exemption, Rehnquist was simply wrong. Not only did the University concede openly that the surcharges were calculated in an attempt at "granting a higher subsidy" and "achieving equalization," both tax terms, but in their brief the University noted that the non-resident tuition differential was "roughly equivalent to the amount of state income tax [a G-4 alien] is spared by [the state] treasury each year."  

What Rehnquist might have queried was the extent to which public universities may appropriately regulate their admissions policies concerning residence, particularly policies concerning foreign nationals, following *Toll*. A significant number of states have residency requirements that functionally resemble Maryland's practice, and not all have granted G-4 alienage tax exemptions. Given the complexity of administration in foreign-student affairs, it is likely that many administrators in public and private
universities frequently do not understand their legal responsibilities to foreign nationals who apply for admission, in-state tuition, or state financial assistance. There, therefore, the majority's broad language ("we cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminating tuition charges and fees solely on account of the federal immigration classification") is unhelpful to guide admissions officers in drafting acceptable guidelines. For example, how can a state university "track" relevant federal immigration statutes in admissions and financial aid, so as to meet the requirements of DeCanas v. Bica? How may states regulate tuition charges for other similarly-situated nonimmigrants who are not G-4 aliens? Read with Doe v. Plyler, Toll raises several important questions concerning the "residency clock" for undocumented adults: does the proper determination for establishing domicile begin when they enter the country? When they apply for a formal status? When they receive formal, adjusted status? While Toll may have resolved the narrow issue of domiciled G-4 aliens in states that grant tax exemptions, it is clear its significance lies beyond this setting.
Soon after Plyer was decided, its postsecondary applications were tested in a California case, Leticia "A" et al. v. The Board of Regents of the University of California et al. Five undocumented students who had been admitted into the University of California for the fall term, 1984, were notified by the University that they were required to pay non-resident tuition and fees because they were not entitled to California in-state status. The five plaintiffs had graduated from California high schools, and had resided continuously in California for an average of seven years each, ranging from three years to eleven years; all were brought to the United States as children by their parents.

The California legislature revised its residency statute in 1983, including an amended reference to aliens: "an alien, including an unmarried minor alien, may establish his or her residence, unless precluded by the Immigration and Nationality Act (8 U.S.C. Section 1101, et seq.) from establishing domicile in the United States." The University of California read this statute as precluding undocumented aliens from establishing California residence. A non-resident, under Sec. 68018, is a person who did not meet the code definition: a resident is "a student who has a residence, pursuant to Article 5 (commencing with Section 68060) of the Chapter in the state for more than one year immediately preceding the residency determination date."

The statutes, while employing the term "residence", exacted the traditional criteria of "domicile"; for example, a resident could only maintain "one residence" and "residence can be changed only by the union of act and intent." The University argued that the undocumented students could not establish the requisite intent, as
Section 68061 stated, "every person who is married or 18 years of age, or older, and under no legal disability to do so, may establish residence." \[151\]

The University's position was buttressed by an Attorney General's Opinion that determined that the University could deny resident status to the students because the California legislature had only intended to make the Statute conform to Toll, and had not intended to incorporate undocumented aliens. \[152\] The judge in California Superior Court, \[153\] however, was not persuaded by the University's argument or the Attorney General's opinion. He enjoined the University to treat undocumented students "in the same manner and on the same terms as United States citizens" in residency determinations, and declared the University's policy unconstitutional. \[154\] He quickly dismissed the state's "clean hands" argument, noting that the plaintiffs had been brought into California as children. \[155\] The U.S. Supreme Court had similarly dismissed this line of Texas' reasoning in Plyer. \[156\]

As the court had also done in Plyer, \[157\] Judge Kawauchi stretched education to be more than a minimal interest requiring a mere rational relationship. He cited evidence of the "importance of [public] higher education in California" \[158\], and applied heightened scrutiny for "determining whether there is a 'substantial' state interest served by the classification." \[159\] He found no interest.

Rather, unlike the Attorney General's opinion, which did not even attempt to mount a constitutional justification for its result, Judge Kawauchi showed a sophisticated grasp of immigration law relative to student residency issues: he discerned that not all undocumented aliens are similarly situated; as an example, one of the plaintiffs was in the process of becoming a permanent resident. \[160\] In truth, several of the undocumented students were eligible to apply for permanent resident status and were not subject to deportation. \[161\]

He then pointed to the difficulty in employing federal immigration residency as criteria for determining students' domiciles:
The policies underlying the immigration laws and regulations are vastly different from those relating to residency for student fee purposes. The two systems are totally unrelated for purposes of administration, enforcement and legal analysis. The use of unrelated policies, statutes, regulations or case law from one system to govern portions of the other is irrational. The incorporation of policies governing adjustment of status for undocumented aliens into regulations and administration of a system for determining residence for student fee purposes is neither logical nor rational. 162 /

Under this reasoning, it will be "a difficult legislative task" 163 / for a state to track federal immigration law for purposes of student residency requirements, without violating principles of equal protection or preemption.

In a traditional equal protection vein, the U. S. Supreme Court had, in Plyler, prohibited the very same governmental attempt to charge a form of non-resident tuition to undocumented children: "A state may not, however, accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group as non-resident. And illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State." 164 / Toll v. Moreno, decided within two weeks of Plyler, held that states may not deny aliens the ability to establish domicile unless federal law precludes establishing such domicile, as when aliens are admitted to the United States on temporary visas and retain domicile in their country of origin. 165 /

Plyler, Toll, and Leticia "A" have quickly eroded the ability of states to employ federal immigration criteria irrebuttably to their postsecondary residency determinations. As the next section details, many states continue to employ the discredited approaches of Texas, Maryland, and California to alienage. There is no reason to believe that courts will find factual patterns, demographic data, or extenuating circumstances sufficient to distinguish other states. Instead, public universities will continue to rely upon the small likelihood that undocumented students will press their legal rights in court, requiring financial resources and exposing themselves to immigration officials.
State Residency Requirements
and Alienage

Two additional areas where classifications based on alienage have been challenged in the field of higher education are tuition and financial aid. It has been noted that the state legislating against aliens in these areas is a type of subtle discrimination. 166 / State residency statutes governing tuition often appear haphazard and incongruent. In order to understand how states govern residency, it is helpful to divide the states according to their basic governance patterns of postsecondary residency requirements, that is, whether the locus of authority is legislative, regulatory, or institutional, and whether it is a specifically assigned power or is implicitly included in another plenary power. 167 / (See Table 1)

The first category of governance (Type I) includes twenty-one states with residence requirements specified by the legislature. 168 / Eight of these Type I states have no specific alienage language within their statutes; 169 / these states will be referred to as having "substantially the same" criteria for aliens as for non-alien. 170 / Three states have provisions that exempt "foreign students" from paying a tuition differential. 171 / Six states allow residence for aliens "lawfully admitted for permanent residence"; 172 / of these six states, four have additional qualifying criteria. California requires one year of such status apart from the California residence time requisite. 173 / Hawaii specifies that the requirement of permanent residence does not apply to persons present in the United States by special act of Congress following the violent overthrow of their country of origin. 174 / North Carolina allows Vietnam-region refugees paroled after March 31, 1975, to be charged in-state tuition. 175 / Texas treats persons filing a declaration of intent to become a citizen with the proper federal immigration officials as residents for fee purposes. 176 / Two states allow persons with an intention to become a permanent resident to be considered as "state residents" for tuition purposes. 177 / One of these states, Missouri, requires "at least resident
alien status. Another, Washington, states that aliens cannot establish a Washington domicile "until such person is eligible and has applied for an immigration visa." The second governance category (Type II) includes the seven states where authority for determining residence is specifically given to a state agency. The Mississippi statute is silent as to alienage and is presumed to treat aliens and non-aliens substantially the same. Wisconsin gives rebates to selected "foreign students." The remaining five states use immigration code language ranging as follows: South Dakota requires an "appropriate visa"; New Mexico requires a "proper visa" and exempts student and diplomatic visas from that classification; Georgia and Montana require "permanent residence," and Florida requires that students hold an "I-151, Resident Alien Registration Card."

There is only one state, New Hampshire, in the third governance category (Type III), in which authority regarding residence is specifically given to an institution by the state legislature. The public institution in New Hampshire employs the same requirement for aliens as for non-aliens.

The fourth category of governance (Type IV) includes seven states having no specific residency legislation, where the responsibilities have been undertaken by statewide agencies or boards. Rhode Island makes no distinction between aliens and non-aliens. The balance of the states in this category require an immigration visa or permanent residence. Iowa, Ohio, and Oklahoma also classify refugees/parolees as residents. Oklahoma also allows aliens to be residents if they are married to an Oklahoma resident. One state, West Virginia, allows aliens eligibility for residence if they are "on a resident visa or ... [have] filed a petition for naturalization."

In the final governance category (Type V), the state legislature is silent on residency, and the determinations are made by individual institutions; therefore, a range
of practices exist in the fifteen Type V states. Based on a sampling of major institutions within each Type V state, institutions in six states did not use language distinguishing aliens from non-aliens. 192/ Institutions in eight other states require the student be "legally admitted for permanent residence." 193/ An institution in the other state in this category specifies that residents may not include those with student or temporary visas. 194/

Several conclusions can be drawn from analysis of the state residency statutes for tuition purposes. There seems to be no clarity or uniformity of state provisions in the various categories of governance granting authority for residency requirements. Even subcategories within the governance types show no consistency among the criteria, such as the number of aliens in the population, proximity to a foreign border, or any other such classifications that one might expect to explain the various practices. It also appears unlikely that the state legislation is "tracking" any federal legislation, as there are clear indications that some of the statutes are in direct opposition to others. For example, while New Mexico precludes aliens with diplomatic visas from obtaining resident status, Eastern Michigan University specifically accords these aliens an opportunity to secure residence. 195/ In several cases, it is unclear whether other exemptions, such as marriage to a state resident, are applicable to aliens. 196/ There are also nineteen states having statutory language indicating statewide practices appearing inconsistent with Toll, 197/ while there are seven additional states whose major institutions are similarly situated to the University of Maryland, and whose practices are therefore in direct conflict with Toll. 198/

Another area where alienage language may be said to discriminate is in the area of financial aid at federal, state and institutional levels. The federal statute governing student eligibility for financial aid in higher education states, "Any permanent resident of the Trust Territory of the Pacific Islands or of the Northern Mariana Islands shall be eligible for assistance under this title [Title IV of the Higher Education Act of 1965]
to the same extent that citizens of the United States are eligible for such assistance."

Applications for federal assistance, including the Pell grant, College work-study, national direct student loan (NDSL) and guaranteed student loan (GSL) require the following criteria for eligibility: 1) U.S. national; 2) U.S. permanent resident (I-151 or I-551); 3) permanent resident of the Northern Mariana Islands, 4) permanent resident of trust territory of the Pacific Islands, or 4) other eligible non-citizen with INS documents as follows: a) official statement granting asylum in the U.S., or b) arrival-departure (I-94) showing refugee, adjustment applicant, conditional entrant, or indefinite parolee. F_1 or F_2 student visas or J_1 or J_2 exchange visitor visas are excluded.

As an example of state regulation, receipt of financial aid by an alien in Texas requires the following: he or she must be living in the U.S. under a visa permitting permanent residence or have filed with the proper federal immigration authorities a declaration of intention to become a citizen; in addition, certain foreign student scholarships, exemptions, or exchanges are provided. Texas applications for financial aid (Texas-GSL and Hinson-Hazelwood programs) include: General eligibility section: "#4. Be a citizen of the U.S. or be a permanent resident with a proper visa"; Instructions section: "#8. Citizen or eligible noncitizen: 1) U.S. national, 2) U.S. permanent resident and you have an Alien Registration Receipt Card (I-151 or I-551), 3) permanent resident of Northern Marianas Islands, 4) permanent resident of the trust territory of the Pacific Islands, 5) other eligible non-citizen -- that is, you have one of the following documents from the U.S. Immigration and Naturalization Service: arrival-departure record (I-94) showing 'refugee' or 'adjustment applicant,' or an official statement that you have been granted asylum in the United States. Appropriate documentation must be submitted to the school to verify . . . status."

Another State application for Texas financial aid asks whether or not applicants
are citizens and if not, refers the applicants to the financial aid office at the institution they will attend to determine what classification is required. 205/

As examples of institutional practices: The University of Houston residency form asks whether the applicant is a U.S. citizen, and if not, the type of visa held. 206/ The Texas Woman's University application for student financial aid and scholarships asks if the applicant is a U.S. citizen or permanent resident of the U.S., Northern Mariana Islands, or the Trust Territory of the Pacific Islands. 207/

These federal, state, and institutional financial aid provisions can pose several problems. The degree of "tracking" of federal statutes by state and institutional provisions is an issue. The Texas state eligibility provisions in financial aid applications are similar to the federal application provision, with the exception that the federal statute grants eligibility to two more groups than does the state provision: "conditional entrant" and "indefinite parolee." 208/ However, the residency requirements do not comport with Toll's provisions. 209/ The new California statute conforms to the provisions of the federal Immigration and Nationality Act by incorporating it within the provisions; none of the specific immigration code categories cited in the federal statute are excluded by the California provision. 210/ Under Leticia "A" rules, "Cal Grant" legislation would allow undocumented aliens to participate in the state's financial aid programs: 211/ undocumented aliens are not "precluded by the Immigration and Nationality Act from establishing domicile in the United States." 212/

Another complex issue that can influence determination of alien residency is that of the "residence clock." Conceivably, there are at least five times at which an alien could begin to establish residence: when the alien enters the country; when the alien applies for permanent residence; when the alien receives formal adjusted status; when the alien applies for citizenship; or when the alien becomes naturalized. 213/

Several states give indications in their residency legislation of when the clock starts: Colorado allows domicile absent "legal disability," and notes that such an
impediment need not exist until permanent resident status is granted though it is present while the student is a nonimmigrant alien; 214/ Minnesota allows resident status if the the resident alien can "present documentary evidence from U.S. Immigration or consular officials in his or her home country that (s)he is eligible for resident alien [status] under specified conditions"; 215/ Nebraska grants residence to an alien who has the bona fide intention of becoming a permanent resident alien, supported by documentary proof; 216/ Washington states that domicile in the state is not possible until a noncitizen of the U.S. is eligible and has applied for an immigration visa; 217/ Oregon declares that "time toward residence shall be counted from the date of receipt of the immigrant visa; 218/ three states allow resident status if applicants have petitioned for naturalization; 219/ and Oklahoma requires a domicile time element after status is received. 220/

Other indications for determining when the alien's residency clock begins are found in case law. An Indiana case held that the alien's clock for residence began when the legal status changed, not when the individual's intent changed. 221/ A pre-Leticia "A" California case denied an equal protection challenge to a requirement that aliens hold permanent residence status for a year prior to residence determination. 222/ Although the court did not conclude that the alien's intention for permanent residency was negated by her having held temporary student visas and therefore showing no intention of abandoning her foreign residence, it found no other evidence expressing her intent to become a resident of the state except a "belated self-serving expression" of intent upon application for free-tuition status. 223/ The court found the requirement of intent to reside in California to be non-arbitrary and reasonably related to a state interest, and denied the equal protection challenge.

One commentator has criticized the Wong decision as constituting a violation of an alien's right to travel. 224/ Although aliens may have resided in California several years before their status was changed, "[They are] not given any credit for . . . past
continuous residency in the state. In effect, the clock is set back to midnight." 225 /
According to this commentator, there are nonimmigrant aliens who have lived in the
United States for many years, paid taxes, and have the present intent to remain. This
group, along with aliens who have just received their permanent residency status should
have to meet only the same requirements as other student applicants, that is, residence
in the state for one year. Instead of using the federal classification of "permanent
resident" as the sole determination of intent, a state could look to all the facts and
circumstances of a particular case and determine domicile on an individual basis. 226 /

In conclusion, it is unclear at what point an alien's residence clock begins in
states where the legislature or agency has not spoken or the judiciary has not dealt
with the problem. Some evidence is available that the clock should begin only after
the legal status (particularly student status) has changed to guard against self-serving
declarations of intent, but other arguments for determination of residence on a case-
by-case basis are equally strong. The concept of domicile remains elusive and difficult
to document, although legal residence is not required for undocumented adults to be
domiciled. Because undocumented persons virtually surrender their residence in their
native country, and may establish legal residence in the United States, courts could
find that their domiciliary "clock" began upon their arrival in the U.S. States that
have spoken on the issue provide a spectrum of solutions to the problem. As with the
range of state residency provisions, considerable confusion reigns in the states, verging
upon arbitrariness. Finally, following Leticia "A" and other cases concerning alienage
and postsecondary residence determinations, it is not at all clear that immigration code
classifications can constitutionally mesh with state residence provisions, or that the
two sets of "clocks" can synchronize.
Residency As a "Benefit"

Durational residency requirements are used by governments to render eligibility, to confer benefits, and to categorize participants in a wide range of programs. Alien claims to this array of public privileges constitute an important area of litigation and legislation. As has been documented extensively, undocumented aliens contribute considerable sums to public coffers, yet are barred from participation in many programs. While the thorough and comprehensive analysis of this issue is well beyond the scope of this article, a growing body of legal scholarship and social science literature has focused upon alienage and program eligibility. This sections of the article reviews residency in a range of areas, including the treatment of alienage and resident requirements.

Case law on the range of rights, benefits, and liabilities of citizens according to durational residency requirements or citizenship status itself will be discussed in four general categories: political rights, social service and health benefits, occupational rights, and educational rights and benefits. Political rights include issues in voting, eligibility for elective office, and access to the courts. Most decisions have held that voting is reserved as a privilege of citizenship. Evidence that the privilege is highly valued is demonstrated in case law striking lengthy durational residency requirements as prerequisites to voter registration. In Dunn v. Blumstein the Supreme Court held that a Tennessee law that required residency in the state for one year before registration impermissibly penalized some residents for recent interstate movement. The state's justification of the need for an informed electorate was neither compelling nor sufficiently tailored to meet the objective. The court held that there could be no delay beyond 30 days for administrative purposes to vote in federal elections. The Supreme Court has also ruled that a Georgia statute that closed voter registration fifty days before state elections "approached the outer constitutional limits," yet was permissible.
State and local governments also impose durational residency requirements as conditions of eligibility to file as a candidate for public office. The trend in office-seeker cases has been to uphold longer durational residency requirements for state office than for local offices. The Supreme Court in *Chimento v. Stark* 234 affirmed without opinion a seven-year residency requirement to run for governor of New Hampshire. 235 The courts have upheld a one-year residency period in a state senate election. 236 However, a five-year residency requirement has been struck for a city council position, 237 as was a two-year requirement for mayor. 238 For several reasons, the Supreme Court has mandated the shortest residency requirements for federal elections, striking down laws dividing residents in two categories -- previous residents and new residents. The longer registration periods for new residents totally denied them the right to vote 239 and impermissibly interfered with their right to travel. 240

In the cases involving access to the courts, the Supreme Court has upheld a one-year residency requirement in order for the courts to exercise jurisdiction over a divorce case. 241 The majority in that case held that "the state [had an] interest in requiring that those who seek a divorce from its courts be genuinely attached to the state. . . ." 242 In *Williams v. Williams*, 243 a federal court held that nonimmigrant aliens could demonstrate sufficient state contacts to be allowed access to divorce courts. 244

In recent cases undocumented aliens have also been given access to the courts. In 1965, a New York court ruled that undocumented aliens could bring a personal injury action under the state Motor Vehicle Indemnification Laws. 245 In *Torres v. Sierra*, 246 undocumented aliens were considered "persons" under the New Mexico Wrongful Death Act. Undocumented aliens were considered "residents of California" under that state's Victims of Violent Crime Act. 247
Undocumented aliens have not always had access to the courts. In *Coules v. Pharris*, 248/ a 1933 case denying undocumented aliens access to the courts, the plaintiff had brought suit to recover wages. The court held the right to sue was more a matter of comity rather than a matter of right. However, there has been no case that followed *Coules* or cited it with approval, 249/ and it appears to have been an anomaly for 45 years before *Arteaga v. Literski* 250/ overruled *Coules* to the extent that *Coules* had held undocumented aliens had no right to the courts. The court reasoned that there was no public policy that was served by refusing access to courts, especially when undocumented aliens are injured by others. In fact, the court suggested that if the aliens did not have access to the courts it might permit employers knowingly to hire undocumented aliens and refuse to honor contracts with them. 251/

The nature of the privilege or right dictates the allowable residency requirement. "Voting is the preeminent symbol of participation in the society" 252/ and is therefore reserved for citizens, and any durational residency requirement for eligibility to vote in federal elections is kept to a minimum. 253/ Longer durational residency requirements are permitted in office-seeker cases so the candidates can manifest strong ties to the community they would represent. Immediate access to the courts is necessary to maintain legal rights, regardless of citizenship status. There is no public policy that would allow some members of society to become victims of others simply because they have no access to the courts. The nature of a government benefit or service also may dictate the allowable eligibility requirements. Long or unduly restrictive residency requirements for social services have been struck because those services often provide essential services.

The rights of citizens and aliens to social services have been expanded in several cases involving residence. *Shapiro v. Thompson* 254/ struck a durational residency requirement for citizens who moved from another state and applied for welfare benefits. The newly arrived residents met all eligibility requirements for welfare assistance except
that they had not resided within the jurisdiction for at least one year immediately preceding their application for assistance. The state statutes distinguished between previous residents and new residents, and also on the basis of the monetary contribution each made through payment of taxes. The court pointed out the weakness in the state's justification: "long term residents who qualify for welfare are not making a greater present contribution to the state in taxes than indigent residents who have recently arrived." 255/ The court was also concerned about the possible extension of the state's reasoning to exclude newly arrived residents from other public services and facilities such as "schools, parks, and libraries" 256/ or to "reduce expenditures for education by barring indigent children from its schools." 257/ The state statutes in Shapiro were struck on Equal Protection grounds, the court holding that the state could not apportion state services by discriminating between resident classifications. 258/

Graham v. Richardson 259/ lends the strongest support for the eligibility of aliens to social services. Resident aliens were held to be a suspect class 260/ and therefore any classifications based on their alienage were subject to strict judicial scrutiny "whether or not a fundamental right was impaired." 261/ Graham relied on Shapiro to strike Arizona and Pennsylvania statutes conditioning receipt of welfare benefits upon: (a) being a citizen, or (b) if an alien, the requirement that the alien have resided in the United States for a specified number of years. 262/ The states relied solely on the "special public interest" doctrine, which would allow them to treat citizens and noncitizens differently and favor citizens in order to protect "special interests" or "limited resources" of the state. 263/ The doctrine had been grounded on the notion that certain government benefits were a privilege rather than a right and those privileges could be apportioned on citizenship status. 264/ But by 1948 Takahashi v. Fish & Game Commission had questioned the continuing validity of the special public interest doctrine in nearly all contexts. 265/ Graham further questioned the "contemporary vitality" 266/ of the doctrine and "rejected the concept that
constitutional rights turn on whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" 267 / The court also held that lawfully admitted aliens were to be afforded "full and equal benefits of all state laws for the security of persons and property." 268 /

Shapiro and Graham demonstrate the judicial viewpoint that the essentiality of the service governs the permissible burdens the state may impose on prospective recipients. The denial of welfare assistance to anyone otherwise eligible because of durational requirements or immigration status can be termed an "undue hardship" because the denial deprives the applicants of the "necessities of life, including food, clothing and shelter." 269 / Health care is similar to welfare in that it too serves basic human needs.

Durational requirements are not allowed "when immediate hospitalization or medical care is necessary for the preservation of life or limb." 270 / An Arizona statute that required a one-year durational requirement within an Arizona county before granting an indigent free nonemergency medical care was challenged. 271 / The statute was drafted not only to affect interstate travelers but also long-term state residents merely moving into a new county within the state. The court struck the statute, noting that the classification discriminatorily affected indigents who wished to move; the court commented, "[t]he denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without means to obtain alternative treatment." 272 / The effect of the statute on indigents was to deny them benefits until they were in immediate danger, requiring emergency care and subjecting "the sufferer to the danger of a substantial and irrevocable deterioration in his health." 273 /

The language used throughout Memorial Hospital and the underlying implications of the state statute offer distinct parallels between the case and Plyler. The concern in Plyler for an "enduring disability of illiteracy" 274 / echoes the concerns of "substantial and irrevocable deterioration of health" in Memorial Hospital. 275 / The
court in Memorial Hospital went on to note the probable result of permanently failed health that would require the state in the long run to maintain the family on the welfare rolls indefinitely. 276/ In Plyler, Brennan noted that by denying undocumented children an education, "we deny them the ability to live within the structure of our civic institutions and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation." 277/

None of the state justifications proffered 278/ were held to be compelling enough to justify impinging on the "right of interstate travel by denying newcomers 'basic necessities of life'." 279/ Justice Douglas, although he had doubts about the infringement of the right to travel rationale, 280/ nevertheless concurred because of his concern that the state statute effectively "fence[d] the poor out" 281/ from free medical care. Similarly, the Tyler School District, in Doe v. Plyler, candidly admitted that denying undocumented children an education was designed to prevent the school district from becoming a "haven for illegal aliens." 282/

Employment classifications and unemployment benefits also have consequences for aliens and residency determinations. Truax v. Raich, 283/ decided in 1915, was one of the earliest cases establishing employment rights for aliens. A worker who had been gainfully employed was fired solely because his employer had exceeded the allotted percentage of alien workers he was permitted to hire by Arizona statute. The court held that aliens could not be denied the means of earning a living because of their race or nationality. 284/ The United States Supreme Court in Takahashi v. Fish & Game Commission 285/ held that California could not preclude Takahashi, a Japanese resident alien, from earning his living as a fisherman by denying him a commercial fishing license. The state reserved commercial fishing in the three-miles off the California coast for citizens or those eligible for citizenship. California asserted a "special public interest" 286/ for its citizens as collective owners of the fish in the three-mile
offshore belt. The court held that whatever the interest the state had, it did not justify discriminating against aliens who were lawful residents of California.

However, there has been a series of cases that has allowed states to preclude aliens from certain employment, if citizenship were necessary to "exercise and therefore symbolize this power of the political community over those who fall within its jurisdiction." 287 / The practice has been labeled as the "government function doctrine." 288 / In Foley v. Connelie, 289 / citizenship was held to be an appropriate qualification for members of the state police force. A New York education law forbade permanent certification of public school teachers who were not citizens or had not manifested an intent to apply for citizenship. 290 / The government function doctrine requires only that citizenship bear a rational relationship to a legitimate state interest in order not to violate equal protection standards; thus, in certain employment, strict scrutiny normally applied to alienage is not applied to the job classification. New York, in justifying the classification, focused on the role of public education and the degree of responsibility and discretion teachers have. 291 / Since teachers impart societal values and educate students about U.S. society, their role was deemed to symbolize the political community and therefore could be reserved for citizens. 292 /

In Chavez - Salcido, 293 / the court upheld a California statute requiring probation officers to be citizens. The language used to justify these requirements is broad and its application to probation officers is inconsistent in light of other positions aliens are allowed to hold in California. Blackmun, writing for the dissenters, documented the inconsistencies towards aliens in the employment system of California. Counties in the state may appoint aliens to the position of chief juvenile probation officer or chief adult probation officers if "the best interest of the county will be served." 294 / However, resident aliens cannot be barred from practicing law 295 / nor are they barred from becoming California superior court judges or supreme court justices. "Thus a criminal defendant in California may be represented at trial and on appeal by an
alien attorney, have his case tried before an alien judge and appealed to an alien justice and then have his probation department headed by an alien. Yet the same defendant cannot be entrusted to the supervised discretion of a resident alien deputy probation officer.\textsuperscript{296} The case appears to be a blind application of the "government function doctrine" when viewed in context of other California laws.

There is also a series of cases that has rejected the "government function doctrine." A New York Civil Service law that required citizenship for permanent positions in the competitive class of the state civil service was held to violate the Equal Protection clause;\textsuperscript{297} the court reasoned that the law swept indiscriminately in its job classification and could not be justified on the premise that aliens are presumed to be less permanent employees. Although a practicing attorney could symbolize the "political community," In re Griffiths\textsuperscript{298} held that a resident alien should be allowed to take the state bar exam. The state had not met the burden of showing the classification of aliens was tailored to meet the state interest of maintaining high professional standards in the legal profession. In Examining Board of Engineers v. Otero\textsuperscript{299} a Puerto Rican statute that allowed only United States citizens to practice privately as civil engineers was held unconstitutional. Generally, it appears that employees most like police officers are within the "government function doctrine." But because the language of the doctrine -- "employees symbolizing the power of the political community"\textsuperscript{300} -- is so broad, legislatures anticipating public sentiment on alien employment have deemed a wide variety of positions to be within the scope of the doctrine: if only a rational basis is needed to justify the state interest, those classifications will rarely be overturned.

Case law on employment benefits for undocumented aliens is similarly inconsistent, sometimes even within the same state. Two California cases have dealt with the rights of undocumented aliens to receive unemployment benefits. In Alonso v. State of California,\textsuperscript{301} Alonso, an undocumented alien, was denied unemployment benefits
on the grounds that he was "not available for work" within the requirement of Unemployment Insurance Code, 1253, (c). When asked about his immigration status, Alonso maintained that the information was "irrelevant" to the issue of his right to unemployment benefits. The court held that the right of the Department of Human Resources Development to ask his immigration status did not violate any of his individual rights. Furthermore, the court held that even if Alonso put money into the fund he was not entitled to those benefits because of his illegal entry into the country. It reasoned that because he was subject to deportation "any subsequent acts done by him in this country would be in furtherance of that illegal entry." An opposite result was reached in Commercial Standard Fire & Marine Co. v. Galindo, which held that an alien whose presence in the country was illegal but whose contract of employment did not aid him in his illegal entry was an "employee" within the Workmen's Compensation Act of Texas; as a result, he was not barred from receiving workmen's compensation benefits.

One year after the Alonso decision, the same court allowed an undocumented alien to receive payments as defined by the California Unemployment Insurance Code; the code section defined the requirements for compensation in part for wage loss sustained because of sickness or injury. The court distinguished the state's reliance on Alonso by finding that an undocumented alien who has been attached to the labor force and who has in all other respects complied with provisions of the Unemployment Insurance Code could collect disability benefits. The court relied on Supreme Court holdings that invalidated statutory or administrative classifications based on irrebuttable presumptions. The court contrasted unemployment benefits (Alonso) with disability benefits (Ayala), and held that provisions governing eligibility for unemployment compensation should not apply to disability insurance.

The same year Ayala was decided, the U.S. Supreme Court let stand a California labor code provision prohibiting an employer from knowingly hiring an undocumented
alien if such employment would have adverse effects on workers who were legal residents. \textsuperscript{310} The court held that it was not preemptive to decide the effect of the administration of the statute and to what extent it might interfere with federal immigration policy; in labor policy, the court found that Congress had not precluded the state from regulating the employment of undocumented aliens. \textsuperscript{311} The long term implications of this case remain to be seen, and will depend upon whether courts liken benefit-cases and employment and labor policy (Alonso and Chavez-Salcido) or to disability and court access (Ayala and Arteaga).

Conclusion: The Law of Residency and Undocumented Alienage

The law of duration and domicile is in flux, due to the range of factors outlined in this article: residency statutes, regulations, and practices are often confusing and illogical; potential students "forum shop" and exploit technical loopholes in requirements; and many state-of-intent criteria are difficult to administer or verify. In addition, more mobile students present more sophisticated claims to residence and employ litigation when these claims are denied. The recent cases of Plyler v. Doe, Toll v. Moreno, and Leticia "A" v. Regents exemplify all of these issues, and constitute an important assault upon ambiguous or improper residency requirements. Unfortunately, the states, state boards, and public institutions have not reacted to this litigation by revising their practices, nor have they anticipated other legal problems with their requirements. For instance, in a recent legislative session (held biennially), the Texas Legislature requested an Attorney General's opinion concerning its treatment of resident aliens, \textsuperscript{312} and even after being advised that the current practice did not comport with Toll v. Moreno, \textsuperscript{313} the legislators chose not to revise the statute's infirmities. An Attorney General's opinion can be wrong (as California's was in Leticia "A"), but
Toll is established law and the Texas statute incontestably constitutes the irrebuttable presumption precluded by both Vlandis v. Kline /314/ and Toll v. Moreno. With the thousands of transactions occurring each semester under flawed residency rules, it is surprising that more litigation is not brought by aggrieved students or applicants.

This article has analyzed the issue of undocumented alienage and postsecondary admissions. While the number of students affected by this issue is undoubtedly small in comparison to the millions of postsecondary students, the students affected by Plyler's rule in public elementary and secondary schools will soon produce more Leticia "A" cases, and the continuing problem of residency requirements will plague institutions until states more realistically and carefully draft reasonable preferences for genuine residents without fencing out the thousands of mobile students who can raise legitimate claims to state residency. In the alternative, it may become necessary to abandon non-durational "benefits" /315/ and to lessen the strictness of domicile in exchange for a lengthening of durational requirements. However states choose to undertake such reform, it is clearly necessary, and alienage is only one such manifestation of the system's failure to account for modern day mobility.


3. See Restatement (second) of Conflict of Laws (1971): "Every person has a domicile at all times and, at least for the same purpose, no person has more than one domicile at a time." Section 11 (2).


5. 8 U.S.C. 1101 (a) (3)

6. 8 U.S.C. 1101 (a) (15).

7. 8 U.S.C. 1184 (a).

8. 8 U.S.C. 1101 (a) (15) (A) - (L).


11. "The very concept of 'illegal alien' amounts only to a vague notion of a person who might be deported if his or her presence were known to the authorities. But the determination of that fact can be a complicated process, as numerous cases involving attempts by INS to deport residents of this country demonstrate." FAIR v. Klutznick, 486 F. Supp. 564 (D.C.), appeal dismissed, 447 U.S. 916 (1980).


15. FAIR v. Klutznick, supra at note 11.

17. Id.

18. Id. (Brennan).

19. Id. at

20. Id. at

21. Id. at 2400.


23. Id.


26. Id. at 2401, citing 458 F. Supp. at 577.

27. Id. at 2401, citing 458 F. Supp. at 589.

28. Id. at 2400-2401.

29. Id. at 2401, citing 628 F. 2d at 461.

30. See, e.g., Toll v. Moreno, supra at note 9.

31. Because Brennan stuck the statute on Fourteenth Amendment grounds, he did not reach the issue of preemption. Id. at 2391 at note 8. See, e.g., DeCanas v. Bica, 424 U.S. 351 (1976).
32. "It is thus clear that whether savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the state, and the nation." Id. at 2402.

33. Id. at 2401-2402.

34. Id. at 2401.

35. Id. at 2402.

36. See pp. __________, infra.

37. See pp. __________, infra.

38. See pp. __________, infra.


41. United States v. Barbera, 514 F.2d 294, 296 (2d Cir. 1975) (undocumented alien has standing to assert fourth amendment violation).

42. Wong Wing v. United States, 163 U.S. 228, 238 (1896) (all aliens are "persons" subject to due process guarantees of the fifth amendment); Mathews v. Diaz, 426 U.S. 67, 81 (1976) (undocumented aliens protected by the fifth amendment from invidious discrimination by the Federal Government).

43. Wong Wing, 163 U.S. at 238 (all persons within territory of United States entitled to the protection of sixth amendment).


45. Plyler, 102 S. Ct. at 2391-33.
46. U.S. Const. amend. XIV.

47. Wong Wing, 163 U.S. at 228 (1896).

48. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (14th amendment provisions "are universal in their application, to all persons").

49. Plyler, 102 S. Ct. at 2392.

50. Id. at 2393-94.

51. Id. at 2393. In the dissent, Chief Justice Burger concurred that the Equal Protection clause applies to undocumented aliens. (Burger, C.J., dissenting, Id. at 2409.)

52. Id. at 2391 nn. 7 & 8. The Supreme Court did not address the issue of preemption.

53. Id. at 2394 n. 14 and 2396 n. 19.

54. Id. at 2395 n. 15.


57. 102 S. Ct. at 2402.

58. Id.

59. Id. at 2391, n. 8.

60. Id. at 2396, n. 19 (citing DeCanas v. Bica, 424 U.S. 351 (1976)).


102 S. Ct. at 2396 (citing Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

Doe, 102 S.Ct. at 2396.

Id. at 2397, 2398 (citing Rodriguez, 411 U.S. 1 (1973)).

Id. at 2397 (emphasis added).


Plyler, 102 S.Ct. at 2400-02.


102 S. Ct. at 2400.

429 U.S. 190, 221 (Rehnquist, J., dissenting). To date, he remains the only member of the Burger Court not to have employed this standard of heightened or intermediate scrutiny.
77. 102 S. Ct. at 2397.
79. 411 U.S. at 37. "Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument . . . [would not prevail in this setting]." (emphasis added).
81. 501 F. Supp. at 582 (citing In re Griffiths, 413 U.S. 717 (1973)).
82. Id.
85. 501 F. Supp. at 555.
86. 102 S. Ct. at 2394, n. 14, 2395.
88. 102 S. Ct. at 2396, n. 19.
89. Id. at 2396.
90. Id. ("legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.") He also suggests that being undocumented is not an "absolutely immutable characteristic," as aliens
may seek reclassification; this would also not obtain for children who cannot
themselves seek reclassification.

91. See, generally, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Shaughnessy v. U.S. ex
    rel. Mezei, 345 U.S. 206 (1953) (undocumented aliens can be deported only upon
    fair hearing); Castaneda v. Partida, 430 U.S. 482 (1977) (race and national origin
    classifications are suspect); Oyama v. California, 332 U.S. 144 (1938) (national
    origin classifications are suspect); Graham v. Richardson, 403 U.S. 365 (1971)
    (alienage classifications are independently suspect, requiring strict scrutiny).

92. Toll v. Moreno, 102 S. Ct. 2977, 2987-88 (1982); Cabell v. Chavez-Salido, 102 S.
    Ct. 735, 739 (1982) ("citizenship is not a relevant ground for the distribution of
    economic benefits").

93. TEX. EDUC. CODE ANN. SS 21.031(a), (b), (c), (Vernon Supp. 1976).


96. Id. at SS 11.18(a)2.

97. Id. at SS 11.18(c). The Houston Community College System (HCCS), for example,
    annually enrolls over 50,000 students, approximately 15% of whom are in "adult
    education" and remedial courses. Interview with HCCS officials. (November, 1985).

98. 102 S. Ct. 3331, 3339 (1982).

99. For example, the 9-member HCCS trustee board is elected as the board of the
    Houston Independent School District (HISD), and administers both the Community
    College (50,000 students) and the public schools (190,000 students). Interview with
    HISD officials (November, 1985).

100. 102 S. Ct. at 2397.

101. Whereas 14 percent of the adult white population has not graduated from high
    school, 40 percent of the adult Hispanic population has not graduated. Brown,
    Hill, Rosen, Olivas, The Condition of Education for Hispanic Americans (DC:
National Center for Education Statistics, 1980, Table 2.30). See also, Olivas, Research and Theory on Hispanic Education, 14 Aztlan, 1, 111-146 (1983).


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


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

107. 102 S. Ct. at 2977, 2986-87.


111. Id. at 1350-51.


115. Id. at 2045.


119. Id. at 667-68.
120. Moreno v. Univ. of Maryland, 645 F.2d 217 (1981).
121. 102 S. Ct. at 2981.
122. See, generally, discussion on Plyler v. Doe supra at __________.
124. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (states cannot impose discriminatory burdens on the entrance or residence of aliens).
126. DeCanas v. Bica, 424 U.S. 351 (1976) (states may not impose regulations upon aliens if the burdens are not contemplated by Congress; Court upheld state law regulating employment of undocumented aliens).
127. 102 S. Ct. at 2983 (quoting DeCanas, 424 U.S. 351, 358, n. 6). Justice Brennan allowed that the Court had upheld legislation limiting the "participation of noncitizens in the State's political and governmental functions." Id. at n. 17.
128. 102 S. Ct. 2977, 2984 (1982).
129. 102 S. Ct. 2977, 2985 (1982). Moreover, Maryland law also tracked the federal exemption: MD. ANN. CODE, Art. 81, 280(a).
130. 102 S. Ct. 2977, 2985 (1982). Justice O'Connor dissented from this characterization, but concurred in the opinion "in so far 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." (O'Connor, J., concurring in part and dissenting in part, Id. at 2989-90).
132. Id. at 2994 (Rehnquist, J., dissenting) (emphasis in the original).
133. See, e.g., Vance v. Bradley, 440 U.S. 93 (1979) (early retirement age for Foreign Service officers violates due process clause of fifth amendment); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (Civil Service Commission regulation which barred undocumented aliens from employment was invalidated).


135. 102 S. Ct. at 2986.


137. 102 S. Ct. at 2981 (quoting App. to Pet. for Cert. 172a-174a).

138. 102 S. Ct. at 2985.

139. Infra pp. _____.


141. 102 S. Ct. at 2986.


143. 102 S. Ct. 2382 (1982).

144. Wong v. Bd. of Trustees, 53 Cal. App. 3d 711, 125 Cal. Rptr. 841 (1st Dist. 1975) (omitted in official reporter by order of California Supreme Court, 15 January 1976) (Denying equal protection challenge to requirement that aliens hold permanent resident status for one year prior to determination of residence).

145. Tentative Decision, Action No. 588-982-5, California Superior Court, Alameda County (April 3, 1985); Judgment (April 11, 1985); Judgment Vacated (June 10, 1985); Judgment Amended and Reinstated (June 19, 1985).
161. Indeed, several of the original plaintiffs, including Leticia "A", had changed their status during the course of the litigation. The original eight plaintiffs thereby shrank to four. (Discussions with Mexican American Legal Defense and Educational Fund staff, November, 1985.) The author served as a consultant to MALDEF in the Leticia "A" case.

162. LA at 9-10.

163. Id. at 10.

164. Plyler, 102 S. Ct. 2400 at note 22.


168. States in this category are as follows: Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Kansas, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, South Carolina, Texas, Utah, Vermont, and Washington.


170. As these states have no specific alienage language, it is unclear whether aliens were meant to be included as residents on the same basis as citizens, or whether the absence of language including aliens with citizens precludes their capacity to
146. **Id.** at pp. 1-4. All subsequent references are to the text of the Tentative Decision, as amended and reinstated (hereinafter, *Leticia* "A" or *LA*). The California State University and College System, which had also employed the UC System practice, was also enjoined from continuing in that practice. The reinstated judgment (June 19, 1985), however, allocated the trial costs to the UC System.

147. **Id.**

148. CAL. EDUC. CODE Section 68062 (h).

149. CAL. EDUC. CODE Section 68062 (a).

150. CAL. EDUC. CODE Section 68062 (d).

151. CAL. EDUC. CODE Section 68061.


153. Supra, at note 145 (Ken W. Kawaichi).


155. "It is neither applicable to the facts nor appropriate to the legal issues in this case." *LA* at 6.

156. To do so "does not comport with fundamental conceptions of justice." *Plyler v. Doe*, 102 S. Ct. 2396.

157. "In sum, education has a fundamental role in maintaining the fabric of our society." *Id.* at 2397.

158. *LA* at 7.

159. *LA* at 8. (Emphasis in the original.) Moreover, Judge Kawaichi did not even sustain "any rational governmental basis for the policy in issue." *Id.* at 8.

160. *Id.* at 9.
establish residence. The former approach is lawful, while the latter is not, following Toll.

171. CONN. GEN. STAT. SS 10-329i (1958) (transferred to SS 10a-26 to 10a-33 in 1983); KAN. STAT. ANN. SS 71-302 (1980); NEV. REV. STAT. SS 396.540(3) (1977). Aliens are, by definition, "foreign students." However, it is unclear whether the legislatures intended to include them in this category.

172. CAL. EDUC. CODE SS 68076, 68077 (West 1978). The California legislature repealed these sections and the Leticia "A" court found them to be unconstitutional. Unless otherwise noted, this article is referring to the former statute; HAWAII REV. STAT. SS 304-4 (1969). Rules and Regulations Governing Determination of Residency as Applied to Tuition Payments and Admission at all Institutions under the Jurisdiction of the Board of Regents of the University of Hawaii, Section V, IX; MINN. STAT. SS 136.11 (1979). Common Policy of Resident Tuition Status, State University System of Minnesota; N.C. GEN. STAT. SS 116-143, 116-143.1, 116-143.2 (1981). A Manual to Assist the Public Higher Education Institutions of North Carolina in the Matter of Student Residence Classification for Tuition Purposes, Board of Governors, the University of North Carolina, August 1979. Although these provisions do not employ the language "lawfully admitted for permanent residence," we interpret the statute's exclusion of temporary/non-resident visas to have the same effect as if the quoted language had been employed; TEX. EDUC. CODE ANN. SS 54.057 (Vernon 1972); UTAH CODE ANN. SS 53-34-2.2 (1981).


174. Rules and Regulations of the University of Hawaii, Section 9(c), as amended.
176. TEX. EDUC. CODE ANN. SS 54.057 (Vernon 1972).
    Minnesota also attaches this language to its requirement of lawfully admitted for
    permanent residence.
180. MISS. CODE ANN. SS 37-103-1 to 37-103-29 (Supp. 1983). Bylaws and Policies,
    Board of Trustees of State Institutions of Higher Learning in Mississippi.
    of Regents Policy SS 12.2.8.
183. N.M. STAT. ANN. SS 21-1-4 (1978). Board of Educational Finance, Policy on
    Residence Status, #10.
184. GA. CODE ANN. SS 32-169 (1980). Board of Regents of University System of
    Georgia, Manual for Interpreting Residence Status SS I-6, I-7, Revised November
    Montana University System Residence Policy SS 3f.
185. FLA. STAT. SS 240 (Supp. 1983). State Board Rule 6C-7.05, Florida Student
    Definition.
    the University of New Hampshire System.
    Regulations on Determination of Residency.
188. IOWA CODE SS 262.7, 262.9 (1972); IOWA ADMIN. CODE SS 720-1.4(262) 1.4(2)e;
    OHIO REV. CODE ANN. SS 3333.31 (Page 1980). Ohio Board of Regents, Rule
    3333-1-10, Ohio Student Residency for State Subsidy and Tuition Surcharge Purposes


190. Id. at Section 3. Other statutes also include language which specifies a nonresident may become a resident by marriage to a resident, although Oklahoma is the only state to designate aliens as eligible for residence in this manner. It is, therefore, unclear in other state statutes whether aliens are able to use this provision to gain resident status or whether the alienage language within the statute take precedence over the marriage to a resident provision.


or University Fees and Tuition and for Admission Purposes. Rules of the University of Tennessee, Ch. 1720-1-1, Residency Classification; VT. STAT. ANN. tit. 16, SS 2282, 2282(i) (Supp. 1981). University of Vermont, catalog of general information, p. 45-46.

193. D.C. CODE ANN. SS 31-301a (1961). University of the District of Columbia, Statement of Admissions and Fees; ILL. ANN. STAT. ch. 144, SS 22, 40b, 40c, 190, 600, 602, 651, 653, 658 (Smith-Hurd Supp. 1981-82). University of Illinois, Board of Governors Regulations SS 7, Jan. 1977. This institution also allows residence status to refugees, parolees, or conditional entrants. Southern Illinois University, Policies of the Board of Trustees, Chapter 3, SS A: Residency Status Policies; IND. CODE ANN. SS 20-12-1 (Burns 1981). Indiana University, Schedule VIII-C Supplement SS 3. We are interpreting the intent of this policy to require an immigrant visa or permanent resident visa. However, the mere fact that an alien does not possess one of these visas would not necessarily preclude such alien from having the "legal capacity to remain permanently in the United States."; KY. REV. STAT. SS 164.020(3), 164.400 (1980). Kentucky Council on Higher Education, Classification of Students for Fee Assessment SS 4(7); LA. REV. STAT. ANN. SS 17.3130 (West Supp. 1982). Louisiana Southern University, Administrative Regulations, Lousiana Residence Status SS 10. Board of Trustees for State Colleges and Universities, Policies and Procedure Manual, Part VI, SS 6.5. LSU Board of Supervisors, catalog, residence status; MD. EDUC. CODE ANN. SS 13-104 (1981). University of Maryland, Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, General policy #1; MICH. COMP. LAWS ANN. SS 390.1 (West 1976). Michigan State University, Out-of-State Tuition Regulations, I.F. University of Michigan, Residence Regulations #6. Temporary or student visa holders are expressly excluded from classification as a resident. cf., Eastern Michigan University, Classification for Tuition Purposes SS IV. (This provision
specifically allows eligibility for residence to those with diplomatic visas in addition to allowing eligibility to those with permanent visas. As one can see, institutional variance within the state is inevitable, therefore, rendering this state categorization fluid.); WYO. STAT. SS 21-17-203, 21-17-204 (1977). University of Wyoming, Petition for In-State Fee Status.

194. DEL. CODE ANN. tit. 14, SS 5106 (1981). University of Delaware, Regulations Governing the Classification of Students at the University of Delaware for Tuition and Fee Purposes SS 4. Kentucky, the University of Michigan, and the University of Wyoming have similar provisions. The District of Columbia allows persons with student visas to be classified as residents at their Teachers College.

195. Board of Educational Finance, Policy on Residence Status, #10; Eastern Michigan University, Classification for Tuition Purposes SS IV.


197. States using similar language follow: (Type I) California, Colorado, Hawaii, Minnesota, Nebraska, North Carolina, Texas and Utah; (Type II) Florida, Georgia, Montana, New Mexico, and South Dakota; (Type IV) Iowa, Ohio, Oklahoma, Oregon, Pennsylvania, and West Virginia.


200. 34 C.F.R. SS 674, 675, 676, 682, 690 (1982).


202. TEX. EDUC. CODE ANN. SS 52.32, 54.051(i) (Vernon 1972).

203. Instruction for Texas Guaranteed Student Loan Application, 1983-84.

204. Id.

205. Texas Student Data Form (SDF), 1983-84, Item #8.
206. **Residency Questionnaire**, University of Houston, April 1983. A naturalized citizen is requested to provide date of naturalization and certificate number.

207. **Application for Student Financial Aid and Scholarships**, Texas Woman's University, [1984-85], Item #11. Visa number and type are also requested.

208. Application, *supra* notes 201 and 205.

209. *See* discussion, *supra* at ____.


211. *See* Comment, note 166 *supra*, and generally, notes 145-165 *supra*.

212. 1983 Cal. Legis. Serv. 3978 (West). The pertinent part is SS 68062(h), as amended.

213. As domicile requires both fact and intent, variations on either of these could trigger a different clock for residency. At each of the five times enumerated, it could be argued that the alien has satisfied both requisites as the fact of residence and the intent to remain could exist.


217. **WASH. REV. CODE** SS 28B.15.013(4) (1974). One exception to this requirement noted in the statute is a non-citizen of the United States who is a dependent minor of a parent or legal guardian who is domiciled in Washington.


219. 22 PA. ADMIN. CODE SS 35.29b.(a)(2) (Shepard's 1979); West Virginia Board of Regents Policy Bulletin No. 34, **Policy Regarding Classification of Residents and Nonresidents for Admission and Fee Purposes**, SS 9; **TEX. EDUC. CODE ANN.** SS 54.057 (Vernon 1972).


223. Id., 125 Cal. Rptr. at 843.

224. Comment, supra note 166 at 532.

225. Id. at 532-33.

226. Id.


228. Id. See also Community Research Associates, Undocumented Immigrants: Their Impact on the County of San Diego, 1980; Task Force on Medical Care for Illegal Aliens, The Economic Impact of Undocumented Immigrants on Public Health Services in Orange County, 1978.


231. Id.

232. Id. at 348.


235. Id.


238. State ex rel. Gralike v. Walsh, 483 S.W. 2d 70 (1972).

239. Dunn, 405 U.S. at 334-335.

240. Id. at 335.


242. Id. at 338.

243. Williams v. Williams, 328 F. Supp. 1380 (1971) (Ms. Williams, a non-immigrant temporary worker with a H-15 visa, was allowed access to the divorce courts. She had lived in St. Croix, Virgin Islands continuously for almost 10 years). See also, Rzeszotarski v. Rzeszotarski, 296 A.2d 431 (1972) (nonimmigrant alien allowed access to divorce courts notwithstanding his wife's claim that it was impossible for the husband, who with his wife, was born and raised in Poland, to form an intent to be domiciled in Washington, D.C., because of his immigrant status).

244. Williams, 328 F. Supp. 1380 (1971).


250. Arteaga v. Literski, 82 Wis.2d 128, 265 N.W.2d 148 (1978) (undocumented aliens have access to the courts in personal injury suits).

251. 265 N.W.2d at 150.


253. See supra notes 229-236.

255. Id. at 632.

256. Id.

257. Id. at 633.

258. Id. at 632-33.


260. Id. at 372.

261. Id. at 376.

262. Id. at 368.

263. Id. at 374.

264. Id.

265. Id., citing Takahaski v. Fish and Game Commission, 334 U.S. 410 (1948).


267. Id.


269. Id. at 370. See also Graham, 403 U.S. at 627.


272. Id. at 255-56.

273. Id. at 261 (footnote omitted).

274. Plyler, 102 S. Ct. at 2397.

275. 415 U.S. 261.

276. Id. at 265.

277. Plyler, 102, S. Ct. at 2398.

278. Memorial Hospital, 415 U.S. at 263, 266-68 (to "insure the fiscal integrity of its free medical care program by discouraging an influx of indigents ..."; to maintain
"the development of modern and effective [public medical] facilities"; to determine "bona fide" residents; and to "prevent fraud").

279. Id. at 269.

280. Id. at 270 (Douglas, J., concurring).

281. Id. at 271.


284. Id. at 41.

285. Takahashi, supra at note 265.

286. Id.


288. Id. at 460, note 12.


292. Id.


294. Id. at 447 (Blackmun, J., dissenting).


300. Sugarman, 413 U.S. at 647.


302. CAL. UNEMP. INS. CODE, SS 1253, subd. (c) (West 1972). He was able to work and available for work for that week.
304. Id. at 253.
305. Id.
311. 424 U.S. at 354-356.
312. Texas Attorney General Opinion No. JM-241. ("Whether certain foreign nationals are residents of Texas for purposes of tuition at a state university.")
313. Id. at 1087. "Under the Supremacy Clause of the United States Constitution, aliens who are permitted by Congress to adopt the United States as their domicile while they are in this country must be allowed the same privilege as citizens and permanent residents of the United States to qualify for Texas residency for purposes of tuition at state universities, despite the limitation in Section 54.057 of the Texas Education Code [emphasis added].