NOTES

NEW JERSEY'S ATTACK ON MIXED-STATUS FAMILIES: THE UNCONSTITUTIONALITY OF NEW JERSEY'S IMMIGRANT ELIGIBILITY REQUIREMENTS FOR FOSTER PARENTS

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[*] I am extremely grateful to Max Cadmus, Yelena Yukhvid, and the entire staff and editorial board of the *Rutgers University Law Review* for their patience and hard work. I am also eternally grateful to Carol and Paul Miller for their incredible investment in my education and, of course, to my husband and parents for their support and understanding.

I. INTRODUCTION

When Marcos was nine years old, his father beat him so brutally he had to be hospitalized.[1] After the incident Marcos, a United States citizen, was removed from his father's care.[2] At the time, Marcos's mother Gloria, an undocumented immigrant, was hundreds of miles away; she had been deported to Mexico.[3] When Gloria heard about the abuse she crossed the United States-Mexico border in an effort to reunite with her son.[4] Immigration and Customs Enforcement apprehended her in Texas and placed her in immigration detention.[5]

Despite being removed from his father and separated from his mother, Marcos was not alone. He had a network of family members residing in the same community where he had lived with his father.[6] After the state's child protection services became involved in Marcos's case, his aunts and uncles told the child welfare agency that they loved their nephew and wanted to care for him until he could be reunited with his mother.[7] A caseworker inspected his aunt's home and found a stable, happy family.[8] However, instead of being placed with his relatives, Marcos has languished in foster care.[9] The state child protection agency refused to place the boy with his family members because they did not have legal immigration status.[10] An immigrant rights advocate familiar with the family's situation said, "'It is heartbreaking . . . [Marcos] has no permanent place. He's confused.'"[11]

To make matters worse, the state has claimed that Gloria legally abandoned Marcos and has filed a petition to force her to relinquish

1. Ryan J. Stanton, *Undocumented Immigrants Losing Fight to Keep Children Who Are U.S. Citizens,* ANN ARBOR NEWS (Apr. 15, 2012, 5:59 AM), http://www.annarbor.com/news/undocumented-immigrants-losing-the-fight-to-keep-their-us-citizen-children/.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

custody of her son.[12] The results could be disastrous for Marcos. If his mother loses custody, he will most likely spend his teenage years cycling through the foster care system.[13] If his mother fights to retain custody, Marcos will face the same result—a protracted custody battle with the state means more time in foster care. Marcos's bleak situation is amplified by the fact that loving family members were willing to welcome him into their home.[14]

Marcos personifies a disconnect between federal child welfare policy and state practice. Despite evidence that children removed from the home are better off being placed with family members,[15] some states' child welfare agencies require children like Marcos to be placed in foster care because their relatives are undocumented.[16] Unfortunately, New Jersey's child welfare regulations mandate the same outcome.[17]

This Note argues that New Jersey's immigration status requirements for foster parents are unconstitutional and part of a broad yet insidious attack on the rights of citizen children in mixed-status families.[18] Part I provides a brief history of the development of child protective services in the United States and an overview of how the system is administered today. Part II avers that New Jersey's immigrant eligibility requirement for foster parents violates the Supremacy Clause and Equal Protection Clause of the United States Constitution, along with Article I, paragraph 1 of the New Jersey Constitution. Finally, Part III contextualizes New Jersey's regulation

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12. *Id.*

13. Marcos's foster parents have no intention of providing a permanent home for him. *Id.*

14. *Id.*

15. According to Seth Freed Wessler

> Research studies indicate that children who enter the child welfare system and are placed with family or friends are less likely to be moved around from foster home to foster home, are more likely to continue living with their siblings and, perhaps most importantly, are more likely to say that they 'always felt loved.'

SETH FREED WESSLER, APPLIED RESEARCH CENTER, SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 52 (2011).

16. *See id.* (discussing a study that finds that children with Latin American ancestry are less likely to be placed with relatives because of agency policies prohibiting placement with undocumented relatives).

17. For a discussion of New Jersey child welfare regulations and immigrant eligibility, see *infra* Part I.B.

18. For the remainder of this Note, the term "citizen child" or "citizen children" will be understood to apply to citizen children who are part of mixed-status families. The term "mixed-status" applies to families comprised of people who are citizens/lawful residents and people without legal immigration status. *See* Oliver Ortega, *What Are Mixed-Status Families?*, IMMIGRANT CONNECT CHI. (Dec. 4, 2012), http://www.immigrantconnect.org/2012/12/04/sidebar/.

and demonstrates that it is part of a broader trend towards the erosion of rights for citizen children in mixed-status families.

II. UNDERSTANDING THE FEDERAL AND STATE ADMINISTRATION OF CHILD PROTECTIVE SERVICES

A. Historical Overview

Historically, the federal government was not involved in the administration of child protection programs.[19] In the 1700s, child welfare was largely a private matter and families who could not care for their children would often indenture them to work for other families.[20] In the 1800s, churches and charitable organizations began creating orphanages and private adoption programs.[21] In 1875, the New York Society for the Prevention of Cruelty to Children—the first ever non-governmental organization devoted entirely to child protection—was formed and "by 1922, some 300 nongovernmental child protection societies were scattered across America."[22]

The federal government took its first step into child protection when it created the Children's Bureau in 1912.[23] Decades later, the infrastructure for the contemporary system of child protection services began to take shape with the passage of the 1935 Social Security Act.[24] Section 521 of the statute states

> For the purpose of enabling the United States, through the Children's Bureau, to cooperate with State public-welfare agencies in establishing, extending, and strengthening, especially in predominantly rural areas, public-welfare services . . . for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent, there is hereby authorized to be appropriated for each fiscal year . . . the sum of $1,510,000.[25]

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19. KASIA O'NEILL MURRAY & SARAH GESIRIECH, PEW CHARITABLE TRUST, A BRIEF LEGISLATIVE HISTORY OF THE CHILD WELFARE SYSTEM 1 (2004), *available at* http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/LegislativeHistory2004pdf.pdf.

20. *Id.* Compare this with the pre-independence examples of government involvement in child welfare mentioned in John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 450 (2008); namely, legislation that permitted magistrates "to remove children from parents who did not 'train up' their children properly" and the story of an orphan who was removed from a sexually abusive family placement.

21. MURRAY & GESIRIECH, *supra* note 19, at 1.

22. Myers, *supra* note 20, at 451-52.

23. *Id.* at 452-53.

24. *See id.* at 453 (describing the child protection provision in the Social Security Act as "a modest step toward what in the 1970s became a central role for the federal government in efforts to protect children"); *see also* Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in 42 U.S.C. §§ 301-1397mm (2012)).

25. Social Security Act of 1935, §521 (codified as amended at 42 U.S.C. § 721,

Despite the federal appropriation of funds for child welfare services, a national survey conducted in 1956 revealed that "many communities had no agency clearly in charge of [child welfare]."[26] Just six years later, three events marked a watershed in the recognition and administration of child protection programs. First, Dr. Henry Kempe published *The Battered-Child Syndrome*,[27] an article that brought significant media and medical attention to the issue of child abuse.[28] Second, Congress amended the Social Security Act to require states to offer comprehensive child protective services by 1975.[29] Finally, the federal Children's Bureau recommended that states enact legislation to require doctors to report instances of child abuse to law enforcement or child protection agencies.[30] "By 1967, all states had reporting laws."[31]

After 1962, Congress took additional steps to centralize the federal government's power over child protection services. The Child Abuse Prevention and Treatment Act ("CAPTA"),[32] passed in 1974, effected three major changes: (1) it created a new federal agency, the National Center on Child Abuse and Neglect; (2) funded research about child abuse and; (3) "focused particular attention on improved investigation and reporting."[33]

B. Modern Child Welfare Administration and Immigrant Eligibility

Today, the administration of federal foster care benefits is governed by Title IV-E of the Social Security Act ("Title IV-E"),[34] a provision enacted by the Adoption Assistance and Child Welfare Act of 1980.[35] Title IV-E allocates federal funds to state foster care programs and requires states that accept Title IV-E funds to "make foster care maintenance payments on behalf of each child who has been removed from the home."[36]

In order to be eligible for federal foster care maintenance

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repealed 1968).

26. Myers, *supra* note 20, at 453.

27. C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 17 (1962).

28. Myers, *supra* note 20, at 455.

29. *Id.*

30. *Id.* at 456.

31. *Id.*

32. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974), *amended by* CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, 124 Stat. 3459 (codified in scattered sections of 42 U.S.C.).

33. Myers, *supra* note 20, at 457.

34. Social Security Act Title IV-E, 42 U.S.C. §§ 670-679 (2012).

35. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

36. Social Security Act Title IV-E § 672(a)(1).

payments, Title IV-E requires children to meet immigration status guidelines laid out in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA").[37] Citizen children and children who have been legal permanent residents for five years are eligible for Title IV-E benefits.[38] Children who have been legal permanent residents for fewer than five years may be eligible for benefits.[39] Undocumented children are not entitled to any benefits.[40] It bears repeating that Title IV-E and PRWORA *do not* impose any immigration status requirements on adults who would like to foster citizen children.[41] Similarly, federal regulations governing the administration of foster care benefits do not require foster parents to demonstrate legal immigration status.[42]

Like Title IV-E, New Jersey's child protection legislation does not require foster parents to demonstrate legal immigration status.[43] Strangely, though there is no federally compelled reason to do so, New Jersey's regulations require foster parents[44] and anybody in the foster parents' household to produce proof of legal status.[45] Even stranger, the relevant provision does not appear in the portion of the regulation that outlines general eligibility criteria and mandates background checks.[46] Instead, the provision is buried in the part of the regulatory scheme that addresses home visits.[47] Section 10:122C-5.3 of the New Jersey Administrative Code states:

> (a) The applicant shall permit and participate in a home study by the Department or contract agency. The completed home study shall include:
>
> > 1. Identifying information on each applicant and household member, including: . . .
> >
> > > ii. A visa or United States Immigration and Naturalization Service documentation as evidence of legal residency, if the resource family parent or applicant is not a citizen of the

37. *Id.* §672(a)(4); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (relevant immigration provisions codified as amended in 8 U.S.C. §§ 1601-1646 (2012)) [hereinafter "PRWORA"].

38. *See* PRWORA § 403(a) (codified as amended at 8 U.S.C. § 1613 (2012)).

39. *Id.*

40. *Id.* §§ 401(a), 411(a) (codified as amended at 8 U.S.C. §§ 1611(a), 1621(a) (2012)).

41. *See* Social Security Act Title IV-E§§ 670-679(c); PRWORA §§ 400-435 (codified as amended at 8 U.S.C. §§ 1601-1646 (2012)).

42. 45 C.F.R. § 1356.30 (2013).

43. N.J. STAT. ANN. § 9:6B-4 (2013).

44. New Jersey's regulations refer to foster parents as "resource family parents." N.J. ADMIN. CODE § 10:122C-1.3(b) (2012). For the sake of continuity, the term "foster parent" will be used throughout this Note.

45. N.J. ADMIN. CODE § 10:122C-5.3 (2012).

46. *See* N.J. ADMIN. CODE §§ 10:122C-5.1, 5.4, 5.5 (2012) (identifying "general personal requirements," criminal background checks and child abuse registry checks).

47. N.J. ADMIN. CODE § 10:122C-5.3 (2012).

> United States . . . .[48]

Therefore, in New Jersey, a child traumatized by abuse and family separation could be put into the foster care system instead of placed with relatives.[49] With the story of Marcos and his family in mind,[50] it is not hard to imagine how this regulation could have disastrous results for children in New Jersey. According to a 2011 report by the Applied Research Center:

> Child welfare experts agree that as a general rule, children are better off living with . . . relatives than in foster care . . . . Research studies indicate that children who enter the child welfare system and are placed with family or friends are less likely to be moved around from foster home to foster home, are more likely to continue living with their siblings and, perhaps most importantly, are more likely to say that they "always felt loved."[51]

Thus, New Jersey's regulation is completely antithetical to the placement practices most child welfare specialists recommend for vulnerable children. In addition to being detrimental to child welfare, and indeed, in part because it is so detrimental to children, New Jersey's immigration status requirements are unconstitutional. The remainder of this Note is dedicated to explaining why New Jersey's foster care provisions are constitutionally unsound and why the regulation should be a cause of concern for scholars and advocates.

III. THE UNCONSTITUTIONALITY OF NEW JERSEY'S IMMIGRANT ELIGIBILITY REQUIREMENTS FOR FOSTER PARENTS

New Jersey's immigrant eligibility regulation is susceptible to several constitutional attacks. First, the provision is preempted by federal law and runs afoul of the Supremacy Clause.[52] Second, the regulation creates a suspect class of citizens and violates the Equal Protection Clause of the Fourteenth Amendment.[53] Finally, the regulation violates Article I, paragraph 1 of New Jersey's Constitution because it abrogates the rights of the state's most vulnerable children.[54]

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48. *Id.*

49. It is worth noting that the regulation is drafted in a way that could prevent a citizen child from being placed with his or her lawfully admitted relatives because an undocumented person lives in the household. *See id.* (requiring immigration documentation for all household members when the foster parent is not a United States citizen). For example, if a citizen child has grandparents who are legal permanent residents, the grandparents would not be able to care for their grandchild if another household member is out of status.

50. See *supra* Introduction for Marcos's story.

51. *See* WESSLER, *supra* note 15, at 52 (citations omitted).

52. *See infra* Part II.A.

53. *See infra* Part II.B.

54. *See infra* Part II.C.

A. New Jersey's Immigrant Eligibility Requirement is Preempted by Federal Child Welfare Provisions

Preemption is the constitutional precept that some federal laws supplant state laws.[55] Preemption doctrine is a product of our government's evolutionary process. After independence, the states drafted the Articles of Confederation and created a system of sovereign states.[56] The system of sovereign states ultimately failed and inspired the dual federal system adopted in the Constitution.[57] The drafters of the Constitution settled on a system of enumerated federal powers and explicitly laid out some of the contours of federal preemption doctrine.[58] Federal powers fell into two categories: exclusive powers and concurrent powers.[59] Examples of exclusive federal powers are treaty formation and minting currency.[60] Concurrent federal powers include taxation and almost any power that was granted to Congress and not explicitly denied to the states.[61] The final result is a federal preemption doctrine bound on one side by the Supremacy Clause[62] and on the other by the Tenth Amendment.[63]

Modern preemption doctrine is divided into two broad categories: informal preemption and formal preemption.[64] Informal preemption occurs when Congress creates statutes, particularly federal grants, that do not explicitly preempt state laws but place conditions on funding that ultimately require states that accept funding to voluntary preempt regulation of their own activity.[65] Formal preemption occurs in the following three scenarios: 1) express preemption: a statute executed by Congress explicitly removes a particular power from the states; 2) field preemption: Congress so wholly occupies a regulatory field that there is "'no room for the States to supplement it'" or the federal interest is so pervasive it can be inferred that states may not

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55. BLACK'S LAW DICTIONARY 1297 (9th ed. 2009).

56. *See* JOSEPH F. ZIMMERMAN, FEDERAL PREEMPTION: THE SILENT REVOLUTION 20-21 (1991) (describing the states' opposition to relinquishing power and the Articles of Confederation recognition of sovereign states).

57. *See id.* at 21-22.

58. The Supreme Court did not refer to the preemption doctrine during the nineteenth century but framed the same issue in terms of distribution of state and federal power. *See* Viet D. Dinh, *Federal Displacement of State Law: The Nineteenth-Century View*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 27 (Richard A. Epstein & Michael S. Greve eds., 2007) (explaining that the term "preempt" was not used in the Court's constitutional jurisprudence until 1917).

59. *See* ZIMMERMAN, *supra* note 56, at 24.

60. *Id.*

61. *Id.*

62. U.S. CONST. art. VI, cl. 2.

63. U.S. CONST. amend. X.

64. *See* ZIMMERMAN, *supra* note 56, at 3, 35.

65. *See id.* at 35.

regulate the same area of law; and 3) conflict preemption: a state law conflicts with federal law and impedes enforcement of federal law.[66]

Although preemption doctrine is famously murky,[67] the Supreme Court has provided some guiding principles. First, the Court has adopted a presumption against federal preemption.[68] This presumption can be overcome when Congress's "clear and manifest purpose" is to create a federal provision that trumps state regulation.[69] Naturally, Congress's legislative intent is the "touchstone" of this type of analysis.[70] Finally, even where federal law does preempt state regulation, courts should tailor the scope of preemption to reflect Congress's intent and to avoid overly broad statutory interpretations that unnecessarily usurp the power of the states.[71] With these principles in mind, our attention now turns to whether federal child welfare laws preempt New Jersey's immigrant eligibility regulation.

1. Express Preemption

Of the three types of preemption, express preemption proves to be the easiest to analyze and apply to actual statutes. Indeed, one only has to read the language of the relevant federal provisions. A closer look at the Social Security Act reveals that it does not expressly preempt New Jersey's immigrant eligibility regulation.[72]

The Social Security Act, specifically Title IV-E's provisions on foster care programs, does not contain any language that could be understood to expressly preempt state regulation.[73] In fact, because Title IV-E appropriates funds to be administered by state agencies, it actually requires concurrent state regulation of foster care.[74] Instead of creating a detailed system of federal regulation, Title IV-E enumerates the core provisions and requirements states must meet to

66. Arizona v. United States, 132 S. Ct. 2492, 2500-01 (2012) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

67. Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39, 40 (2005) ("Preemption remains a notorious doctrinal labyrinth . . . .").

68. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) ("Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" (quoting *Rice*, 331 U.S. at 230)).

69. *Rice*, 331 U.S. at 230.

70. Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96, 103 (1963) ("There is thus conflict between state and federal law; but it is a conflict sanctioned by Congress . . . . The purpose of Congress is the ultimate touchstone.").

71. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996) (explaining that in preemption analysis, Congress's legislative purpose not only determines if preemption was intended at all, but also proscribes the scope of preemption when a federal scheme is deemed preemptive).

72. *See generally* Social Security Act Title IV-E, 42 U.S.C. §§ 670-79(c) (2012).

73. *See id.*

74. *See id.*

qualify for funds, and guides states in the creation of their own child welfare systems.[75] Moreover, Title IV-E's provision on statutory construction explicitly says the statute should not be interpreted to "preclud[e] State courts from exercising their discretion to protect the health and safety of children in individual cases."[76] Thus, Title IV-E cannot be understood to expressly preempt state regulation of immigrant eligibility.

2. Field Preemption

Field preemption provides a second possible argument for federal preemption of New Jersey's immigrant eligibility regulations. Field preemption occurs "[w]hen the Federal Government completely occupies a given field or an identifiable portion of it"—meaning, a federal scheme leaves no room for additional regulation by the states.[77] Unlike express preemption, there is a colorable, albeit weak, argument that New Jersey's regulation is field preempted by federal law.

At first glance, Title IV-E and PRWORA seem to provide a comprehensive scheme of foster care fund appropriation requirements and immigrant eligibility.[78] The argument for field preemption is further supported by the federal government's power to regulate immigrants and immigration.

Historically, the federal government's power to regulate immigrants has preempted state efforts to do the same. The authority to admit or expel immigrants has been recognized as an exclusive federal power since the late 1800s.[79] The Supreme Court has expanded the scope of federal preemption to go beyond admitting and deporting aliens, and has also preempted state regulations that impact enforcement of federal immigration law, even when those provisions support or enhance the federal enforcement scheme.[80] Thus, because

75. *Id.*

76. *Id.* § 678.

77. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212-13 (1983).

78. Title IV-E of the Social Security Act expressly subjects eligibility for benefits to the immigrant eligibility provisions in PRWORA. *See* 42 U.S.C. § 672(a)(4). Meanwhile, PRWORA comprehensively addresses immigrant eligibility for a multitude of federal benefits, including payment to children in foster care. *See* PRWORA, Pub. L. No. 104-93, 110 Stat. 2105, 2260-76 (1996) (relevant immigration provisions codified in 8 U.S.C. §§ 1601-46).

79. Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) ("The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of congress, and to be executed by the executive authority . . . .").

80. The following are some examples of immigration regulations that have been implemented by states and subsequently found to be preempted by federal immigration law. First, states may not impose heightened immigration status requirements for employment because restricting an immigrant's ability to work is equivalent to

the regulations impact immigrants, there is some traction for a field preemption challenge.

Ultimately, a field preemption argument would most likely fail for two reasons. First, Congress structured Title IV-E to confer benefits on eligible children.[81] The child must meet Title IV-E and PRWORA's immigration eligibility requirements, not the foster parents.[82] Thus, the immigration status of the foster parent is wholly outside of the scope of the federal government's regulatory "field."

Second, though some forms of immigration regulation are field preempted, the scope of preemption remains quite narrow.[83] A provision is not automatically preempted because it happens to touch the lives of immigrants.[84] Indeed, recent Supreme Court decisions demonstrate that, when analyzing state statues for immigration dependent field preemption, the Court will carefully tease apart the challenged legislation.[85] Given the presumption against preemption, a challenge that falls outside the judicially recognized field of federal immigration enforcement would probably prove unsuccessful.

3. Conflict Preemption

The third and final type of preemption—conflict preemption—presents the most promising argument for federal preemption of New Jersey's immigrant eligibility requirements for foster parents. The Supreme Court has recognized two types of conflict preemption: "physical impossibility" preemption and "obstacle" preemption.[86] The

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deportation. *See* Truax v. Raich, 239 U.S. 33, 42 (1915) ("The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work."). The Supreme Court has also held that states may not criminalize an immigrant's failure to carry immigration documents or criminalize undocumented immigrants who decide to work or look for employment without proper work authorization. *See* Arizona v. United States, 132 S. Ct. 2492, 2501-05 (2012) (striking down Sections 3 and 5(c) of Arizona S.B. 1070). Similarly, state enforcement officers may not unilaterally enforce federal immigration law by arresting suspected undocumented immigrants without a warrant. *See id*. at 2505-07 (striking down Section 6 of Arizona S.B. 1070).

81. *See* 42 U.S.C. § 672(a)(1) ("Each State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home . . . .").

82. *See supra* Part I.B. (discussing the relationship between Title IV-E and PRWORA).

83. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996) (explaining that even when a preemption challenge succeeds, the scope of preemption will be narrowly tailored to Congress's legislative intent).

84. *See id.*

85. *See Arizona*, 132 S. Ct. at 2500-10 (applying careful analysis of each type of preemption before deciding if Arizona's immigration enforcement provisions were preempted by federal immigration law).

86. Christopher H. Schroeder, *Supreme Court Preemption Doctrine*, *in* PREEMPTION

former refers to scenarios in which it is impossible to comply with a federal statute and a state statute.[87] The latter applies to state laws that impede "'the accomplishment and execution of the full purposes and objectives of Congress.'"[88] The Court has been reluctant to use physical impossibility as grounds for preemption.[89] Obstacle preemption, however, has enjoyed much wider application.[90]

When the Supreme Court employs the concept of obstacle preemption, it does not require the federal statute at issue to explicitly state an objective in order to find the state law preempted.[91] Rather, the Court has taken some latitude to interpret Congress's intended purpose and to analyze its relationship to state law.[92] For example, in *Geier v. American Honda Motor Co.*, a motor vehicle tort action, the Court cast its net far beyond the stated purpose of the statute.[93] With the scaffolding of federal conflict preemption in place, it is not difficult to argue that New Jersey's immigrant eligibility regulation is susceptible to a conflict preemption challenge. Indeed, the regulation

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CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 119, 131-32 (William W. Buzbee ed., 2009).

87. *Id.* at 131 n.42 (citing Geier v. Am. Honda Motor Co., 529 U.S. 861, 867 (2000) (identifying physical impossibility as "a case in which state law penalizes what federal law requires")).

88. *Arizona*, 132 S. Ct. at 2501 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

89. *See* Schroeder, *supra* note 86, at 131.

90. *See id.* at 132.

91. *See id.* at 135 (stating that the Supreme Court undertakes "a very aggressive pursuit of federal purposes" when analyzing cases of obstacle preemption).

92. *See id.*

93. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 867 (2000). In order to fully understand how far the Court will go when analyzing the objective of a federal statute, it is worth detailing the facts of *Geier* and the Court's subsequent analysis. Alexis Geier sustained serious injuries in a car accident and, using a District of Columbia tort action, sued Honda for its failure to install airbags. *Id.* at 865. Several years before Geier's 1987 model Honda was manufactured, the Department of Transportation issued Federal Motor Vehicle Safety Standard 208 ("FMVSS 208"). *Id.* at 864.The stated purpose of FMVSS 208 was "to reduce the number of deaths of vehicle occupants, and the severity of injuries . . . by specifying equipment requirements for active and passive restraint systems." FED. MOTOR VEHICLE SAFETY STANDARDS No. 208, § 2 (1984) (codified in 49 C.F.R. § 571.208). Specifically, FMVSS No. 208 "requir[ed] auto makers to equip some but not all of their 1987 vehicles with passive restraints." Schroeder, *supra* note 86, at 132. The petitioner argued that FMVSS No. 208 established a minimum airbag requirement, not a prohibition on state causes of action that might encourage car manufacturers to install airbags more quickly than the federal standards required. *Geier*, 529 U.S. at 874-75. Given the language of the standard's purpose, the petitioner's assertion is certainly plausible. However, the court ultimately rejected the argument, instead holding that the objective of FMVSS No. 208 was to allow car manufacturers to decide what types of passive restraints they wanted to install and gradually introduce the use of different kinds of passive restraints. *Id.* at 881. To arrive at this conclusion, the Court engaged in a close scrutiny of the history of FMVSS No. 208, relevant case law, and statements from the Department of Transportation's Solicitor General. *Id.* at 875-83.

seems to contradict general principles of effective child welfare systems.[94] "Child welfare experts agree that" children removed from their parents generally enjoy better outcomes when placed with relatives.[95] Unsurprisingly and to their credit, Congress and the federal agencies that promulgate child welfare regulations have not ignored these principles.

According to a 2012 Congressional Research Services report, state agencies administering Title IV-E benefits "must have an approved Title IV-E plan that provides for core policies and procedures to accomplish the following . . . purposes: promote children's placement with relatives . . . by considering placement of a child with a relative rather than a non-relative foster caregiver."[96] Federal regulations lend even more weight to the proposition that state agencies should place children with their relatives, regardless of the family's immigration status. Specifically, section 1355.25(e) of Title 45 of the Code of Federal Regulations says services should be "flexible . . . and accessible to families and individuals, principally delivered in the home or the community, and are delivered in a manner that is respectful of . . . cultural groups."[97] Although this is hardly a statement of the federal government's intention to allow children to be placed with undocumented relatives, given the scope of the Court's analysis in *Geier*,[98] it certainly presents a challenge to New Jersey's regulatory scheme.

Imagine, for example, a child in New Jersey whose only relatives are her undocumented grandparents. The child's grandparents live in her community and speak the same language that she spoke at home with her parents. New Jersey's regulation makes the grandparents ineligible to serve as foster parents and would require the child to be placed with non-relatives.[99] This could result in the child being placed in a different community with foster parents who do not share the child's language or cultural background. Such an outcome directly contradicts the federal legislative mandate described in the Congressional Services Report and undermines the federal regulation that calls for cultural respect and community-oriented services.[100]

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94. *See* WESSLER, *supra* note 15, at 52.

95. *See id.*

96. EMILIE STOLTZFUS, CONG. RESEARCH SERV., R42794, CHILD WELFARE: STATE PLAN REQUIREMENTS UNDER THE TITLE IV-E FOSTER CARE, ADOPTION ASSISTANCE, AND KINSHIP GUARDIANSHIP ASSISTANCE PROGRAM 3 (2012).

97. 45 C.F.R. § 1355.25(e).

98. Geier v. Am. Honda Motor Co., 529 U.S. 861, 867 (2000).

99. *See infra* Part I.B.

100. Ironically, New Jersey's regulation contradicts the purpose of its own child welfare statute. According to New Jersey's "Child's Rights" law:

> A child placed outside his home shall have the following rights . . . [t]o the best efforts of the applicable department, including the provision or arrangement

For the foregoing reasons, New Jersey's immigrant eligibility requirement for foster parents is vulnerable to a conflict preemption challenge. The purpose of Title IV-E is to protect children in a way that serves their best interests.[101] New Jersey's regulation can lead to outcomes that fly in the face of widely held beliefs about child welfare, and more importantly, the beliefs adopted by Congress.[102]

B. New Jersey's Regulation Violates the Equal Protection Clause of the Fourteenth Amendment

A federal preemption argument is not the only avenue available to challenge New Jersey's immigrant eligibility regulation; the Equal Protection Clause of the Fourteenth Amendment provides an alternate path. Forged in the aftermath of the Civil War,[103] the Equal Protection Clause was a highly politicized compromise designed to protect the rights of newly emancipated slaves.[104] As Equal Protection jurisprudence evolved, the Clause was understood to protect "discrete and insular minorities,"[105] and to require that "all persons similarly circumstanced . . . be treated alike."[106]

Contemporary Equal Protection doctrine has developed into a two part analysis. First, courts determine how/if a state's classification disadvantages class members or somehow impedes their ability to exercise a fundamental right.[107] Then, depending on the nature of the

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> of financial or other assistance and services as necessary, to place the child with a relative . . . [and] [t]o have a placement plan, as required by law or regulation, that reflects the child's best interests and is designed to facilitate the permanent placement or return home of the child in a timely manner that is appropriate to the needs of the child.
>
> N.J. STAT. ANN. §9:6B-4 (2013).

101. *See* 45 C.F.R. § 1355.25 (2000) ("The . . . well-being of children and of all family members is paramount . . . . Services [should] . . . meet the . . . best interests and need of the individual(s) who may be placed in out-of-home care.").

102. *See supra* notes 94-97 and accompanying text.

103. *See* Laura A. Hernández, *Anchor Babies: Something Less Than Equal Under the Equal Protection Clause*, 19 S. CAL. REV. L. & SOC. JUST. 331, 334-35 (2010) (explaining that the Fourteenth Amendment was ratified in the wake of the Civil War to "piece back together a divided country" and protect freed slaves from violence).

104. When the federal government gathered to draft what is now the Fourteenth Amendment, the trajectory of Congress's debate was informed in large part by conflicting ideas about how to reintegrate the states that had seceded. *See* Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933, 934-35 (1984). Views on African American equality and suffrage were inextricably intertwined with the party politics of the day and fell into three main camps: Democrats, moderate Republicans and radical Republicans. *Id.*

105. United States v. Carolene Prod., 304 U.S. 144, 152-53 n.4 (1938).

106. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

107. Plyler v. Doe, 457 U.S. 202, 216-17 (1982) (acknowledging that in most circumstances the Court will defer to Congress's power to create classifications but when such classifications unduly burden the class, the classification is subject to judicial

classification, courts will apply one of the following levels of scrutiny (from most rigorous to least rigorous) to the government's reasons for imposing the classification: strict scrutiny, intermediate scrutiny and the rational basis test.[108]

1. Understanding the Classification Created by New Jersey's Regulation

Thus, an Equal Protection analysis begins with the nature of the classification being challenged. At first glance, New Jersey's immigrant eligibility requirement seems to construct a classification that distinguishes undocumented people who would like to be foster parents from their citizen or lawfully admitted alien counterparts. In reality, the classification actually burdens the eligible children, not the potential foster parents.

Eligibility for Title IV-E benefits are based on the individual child.[109] If deemed eligible, benefits are paid on behalf of the child; foster parents are conduits, not recipients.[110] Thus, when the New Jersey regulation is applied it either nullifies the child's eligibility for benefits or bars placement with the child's relatives. This places the child squarely between Scylla and Charybdis. On the one hand, the child can refuse the benefits she is eligible for and stay with her relatives. On the other hand, the child can accept the benefits and be placed in an institution or with strangers. Meanwhile, a similarly situated child with citizen relatives does not have to choose between receiving benefits and staying with family.

To date, the Supreme Court has not addressed this particular type of classification. However, if principles from previous Equal Protection

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review).

108. The Second Circuit Court of Appeals summarizes the three levels of review as follows:

> When a legislative enactment has been challenged on equal protection grounds, one standard of review is rational basis review, which requires that the law be rationally related to a legitimate government interest. A law will survive this level of scrutiny unless the plaintiff proves that the law's class-based distinctions are wholly irrational. A heightened level of review—strict scrutiny—applies when legislation discriminates on the basis of a person's membership in a suspect class or when it burdens a group's exercise of a fundamental right.
>
> More recently, the Supreme Court has developed an intermediate level of scrutiny that lies "[b]etween [the] extremes of rational basis review and strict scrutiny." (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988) . . . . Under intermediate scrutiny, the government must show that the challenged legislative enactment is substantially related to an important government interest.

Ramos v. Town of Vernon, 353 F.3d 171, 174-75 (2d Cir. 2003) (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)) (citations omitted).

109. *See* Social Security Act Title IV-E, 42 U.S.C. § 672.

110. *Id.* § 672(h).

cases are applied to the instant facts, it becomes clear that New Jersey's regulation should not survive any level of scrutiny. The Court's Equal Protection decisions concerning non-citizens and children are particularly instructive.

2. The Supreme Court's Stance on Alienage Classifications and Children

In *Graham v. Richardson*, the Supreme Court struck down state laws that made lawfully admitted immigrants ineligible for public assistance and found that classifications based on alienage "are inherently suspect and subject to close judicial scrutiny."[111] In the years following *Graham*, the Court continued to recognize alienage as a suspect class and struck down a series of exclusionary state provisions.[112] These decisions were later cabined by *Foley v. Connelie*.[113] In *Foley*, a legal permanent resident challenged a New York statute that barred lawfully admitted immigrants from becoming police officers.[114] After applying a rational basis test, the Court upheld New York's citizenship requirement.[115] In dicta, the Court distinguished *Foley* from the previous line of cases by saying alienage is only a suspect class when it impedes "noncitizens' ability to exist in the community."[116]

Meanwhile, in *Plyler v. Doe*, the Court declined to apply strict scrutiny to a Texas statute that withheld funds from public schools that enrolled undocumented children.[117] Instead, the Court applied a rational basis test and found the statute was still unconstitutional.[118] In his Opinion for the Court, Justice Brennan says:

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111. Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

112. *See* Foley v. Connelie, 435 U.S. 291, 295 (1978) ("Following *Graham*, a series of decisions has resulted requiring state action to meet close scrutiny to exclude aliens . . . .").

113. *See id.* at 295-97 (explaining that not all classifications based on alienage are suspect; classifications that limit an immigrant's ability to access education or public services are suspect, but classifications that exclude aliens from governing are not suspect).

114. *See id.* at 292.

115. *See id.* at 298-300.

116. *Id.* at 295.

117. Plyler v. Doe, 457 U.S. 202, 205-06 (1982).

118. Explaining its decision, the Court in *Plyler* says:

> Undocumented aliens cannot be treated as a suspect class . . . . Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided . . . . In determining the rationality of [the challenged statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the challenged statute] can hardly be considered rational . . . .

Id. at 223-24.

> [U]ndocumented status is not irrelevant to any proper legislative goal. . . . But [the statute] is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children . . . .[119]

When considered alongside the Supreme Court's decisions on alienage, Brennan's words prove particularly relevant to the case against New Jersey's regulation.

3. Putting It All Together: Why Any Level of Judicial Scrutiny Would Prove Fatal to New Jersey's Regulation

Although the cases above are not quite on all fours with the situation presented in New Jersey, when cobbled together they reveal some overarching principles. First, any alienage based classification that impedes an individual's ability to participate in the community is highly suspect.[120] Second, burdening a child "on the basis of a legal characteristic over which" she has no control is irrational and unfair.[121]

These principles provide a strong argument in favor of applying strict scrutiny to New Jersey's immigrant eligibility requirement for several reasons. First, when the regulation is applied to a child, all possible outcomes would impede his or her ability to participate in the community. If the child retains benefits and is placed with strangers, she is uprooted from family members and placed with unfamiliar people in an unfamiliar environment. This, quite literally, impedes the child's ability to participate in her family and community. On the other hand, if the child stays with her undocumented relatives and does not receive benefits, the child's ability to materially participate in her community is reduced. As *Graham* and its progeny indicate, these circumstances alone would be enough to trigger strict scrutiny.[122] The previous classifications that were ultimately struck down by the Court concerned non-citizen adults.[123] New Jersey's regulation, however, impacts *citizen children* who are removed by the child welfare system and happen to have undocumented relatives.[124] In some ways, this makes New Jersey's classification even more abhorrent than the classifications that were previously struck down by the Court.

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119. *Id.* at 220.

120. *See Foley*, 435 U.S. at 295 (explaining that "exclusions [that] struck at the noncitizens' ability to exist in the community" are suspect).

121. *See Plyler*, 457 U.S. at 220.

122. *See supra* notes 111-12 and accompanying text.

123. *See Foley*, 435 U.S. at 295 (identifying immigrant eligibility for public employment and licensing as some of the classifications that were challenged after *Graham*).

124. For a discussion of New Jersey's regulation and how it applies to citizen children see *supra* Part I.B.

Ultimately, whether strict scrutiny applies is immaterial because New Jersey's regulation would not survive any level of judicial scrutiny. As the Court noted in *Plyler*, it would be hard pressed to find any rational basis for "impos[ing a] discriminatory burden on the basis of a legal characteristic over which children can have little control."[125] New Jersey's regulation most certainly imposes a burden on the children it impacts; unlike children with citizen relatives, children with undocumented family members are caught between their own personal and material best interests.[126]

Moreover, a child caught in the crosshairs of New Jersey's regulation cuts one of the most vulnerable and least culpable figures imaginable. Indeed, who could be more powerless than a child who has been removed from her parents? Who could possibly blame a child for the circumstances that led to her removal? As *Plyler* indicates, under these circumstances, almost any justification presented by the state would not survive a rational basis review.[127] Also, unlike the undocumented children impacted by the statute at issue in *Plyler*, New Jersey's regulation impacts citizen children.[128] For this reason, New Jersey's regulation is perhaps even more damned than the statute presented in *Plyler*.[129] Thus, regardless of what level of scrutiny is applied, an Equal Protection challenge would prove fatal to New Jersey's regulation.

C. New Jersey's Regulation Violates the State Constitution

New Jersey's Constitution poses an additional threat to the state's immigrant eligibility requirement for foster parents. Article I, paragraph one of the New Jersey State Constitution reads, "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."[130] Over time, the New Jersey Supreme Court has interpreted this language to operate much like the Equal Protection Clause of the Fourteenth Amendment.[131] From there, however, the United States Supreme

125. *Plyler*, 457 U.S. at 220.

126. *See supra* Part II.B.i.

127. *Plyler*, 457 U.S. at 220 (stating that it would be "difficult to conceive of a rational justification for penalizing these children").

128. *Compare Plyler*, 457 U.S. at 205-06 (challenging statute that bars undocumented children from public education), *with* Title IV-E, 42 U.S.C. § 672 (2012) (requiring eligible children to have lawful status through application of PRWORA).

129. *Plyler*, 457 U.S. at 205-06.

130. N.J. CONST. art. I, ¶ 1.

131. *See* Barone v. Dep't of Human Servs., 107 N.J 335, 367 (1987) ("[I]t has long been recognized that Article I, paragraph 1, of the State Constitution, 'like the fourteenth amendment, seeks to protect against injustice and against . . . unequal treatment . . . .'")

Court and the New Jersey Supreme Court part ways. Instead of applying strict scrutiny, intermediate scrutiny, or rational basis to challenged classifications, the New Jersey Supreme Court adopted a balancing test.[132] When assessing the constitutionality of a challenged classification New Jersey courts will consider: (a) "the nature of the affected right"; (b) "the extent to which the governmental restriction intrudes upon it"; and (c) "the public need for the restriction."[133]

1. Applying the Balancing Test to New Jersey's Immigrant Eligibility Regulation

Although the rights impacted by New Jersey's regulation and the extent of the government's intrusion have already been discussed at length,[134] a brief restatement is in order. Simply put, New Jersey's regulation interferes with an eligible child's right to *both* receive the benefits she is statutorily entitled to *and* stay in a familial foster care setting. A child subject to the regulation can choose material support or familial support, but the regulation abrogates the child's right to enjoy both simultaneously. This goes to the second element of the New Jersey Supreme Court's balancing test.[135] The regulation completely intrudes on the citizen child's right by statutorily precluding the possibility of receiving aid and staying with family.

Given what is at stake for the child—namely, material support and a foster placement that serves her best interests—the state of New Jersey must present a compelling "public need"[136] to justify the regulation and overcome a constitutional challenge. Because the regulation has not been challenged, the State has not had to proffer its reasons for promulgating the regulation. One possible argument in favor of barring children from being placed with undocumented relatives is that it puts the child in a precarious custody situation because her relatives could be deported.[137] Though stability and permanency are noble goals for child welfare agencies, the regulation does not guarantee either. In fact, it could actually make family permanency less likely for impacted children—studies have shown that children placed with non-relatives are less likely to be reunited

(quoting Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985)).

132. *See Greenberg*, 99 N.J. at 567.

133. *Id.*

134. *See supra* Part II.B.i.

135. *See Greenberg*, 99 N.J. at 567 (identifying the second element of New Jersey's equal protection analysis).

136. *See id.* (identifying the third element of New Jersey's equal protection balancing test as "public need for the restriction.").

137. *See* WESSLER, *supra* note 15, at 52 (explaining that child protective services will refuse to place children with undocumented relatives because the relatives are at imminent risk of deportation).

with parents.[138] According to one report, children who are placed with family members are more likely to be reunited with family members and face better chances of achieving family permanency.[139] Therefore, if one of the State's goals is to effect permanency for children removed from their homes, the regulation could actually exacerbate instability instead of promoting permanency. Ultimately, these arguments are purely conjecture. That being said, without further enlightenment from the state, it is difficult to imagine how abrogating the rights of vulnerable, citizen children could serve a public need. Unless the State can offer a compelling reason for restricting the rights of its most vulnerable children, New Jersey's regulation should not survive a challenge based on Article I, paragraph 1 of the New Jersey Constitution.

IV. WHAT IS AT STAKE?

All of this analysis begs an obvious question—what is at stake? Or, more crudely put, who cares? Why engineer a constitutional argument to challenge a provision buried deep in New Jersey's child welfare regulations? At first glance, there does not seem to be much at stake. Indeed, child placement with undocumented family members does not seem to be New Jersey's greatest child welfare concern. After making headlines for a series of gruesome child welfare nightmares in 2003,[140] New Jersey's child welfare system has focused on rebranding itself and staying out of the news.[141] A search for emergent concerns in New Jersey's child advocacy community does not generate any information about the regulation or its impact.[142] Why then should

138. *See id.*

139. *Id.*

140. In 2003, the body of seven year old Faheem Williams was found in a closet. Susan K. Livio & Mary Jo Patterson, *Newark Abuse Death Gets Uglier Amid Claims of DYFS Inaction, Angry McGreevey Vows a Probe*, NJ.COM (Jan. 7, 2003), http://www.nj.com/news/ledger/index.ssf?/news/stories/0107faheem.html. Faheem had been removed from his parents and should have had regular contact with the Division of Youth and Family Services but the agency failed to keep track of him. *Id.* The same year, four children in Camden County who had been adopted by their foster parents were found extremely undernourished. Lydia Polgreen & Robert F. Worth, *New Jersey Couple Held in Abuse; One Son, 19, Weighed 45 Pounds*, N.Y. TIMES (Oct. 27, 2003), http://www.nytimes.com/2003/10/27/nyregion/new-jersey-couple-held-in-abuse-one-son-19-weighed-45-pounds.html. The Division of Youth and Family Services came under fire because they claimed to have made numerous home visits but failed to note how emaciated the children were. *Id.*

141. *See* Susan K. Livio, *N.J. DYFS to Get a New Name and New Mission, Commissioner Says*, N.J.COM (Feb. 28, 2012), http://www.nj.com/news/index.ssf/2012/02/nj_dyfs_to_get_new_name_and_ne.html.

142. *See, e.g.*, ADVOCATES FOR CHILDREN OF NEW JERSEY, www.acnj.org/home.asp?uri=1000&sti=1000 (last visited Jan. 23, 2015)(displaying a section called "What's New" that features a variety of developments and advocacy concerns but does not include the issue of child placement with undocumented relatives).

scholars and advocates concern themselves?

The answer lies, in part, in the fact that an unknown number of children in New Jersey[143] could find themselves in Marcos's situation—torn away from one parent, traumatized by the abuse of the other, and placed with strangers instead of loving family members.[144] According to one report, in 2010 approximately seven thousand children in New Jersey were placed in out-of-home care.[145] To date, there are no studies available to determine how many of those children were impacted by the regulation. However, the following statistics shed some light on the potential scope of the problem. Approximately nine million people in the United States live in mixed-status families.[146] Approximately four and a half million children born in the United States have at least one undocumented parent.[147] In New Jersey, undocumented immigrants make up approximately 6 percent of the state's population.[148] Although these figures do not pinpoint the number of affected children, they do indicate that at least some children placed in protective care could be affected by the regulation.

The impact of the regulation on New Jersey's children is itself disconcerting but it is not the only cause for concern. New Jersey's regulation should also be challenged because it is part of a disturbing constellation of attacks on the rights of citizen children with undocumented relatives. Nationally, efforts to erode the rights of such children have taken the following forms: housing ordinances,[149] financial aid restrictions,[150] post-deportation adoptions,[151] and Constitutional revisions.[152]

A. Housing Ordinances

In recent years at least three cities have attempted to use housing ordinances to exclude undocumented immigrants from their

143. At the time of this writing there are no known sources of statistics that quantify how many children are placed with unfamiliar foster parents instead of undocumented relatives.

144. *See supra* Introduction.

145. *See* CHILD WELFARE LEAGUE OF AMERICA, NEW JERSEY'S CHILDREN 2012, *available at* http://66.227.70.18/advocacy/statefactsheets/2012/newjersey.pdf (last visited Nov. 7, 2014).

146. PAUL TAYLOR ET AL., PEW HISPANIC CENTER, UNAUTHORIZED IMMIGRANTS: LENGTH OF RESIDENCY, PATTERNS OF PARENTHOOD 6 (2011), *available at* http://www.pewhispanic.org/files/2011/12/Unauthorized-Characteristics.pdf.

147. *Id.*

148. IMMIGRATION POLICY CENTER, NEW AMERICANS IN NEW JERSEY (Jan. 11, 2013), *available at* http://www.immigrationpolicy.org/just-facts/new-americans-new-jersey.

149. *See infra* Part III.A.

150. *See infra* Part III.B.

151. *See infra* Part III.C.

152. *See infra* Part III.D.

communities.[153] These exclusionary ordinances required landlords to verify the immigration status of prospective renters.[154] Property owners who fail to do so or rent to adults despite their undocumented status are subject to fines and jail.[155] Ultimately, these ordinances proved problematic because not only did they essentially deputize landlords to enforce federal immigration law, they also failed to make exceptions for undocumented adults with citizen children.[156] By excluding mixed-status families along with undocumented families, these ordinances legally required citizen children to be evicted from their homes and/or barred them from living in certain localities because of the immigration status of their adult family members.[157]

Thankfully, in every instance where these ordinances have been passed, they have been challenged and struck down.[158] Though federal court decisions that find exclusionary housing ordinances unconstitutional are a boon to immigrant families and advocates, the phenomenon is still troubling for two reasons.

First, the passage of such ordinances shows that some state and local governments harbor such anti-immigrant sentiments that they are willing to exclude immigrant families at the cost of discriminating against an entire class of citizens—namely, citizen children with undocumented family members. Second, though federal courts have found exclusionary housing ordinances unconstitutional,[159] the opinions issued did not give sufficient weight to the discriminatory impact the ordinances have on children in mixed-status families. In *Garrett v. City of Escondido*, the plaintiffs never even raised an equal protection challenge on behalf of documented children.[160] The court found the provision unconstitutional because it was preempted by federal law and did not provide sufficient procedural due process

153. *See* Escondido, Cal., Ordinance 2006-38R (Oct. 18, 2006); Farmers Branch, Tex., Ordinance 2903 (May 12, 2007); Hazleton, Pa., Ordinance 2006-18 (Sept. 21, 2006) *amended by* Hazleton, Pa., Ordinance 2006-40 (Dec. 28, 2006) *and* Hazleton, Pa., Ordinance 2007-6 (Mar. 21, 2007).

154. *See* Hernández, *supra* note 103, at 331.

155. *See id.*

156. *See id.* at 331-32.

157. *Id.*

158. Three cities successfully passed housing ordinances to prevent landlords from renting to undocumented families but they were found unconstitutional when challenged. *See* Lozano v. City of Hazelton, 496 F. Supp. 2d 477, 521(M.D. Pa. 2007), *aff'd in part*, 620 F.3d 170, 219 (3d Cir. 2010) (upholding lower court finding that Hazelton's housing ordinance was preempted by federal immigration laws); Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 777 (N.D. Tex. 2007) (granting injunction to prevent enforcement of the housing ordinance); Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1059 (S.D. Cal. 2006) (granting plaintiff's request to enjoin Escondido's exclusionary housing ordinance).

159. *See Lozano*, 620 F.3d at 219; *Villas at Parkside Partners*, 496 F. Supp. 2d at 777; *Garrett*, 465 F. Supp. 2d at 1059.

160. Hernández, *supra* note 103, at 350.

protections.[161] In contrast, the plaintiffs in *Villas at Parkside Partners v. City of Farmers Branch* did raise an equal protection argument.[162] The court acknowledged that the intent of the ordinance was to discriminate against undocumented immigrants but did not address the impact on citizen children, and instead found the ordinance unconstitutional on due process grounds.[163] Finally, and perhaps most disturbing, in *Lozano v. City of Hazelton*, the court rejected the plaintiffs' equal protection argument after finding that no suspect class existed[164] and that there was insufficient evidence to demonstrate discriminatory intent.[165] Instead, the court enjoined the enforcement of the Hazleton Ordinances, holding that they were express,[166] field[167] and conflict preempted[168] by federal immigration law and also violated due process requirements.[169] Although these holdings operate in favor of undocumented families and their citizen children, the corresponding judicial opinions do little to acknowledge the vulnerability of citizen children in mixed-status families.

B. Financial Aid Restrictions

The rights of citizen children with undocumented relatives have also been implicated in the context of higher education.[170] At least six

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161. *Garrett*, 465 F. Supp. 2d at 1059 ("Defendant again fails to address any legally sufficient type of procedural due process available to tenants who are deemed illegal aliens . . . . Accordingly, it appears that there are serious concerns regarding due process considerations of the Ordinance . . . .").

162. *Villas at Parkside Partners*, 496 F. Supp. 2d at 763.

163. The court states:

> The court rejects the city's thinly-veiled argument that tries to distinguish its Ordinance as no more than a system of recordkeeping that is intended to assist the federal government in its enforcement of immigration laws. . . . Although it is not spelled out in black and white, the dominant, and perhaps sole, purpose of this provision of the Ordinance is to prevent illegal immigrants from renting apartments in Farmers Branch; otherwise, there would be no need to verify immigration status as a prerequisite for entering into a lease. Of course the city, through legal legerdemain and sophistication, has avoided including in the Ordinance any specific reference to denying rental apartment units to illegal immigrants, but considering the Ordinance as a whole, its purpose is unmistakably clear.

Id. at 771.

164. *See Lozano*, 496 F. Supp. 2d at 542.

165. *Id.* at 540.

166. *Id.* at 521.

167. *Id.* at 523.

168. *Id.* at 529.

169. *Id.* at 538.

170. For a thorough discussion about the ability of children with undocumented parents to access higher education see Michelle J. Seo, Note, *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 (2011).

states—California,[171] Colorado,[172] Florida,[173] Indiana,[174] New Jersey,[175] and Virginia[176]—have maintained policies that make children born in the United States ineligible for in-state tuition or financial aid because of their parents' undocumented status. In Virginia and Colorado, the states' respective attorney generals issued formal opinions that upended the discriminatory statutes.[177] In California, Florida, and Indiana the provisions were challenged in court and struck down.[178]

Unfortunately, New Jersey presents a troubling case study in financial aid restrictions. In 2012, a United States citizen and long-time resident of New Jersey challenged a state regulation that made her ineligible for financial aid because of her parent's undocumented

171. Consent Decree, Students Advocates for Higher Educ. v. Bd. of Trs. of the Cal. State Univ., No. CPF-06-506755 (Cal. Super. Ct. Apr. 19, 2007).

172. *See* Formal Opinion of John W. Suthers, Attorney General, State of Colorado No. 07-03 (2007), *available at* www.coloradoattorneygeneral.gov/sites/default/files/press_releases/2007/08/14/.pdf (explaining that domicile requirements for in state tuition would no longer be interpreted in a way that automatically prevents citizens with undocumented parents from being considered state residents).

173. *See* Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1333 (S.D. Fla. 2012) (" [34] [A]s applied, Defendants' additional criteria for determining residency for public post-secondary education purposes classifies Plaintiffs in such a way as to deny Plaintiffs the same benefits and important opportunities as similarly situated individuals by virtue of their parents' undocumented immigration status.").

174. The relevant suit, *E.C. v. Obergfell*, was settled. *See* E.C. v. Obergfell, No. 1:06-cv-00359-DFH-WTL (S.D. Ind. 2007), *available at* http://www.law.uh.edu/ihelg/undocumentedparents/EC-v-OBERGFELL--docket.pdf; *see also* Michael A. Olivas, *Higher Education Financial Aid, Residency, and Undocumented Parents of U.S. Citizen College Students*, UNIVERSITY OF HOUSTON LAW CENTER, http://www.law.uh.edu/ihelg/undocumentedparents/homepage.asp (last visited Nov. 7, 2014).

175. *See* A.Z. *ex rel.* B.Z. v. Higher Educ. Student Assistance Auth., 427 N.J. Super. 389, 398 (N.J. Super. Ct. App. Div. 2012).

176. *See* Memorandum from Lee Andes, State Council of Higher Educ. for Va., to Ronald C. Forehand, Senior Assistant Att'y Gen. (Mar. 6, 2008), *available at* https://www.law.uh.edu/ihelg/documents/VirginiaAGMemo.pdf (clarifying Virginia higher education policy that previously prevented citizens with undocumented parents from being considered domiciled in Virginia for purposes of in-state tuition).

177. Though Colorado and Virginia used the same vehicle to end discrimination against citizens with undocumented parents, their policies are different. In Colorado, the child is considered domiciled in the state if his or her parents or guardians, regardless of their status, can show they have resided in the state for at least a year. *See* Formal Opinion of John W. Suthers, *supra* note 172, at 1. Conversely, Virginia's Attorney General reasoned that undocumented immigrants cannot demonstrate domicile but an unemancipated U.S. citizen can overcome the presumption of ineligibility if she or he can demonstrate legal status and presence in the state for at least a year. *See* Memorandum from Lee Andes, *supra* note 176, at 1-2.

178. *See* Consent Decree, *supra* note 171; *Ruiz*, 892 F. Supp. 2d at 1333; *Obergfell*, No. 1:06-cv-00359-DFH-WTL.

status.[179] The New Jersey Appellate Division struck down the regulation as applied to the student.[180] Despite the favorable ruling, the agency in charge of administering financial aid in New Jersey continues to deem citizens with undocumented parents ineligible for aid.[181] In July 2013, the Rutgers Constitutional Rights Clinic, American Civil Liberties Union of New Jersey, Latin American Legal Defense and Education Fund, and LatinoJustice PRLDEF petitioned the agency to amend the offending regulation.[182] The petition was denied[183] and the struggle for equal access to education in New Jersey continues.

Although successful court challenges and favorable executive decisions are heartening, New Jersey provides a sad counterpoint. Moreover, the prevalence of unequal treatment for United States-born students further demonstrates the vulnerability of children in mixed-status families.

C. Post-Deportation Adoptions

Another affront to the rights of citizen children is the prevalence of post-deportation adoptions. In 2010, approximately one of four people deported was the parent of a United States citizen.[184] Once deported, parents face nearly impossible obstacles to reunite with their children.[185] Even more disturbing, state agencies will often instigate adoption proceedings against the parents' will and without their participation.[186]

The story of Encarnacion Romero and her son Carlos serves as an example of the devastating consequences procedurally deficient, post-deportation adoptions can have on mixed status families.[187] When

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179. *See A.Z.* ex rel. *B.Z.*, 427 N.J. Super. at 392.

180. *Id.* at 403.

181. Petition for Rulemaking from Ronald K. Chen et al. to the Higher Education Student Assistance Authority (July 10, 2013) (on file with the author) ("Even after the decision in *A.Z. v. HESAA*, however, HESAA has apparently continued the practice of denying financial aid . . . to students who are themselves United States citizens and . . . residents of the State of New Jersey, but whose parents cannot establish lawful presence in the United States . . . ."); *see also* 45 N.J. Reg. 1970(a) (Aug. 19, 2013) (publishing receipt of petition in the New Jersey Register).

182. Petition for Rulemaking, *supra* note 181.

183. *See* 46 N.J. Reg. 141(b) (Jan 6, 2014) (denying petition for rulemaking).

184. Seth Freed Wessler, *Thousands of Kids Lost from Parents in U.S. Deportation System*, COLORLINES (Nov. 2, 2011, 8:00AM), http://colorlines.com/archives/2011/11/thousands_of_kids_lost_in_foster_homes_after_parents_deportation.html.

185. *See id.*

186. *See id.*

187. *See* Nancy Cambria, *Judge Gives Missouri Couple Custody of Illegal Immigrant's Child*, ST. LOUIS POST-DISPATCH (July 19, 2012, 3:15 AM), http://www.stltoday.com/news/local/crime-and-courts/judge-gives-missouri-couple-custody-of-illegal-immigrant-s-child/article_8d7ca32d-94e9-54f4-91a8-

Carlos was just an infant, Encarncion was "arrested and detained for working in the country illegally."[188] While she was in detention, Carlos "was passed around among family members" and ultimately placed with non-relatives who decided to pursue adoption.[189] Encarnacion received notice of the proceedings in English, but could not understand the court documents and was not permitted to attend the custody hearings that would determine the fate of her son.[190] When Encarnacion learned of the adoption, she vigorously fought for custody of her son.[191] Though a court ultimately agreed that the adoption proceedings unfairly terminated Encarnacion's rights, the adoption was upheld.[192]

This disturbing practice encapsulates the truth that lurks behind policies that treat citizen children with undocumented parents differently from all other United States citizen children—namely, that these families are somehow less valuable than other families. Typically, courts recognize the gravity of permanent termination of parental rights and, when necessary, afford families significant procedural safeguards.[193] In *Lassiter v. Department of Social Services*, the United States Supreme Court stated, "[t]his Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"[194]

When considered against the backdrop of the Supreme Court's emphatic recognition of parent/child rights, the prevalence of post-deportation adoptions demonstrates one of two things. One could argue that the deference and protection the Court thought should be applied to parent/child relationships is not nearly as "plain" as it anticipated and post-deportation adoption demonstrates that these rights have eroded over time. Alternatively, post-deportation

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7512476da753.html.

188. *Id.*

189. *Id.*

190. Lauren Gilger et al., A*doption Battle Over 5-Year Old Boy Pits Missouri Couple Vs. Illegal Immigration*, ABC NEWS at 2 (Feb. 1, 2012) http://abcnews.go.com/Blotter/adoption-battle-year-boy-pits-missouri-couple-illegal/story?id=15484447&page=2("One year later, with Bail Romero unable to understand the language in which the adoption proceedings were being carried out, unable to attend court hearings and despite her statement that she did not want her son to be adopted, Seth and Melinda Moser legally adopted the little boy.")

191. *See* Cambria, *supra* note 187.

192. *Id.*

193. *See* Lassiter v. Dep't of Soc. Serv., 452 U.S. 18, 33-34 (1981) (holding that, in some circumstances, a parent facing termination of parental rights is entitled to court-appointed counsel).

194. *Id.* at 27 (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

adoptions could simply show, despite the recognition of parent/child relationships, citizen children with undocumented parents are not entitled to such deference or protection. In either case, mixed-status families are relegated to a class of relationships that is "less than" families comprised entirely of United States citizens.

D. Constitutional Revisions

In addition to differences in the substantive rights afforded to children with undocumented family members, the ongoing immigration debate also demonstrates a disturbing challenge to their status as equal citizens of the United States. The pejorative term "anchor baby" is often used to distinguish citizens who were born to undocumented immigrants in the United States from other citizens.[195] Despite their status as birthright citizens, so-called anchor babies often wind up in the crosshairs of anti-immigrant rhetoric.[196] Conservative vitriol against this class of citizens has become so mainstream that a host on the television show *Fox and Friends* referred to the Fourteenth Amendment as the "anchor baby amendment."[197]

Sadly, attacks on the constitutional rights of so-called "anchor babies" are not limited to partisan media outlets. In 2011, Senators Paul Vitter and Rand Paul introduced a resolution to rewrite the Fourteenth Amendment "to end birthright citizenship."[198] Two years later, House Republican Steve King proposed a bill to do the same.[199] Though these attempts have proven unsuccessful, they show that children of undocumented immigrants are particularly vulnerable to the very type of discrimination the Fourteenth Amendment was designed to prevent.[200]

V. CONCLUSION

At first blush, New Jersey's immigrant eligibility requirement for

195. Julia Preston, *Anchor Baby: A Term Redefined as a Slur*, N.Y. TIMES (Dec. 8, 2011), http://www.nytimes.com/2011/12/09/us/anchor-baby-a-term-redefined-as-a-slur.html.

196. *See, e.g.*, Al Knight, *Change U.S. Law on Anchor Babies*, DENVER POST (June 22, 2005, 1:00 AM), http://www.denverpost.com/opinion/ci_2815775.

197. *Fox Calls 14th Amendment "the Anchor Baby Amendment,"* MEDIA MATTERS (Aug. 4, 2010, 8:42 AM), http://mediamatters.org/video/2010/08/04/fox-calls-14th-amendment-the-anchor-baby-amendm/168722.

198. Elise Foley, *Steve King Introduces Bill to Stop "Anchor Babies,"* HUFFINGTON POST (last updated Jan. 23, 2014, 6:58 PM), http://www.huffingtonpost.com/2013/01/04/steve-king-anchor-babies_n_2411989.html.

199. *Id*.

200. *See* Hernández, *supra* note 103, at 332 ("Suspect classifications that place special disabilities on certain disfavored groups create a 'class or caste' system that is both subordinating and unconstitutional—a second-class citizenship that the Fourteenth Amendment was intended to abolish.").

foster parents appears innocuous; it seems to be just one of many prerequisites all foster families must satisfy.[201] However, as this Note has advanced, the regulation is part of a much broader attack on the rights of citizen children with undocumented relatives. At best, such policies simply ignore the unique position of citizen children in mixed-status families. At worst, they make United States citizen children proxies for punishment and use them to mete revenge against undocumented adults.

One obvious solution to the problem would be comprehensive immigration reform that eliminates mixed-status families. However, until immigration reform is achieved, regulations like New Jersey's present a real threat to the equal status of a very vulnerable class of citizens. For this reason, advocates and scholars should challenge New Jersey's regulation along with the other insidious policies that undermine and devalue the integrity of mixed-status families. Meanwhile, adjudicators and legislators should be more mindful of how their opinions and policies impact this uniquely situated class of citizens.

201. *See* N.J. STAT. ANN. § 9:6B-4 (2013) (outlining statutory requirements for foster parent eligibility); *see also* N.J. ADMIN. CODE § 10:122C-5.1, 5.4, 5.5(2013) (identifying "general personal requirements," criminal background checks, and child abuse registry checks).