

# COMMENTS

## IS POSTSECONDARY EDUCATION A FUNDAMENTAL RIGHT? APPLYING *SERRANO v. PRIEST* TO *LETICIA "A"*

*[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society.*<sup>1</sup>

### I. INTRODUCTION

Sonia "V" came to the United States when she was eight years old and graduated from high school with a grade point average of 3.90 on a four point scale. Lorena "M" came to the United States when she was fourteen and graduated from high school with honors. Manuel "S" came to the United States when he was seven years old and graduated from high school with a 3.71 grade point average.<sup>2</sup>

Although all three have been admitted to the University of California and their futures look very promising, they face one major obstacle: They are undocumented. It is the policy of the University of California to classify undocumented aliens as non-residents for tuition purposes.<sup>3</sup> As a result, Lorena, Sonia and Manuel will not be able to attend college because they cannot afford to pay out-of-state tuition fees.

Education is essential to achieving economic stability and independence in American society. The United States Supreme Court in *Brown v. Board of Education*<sup>4</sup> confirmed the value of an education by declaring that all people, regardless of race, should

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1. Plyler v. Doe, 457 U.S. 202, 221 (1982).

2. These three individuals were plaintiffs in *Leticia "A" v. Bd. of Regents of the Univ. of Cal.*, No. 588-982-4 (Cal. Super. Ct. Apr. 11, 1985) (order granting a permanent injunction against the University of California and California State University systems).

3. *Regents of the Univ. of Cal. v. Super. Ct.*, 225 Cal. App. 3d 972 (1990). See also CAL. EDUC. CODE § 68062 (h) (West 1989).

4. 347 U.S. 483, 494-95 (1954).

have equal access to public education. In *Plyler v. Doe*,<sup>5</sup> the Court held that even undocumented children cannot be denied elementary or secondary education simply because they are not legally admitted into the United States.<sup>6</sup> These cases suggest that education should be accessible to all people who reside in this country.

While undocumented aliens<sup>7</sup> have made progress in securing access to elementary and secondary education, they continue to confront barriers in obtaining a higher education. The residency requirements of the University of California (UC), California State University (CSU), and community college systems classify undocumented students as nonresidents and require them to pay out-of-state tuition fees.<sup>8</sup> Since undocumented students are traditionally from low-income families,<sup>9</sup> their inability to pay out-of-state tuition fees amounts to their exclusion from state universities.<sup>10</sup>

5. 457 U.S. 202 (1982).

6. *Id.* The Supreme Court held that the state of Texas could not deny public education to undocumented children. Justice Brennan stated that although undocumented aliens were, by definition, in the country unlawfully, they were nevertheless "persons" within the territory of the United States and, therefore, entitled to equal protection under the Fourteenth Amendment. *Id.* at 210-13.

The *Plyer* majority also made it clear that while education is not a right granted by the United States Constitution, it should be treated as more than a mere governmental benefit because it plays a "fundamental role in maintaining the fabric of our society." *Id.* at 221.

7. Throughout this comment, the term "undocumented aliens" will be used in place of "illegal aliens." Under the Immigration and Nationality Act, undocumented aliens are persons who have entered the United States without inspection, or "EWI." The Immigration and Nationality Act of 1952, 8 U.S.C. § 1325 (1988 & Supp. IV 1993). See generally 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 85.07(2)(c) (rev. ed. 1993) (describing penalties for unlawful, surreptitious and fraudulent entry).

The Immigration and Nationality Act does not classify aliens as "undocumented." Instead, an "alien" is defined as any person who is not a citizen or national of the United States. *Id.* § 1101(a)(3). Two classes of aliens exist under the Act: immigrants and nonimmigrants. Immigrant aliens are admitted for permanent residence. *Id.* § 1151(a). By contrast, nonimmigrants are admitted only for temporary periods and include students, diplomats, tourists and temporary workers. *Id.* § 1101(a)(15).

8. 67 Cal. Op. Att'y Gen. 241 (1984).

9. See Roberto Rodriguez, *California's Undocumented Students Face Uncertain Future*, 8 BLACK ISSUES IN HIGHER EDUC. 8, 8-9 (1991).

10. Throughout this comment, the terms "universities" and "colleges" will be used interchangeably to include the University of California, California State University and Community College systems. When referring to a specific system, the exact name, i.e., the University of California, will be used.

See also Leonard P. Strickman, *The Tuition-Poor, The Public University and Equal Protection*, 29 U. FLA. L. REV. 595, 595 (1977). The author argues that there have always existed a class of people who are unable to meet tuition requirements. Their inability to pay tuition fees represents the difference between *exclusion* from and *access* to higher institutions. Due to rising tuition fees, the class of people excluded from higher education is growing. *Id.* (emphasis added).

This comment focuses on litigation in California regarding the constitutionality of California Education Code section 68062(h). Under section 68062(h), an alien may establish his or her *residence* in the state of California, unless the Immigration and Nationality Act (INA)<sup>11</sup> precludes the person from establishing *domicile* in the United States.<sup>12</sup> Since the adoption of section 68062(h) in 1983, the question of whether the INA precludes aliens from establishing domicile has posed problems for college officials interpreting the code.<sup>13</sup>

Two cases regarding this issue, *Leticia "A" v. Board of Regents of the University of California*<sup>14</sup> and *American Association of Women (AAW) v. Board of Trustees of the California State University*<sup>15</sup>, challenged the constitutionality of section 68062(h). In *Leticia "A"*, the plaintiffs successfully argued that the UC's and CSU's policy of classifying undocumented students as non-residents for tuition purposes was unconstitutional.<sup>16</sup> Subsequently, the plaintiffs in the recent *AAW* case sought an interpretation consistent with the decision in *Regents of the University of California v. Superior Court (Bradford)* which upheld the policy of classifying undocumented students as nonresidents.<sup>17</sup>

This comment evaluates the constitutionality of section 68062(h)<sup>18</sup> by focusing solely on the equal protection clause of the California Constitution.<sup>19</sup> The California Supreme Court has already declared elementary and secondary education a fundamental right.<sup>20</sup> This comment contends that the Court must now

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11. See generally 3 GORDON & MAILMAN, *supra* note 7, § 1101-1503.

12. CAL. EDUC. CODE § 68062(h) (West 1989) (amending CAL. EDUC. CODE § 68076 (1983) which classified aliens as nonresidents unless they were lawfully admitted to United States for permanent residence). Section 68062(h) provides that "an alien, including an unmarried minor alien, may establish his or her residence, unless precluded by the Immigration and Nationality Act . . . from establishing domicile in the United States." *Id.*

13. Cf. G. M. Bush, *Suit Attacks University Policy on Undocumented Students*, L.A. DAILY J., May 24, 1990, at 9 (describing an administrator's refusal to interpret section 68062(h) to allow undocumented students to be classified as residents).

14. *Leticia "A"*, No. 588-982-4 (Cal. Super. Ct. Apr. 11, 1985) (order granting permanent injunction against the UC and CSU systems).

15. *American Ass'n of Women (AAW)*, No. B072439, 1995 WL 15414 (Cal. Ct. App. Jan. 17, 1995).

16. *Leticia "A"*, No. 588-982-4 (Cal. Super. Ct. Apr. 11, 1985) (order granting permanent injunction against the UC and CSU systems).

17. 225 Cal. App. 3d 972 (1990).

18. CAL. EDUC. CODE § 68062(h) (West 1989).

19. CAL. CONST. art. I, § 7(a). The California Constitution provides that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . ." *Id.*

20. *Serrano v. Priest*, 5 Cal. 3d 584 (1971) [hereinafter *Serrano I*]; *Serrano v. Priest*, 18 Cal. 3d 728 (1977), *cert. denied*, 432 U.S. 907 (1977) [hereinafter *Serrano II*].

decide whether postsecondary education is a fundamental right. Because postsecondary education plays an essential role in the development of our society, courts should declare it is a fundamental right.

Upon declaring education a fundamental right, courts must ensure that all bona fide California residents, including undocumented aliens, have access to postsecondary education without unreasonable obstacles or barriers to the full enjoyment and exercise of that right. When fundamental rights are involved, the state must demonstrate that a compelling state interest is served by legislation impacting those rights to withstand equal protection scrutiny.

In Part II, this comment describes the California residency requirements for public universities<sup>21</sup> and explores the complexities of determining residency.<sup>22</sup> Part III presents a chronology and description of *Leticia "A"*, *Bradford* and *AAW*. Part III explains the various interpretations that lower California courts have applied to section 68062(h).

Part IV focuses on the equal protection clause of the California Constitution as it applies to education and analyzes *Serrano v. Priest I* and *Serrano v. Priest II*,<sup>23</sup> where the California Supreme Court held that access to elementary and secondary education was a fundamental right and, thus, subject to strict scrutiny. Section IV is premised on the notion that the California Constitution offers a broader range of constitutional protections than the United States Constitution.<sup>24</sup> Part V will show that the reasoning applied to declaring elementary education a fundamental right can be equally applied to postsecondary education. Thus, Part V contends that postsecondary education should also be declared a fundamental right.

Finally, Part VI analyzes current cases which demonstrate that although undocumented aliens are not barred per se under section 68062(h)<sup>25</sup> from attending a California university or college, to require them to pay out-of-state tuition fees when they otherwise meet the residency requirements imposes a substantial barrier to their attainment of postsecondary education. Under a

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21. See *supra* note 10.

22. See Michael A. Olivas, *State Residency Requirements: Post Secondary Authorization and Regulations*, 13 COLLEGE L. DIG. 157 (1983). Olivas argues that since all states have different statutes, with various exemptions to residency requirements, as well as institutional autonomy to decide individual cases, "there is a strong likelihood that students similarly situated will be treated unlike each other, often even by the same institutions." *Id.* at 158.

23. *Serrano I*, 5 Cal. 3d at 589; *Serrano II*, 18 Cal. 3d at 765-66.

24. *Serrano II*, 18 Cal. 3d 728, at 764.

25. CAL. EDUC. CODE § 68062(h) (West 1989).

strict scrutiny analysis, section 68062(h)<sup>26</sup> would violate the equal protection guarantees of the California Constitution.<sup>27</sup>

## II. RESIDENCY REQUIREMENTS FOR THE STATE UNIVERSITIES

In California, the state legislature has established the regulations that determine the residency policies for state universities.<sup>28</sup> These regulations classify students as either residents or nonresidents of the state for tuition purposes.<sup>29</sup> California, like most other states, distinguishes between residents and nonresidents on the theory that taxpayers and their families, whose money supports the institutions, should have access to an education at a lower cost.<sup>30</sup>

In contrast, nonresidents can be required to pay a higher share of the tuition costs because they are not state taxpayers.<sup>31</sup> For those students classified as nonresidents, the costs can be prohibitive. For example, at the University of California, a nonresident undergraduate student is required to pay a tuition fee of \$7,699.00 in addition to the university fee of \$3,509.00 totalling \$11,208.00 for one year of school.<sup>32</sup> Resident students only pay \$3,509.00.<sup>33</sup>

Administrators interpreting the California Education Code often find the residency regulations difficult to apply due to the complexity involved in distinguishing between residents and nonresidents.<sup>34</sup> Generally, a person moving from one state to another for the primary purpose of obtaining an education is considered a nonresident.<sup>35</sup> California law will allow a person to become reclassified as a resident after living in the state for

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26. *Id.*

27. CAL CONST. art. I, § 7(a).

28. CAL. EDUC. CODE § 68000 (West 1989). This section states that "it is the intent of the Legislature that the public institutions of higher education shall apply uniform rules, as set forth in this chapter . . . in determining whether a student shall be classified as a resident or a nonresident."

29. *Id.* §§ 68017, 68018. California Education Code § 68017 provides "[a] 'resident' is a student who has residence . . . in the state for more than one year immediately preceding the residence determination date." *Id.* § 68017. The Code defines "nonresident" as a "student who does not have residence in the state for more than one year immediately preceding the residence determination date." *Id.* § 68018.

30. Michael A. Olivas, *Administering Intentions: Law, Theory & Practice of Post-secondary Residency Requirements*, 59 J. HIGHER EDUC., 263, 263 (1988).

31. *Id.*

32. See UCLA 1993-94 FINANCIAL AID HANDBOOK, 1, 1 (1993).

33. *Id.*

34. See Olivas, *supra* note 30, at 265-66.

35. *Id.* at 265.

"more than one year immediately preceding the residency determination date."<sup>36</sup>

In addition to the durational requirement, California law requires that residents establish "domicile" in the state or the intent to remain permanently in the state.<sup>37</sup> Confusion arises because administrators often use the term "residency" interchangeably with "domicile."<sup>38</sup> While "domicile" includes "residency," it has a more comprehensive meaning than "residency."<sup>39</sup> To establish "domicile," a person must have a residence and an intention to make that residence her home and abode.<sup>40</sup> Administrators will consider the student's state of motor vehicle registration, voter registration, driver's license, as well as the place of employment and filing of income tax returns to determine the person's intent to establish domicile.<sup>41</sup> Some of these factors are weighed more heavily than others.<sup>42</sup>

Residency determination is further complicated in the case of students whose status must be examined against the complex set of immigration laws and regulations.<sup>43</sup> The California Education Code requires administrators to examine the immigration status of an alien student.<sup>44</sup> Alien students possess visa documents approved by the Immigration and Naturalization Service (INS) allowing them to reside permanently or temporarily in the United States.<sup>45</sup> However, the physical shape, form, and style of

36. CAL. EDUC. CODE § 68017. See also *Vlandis v. Kline*, 412 U.S. 441, 452 (1973) (holding that states have the right to impose a reasonable durational residency requirement on a student as an element demonstrating bona fide residency).

37. CAL. EDUC. CODE § 68062 (West 1989). This section states that the following rules are to be observed in determining the student's place of residence: "a) there can only be one residence . . . c) a residence cannot be lost until another is gained d) the residence can be changed only by the union of act and intent . . ." In this section, the legislature is using "residence" and "domicile" interchangeably. See also *Olivas*, *supra* note 30, at 266.

38. Michael A. Olivas, Plyler v. Doe, Toll v. Moreno, and Postsecondary Admissions: *Undocumented Adults and "Enduring Disability"*, 15 J.L. & EDUC. 19, 19 (1986).

39. *Id.*

40. *Id.*

41. See generally *Olivas*, *supra* note 30, at 265 (arguing that because such "objective" factors are not conclusive to prove intent, an administrator is forced to make a subjective determination of the student's intent). But see *Vlandis*, 412 U.S. at 453-54 (state can establish reasonable criteria to make certain that students who are not bonafide residents cannot take advantage of resident fees).

42. For example, voter registration in California does not conclusively demonstrate intent to remain in the state. On the other hand, if the student is employed in California and has paid income taxes, administrators weigh this factor more heavily. See generally *Olivas*, *supra* note 30, at 266.

43. See generally 2 & 3 GORDON & MAILMAN, *supra* note 7, (analyzing the Immigration and Nationality Act to demonstrate the complexities of identifying who is an immigrant or a nonimmigrant).

44. CAL. EDUC. CODE § 68062(h) (West 1989).

45. See 2 GORDON AND MAILMAN, *supra* note 7, § 31.

the documents will vary because there are several immigrant and nonimmigrant categories under the INA.<sup>46</sup> As a result, administrators must familiarize themselves with the INA to apply section 68062(h).

To add to the ambiguity, undocumented aliens are not classified under the Act.<sup>47</sup> Consequently, administrators are forced to infer whether or not Congress intended to preclude undocumented aliens from establishing domicile. Due to the ambiguous legislative treatment of alienage, administrators frequently violate the constitutional rights of alien students.<sup>48</sup>

### III. HISTORY OF THE LITIGATION

In 1985, the Alameda County Superior Court rendered a decision in *Leticia "A" v. Board of Regents of the University of California*, the first major challenge to the constitutionality of California Education Code section 68062(h).<sup>49</sup> In *Leticia "A"*, several undocumented students filed a suit against the UC and the CSU systems after they were notified by the University of California that they were required to pay nonresident tuition and fees because of their alien status.<sup>50</sup> The plaintiffs had graduated from California high schools and had resided continuously in California for an average of seven years.<sup>51</sup>

However, because the University of California interpreted section 68062(h) as precluding undocumented aliens from establishing residency, the plaintiffs were not allowed to demonstrate that they had lived in the state continuously for well over the one year requirement<sup>52</sup> and that they intended to remain in the state permanently.<sup>53</sup> The University's position was buttressed by the California Attorney General's opinion determining that the legislature did not intend to permit undocumented aliens to establish residency for tuition purposes under section 68062(h).<sup>54</sup> In his opinion, the Attorney General found that section 68062(h)'s purpose was to conform with the United States Supreme Court

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46. 8 U.S.C. § 1153(b) (1988).

47. See 3 GORDON AND MAILMAN, *supra* note 7, § 85.07(2)(c).

48. See Olivas, *supra* note 30, at 270. See generally 1 GORDON & MAILMAN, *supra* note 7, § 6.

49. *Leticia "A"*, No. 588-982-4 (Cal. Super. Ct. Apr. 11, 1985) (order enjoining the UC and CSU systems from classifying undocumented students as nonresidents).

50. *Leticia "A"*, No. 588-982-5 at 2 (Cal. Super. Ct. Apr. 3, 1985) (tentative decision).

51. *Id.*

52. CAL. EDUC. CODE § 68018 (West 1989).

53. *Leticia "A"*, No. 588-982-5 at 8-9.

54. 67 Cal. Op. Att'y Gen. 241 (1984).

decision in *Toll v. Moreno*,<sup>55</sup> which held that documented aliens must be classified as residents for tuition purposes.<sup>56</sup>

The Alameda County Superior Court was not persuaded by the University's argument or the Attorney General's opinion. Instead, the court held that the policy denying undocumented aliens residency because of their immigration status violated the equal protection clause of the California Constitution.<sup>57</sup> After examining the evidence and testimony,<sup>58</sup> the court found no substantial or rational state interest for the legislature's policy precluding aliens from establishing residency just because the Immigration and Nationality Act prevents their classification as residents.<sup>59</sup>

According to the court, the policies which underlie the immigration laws are vastly different from the policies that underlie student residency requirements.<sup>60</sup> Therefore, the UC and CSU systems were permanently enjoined from automatically precluding undocumented students from establishing residency based on their immigration status.<sup>61</sup> Administrators were to make their residency determinations "in the same manner and on the same terms as United States citizens."<sup>62</sup> Neither the UC nor CSU appealed the court's decision.

Subsequently, an employee assigned to determine the residency status of students at the University of California Los Angeles refused to comply with the *Leticia "A"* injunction and was forced to resign.<sup>63</sup> The employee, David Bradford, filed a lawsuit

55. 458 U.S. 1 (1982). The state of Maryland had denied resident status to aliens who held a G-4 visa because they could not establish state domicile. *Id.* at 4. Such visas are issued to nonimmigrant aliens who are officers or employees of certain international organizations and their immediate families. *Id.* However, the Supreme Court found that nonimmigrant aliens holding a G-4 visa were not precluded by the Immigration and Nationality Act from establishing domicile in the United States. *Id.* at 8. Thus, the Supreme Court held that the University of Maryland's resident policy violated the Supremacy Clause of the Constitution by barring G-4 aliens and their families from in-state status. *Id.* at 9.

56. 67 Cal. Op. Att'y Gen. 241, 247 (1984).

57. *Leticia "A"*, No. 588-982-5 at 2 (Cal. Super. Ct. Apr. 3, 1985) (tentative decision) (construing CAL. CONST. art. I, § 7(a)). The court did not have to decide whether education was a fundamental right because the justifications advanced by the university lacked rationality. *Id.* at 7-8.

58. *Id.* at 7-8.

59. *Id.* at 8.

60. *Id.* at 9. The court stated that the immigration laws and residency regulations were "totally unrelated for purposes of administration, enforcement and legal analysis." *Id.*

61. *Leticia "A"*, No. 588-982-4 at 2 (Cal. Super. Ct. Apr. 11, 1985) (order enjoining the UC and CSU systems from classifying undocumented students as nonresidents).

62. *Id.*

63. *Regents of Univ. of Cal. v. Super. Ct. (Bradford)*, 225 Cal. App. 3d 972, 976 (1990).

in Los Angeles Superior Court<sup>64</sup> asking the court to require the UC to classify undocumented students as nonresidents for tuition purposes.<sup>65</sup> The court of appeals affirmed the trial court's ruling that section 68062(h) was constitutional as interpreted by the Attorney General.<sup>66</sup> The court focused primarily on the intent of the legislature and concluded that undocumented alien students could not be classified as residents for tuition purposes.<sup>67</sup> Furthermore, the court did not consider subsidized public university education to be a fundamental or even an important interest.<sup>68</sup> Instead, the court decided that precluding undocumented students from being classified as residents furthered legitimate state interests, such as preferring to educate California's lawful residents and not "subsidizing violations of law."<sup>69</sup>

Thereafter, the CSU, which was not a party in the *Bradford* case, requested a clarification from the court in the *Leticia "A"* case regarding CSU's obligations under the preexisting injunction. The Alameda County Superior Court upheld the injunction against CSU and ordered that "undocumented immigrants be afforded a full and fair opportunity to demonstrate the bona fides of their residency."<sup>70</sup>

Immediately following this clarification order, the American Association of Women (AAW) along with various other groups<sup>71</sup> sought an injunction to stop CSU's practice of classifying undocumented students as California residents.<sup>72</sup> Essentially, the plaintiffs sought to broaden the application of the *Bradford* decision to apply to the CSU system. The court, attempting to find a middle ground between *Leticia "A"* and *Bradford*, issued a writ of mandate commanding CSU to establish a procedure for undocumented students to prove residency "to the extent they are not precluded from doing so by the Immigration and Nationality

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64. *Id.* at 978.

65. *Id.* The plaintiff argued that Education Code § 68062(h) should be interpreted according to the California Attorney General's opinion. *Id.* (citing 67 Cal. Atty. Gen. 241 (1984)).

66. *Id.* at 980.

67. *Id.*

68. *Id.* at 981.

69. *Id.*

70. *Leticia "A"*, No. 588-982-4982-4 at 18 (Cal. Super. Ct. May 19, 1992) (clarification order affirming the permanent injunction against the CSU systems).

71. The Citizenship Protection Fund ("CPF"), the California Coalition For Immigration Reform ("CCIR"), the Federation For American Immigration Reform ("FAIR"), the Citizens For Law and Order as well as other organizations joined AAW in this action. All of these organizations have taken strong stands against undocumented immigration, and advocated cutbacks of legal immigration to the United States as well.

72. AAW, No. BC061221 at 3 (Cal. Super. Ct. Sept. 28, 1992) (ordering CSU to establish a procedure whereby aliens may establish residency if not precluded by the Immigration and Nationality Act).

Act.<sup>73</sup> The court ruled that section 68062(h) was constitutional but that aliens should not be automatically precluded from establishing state residency.<sup>74</sup> The AAW appealed, seeking an order that complied with the *Bradford* decision.<sup>75</sup>

The court of appeals ruled in favor of AAW. The court held that section 68062(h) was constitutional and that it applies without limitation to the California State University and College system.<sup>76</sup> The court reasoned that the *Bradford* court did not restrict its decision to the U.C. system.<sup>77</sup>

However, in *AAW*, the court did not find it necessary to engage in a thorough interpretation of the ruling in *Bradford*, that section 68062(h) precludes undocumented alien students from qualifying as residents of California for tuition purposes.<sup>78</sup> The court simply stated that section 68062(h) did not, by itself, preclude undocumented alien students from qualifying as California residents for tuition purposes.<sup>79</sup> As such, the *AAW* decision severely limits undocumented students' ability to obtain a higher education. Unless this decision is overturned, many bright, intelligent, hard working and motivated students will be relegated to low-paying menial jobs.

#### IV. EQUAL PROTECTION ANALYSIS

The Federal Constitution guarantees to any person within the jurisdiction of the United States equal protection of the laws.<sup>80</sup> If the states or the federal government<sup>81</sup> enact laws which discriminate against a discrete group or classification of people—including aliens<sup>82</sup>—the law will be struck down, unless the state or federal governments provide adequate justification.<sup>83</sup>

73. *Id.* at 9.

74. *Id.*

75. 225 Cal. App. 3d 972 (1990) (holding that undocumented aliens were precluded from establishing state residency for tuition purposes under § 68062(h)).

76. *AAW*, No. B072439, 1995 WL 15414 at 2 (Cal. App. Jan. 17, 1995).

77. *Id.*

78. *Id.* at 3.

79. *Id.*

80. U.S. CONST. art. XIV, § 1. The Fourteenth Amendment states that "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." *Id.* (emphasis added).

81. The Fifth Amendment has been interpreted to impose the same restrictions on the federal government that the Fourteenth Amendment explicitly imposes on the states. *See, e.g., Mathews v. Diaz*, 426 U.S. 67 (1976). *See generally* Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977).

82. *See Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Supreme Court stated that an alien was a "person" in any ordinary sense of the term, regardless of his immigration status. *Id.* at 210.

83. *See generally* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-1 to 16-8 (2d ed. 1988).

Federal courts apply varying standards of review to laws challenged under the federal Equal Protection Clause depending upon the rights involved, the nature of the classification and whether there are any countervailing constitutional concerns.<sup>84</sup> The "mere rationality" standard is applied to those legislative classifications which do not affect a suspect class or a fundamental interest.<sup>85</sup> Under this standard, the state or federal government need only demonstrate that the classification is rationally related to a legitimate governmental purpose.

However, when a classification affects a suspect class<sup>86</sup> or infringes on a fundamental right<sup>87</sup>, the court applies a strict scrutiny analysis. Under this standard, the law will be upheld only if it is necessary to achieve a compelling governmental interest. In recent decisions, the Supreme Court has also developed an intermediate standard of review,<sup>88</sup> requiring that the classification serve important governmental objectives, and be substantially related to the achievement of those objectives.<sup>89</sup>

The California Supreme Court has adopted the traditional two-tiered standard of review for evaluating legislative classifications under the state's equal protection provisions.<sup>90</sup> But while the state equal protection clause may require a higher level of justification for a classification created by the state, the California Constitution cannot be less protective than the United States Constitution.<sup>91</sup>

Under both the state or the federal equal protection clauses, legislative classifications will usually survive under a "mere rationality" test, since the courts will accept any "conceivable" purpose for the legislation.<sup>92</sup> On the other hand, classifications based on a suspect class or infringing upon a fundamental right will usually be struck down under a strict scrutiny analysis.<sup>93</sup> While a suspect classification is based on race or national origin,

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84. *Id.*

85. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

86. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967).

87. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969).

88. The Supreme Court has employed intermediate review primarily in gender-based discrimination cases and in cases involving discrimination against illegitimate children. *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976); *Lalli v. Lalli*, 439 U.S. 259 (1978).

89. *Craig v. Boren*, 429 U.S. 190 (1976).

90. *Sailer Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 16 (1971). *See generally Serrano v. Priest*, 5 Cal. 3d 584, 597 (1971); *Hawkins v. Superior Court*, 22 Cal. 3d 584, 592 (1978); *Molar v. Gates*, 98 Cal. App. 3d 1, 13 (1979).

91. *Serrano I*, 5 Cal. 3d 584 (1971); *Serrano II*, 18 Cal. 3d 728 (1977).

92. *See Allied Stores v. Bowers*, 358 U.S. 522 (1959). *But see City of Cleburne v. Cleburne Living Center* 473 U.S. 434 (1985).

93. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *But see Korematsu v. United States*, 323 U.S. 214 (1944).

both the state and federal courts have had a more difficult time defining what rights are fundamental.

A. *What is a fundamental right?*

There are two classes of rights which are deemed "fundamental." The first class consists of rights which are explicitly guaranteed by a constitutional provision other than the Equal Protection Clause.<sup>94</sup> Fundamental rights such as the freedom of speech, religion, press and assembly are explicitly recognized in the Bill of Rights.<sup>95</sup> The second class includes rights that are perceived to be important and implicitly granted by the Constitution.<sup>96</sup> Some of the rights implicit in the Constitution include the rights to vote and to travel.<sup>97</sup>

As a result, any state action that infringes upon a fundamental right is reviewed under the strict scrutiny standard.<sup>98</sup> Thus, before a state can abridge these basic freedoms, it must demonstrate that the classification is necessary to achieve a compelling state interest; otherwise, the classification will be struck down.

The fundamental rights protected by the federal Constitution are also guaranteed by the California Constitution. The California courts also require that the state show a compelling interest if it infringes upon a fundamental right.<sup>99</sup> The California Supreme Court has gone a step further by recognizing other fundamental rights not recognized under the federal Constitution. Education is a prime example.

B. *Is Education a Fundamental Right?*

1. *The United States Constitution*

The United States Supreme Court addressed the issue of whether education was a fundamental right in *San Antonio Independent School District v. Rodriguez*.<sup>100</sup> In this case, a class action suit was brought on behalf of poor and minority school children challenging the Texas public school financing system which relied on local property taxes.<sup>101</sup> The plaintiffs claimed that Texas' system violated the Equal Protection Clause of the Fourteenth Amendment because schools located in low-income

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94. See generally Tribe, *supra* note 83.

95. U.S. CONST. amends. I to X.

96. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

97. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (imposition of a poll tax as a prerequisite for voting could not survive strict scrutiny). See also *Shapiro v. Thompson*, 394 U.S. 618 (1969).

98. See *Shapiro*, 394 U.S. at 634.

99. *Serrano I*, 5 Cal. 3d 584 (1971).

100. 411 U.S. 1, 17 (1973).

101. *Id.* at 5.

areas received less money for education than schools located in wealthier areas.<sup>102</sup> As a result, the quality of education provided was directly proportional to the wealth of the area in which the school was situated.<sup>103</sup>

To determine whether education could be considered a fundamental right, the court first assessed "whether there is a right to education explicitly or implicitly guaranteed by the Constitution."<sup>104</sup> The Court did not dispute the importance of an education, but it refused to create a substantive constitutional right to an education.<sup>105</sup> It stated that such "social importance is not the critical determinant for subjecting state legislation to strict scrutiny."<sup>106</sup> Thus, because the right to an education could not be derived from the federal Constitution, the Court held that it was not fundamental.<sup>107</sup>

Because the court determined that education is a fundamental right, it did not apply a strict scrutiny analysis. Thus, the school district only had to prove that the financing system was rationally related to a legitimate state interest. After concluding that a rational relationship existed, the Court upheld Texas' financing system.<sup>108</sup> Hence, under the Fourteenth Amendment, education is not a fundamental right and legislative classifications will be reviewed under a "mere rationality" standard.

## 2. *The California Constitution*

Despite the *Rodriguez* decision, the California Supreme Court has determined that education is a fundamental right under the equal protection guarantees of its state constitution. Therefore, a strict scrutiny standard will apply when this right is trespassed upon.<sup>109</sup> Two cases, which first presented the issue to the California Supreme Court, *Serrano I* and *II*, were brought by the same parties challenging the constitutionality of California's public school financing system.<sup>110</sup>

*Serrano I* first came before the California Supreme Court in 1971<sup>111</sup> when the court held that the case had been erroneously dismissed and should have been allowed to go to trial. On remand, the trial court ruled that the financing system was unconstitutional under the state constitution's equal protection clause.

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102. *Id.* at 16.

103. *Id.* at 23.

104. *Id.* at 33-34.

105. *Id.*

106. *Id.* at 32.

107. *Id.* at 35.

108. *Id.* at 55.

109. *Serrano II*, 18 Cal. 3d 728 (1977).

110. *Serrano I*, 5 Cal. 3d 584 (1971); *Serrano II*, 18 Cal. 3d 728 (1977).

111. *Serrano I*, 5 Cal. 3d at 584.

The defendants appealed, claiming that *Serrano I* should be overturned because of the United States Supreme Court's ruling in *Rodriguez*.

The facts in *Serrano I* were almost identical to those in *Rodriguez*.<sup>112</sup> In *Serrano I*, elementary and high school students and parents, concerned with the financing of California's public school system, brought a class action suit against state and county officials.<sup>113</sup> They claimed that the financing system relied heavily on local property taxes and resulted in substantial disparities in expenditures per pupil due to the differences in local and taxable wealth between districts. Essentially, they argued, poorer districts had less for school expenditures than wealthier districts.<sup>114</sup> Thus, the quality and opportunities of education were substantially unequal between rich and poor districts and violated the equal protection clause of the California Constitution.<sup>115</sup>

The California Supreme Court decided that its prior decisions had held the equal protection provisions<sup>116</sup> of the state constitution to be "substantially the equivalent" to be the equal protection clause of the Fourteenth Amendment of the federal Constitution.<sup>117</sup> Yet, although substantially equivalent to the guarantees of the federal Constitution, the court found that California's equal protection provisions "possessed of an independent vitality which, in a given case, may demand an analysis different from . . . the federal standard . . ."<sup>118</sup> The court further stated that "[although] decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, [they] are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law."<sup>119</sup> Accordingly, as long as California provides the minimum protections set forth by the Federal Constitution, it may provide additional guarantees for state residents.<sup>120</sup>

C. *Access to Elementary and Secondary Education is a Fundamental Right Under the California Constitution.*

In *Serrano II*, the California Supreme Court affirmed its finding under *Serrano I*, again concluding that education under

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112. *Rodriguez*, 411 U.S. at 1.

113. *Serrano I*, 5 Cal. 3d at 588.

114. *Id.*

115. *Id.*

116. CAL. CONST. art. I, § 7, cl. a.

117. *Serrano II*, 18 Cal. 3d at 763.

118. *Id.* at 764-65.

119. *Id.*

120. *Id.* at 766.

the state constitution was a fundamental right.<sup>121</sup> Education, the court stated, is the lifeline between the individual and society,<sup>122</sup> and is a major factor in assessing a person's chances for economic and social success.<sup>123</sup> Additionally, education influences an individual's participation in political and community life.<sup>124</sup>

The *Serrano I* court referred to *Brown v. Board of Education*<sup>125</sup> to exemplify the fundamental importance of an education. In *Brown*, the United States Supreme Court declared:

Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.<sup>126</sup>

*Serrano I* also recognized that a child's emotional and psychological development is influenced by what she learns in school.<sup>127</sup> In school, children are exposed to world views, ideas and experiences that they would otherwise not encounter. If education were not important, the *Serrano I* Court reasoned, then the state would not make it compulsory by requiring school attendance.<sup>128</sup> Therefore, the court was persuaded that the state recognized the value of obtaining an education.<sup>129</sup>

The *Serrano I* court also found that the drafters of the California Constitution explicitly acknowledged the importance of an education in Article IX, section 1:<sup>130</sup> The Constitution states, "[A] general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people [and] the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral . . . improvement."<sup>131</sup>

The court also reasoned that education was likely to foster the understanding of, and interest in, public issues which may then spur involvement in civic and political activities.<sup>132</sup> For instance the court stated, "At a minimum, education makes more meaningful the casting of a ballot."<sup>133</sup> Therefore, not only did the court find that an education creates a myriad of opportunities

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121. *Id.* at 768.

122. *Serrano I*, 5 Cal. 3d at 605.

123. *Id.*

124. *Id.*

125. 347 U.S. 483 (1954).

126. *Id.* at 493.

127. *Serrano I*, 5 Cal. 3d at 610.

128. *Id.* at 610.

129. *Id.*

130. *Id.* at 608.

131. CAL. CONST. art. IX, § 1. (emphasis added).

132. *Id.*

133. *Serrano I*, 5 Cal. 3d at 608.

for an individual to achieve economic stability, but it also concluded that an education encourages individuals to become active in the political process of our democratic society.<sup>134</sup>

Due to the distinctive and priceless function of an education in an individual's life and in society,<sup>135</sup> it was not difficult for the court to conclude that education was a fundamental right and that the school financing system had to be examined under strict judicial scrutiny.<sup>136</sup> After careful review of the evidentiary findings, the court held that the state failed to demonstrate how the California public school financing system was necessary to achieve a compelling state interest.<sup>137</sup> The court held that instead, the system denied all public school children of lower income districts the equal protection of the laws.<sup>138</sup>

#### V. SHOULD POSTSECONDARY EDUCATION BE DECLARED A FUNDAMENTAL RIGHT?

Since the facts in *Serrano I & II* were only concerned with elementary and secondary public education, the Supreme Court did not consider whether postsecondary education was also a fundamental right. However, it is significant that the court did not expressly exclude higher education from its ruling. Nevertheless, one California Court of Appeals decision has declined to extend *Serrano II* to postsecondary education.<sup>139</sup>

In *Gurfinkel v. Los Angeles Community College District* the plaintiff entered the United States from France with a valid visa and married a California resident.<sup>140</sup> Approximately six months later, she applied for admission to the Los Angeles Community College where she was classified as a nonresident pursuant to Education Code sections 68018, 68040(b) and 68050.<sup>141</sup> The plaintiff brought a suit claiming that the statutes constituted an unconstitutional burden on a fundamental right to college and community college education.<sup>142</sup> Nevertheless the court rejected the plaintiff's claim by limiting the holding in *Serrano I & II* to education ranging from kindergarten through twelfth grade.<sup>143</sup> In *Gurfinkel*, the plaintiff's failure to provide evidence demon-

134. *Id.* at 608-09.

135. *Id.*

136. *Serrano II*, 18 Cal. 3d at 766.

137. *Id.* at 768-69, 776.

138. *Id.* at 769.

139. *Gurfinkel v. Los Angeles Community College Dist.*, 121 Cal. App. 3d, 1 (1981).

140. *Id.* at 4.

141. *Id.*

142. *Gurfinkel*, 121 Cal. App. 3d at 4.

143. *Id.* at 6.

strating that a college education was essential to compete in the labor force was fatal to her claim.<sup>144</sup>

In contrast, there was substantial evidence in the *Leticia "A"* case indicating the value of higher education in California. Over the last several years, those without a college education have been at a disadvantage due to changes in technology and the specialization of the labor force. Essentially, those persons with only a high school diploma have been relegated to low paying, menial jobs.<sup>145</sup> In contrast, persons with a college education have an income substantially greater than persons without a college education.<sup>146</sup> An expert witness in *Leticia "A"* testified that in 1988 the annual income of those persons with five or more years of college was more than 80% greater than those with only a high school degree.<sup>147</sup>

The *Leticia "A"* court also cited statistics showing higher unemployment rates for people without college degrees.<sup>148</sup> In 1988, the unemployment rate for those with a high school degree was 5.4%, whereas the rate for those who had four or more years of college was 1.7%.<sup>149</sup> Thus, the evidence indicates that postsecondary education is a strong determinant of economic success.

Additionally, postsecondary education not only benefits the individual, society as well. For example, educated people are usually well informed about political issues affecting their communities. Consequently, they are more likely to participate in state and local elections than people who are not as educated and less informed.<sup>150</sup> Moreover, the state also benefits from providing access to college because people with a postsecondary education are less likely to depend on government programs for support. Therefore, the state has a strong interest in ensuring that its residents attain an educational level that will ensure them economic stability.

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144. *Id.* at 6 n.3. The court stated:

[Plaintiff] merely asserts that a high school education does not adequately prepare a young person to take a rightful place in society and compete in the job market, without relying on any evidence introduced to that effect before the trial court. Further, [the plaintiff] presented no cognizable evidence indicating that individuals with community college educations are better able to compete in the work force.

*Id.*

145. *Leticia "A"*, No. 588982-4982-4 at 8 (Cal. Super. Ct. May 19, 1992) (clarification order affirming the permanent injunction against the UC system).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Leticia "A"*, No. 588982-4982-4 at 10. Another expert in the *Leticia "A"* case testified about the degree to which educated people are involved in political and community affairs. In 1988, 82% of those with five or more years of college voted compared to 55% of the high school graduates. *Id.*

The fact that postsecondary education is not compulsory does not diminish its importance and indispensability. Because higher education is voluntary does not mean that it is not fundamental: rather, it indicates that college-age adults are capable of making their own educational decisions.<sup>151</sup>

Since society has become more complex and technologically advanced, higher education has become part of the total educational system.<sup>152</sup> While in the past, an individual could obtain the basic skills for economic success through an elementary or secondary education, currently a person must obtain at least one or two years of college to compete in the non-menial labor market. Given the importance of a higher education to the economic success of an individual as well as the numerous benefits to society, higher education should be considered a fundamental right.

#### VI. POSTSECONDARY EDUCATION AS A FUNDAMENTAL RIGHT

Upon declaring higher education a fundamental right, the California Supreme Court should ensure that the state does not infringe upon that right. If such a right were established, only bona fide residents of the state would be guaranteed the equal protection of that right.<sup>153</sup> A bona fide resident is someone who intends to make a state her permanent home.<sup>154</sup> Evidence shows that undocumented immigrants who come to California usually stay permanently because of the establishment of familial relationships.<sup>155</sup>

The plaintiffs in *Leticia "A"* had resided in California for an average of seven years.<sup>156</sup> They were brought to California as minors and had attended elementary and secondary schools in the state.<sup>157</sup> They had no intent of leaving California.<sup>158</sup> The United States Supreme Court has staunchly held that "illegal entry into the country would not, under traditional criteria, bar a

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151. *Id.* at 12.

152. *See generally* Piper v. Big Pine School Dist., 193 Cal. 664 (1924). The Supreme Court declared that "each grade [was] preparatory to a higher grade . . . the common schools are doorways opening into chambers of science, art and the learned professions as well as in to fields of industrial and commercial activities." *Id.* at 673.

153. Since the United States Supreme Court has held that durational requirements for the purpose of establishing state residency are constitutional, students must live in California for one year or more in order to be classified as residents under California Education Code § 68017.

154. *See supra* Olivas, note 30, at 266.

155. *Leticia "A"*, 588982-4982-4 at 3 (Cal. Super. Ct. May 19, 1992) (clarification order affirming the permanent injunction against CSU).

156. *Id.* at 1-2.

157. *Id.* at 4.

158. *Id.*

person from obtaining domicile within a State.”<sup>159</sup> Thus, the *Leticia “A”* plaintiffs were properly classified as bona fide residents because they, like most undocumented students, met the requirements of a year’s residence and intent to remain in California.

However, under California Education Code section 68062(h), aliens are required to prove that they are not precluded from establishing residency under the Immigration and Nationality Act. Under a strict scrutiny analysis, this extra requirement placed on aliens does not serve a compelling state interest. According to the *Bradford*<sup>160</sup> court, the state has an interest in not subsidizing violations of the law by precluding undocumented students from establishing residency.<sup>161</sup> Under that decision, the state can conserve its fiscal resources for the benefit of its lawful residents and the state has an interest in restricting employment of undocumented aliens.<sup>162</sup> Nevertheless, these interests do not seem compelling enough to survive strict scrutiny for several reasons.

First, aliens who are undocumented today may very well be documented tomorrow. The *Bradford* court presumes that undocumented aliens cannot legalize their immigration status in the future. Although undocumented aliens are subject to deportation at any time, deportation is within the discretion of the United States Attorney General.<sup>163</sup> Moreover, undocumented aliens can qualify for employment visas.<sup>164</sup> According to Professor Bill Hing, an expert who testified in *Leticia “A”*,<sup>165</sup> it is much easier now for educated people with college degrees to obtain legal status through employment visas.<sup>166</sup>

Also, the *Bradford* court overlooked the contributions undocumented aliens make to the state’s economy.<sup>167</sup> Undocumented aliens satisfy important employment needs, primarily in the service sector,<sup>168</sup> despite immigration laws imposing sanc-

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159. *Plyler v. Doe*, 457 U.S. 202, 227 n.22 (1982).

160. *Regents of Univ. of Cal. v. Super. Ct.*, 225 Cal. App. 3d 972 (1990).

161. *Id.* at 981.

162. *Id.*

163. *See, e.g.*, 8 U.S.C. §§ 1252, 1253(h), 1254 (1988).

164. *See, e.g.*, 8 U.S.C. § 1153(b).

165. No. 588982-4982-4 (Cal. Super. Ct. May 19, 1992) (clarification order affirming permanent injunction against CSU).

166. *Id.* at 5. Professor Hing was a member of the Congressional Select Commission, which issued a report that became the foundation of most of the immigration legislation in the last decade. He testified that Congress intended to reward the educational efforts of undocumented students by giving them the opportunity to obtain employment visas and allowing them to become lawful permanent residents. *Id.*

167. Patrick Lee, *Studies Challenge View That Immigrants Harm Economy*, L.A. TIMES, Aug. 13, 1993, at A33.

168. *Leticia “A”*, No. 588982-4982-4 at 3 (Cal. Super. Ct. May 19, 1992) (clarification order affirming the permanent injunction against CSU).

tions on employers who hire undocumented aliens. Undocumented aliens also pay taxes and tend not to seek tax refunds that are due to them.<sup>169</sup>

California's policy barring undocumented aliens from establishing resident status for tuition purposes, even for those who have resided in the state for several years and who intend to remain, fails to advance any compelling state interest. Therefore, California Education Code section 68062(h) should be declared unconstitutional under the state's equal protection clause.

## VII. CONCLUSION

Higher education, like elementary and secondary education, is a strong determinant of an individual's future economic and social success. As our society becomes more technologically advanced, higher education becomes essential. Those who do not possess a college degree are relegated to lower paying jobs and are more susceptible to economic instability. Therefore, California has a strong interest in ensuring that all those who desire to pursue a higher education may do so without any substantial barriers imposed by the state.

Despite the importance of education, California currently places a substantial burden on undocumented aliens by requiring them to pay out-of-state tuition fees simply because they are undocumented. Thus, the state chooses to penalize students who have demonstrated that they are intelligent, hard-working and motivated individuals simply because of their immigration status. A high proportion of our teenage citizens and legal residents are already ineligible for higher education because they drop out of elementary and secondary schools. And incredibly, the state chooses to drive undocumented students out of schools and into the street, destroying any hopes that these students have of using their minds, creativity, and hard work to improve our society.

There is no doubt that undocumented students and their families will remain in California despite the legislature's efforts to expel them through California Education Code section 68062(h) and other legislation. Evidence shows that most undocumented aliens have resided in California well beyond the one year requirement imposed by the California Education Code section 68017 to establish residency. Most also intend to remain permanently in California. In essence, they are bona fide residents of the state.

California cannot continue to penalize undocumented students who aspire to obtain a higher education and improve their

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169. *Id.*

economic condition. Due to the increasing importance of higher education, the California courts must declare higher education a fundamental right. Upon declaring it a fundamental right, the courts should then declare that California Education Code section 68062(h) does not serve a compelling state interest and, thus, violates the equal protection clause of the California Constitution.

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† J.D. expected 1995, UCLA School of Law; B.A., 1991, University of California at Berkeley. I dedicate this Comment to John A. Ramirez. Without his love, encouragement and support I could never have completed this project. Special thanks to Peter Hernandez for his encouragement, suggestions and editing assistance.