Good Public Policy Occurs Under *Plyler* When In-State College Tuition Rates Are Awarded to Undocumented Bona Fide Resident Immigrants

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Introduction

Undocumented newcomers are people arriving in the United States without official authorization or whose authorized immigration standing or visa has officially ended.[1] By invalidating a Texas law that denied undocumented students a free public education, the Supreme Court in *Plyler v. Doe*[2] implicitly promised undocumented students the right to have equal access to a college education. Equal access is essential because possessing a college education has become central to personal economic growth.[3] An increasing number of undocumented students have graduated from high school without an equal opportunity for a college education, which contradicts the implicit public policy rationale of *Plyler*.[4] One method of creating equal opportunity is to require public universities to give in-state tuition rates to undocumented bona fide residents.[5] In an opinion rejecting a facial challenge

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1 NYC Administration for Children's Services, Office of the Mayor, Immigration and Language Guidelines for Child Welfare Staff 5 (2d ed. 2011), *available at* http://www.nyc.gov/html/acs/downloads/pdf/immigration_language_guide.pdf.

2 See Plyler v Doe, 457 U.S. 202, 205, 230 (1982).

3 Catherine Rampell, *College Graduates Fare Well in Jobs Market, Even Through Recession,* N.Y. Times, May 4, 2013, at B1, http://www.nytimes.com/2013/05/04/business/college-graduates-fare-well-in-jobs-market-even-through-recession.html?pagewanted=all&_r=0.

4 *See Plyler*, 457 U.S. at 232 (Blackmun, J., concurring).

5 Rick Su, *The States of Immigration*, 54 Wm. & Mary L. Rev. 1339, 1393-94 (2013) (citing Stella M. Flores, *State Dream Acts: The Effect of In-State Resident Tuition Policies and Undocumented Latino Students*, 33 Rev. Higher Educ. 239, 240 (2010)).

to the constitutionality of a Texas residency requirement impacting minors who requested to attend for free public schools while living separate from their parents or guardians, the Supreme Court articulated its rationale for allowing a state to maintain a residency requirement for educational benefits.[6] The Supreme Court has decided constitutional challenges to residence requirements numerous times.[7] Occasionally, the Court terminated requirements that condition receipt of a benefit on a minimum time of residence within a state, but the Court has been on the alert to differentiate such durational residence requirements from legitimate bona fide residence requirements.[8] The Court has explicitly approved bona fide residency conditions in the arena of public higher education.[9]

Under the Court's rationale in *Vlandis v. Kline*[10] for a state law should be considered as unconstitutional if it creates an irrefutable presumption of non-residency for tuition for undocumented state university students whose legal addresses were within the state before they applied for admission. The irrefutable presumption of non-residency law violates the Due Process Clause because it, in effect, classified some undocumented bona fide state residents as nonresidents for tuition purposes.[11] A state possesses a legitimate interest in exclusively restricting the right to enroll in its colleges and universities at a preferential tuition rate to its own bona fide residents.[12]

The "legitimate interest" test allows a state to produce reasonable criteria to determine which students are entitled to in-state status as bona fide residents of the state for purposes of the in-state college tuition rates.[13] Under the rationale of *Plyler v. Doe*, the state has a legitimate state interest in establishing non-discriminatory criteria for determining bona fide residence status for all residents regardless of immigration status.[14] Naturally, a state may require that undocumented resident immigrant students, like any other student, truly live in the state before allowing them to enroll in public college at the

6 Martinez v. Bynum, 461 U.S. 321, 322, 333 (1983).

7 *Id.* at 325.

8 *Id.*

9 *Id.* at 326.

10 Vlandis v. Kline, 412 U.S. 441, 453 (1973).

11 *Martinez*, 461 U.S. at 327.

12 *Vlandis,* 412 U.S. at 452-53.

13 *Id.* at 453-54.

14 Martinez v. Bynum, 461 U.S. 321, 328 (1983).

preferred in-state tuition rate.[15] An obligation of *de facto* residency for a preferred college tuition rate equally applied to all bona fide residents including undocumented immigrant residents is not prohibited by the equal protection concept.[16] "A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents."[17] A residency requirement that distinguishes between similarly situated college students for purposes of in-state college tuition rates solely because of the college student's undocumented immigrant status violates the equal protection principle because it discriminates on its face without demonstrating a legitimate state interest as required under the rationale of *Plyler v. Doe*.[18] A bona fide residency requirement, at its core, requires an individual to display local residency prior to receiving benefits that are reserved for a local resident.[19] When undocumented, bona fide resident students are denied in-state college tuition fees, they are denied equal access to a college education. This denial of in-state college tuition fees has the practical effect of denying undocumented immigrants the opportunity of a high paying job because of the close connection between getting a high paying job and having a college education.[20]

It is a given, in contemporary America, that a person without post-secondary education is at a societal disadvantage. In America, nearly 18 million young adults do not have a college degree and are not enrolled in a college.[21] A college degree matters because your chance of becoming unemployed doubles without one.[22] When workers are separated by educational achievement, college graduates are the single category that had more workers employed in 2013 than when the recession began in 2007.[23] However, in spite of the economy, it seems that young college graduates are locating jobs.[24] In

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15 *Id.*

16 *Id.*

17 *Id.*

18 Plyler v. Doe, 457 U.S. 202, 230 (1982).

19 *Martinez*, 461 U.S. at 329.

20 Rampell, *supra* note 3.

21 Susan Saulny, *Underemployed and Overlooked, Struggling Young Adults Are a Question Mark*, N.Y. TIMES, Sept. 20, 2012, at A13, http://www.nytimes.com/2012/09/20/us/politics/struggling-young-adults-pose-challenge-for-campaigns.html?pagewanted=all.

22 *Id.*

23 Rampell, *supra* note 3.

24 *Id.*

2011, the unemployment percentage for individuals in their twenties with a bachelor's degree or above was 5.7 percent.[25] For their age equivalents with only a high school diploma or a G.E.D., the unemployment rate was almost three times as great, at 16.2 percent.[26] Americans have now accepted the message that possessing a college degree pays off in the job market.[27] College degrees were significantly more widespread in 2013 than before.[28] In April of 2013, approximately 32 percent of the available civilian population over the age of 25 had a college degree.[29] During the last two decades, the percentage of the civilian workforce with a college degree grew by approximately ten percent.[30] Many employers appear to believe people without a four-year college degree are not as competent as college graduates regardless of their potential or experience.[31]

In 2012, an employee with a bachelor's degree earned 79 percent more than a similarly situated employee without any college credits.[32] The earning gap among those who have a college degree and those who do not is widening; two decades ago, college graduates earned 73 percent more and three decades ago they earned 48 percent more.[33] Notwithstanding the problematic upfront price tag, the return on the investment in a college degree is clearly still very good.[34] Researchers reveal a four-year college degree is an excellent financial investment because it creates investment income equal to a 15.2 percent a year return.[35] "'This is more than double the average return to stock market investments since 1950,' the report said, 'and more than five times the returns to corporate bonds, gold, long-term government bonds, or homeownership.'"[36]

This article contends that governmental classifications, based on undocumented immigration status, creates a substantial denial of an equal higher educational opportunity to potential college students liv-

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25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.*
29 Rampell, *supra* note 3.
30 *Id.*
31 *Id.*
32 *See Id.*
33 *Id.*
34 *Id.*
35 Rampell, *supra* note 3.
36 *Id.*

ing in the same state since early childhood. This denial of educational opportunity places a virtual death sentence on access to equal employment and economic opportunities in violation of their equal protection rights.[37] A discriminatory higher education policy targeted at young, undocumented immigrant children "strike[s] at the heart of equal protection values by involving the State in the creation of permanent class distinctions."[38]

I. BACKGROUND

The Equal Protection Clause of the Fourteenth Amendment states that not a single state shall deny to any person inside its jurisdiction the equal protection of the laws.[39] The equal protection concept represents the belief that all people similarly situated should be treated in the same way.[40] Laws evaluated under the Equal Protection Clause are exposed to one of three ranks of scrutiny: strict scrutiny, intermediate scrutiny, or rational basis consideration.[41] Strict scrutiny concerns suspect classifications established on race, alienage, or national origin.[42] Under the strict scrutiny standard of analysis, a state must demonstrate the challenged classification is narrowly tailored to promote a compelling governmental interest.[43] Intermediate or heightened scrutiny relates to quasi-suspect, discriminatory classifications such as illegitimacy or gender.[44] To endure at the intermediate rank of heightened judicial review, a classification should substantially relate to an appropriately important governmental interest.[45] Those governmental classifications that are not subjected to either strict scrutiny or intermediate scrutiny are subjected to rational basis review.[46]

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[37] *See* Plyler v. Doe, 457 U.S. 202, 234 (1982) (Blackmun, J., concurring).

[38] L. Darnell Weeden, *The Supremacy Clause Preemption Rationale Reasonably Restrains an Individual State Pursuing Its Own Separate but Unequal Immigration Policy,* 14 SCHOLAR 679, 700 (2012) (citing Plyler v. Doe, 457 U.S. 202, 234 (1982) (Blackmun, J., concurring)).

[39] U.S. CONST. amend. XIV, § 1.

[40] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

[41] Clark v. Jeter*,* 486 U.S. 456, 461 (1988).

[42] *Cleburne Living Ctr.*, 473 U.S. at 440.

[43] Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

[44] *Cleburne Living Ctr.*, 473 U.S. at 440-41.

[45] *Id.* at 441.

[46] *Id.* at 440–41.

Under a rational basis analysis, a classification is valid provided there is a rational relationship between the difference in treatment and a specific legitimate governmental purpose.[47] State governments may, therefore, classify and distinguish between people who are not similarly situated by treating them unequally without violating the Equal Protection Clause.[48] In the majority of cases involving unequal treatment under the law, courts defer to rational legislative judgment.[49] It is not rational to classify people who are bona fide state residents with undocumented federal immigration status because that creates a permanent economic underclass. Therefore, courts should conclude that any discriminatory higher education policy substantially certain to have such an effect violates the Equal Protection Clause.

Part II presents an analysis of the equal protection implications of *Plyler* for higher education. Part II.A argues that *Plyler* implicitly requires a substantial justification to deny undocumented immigrants equal access to education. Part II.B maintains that *Plyler* serves as an Equal Protection Clause safeguard to protect undocumented immigrants from discriminatory economic burdens in an educational policy, which creates a permanent underclass among undocumented residents. Part II.C explains why the Court in *Plyler* correctly dismissed the government's mythical economic harm justification for denying undocumented students access to an equal education as not supported by actual facts. Part II.D emphasizes the belief that the rationale of *Plyler* implicitly encourages individual states to grow their own crop of highly-educated, undocumented, bona fide resident immigrants for their workforce. Part II.E makes the case that *Plyler's* implicit promise of equal access to higher education for undocumented, bona fide resident immigrants requires that undocumented students have equal access to state or federal financial aid available to similarly situated bona fide residents.

Part II.F claims under the expanded rationale of *Plyler*, a state may not deny undocumented immigrants who meet the bona fide residency requirement equal access to higher education by charging higher tuition rates for college. Part II.G contends that section 505 of

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47 Heller v. Doe, 509 U.S. 312, 319-20 (1993).

48 Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135 (2011) ("The guarantee of equal protection coexists, of course, with the reality that most legislation must classify for some purpose or another.") (citing Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 995 (N.D. Cal. 2010)).

49 *Id.* (citing Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 995 (N.D. Cal. 2010)).

the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) is bad public policy and has the potential to undermine the equal access to higher education goal implied in *Plyler* while raising an inference of congressional animosity toward a state created bona fide residency college tuition benefit for undocumented residents. Part II.H discusses a federal district court holding, under the *Plyler* rationale, that a law denying a United States citizen in-state college tuition fees based on their parents' undocumented status is a violation of the Equal Protection Clause.[50]

II. AN ANALYSIS OF THE EQUAL PROTECTION IMPLICATIONS OF *PLYLER* FOR HIGHER EDUCATION

A. Plyler *Implicitly Requires a Substantial Justification to Deny Undocumented Immigrants Equal Access to Education*

In the context of access to secondary education, the Supreme Court, in *Plyler v. Doe*, considered the constitutionality of local and state laws targeting the school-age children of undocumented immigrants.[51] In this case, the Court ruled that public school districts are prohibited by the Equal Protection Clause of the Fourteenth Amendment from denying undocumented students the right to attend public primary and secondary schools simply because of the immigration status of their parents.[52] Some anti-immigration legislative proposals ignore *Plyler* and permit states to collect tuition money from undocumented school children attending local public schools because of their parents' undocumented immigration status.[53] The Supreme Court decided in *Plyler* that a Texas local school district's plan to collect an annual tuition payment on behalf of every undocumented student to make up for the loss of state financial support violated the Equal Protection Clause.[54]

The *Plyler* Court's equal protection analysis prohibited the state of Texas from adopting an education policy that would produce a "shadow population" of undocumented immigrants. The Court was

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[50] Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1323 (S.D. Fla. 2012).

[51] Plyler v. Doe, 457 U.S. 202, 205 (1982).

[52] *Id.* at 229-30.

[53] Michael A. Olivas, *The Political Efficacy of Plyler v. Doe: The Danger and the Discourse*, 45 U.C. DAVIS L. REV. 1, 6-7 (2011).

[54] *Plyler*, 457 U.S. at 228-30.

properly concerned a shadow population could easily be taken advantage of, especially if the state was allowed to deny them the primary and secondary educational benefits available to citizens and lawful residents.[55] The Equal Protection Clause requires the government to evaluate people on an individual basis.[56] Because of the interlink between a denial of educational benefits and undocumented immigration status, *Plyler* implicitly requires a state to demonstrate a substantial governmental interest before denying an undocumented immigrant, who has lived in the state long enough to qualify, in-state college tuition rates but for her undocumented immigration status.[57]

Under the rationale of *Plyler,* the Equal Protection Clause grants undocumented, bona fide resident immigrants of the community in which they live the right to equal access to free elementary and secondary public education.[58] *Plyler's* public policy rationale also grants undocumented, bona fide resident immigrants, living inside the state, equal access to a college education, which a state cannot deny without a substantial justification.[59] *Plyler*'s implicit substantial justification requirement should be expanded to require in-state college tuition rates for those undocumented, bona fide resident immigrant college students who are similarly situated to *de jure* resident students in terms of the number of years actually lived in the state.[60]

Plyler's equal protection principles do not allow a state to deny in-state college tuition fees to undocumented, bona fide student residents of the state because of their federal immigration status, without first establishing a substantial justification for this undue economic burden.[61] When a state denies an undocumented, bona fide resident student in-state tuition fees provided to other in-state resident students without at least a substantial justification, it places an unreason-

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55 René Galindo, *Embodying the Gap Between National Inclusion and Exclusion: The "Testimonios" of Three Undocumented Students at a 2007 Congressional Hearing*, 14 HARV. LATINO L. REV. 377, 378 (2011) (citing Plyler v. Doe, 457 U.S. 202, 218-19 (1982)).

56 *See Plyler*, 457 U.S. at 216.

57 *See generally id.* at 217-18 (stating that a state is required to show that their classification furthers a substantial government interest).

58 *See* Paulo Edmundo Ochoa, Note, *Education Without Documentation: As Plyler Students Reach New Heights, Will Their Status Make Them Morally Unfit to Practice Law?*, 34 T. JEFFERSON L. REV. 411, 416-18 (2012).

59 *Id.* at 416-19 (discussing *Plyler* and its impact on post-secondary education).

60 *Id.* at 416-18.

61 *See* Plyler v. Doe, 457 U.S. 202, 217-18 (1982) (emphasizing that equal protection requires a state to show that their classification fulfills a compelling government interest).

able economic burden on the undocumented, bona fide resident student's equal access to higher education in violation of the Constitution's principles of equality.[62] The Supreme Court should demonstrate its commitment to equal access to higher education for undocumented, bona fide resident students who have benefitted from a free K-12 public education under its holding in *Plyler v. Doe*,[63] by adopting the position that a state may not deny in-state college tuition rates to its bona fide undocumented resident immigrant unless it demonstrates at least a substantial basis for its denial. In *Plyler v. Doe*, Justice Blackmun reasoned, that class-based distinctions contained in discriminatory higher education laws, violate equal protection principles, unless those distinctions are supported with a substantial justification.[64] When it comes to providing equal access to higher education opportunities, our Constitution should never know nor tolerate classes among bona fide residents without a substantial justification.[65]

To impose an increased tuition rate, for undocumented college students who are bona fide residents of the state in which they live, *Plyler* requires that a state must be able to demonstrate a substantial justification, which is a higher level of review, typically classified as intermediate scrutiny under Equal Protection Clause analysis.[66] The *Plyler* Court, in finding the Texas statute violated the Equal Protection Clause, implicitly applied a heightened level of scrutiny.[67] In

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62 *Id.*

63 *Id.* at 230.

64 *Id.* at 234 (Blackmun, J., concurring).

> [W]hen the State provides an education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with [the equal protection of the laws]. Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group, that group—through the State's action—will have been converted into a discrete underclass.

65 *See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.").

66 *See* Maria Pabón López, Diomedes J. Tsitouras & Pierce C. Azuma, *The Prospects and Challenges of Educational Reform for Latino Undocumented Children: An Essay Examining Alabama's H.B. 56 and Other State Immigration Measures*, 6 FLA. INT'L U. L. REV. 231, 232-33 (2011).

67 *Cf.* Laura A. Hernández, *Dreams Deferred—Why In-State College Tuition Rates Are Not a Benefit Under the IIRIRA and How This Interpretation Violates the Spirit of* Plyler, 21 CORNELL J.L. & PUB. POL'Y 525, 531 (2012) (stating that "[t]he Plyler Court declined to apply a heightened level of scrutiny but nonetheless held the Texas statute unconstitutional under the Equal Protection Clause.").

*Plyle*r, the Court rejected the traditional rational basis standard of review by requiring a substantial justification for the law.[68] Udi Ofer, the Advocacy Director of the New York Civil Liberties Union, believes that because the Texas law in *Plyler* was required to advance a particular substantial goal of the state to validate the discrimination, the Court applied the intermediate level of scrutiny.[69] The Supreme Court actually applied the intermediate standard of review while pretending that it was not.[70] Typically, the result of an equal protection case is mainly determined by whether the group is designated as a suspect, quasi-suspect, or non-suspect class; the test for distinguishing between the three levels of scrutiny or judicial review has not been defined with the precision needed.[71]

Under equal protection analysis, when a state is required to demonstrate a substantial justification for its discriminatory treatment of undocumented immigrants, the intermediate level of review is applied.[72] Because education is not a fundamental right, in the context of undocumented immigrants, a state does not have to meet the strict scrutiny test to justify not providing equal access to higher education to all of its bona fide residents.[73] The discriminatory law in *Plyler* failed to advance any substantial interest of the state under an economic cost-benefit analysis in terms of the benefit to the taxpaying public.[74] The Supreme Court's rationale in *Plyler* supports the position that a state policy of denying a subclass of high school graduates, who are bona fide state residents, an equal opportunity to attend college because of their undocumented immigration status unreasonably increases avoidable future expenses associated with unemployment, social justice, and crime.[75] A student denied access to higher education because they are unable to secure in-state tuition fees in their state of residence and where they attended high school is placed at a

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68 *Id.*

69 Udi Ofer, *Protecting Plyler: New Challenges to the Right of Immigrant Children to Access a Public School Education*, 1 COLUM. J. RACE & L. 187, 191 (2012).

70 *See id.* (arguing that the Court used a variation of intermediate scrutiny in *Plyler v. Doe*).

71 Strauss, *supra* note 48, at 138.

72 *See* Plyler v. Doe, 457 U.S. 220, 224, 230 (1982) (stating that a state's discrimination is unjustified if it does not further a substantial state interest).

73 *Id.* at 223.

74 *Id.* at 223-24.

75 *See id.* at 230 ("It is thus clear that whatever 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.")

significant competitive disadvantage when it comes to having a meaningful opportunity to become a member of America's educated middle class and beyond.[76] Because state sponsored higher education discrimination for bona fide residents has such an adverse impact on an individual resident's lifetime income potential, such discrimination must be supported by a substantial justification in order to survive scrutiny under the Equal Protection Clause.[77]

B. Plyler *Serves as an Equal Protection Clause Safeguard to Protect Undocumented Immigrants From Discriminatory Economic Burdens in Education Policy That Creates a Permanent Underclass Among Undocumented Residents*

Plyler has the distinction of being the first time the Equal Protection Clause of the Fourteenth Amendment safeguarded undocumented immigrants from discrimination in education.[78] Under the rationale of *Plyler*, a state may not implement a discriminatory higher education policy that creates a permanent underclass among undocumented resident immigrants.[79] According to Justice Blackmun, the Supreme Court has "implicitly acknowledged that certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis."[80] Although the right to vote, without help, is not a right secured by the Constitution, it has been shielded by strict scrutiny because the Court has recognized the right to vote protects a person's basic civil and political rights.[81] In other words, the right to a higher education for undocumented state residents should be accorded heightened scrutiny because it is, in equal protection terms, at a minimum, a substantial right. An undocumented state resident cannot dream of achieving any meaningful degree of personal economic equality if burdened with inferior access

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[76] *See id.* at 234 (Blackmun, J., concurring) ("Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve.").

[77] *See id.*

[78] Ochoa, *supra* note 58, at 418 (citing Jason H. Lee, *Unlawful Status as a "Constitutional Irrelevancy"?: The Equal Protection Rights of Illegal Immigrants*, 39 GOLDEN GATE U. L. REV. 1, 1 (2008)).

[79] *See* Plyler v. Doe, 457 U.S. 202, 232-34 (1982) (Blackmun, J., concurring).

[80] *Id.* at 233.

[81] *Id.*

to higher education.[82] Those undocumented state residents who are denied equal access to higher education are downgraded, by state decree or authorization, in a truly straightforward way, to second-class status.[83]

As Professor Laura A. Hernandez appropriately contends, the *Plyler* analysis should apply to higher education to avoid creating an underclass in the American social order and to avoid discriminating against minor children transported to the United States by no fault of their own.[84] Furthermore, Professor Hernandez correctly asserts the *Plyler* analysis should encompass higher education when one considers that the failure to do so would create a permanent underclass in America.[85] When the permanent American underclass is directly linked with innocent minor children who came to the United States with their undocumented parents, equal access to an appropriate education based on the equal protection of the law principle is as relevant in post-secondary education as it is in primary and secondary education.[86] The United States' battle to establish a practical immigration policy will only increase this undocumented social economic status based inconsistency unless *Plyler* is comprehensive enough to include higher education.[87]

Professor Danielle Holley-Walker asserts that generally, the debate involving undocumented students and higher education has focused on the issue of whether undocumented students should be allowed to pay in-state or out-of-state tuition fees.[88] For example, a freshman entering the University of Texas as an in-state resident enrolled in the business school, taking 12 credit hours, will pay $5,369

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[82] *See id.* ("Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve.").

[83] *Id.* at 234 (noting that the denial of an education places an individual at a "permanent political disadvantage").

[84] Hernández, *supra* note 67, at 529 (citing Plyler v. Doe, 457 U.S. 202, 221-23, 229-30 (1982)).

[85] *Id.* at 526.

[86] *Id.*

[87] *Id.*

[88] Danielle Holley-Walker, *Searching for Equality: Equal Protection Clause Challenges to Bans on the Admission of Undocumented Immigrant Students to Public Universities*, 2011 MICH. ST. L. REV. 357 (2011) (citing Joshua A. Boggioni, Comment, *Unofficial Americans-What To Do With Undocumented Students: An Argument Against Suppressing the Mind*, 40 U. TOL. L. REV, 453, 467-75 (2009); Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1769-85 (2009)).

while an undocumented student enrolled in the same courses, but charged the out-of-state tuition rate, will be expected to pay $18,198.[89] Because undocumented students often come from challenging economic backgrounds, this kind of tuition disparity policy can have adverse disparate impact consequences.[90] In *Plyler*, the Supreme Court established the rule that in the field of primary and secondary education, undocumented immigrants are entitled to maintain a cause of action under the Fourteenth Amendment's promise of equal protection.[91] The marginalization of undocumented immigrants presents constitutional equality issues under the Equal Protection Clause for undocumented, bona fide immigrants residing throughout America.[92] The *Plyler* Court raised the issue of class-based educational equality involving undocumented immigrants.[93] In *Plyler*, the existence of a permanent undocumented economic underclass, with a lack of access to educational equality, was considered unacceptable in a nation that champions equality under the law.[94] The *Plyler* Court rejected Texas' attempt to engage in the marginalization of undocumented immigrant students by denying those students access to an equal education in spite of the fact they were bona fide residents of the state.[95] Under an expansive reading of *Plyler*, the Supreme Court prohibited all marginalizing restrictions on enrollment in public education that perpetuated a permanent class of economic inferiority of undocumented immigrants residing in a specific state.[96]

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89 UNIVERSITY OF TEXAS AT AUSTIN, UNDERGRADUATE TUITION, BY COLLEGE AND HOURS ENROLLED ACADEMIC YEAR 2012-2013 PER SEMESTER (2012), *available at* www.utexas.edu/business/accounting/pubs/tf_undergrad_fall12.pdf.

90 *See* Thomas R. Ruge & Angela D. Iza, *Higher Education for Undocumented Students: The Case for Open Admission and In-State Tuition Rates for Students Without Lawful Immigration Status*, 15 IND. INT'L & COMP. L. REV. 257, 259-60 (2005).

91 Holley-Walker, *supra* note 88, at 362.

92 Galindo, *supra* note 55, at 382.

93 *Id.*; *see* Plyler v. Doe, 457 U.S. 202, 219 (1982).

94 Galindo, *supra* note 55, at 382.

95 *Id.* at 382-83.

96 *Id.*

C. Plyler *Dismisses Government's Mythical Economic Harm as a Rational Justification for Denying Students Access to an Equal Education in Spite of the Fact They Were Bona Fide Residents of the State*

The typical justification for denying undocumented, bona fide in-state resident students equal access to public higher education is not embedded in either sensible research or analytic consideration.[97] The typical economic injury justifications are not rational under the Equal Protection Clause because they are rooted in prejudice and political expediency rather than dollars and cents.[98] The Alabama Taxpayer and Citizen Protection Act adopted in 2011 is an effort by anti-immigrant politicians in Alabama to target undocumented immigrants as scapegoats in a struggling national economy.[99] The state of Alabama, without adequate research and other objective data, asserted that illegal immigration was producing economic hardship in the state, which would probably increase if public universities extended to undocumented immigrants the public benefit of an in-state tuition rate.[100] Alabama's unsupported conjecture that undocumented immigrants cause economic hardships to the state's economy is in direct conflict with the findings that immigrants, regardless of classification, are profitable economic producers and likely to be even more profitable in a transformative community of inclusion.[101]

Research reveals that undocumented immigrants do cause the U.S. economy to suffer is not supported by the evidence but is plainly and "undeniably false."[102] A study conducted in 2006 revealed that

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97 Olivas, *supra* note 53, at 5.

98 *See id.* ("But these nativist objections to undocumented alienage and higher education enrollments are not rooted in careful research and analytic study, but in prejudice and political expediency. My reading of the discourse leads me to believe that those who object do not do so on meritocratic or substantive grounds . . . .").

99 *Id.* at 7 (citing H.R. 56, 2011 Leg., Reg. Sess. (Ala. 2011)).

100 *Id.* at 7-8.

101 *Id.* at 8 (citing Carole Keeton Strayhorn, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, UNDOCUMENTED IMMIGRANTS IN TEXAS: A FINANCIAL ANALYSIS OF THE IMPACT TO THE STATE BUDGET AND ECONOMY (Dec. 2006), *available at* http://www.window.state.tx.us; Howard F. Chang, *The Disadvantages of Immigration Restriction as a Policy to Improve Income Distribution*, 61 SMU L. REV. 23, 25 (2008)).

102 Natalya Shatniy, Comment, *Economic Effects of Immigration: Avoiding Past Mistakes and Preparing for the Future*, 14 SCHOLAR 869, 883 (2012) (citing Francine J. Lipman, *Taxing Undocumented Immigrants: Separate, Unequal and Without Representation*, 59 TAX LAW. 813, 813 (2006)).

85 percent of economists were of the opinion that the U.S. economy overall benefited from its immigrant residents.[103] In 1995, almost twenty years ago, 74 percent of economists concluded that undocumented immigrants helped grow the U.S. economy[104] as purchasers of goods and services.[105] Approximately eleven million undocumented immigrants living in the United States collectively buy goods and services in this country.[106] Removing undocumented residents would deny the American economy the spending power of eleven million purchasers of goods and services.[107] "In fact, consumption of goods and services by undocumented immigrants who spend their paychecks in the United States and also increase production for their employers is estimated at $800 billion."[108]

In *Plyler,* the Court said, "[t]here is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc."[109] In *Plyler*, the Supreme Court held Texas did not suffer economic harm because of the presence of undocumented immigrants in the state because only a few undocumented immigrants, if any at all, come to Texas to receive a free public education.[110] The dominant incentive for illegal entry into the state of Texas is the availability of employment not education.[111] In fact, undocumented immigrants have made a positive and profitable impact on the economy of Texas.[112] Because it is highly unlikely that an undocumented, bona fide resident's parents initially targeted a particular state to live in because of its in-state

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103 *Id.* at 884.

104 *Id.*

105 *Id.* at 886 (citing Francine J. Lipman, *Taxing Undocumented Immigrants: Separate, Unequal and Without Representation*, 59 TAX LAW. 813, 816 (2006)).

106 *Id.* (citing Jeffery Passel & D'Vera Cohn, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 1 (Feb. 2011), *available at* http://www.pewhispanic.org/files/reports/133.pdf).

107 *Id.* (citing Francine J. Lipman, Taxing Undocumented Immigrants: Separate, Unequal and Without Representation, 59 TAX LAW. 813, 816-17 (2006)).

108 Shatniy, *supra* note 102, at 886-87 (citing Patricia O'Connell, *A Massive Economic Development Boom*, BUSINESSWEEK, July 18, 2005, http://www.businessweek.com/magazine/content/05_29/b3943005_mz001.htm).

109 Plyler v. Doe, 457 U.S. 202, 228 (1982).

110 *Id.*

111 *Id.*

112 *Id.*

college tuition rates, a state does not have a legitimate interest in denying an undocumented, bona fide resident in-state college tuition rates under the pretext of avoiding economic harm by discouraging an influx of undocumented immigrants.[113]

In *Plyler*, the Supreme Court held Texas must prove that it would suffer economic harm with economic facts if its tuition policy for undocumented students were to survive intermediate level scrutiny, because economic facts matter.[114] Economic facts are not unyielding, for that reason, economic reality has the inherent ability to respond to the dynamic issue of undocumented immigration and its impact on higher education and employment.[115] Although economic facts are flexible, under *Plyler*, a state must prove it has suffered substantial economic injury because of an equal access tuition policy for undocumented immigrants.[116] Senator Jeff Sessions (R-Ala.), a typical enemy of proposed immigration reform, wrongly accuses "immigrants [of] exerting downward pressure on wages at the bottom of America's social pyramid."[117] Because vulnerable undocumented immigrant employees do not possess the ability to dictate the wages that they are paid by their employers,[118] Senator Sessions should perhaps argue that some employers wrongly attempt to pay lower wages at the bottom of America's social pyramid by exploiting undocumented, bona fide state residents.

D. *The Rationale of* Plyler *Implicitly Encourages Individual States to Grow Their Own Crop of Highly Educated, Undocumented, Bona Fide Resident Immigrants For Their Workforce*

In 2014, Governor Rick Snyder of Michigan announced his intention to get federal assistance to move 50,000 immigrants to the bankrupt city of Detroit during a five-year period by way of a visa program intended to attract those with advanced degrees or outstanding com-

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113 *See id.* at 228-29.

114 *Id.* at 228.

115 George F. Will, *Ghosts of Immigration Policy*, WASH. POST, May 12, 2013, at A19, *available at* 2013 WLNR 11642983.

116 *See* Plyler v. Doe, 457 U.S. 202, 223-24, 230 (1982).

117 Will, *supra* note 115.

118 *Id.*

petences in science, business or the arts.[119] Governor Snyder's plan would obligate immigrants to reside and engage in employment in Detroit, a city that has decreased to 700,000 inhabitants from 1.8 million in the 1950s.[120] However, Michigan's governor should encourage Congress to provide federal assistance to those individual states, which are willing to develop its undocumented, bona fide resident immigrant population into a group with outstanding ability in science, business or the arts, so that people of good will we can continue to make America a great nation through immigrants.[121] In 2013, Governor Snyder, a Republican, approved the Detroit's bankruptcy protection effort.[122] Michigan's governor should now establish a state office with an emphasis on providing higher education for undocumented, bona fide resident immigrants living in America.

Under a *Plyler* inspired modified proposal, Michigan's governor would request Congress to enact legislation to encourage undocumented, bona fide resident immigrants living anywhere in America to become Detroit residents and study science, technology engineering, and healthcare in Michigan. Michigan's governor should realize that Michigan's future needs for experts in fields like engineering, technology and health care could be met by highly educated, undocumented immigrants.[123] Thousands of international students attend college in Michigan.[124] Under this new proposal, Michigan colleges could now become home to thousands of undocumented, bona fide immigrant residents seeking degrees in the field of science, technology, and healthcare. By offering talented, undocumented residents financially attractive educational opportunities in Michigan along with academic support to develop expertise in the fields of science, technology, engineering, and healthcare, provided they are willing to work and stay in Detroit, the governor of Michigan could provide an opportunity to talented undocumented immigrants residing in America. The governor of Michigan, with the help of Congress, can provide an educa-

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119 Monica Davey, *Immigrants Seen as Way to Refill Detroit Ranks*, N.Y. TIMES, Jan. 24, 2014, at A12, *available at* 2014 WLNR 2103862.

120 *Id.*

121 *Id.*

122 *Id.*

123 *See id.* (Michigan's governor acknowledged that "demand already exists for experts in fields like engineering, technology and health care.").

124 *Id.*

tional opportunity to talented undocumented, bona fide resident immigrants who have no plans to self-deport from this country.

E. Plyler*'s Implicit Promise of Equal Access to Higher Education for Undocumented, Bona Fide Resident Immigrants Requires Undocumented Students Have Equal Access to State or Federal Financial Aid Available to Similarly Situated Bona Fide Residents*

A reluctant Congress should be encouraged to adopt immigration reform that provides financial assistance for college to help more young people who entered this country illegally with their families.[125] California allows undocumented students who graduate from high school to receive financial aid as well as pay the in-state tuition rate when they go to California colleges.[126] Michigan's governor could improve Michigan's long term need for experts in fields like engineering, technology and healthcare by allowing undocumented students who graduate from any high school in the nation to pay the in-state tuition rate and receive financial aid from Michigan colleges if they major in engineering, technology and healthcare and agree to reside in Detroit for a specified number of years.

In New York, undocumented students residing in New York with a dream of obtaining a college education are facing an undue burden in realizing their dream because they do not receive the same kind of financial aid offered to legal residents, although they pay the same fees as legal residents.[127] Because many of New York's students do not have the money to pay at the in-state rate, Assemblyman Francisco Moya, a Democrat from Queens, is seeking to amend New York law so that undocumented students may receive the same type of state-funded financial aid now offered to legal residents.[128] New York pays for these undocumented children through high school and "'[y]et, they can't get help paying for college education, even if they are at the top of their class. It makes no sense,'"[129] said Moya. It is projected that it would cost the state of New York less than $25 mil-

125 The Editorial Board, *Aid for Students With a Dream*, N.Y. TIMES, Feb. 1, 2014, at A22, *available at* 2014 WLNR 2874933.

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

lion a year to provide these young people the equal opportunity to receive the financial aid they need.[130] Although a spokesman for New York's Governor Andrew Cuomo believed the governor would be accommodating toward plans that make available financial assistance to immigrants and undocumented workers, Mr. Cuomo did not place any money for New York's undocumented college students in the following year's $135 billion budget.[131] Assemblyman Moya's "proposal should be an easy one to embrace in New York politically, given the growing Hispanic vote in this state. More than that, it is the right thing to do for students who should get a chance to succeed."[132]

F. *Under the Expanded Rationale of* Plyler*, a State May Not Deny an Undocumented Immigrant, Who Meets the Bona Fide Residency Requirement, Equal Access to Higher Education by Charging Higher Tuition Rates for College*

The Supreme Court in *Plyler* refused to outlaw all restrictions on the enrollment of federally undocumented, bona fide in-state residents.[133] *Plyler* held that a school district's residency qualification may be imposed on bona fide resident students who did not actually reside within the boundaries of a specific school district.[134] Professor Laura A. Hernandez has appropriately argued that establishing discriminatory residency requirements violates the spirit of *Plyler* and is not a legally satisfactory method of denying equal access to public higher education.[135] The Supreme Court approved a Texas law establishing a bona fide residency requirement for deciding tuition rates.[136] The bona fide residency law was acceptable because of Texas' legitimate interests in preserving the quality of its educational system by limiting the right to attend state schools on a preferred tuition basis to its bona fide residents.[137] A bona fide residence requirement basically commands that an individual establish residence prior to receiving the

130 *Id.*

131 The Editorial Board, *supra* note 125.

132 *Id.*

133 Hernández, *supra* note 67, at 528 (citing Plyler v. Doe, 457 U.S. 202, 240 n.4 (1982) (Powell, J., concurring)).

134 *Id.*

135 *Id.*

136 Martinez v. Bynum, 461 U.S. 321, 333 (1983).

137 *Id.* at 330.

services that are awarded to residents.[138] At the very least, public school officials generally are allowed to establish the traditional, basic residence criteria— that is, to live in the state with a bona fide intention of living there—before it recognizes them as residents for purposes of college tuition.[139] Under the rationale of *Martinez v. Bynum,* requiring bona fide residency appears to be a constitutionally permissible means for states to accommodate the issue of undocumented immigrant status, while promoting equal access to higher education.

A nation with an outstanding ability to expand higher education opportunity for all of its bona fide, undocumented residents must reject the call by some to consider undocumented immigration as inherently problematic for higher education. Good public policy requires expanding higher education opportunities in our country for everyone in America, including undocumented, bona fide residents. In addition, it is good public policy to establish a federal immigration policy to increase educational equality for all who reside in America. In enacting needed immigration reform, Congress should take a dynamic approach to establishing an equitable immigration policy for undocumented immigrants that supports equal access to higher education.

G. *Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) is Bad Public Policy and Has the Potential to Undermine the Equal Access to Higher Education Goal Implied in* Plyler

Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), codified as 8 U.S.C. § 1623(a), forbids granting a bona fide residency-based college tuition benefit to an undocumented immigrant when that same bona fide resident benefit is not available to non-resident citizens.[140] This violates the basic equal protection principles articulated by the Court in *Romer v. Evans.*[141] IIRIRA raises the inevitable inference that the congressional denial of a state-created bona fide residency college tuition benefit is born of animosity toward a class of persons identified as undocumented immigrants seeking bona fide residency based tuition

138 *Id.*
139 Hernández, *supra* note 67, at 528.
140 *Id.* at 528-29.
141 Romer v. Evans, 517 U.S. 620, 633-34 (1996).

rates.[142] "'[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'"[143]

Section 505 of IIRIRA should not be applied to post-secondary tuition rates because it directly conflicts with the Supreme Court's decision in *Martinez v. Bynum,*[144] which allows a state rather than Congress to establish tuition rates based on bona fide residency standards for undocumented immigrant residents.[145] A federal law denying a sovereign state's right to grant college tuition preferences, based on a state bona fide residency law, imposes direct, continuing, real damages without any legitimate justification on undocumented, bona fide residents.[146] Congress does not have a legitimate interest in perpetuating a permanent underclass of undocumented, bona fide residents by not allowing a state to decide the local, in-state tuition rate for a public college education.[147] Section 505 offends "conventional and venerable" equal protection principles.[148] The equal protection of the law concept requires any law to display a rational relationship to a legitimate governmental objective, and section 505 does not.[149]

Politicians are exploiting the deep emotions associated with illegal immigration to enact legislation like section 505 without substantial justification.[150] Because the denial of bona fide residency-based college tuition to an undocumented immigrant will not substantially reduce the flow of undocumented immigrants to the United States,[151] section 505 fails to exhibit a substantial rational relationship to a legitimate governmental interest. Section 505 allows politicians to abandon the equal protection of the law principle in exchange for instant

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142 *Id.* at 634.

143 *Id.* at 634-35 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

144 *See* Martinez v. Bynum, 461 U.S. 321, 325, 327-28 (1983) (quoting Vlandis v. Kline, 412 U.S. 441, 452-53, 453-54 (1973)).

145 *Id.* at 333.

146 *Romer*, 517 U.S at 635.

147 Hernández, *supra* note 67, at 525, 561-62, 565-66.

148 *See* Romer v. Evans, 517 U.S. 620, 635 (1996) ("[T]he principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose.") (citing Kadrmas v. Dickinson Public Schools, 487 U.S. 461-62 (1988)).

149 *See id.*

150 Hernández, *supra* note 67, at 525, 561-62.

151 *See id.*

political advantage.[152] Furthermore, because section 505's denial of bona fide residency college tuition to undocumented immigrant represents immigration bias, the law does not have a rational relationship to legitimate state interests.[153] Section 505's arbitrary classification of individuals entitled to receive bona fide residency tuition benefits violates the equal protection principle.[154] IIRIRA is the type of social economic status legislation that makes distinctions between people, which is prohibited by the equal protection of the law.[155] The equal protection principle prohibits any arbitrary governmental legislation, including IIRIRA, which results in denying the equal protection of the law to any bona fide undocumented immigrant.[156]

Professor Hernandez correctly asserts that section 505 of the IIRIRA is not proper for situations involving post-secondary tuition rates because it is inconsistent with the Supreme Court's rationale in *Plyler* of expanding equal educational opportunity to undocumented immigrants who are able to meet relevant bona fide state residency status requirements.[157] Under the *Plyler* promise of equal education for bona fide undocumented residents of a state, Congress is not permitted to authorize a state to charge an undocumented student an out-of-state tuition fee based exclusively on the student's undocumented immigration status without also requiring the state to show a substantial justification for the tuition increase.[158] The rationale used in *Plyler,* by necessity, includes higher education because current in-state bona fide residents transported to the United States as innocent minors charged discriminatory tuition fees for a college education are at risks of becoming members of a permanent underclass created by the state without substantial justification.[159]

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152 *See id.* at 525, 561, 566.

153 *See Romer*, 517 U.S at 634-35.

154 *Id.*

155 *See* The Civil Rights Cases, 109 U.S. 3, 24 (1883) ("The [F]ourteenth [A]mendment extends its protection to races and classes, and prohibits any [S]tate legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.").

156 *See id.*

157 Hernandez, *supra* note 67, at 529; *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 505, 8 U.S.C. § 1623(a) (2012) (mandating that unauthorized immigrants "shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident.").

158 Hernandez, *supra* note 67, at 547, 565.

159 *See* Plyler v. Doe, 457 U.S. 202, 218-19, 229-30 (1982).

Some states have accommodated the federal residency policy contained in section 505 of IIRIRA by providing tuition preferences based on where the student attended and graduated from high school, rather than on a residency requirement.[160] The National Immigration Law Center maintains that section 505 of IIRIRA does not outlaw in-state tuition to undocumented immigrants attending public colleges.[161] "Such a prohibition would have been simple to write, but Congress declined to do so."[162] The states that offer in-state tuition to students without considering their immigration status have complied with section 505 of IIRIRA.[163] Even with the potential chilling effect of section 505 of IIRIRA, at least seventeen states have adopted policies that allow specific, undocumented students who attended and graduated from their primary and secondary schools to receive the same tuition preference as their classmates attending public colleges.[164] The states granting undocumented bona fide students the same tuition preference as in-state resident students are California, Colorado, Connecticut, Florida, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Oregon, Texas, Utah, and Washington.[165] Also, Rhode Island's Board of Governors for Higher Education approved a plan to offer access to in-state tuition at the state's public colleges and universities to specified students, without considering their immigration status.[166] In 2013, the University of Hawaii and the University of Michigan approved comparable policies.[167]

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160 *See* Su, *supra* note 5, at 1395 (citing Martinez v. Regents of Univ. of Cal., 241 P.3d 855, 559-60 (Cal. 2010).

161 NATIONAL IMMIGRATION LAW CENTER, BASIC FACTS ABOUT IN-STATE TUITION FOR UNDOCUMENTED IMMIGRANT STUDENTS (2014), *available at* http://www.nilc.org/basic-facts-in state.html.

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 NATIONAL IMMIGRATION LAW CENTER, *supra* note 161.

H. *Under* Plyler, *a Law Denying a UnitedStates Citizen In-State College Tuition Because of the Parents' Undocumented Immigration Status Also Violates the Equal Protection Clause*

The very narrow issue of in-state tuition for citizen children of undocumented immigrants is a relatively new judicial issue.[168] The principles applicable to undocumented bona fide residents of a local school district, formulated in *Plyler* should also apply to college education when legislation targets United States citizen children of undocumented parents.[169] Some conservatives and champions of anti-immigration policies believe it is not a violation of the equal protection rights of United States citizen students with undocumented parents to deny these students in-state college tuition benefits because of their parents' immigration status.[170]

A fresh report by the Pew Hispanic Center may have energized the anti-immigrant movement to aggressively pursue its goal of deterring undocumented immigration in this country by denying in-state college tuition to those students who are United States citizens with undocumented parents.[171] Utilizing United States Census information, the Pew Hispanic Center calculated that approximately "340,000 of the 4.3 million babies born in the United States in 2008 were the offspring of unauthorized immigrants."[172] The Center also discovered that four million citizens who are born to undocumented immigrants resided in the U.S. in 2009.[173] Although the majority of opponents of birthright citizenship encourage eliminating automatic citizenship for children only in those situations where both parents are undocumented, opponents of birthright citizenship will no doubt use these numbers reported by the Center to promote an unnecessarily alarmist,

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168 Michelle J. Seo, *Uncertainty of Access: U.S. Citizen Children of Undocumented Immigrant Parents and In-State Tuition for Higher Education*, 44 COLUM. J.L. & SOC. PROBS.311, 320 (2011).

169 *See id.* at 321 (summarizing the Court's holding in *Plyler*).

170 *Id*. at 314.

171 Allison S. Hartry, *Birthright Justice: The Attack on Birthright Citizenship and Immigrant Women of Color*, 36 N.Y.U. REV. L. & SOC. CHANGE 57, 61 (2012) (citing Jeffrey S. Passel & Paul Taylor, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANTS AND THEIR U.S.-BORN CHILDREN 1 (2010)).

172 Jeffrey S. Passel & Paul Taylor, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANTS AND THEIR U.S.-BORN CHILDREN 1 (2010).

173 *Id.*

anti-immigration panic.[174] In the current climate, the approach of denying in-state tuition to resident citizen students with undocumented parents is based on a general anti-immigrant sentiment.[175]

At issue in *Ruiz v. Robinson* was whether regulations that classify students who are United States citizens and reside in the state of Florida as "out-of-state" residents because their parents, who also reside in Florida, are undocumented violates the equal protection principles.[176] Judge Moore held that Florida's regulations classifying U.S. citizen students residing in the state by reference to their parents' undocumented federal immigration status furthered no legitimate state interest and were thus unconstitutional because it denied each of these United States citizens the equal protection of the laws.[177] Because of their parents' undocumented immigrant status, plaintiffs who are similarly situated are denied the benefit of a considerably lower tuition rates at Florida's public post-secondary schools, in violation of the equal protection clause.[178] The rationale of the *Ruiz* decision represents the expanded view that Florida's denial of either a *primary* education or post-secondary education benefit to a citizen student or a bona fide resident student based on her parents' immigration status creates a presumptive violation of the Equal Protection Clause because of the growing importance of education at any level.[179]

CONCLUSION

This article has argued that in America's current era of widespread anti-immigrant resentment, federal courts should require that laws denying in-state tuition fees to either an undocumented, bona fide state resident or a U.S. citizen bona state resident student with undocumented parents serve, at a minimum, legitimate governmental objectives. Any requirement to pay a higher tuition fee, based on federal immigration status, should be substantially related to accomplishing a legitimate objective. This article proposes that under a proper application of the intermediate scrutiny, a state regulation denying in-

174 *See* Hartry, *supra* note 171, at 61-62.

175 *See id.* at 62 (arguing that the "ICE's approach toward pregnant immigrant women has its foundation in general anti-immigrant sentiment . . . .").

176 Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1331-33 (S.D. Fla. 2012).

177 *Id.*

178 *Id.* at 1329.

179 *Id.*

state tuition college fees to U.S. citizens who are bona fide in-state residents with undocumented parents does not serve a legitimate state concern under the rationale of the *Plyler* decision. The government will be unable to demonstrate a legitimate state interest for establishing a hostile, anti-immigrant policy when that policy continues to develop an underclass of undocumented, bona fide state residents. Society is the main beneficiary of public policy when public officials expand the opportunity to acquire a college education to students who are bona fide state residents with undocumented federal status; because possessing a college education is the key to personal economic growth.