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Dreams Deferred – Why In-State College Tuition Rates Are Not a Benefit Under the IIRIRA and How This Interpretation Violates the Spirit of Plyler

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(with special thanks to A. Grace Taylor and Kody Silva for their invaluable research assistance)
ABSTRACT

DREAMS DEFERRED – WHY IN-STATE COLLEGE TUITION RATES ARE NOT A BENEFIT UNDER THE IIRIRA AND HOW THIS INTERPRETATION VIOLATES THE SPIRIT OF PLYLER

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A legal barrier to education. The concept is distinctly un-American. We are well acquainted with the narrative. No matter how humble your childhood circumstances, if you studied hard, dreamed big and worked even harder, access to the United States’ finest universities would be yours. A college degree would provide employment opportunities, the chance to form bonds with scions of the privileged and well connected, and with any luck, a direct entree into that world of financial security.

Because this particular tale of manifest destiny has such a strong hold on the American psyche, it is understandable why the number of challenges is increasing to laws that appear to favor undocumented immigrants in post-secondary education. Compounding the problem is the harsh rhetoric surrounding the failure of the United States’ immigration system, and the alleged sapping of resources by undocumented immigrants in a time of economic recession.

One of these emerging legal challenges involves state universities and the volatile subject of tuition rates. Indeed, the issue has caught fire in the Republican presidential primary debates. During the televised debate on September 12, 2011, GOP presidential candidate and Minnesota Representative, Michele Bachmann, stated: “I think the American way is not to give taxpayer subsidized benefits to people who have broken our laws or are here in the United States illegally. That is not the American way.” During the televised debate on September 22, former Massachusetts governor, Mitt Romney stated:

It’s an argument I just can’t follow. I don’t see how it is that a state like Texas, to go to the University of Texas, if you’re an illegal alien, you get an in-state tuition discount. You know how much that is? It’s $22,000 a year. Four years of college ... almost a $100,000 discount, if you’re an illegal alien, to go to University of Texas. If you’re a United States citizen from any one of the other 49 states, you have to pay $100,000 more. That doesn’t make sense to me.

Texas governor Rick Perry responded:
There is nobody on this stage who has spent more time working on border security than I have. For a decade I've been the governor of a state with a 1,200-mile border with Mexico. We put $400 million of our taxpayer money into securing that border…but if you say that we should not educate children who have come into our state for no other reason than they've been brought there by no fault of their own, I don't think you have a heart. We need to be educating these children because they will become a drag on our society.

Political commentators have argued that Perry’s response caused him to lose the debate.

On its face, it appears beyond dispute that undocumented immigrants should not enjoy privileges that are denied to bona fide citizens. In post-secondary education, however, the lines are not so easily drawn. In 1982, the United States Supreme Court held in Plyler v. Doe that state school districts are constitutionally prohibited from denying a student access to primary and secondary public school education based on immigration status. Questions regarding the reach of Plyler ensued when Congress passed section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), prohibiting the conferral of a benefit, based on residency, to an undocumented immigrant when that same benefit is not available to non-resident citizens. Currently, twelve states have enacted legislation that allow undocumented immigrants to qualify for in-state tuition rates if they fulfill a number of requirements such as graduation from a high school located within the state, and the promise to seek citizenship. Critics of these statutes argue that they employ a de facto residency requirement to avoid the issue or immigration status and, on that basis, directly violate section 505 of the IIRIRA.

Along with providing a state-by-state survey of legislation associated with in-state tuition rates, this article will argue that section 505 of the IIRIRA should not be applied to post-secondary tuition rates because it directly conflicts with the Supreme Court’s decision in Plyler and Congress did not enact section 505 with this result in mind. Moreover, the Plyler reasoning should be extended to higher education because the prospect of an underclass in American society, coupled with the innocence of minor children brought to the United States by their undocumented parents, is as relevant in post-secondary education as it is in primary and secondary education. The United States’ struggle with a viable immigration scheme will only exacerbate these problems unless Plyler is extended. Politicians are exploiting the deep emotions associated with illegal immigration to enact punitive legislation that will not staunch the flow of immigrants to the United States. In so doing, these politicians are eviscerating constitutional principles in exchange for short-term political gain.
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I. INTRODUCTION

A legal barrier to education. The concept is distinctly un-American. We are well acquainted with the narrative. No matter how humble your childhood circumstances, if you studied hard, dreamed big and worked even harder, access to the United States’ finest universities would be yours. A college degree would provide employment opportunities, the chance to form bonds with scions of the privileged and well connected, and with any luck, a direct entree into that world of financial security.

Because this particular tale of manifest destiny has such a strong hold on the American psyche, it is perhaps understandable why the number of challenges is increasing to laws that appear to favor undocumented immigrants in post-secondary education. Compounding the problem is the harsh rhetoric surrounding the failure of the United States’ immigration system, and the alleged sapping of resources by undocumented immigrants in a time of economic recession.

One of these emerging legal challenges involves state universities and the volatile subject of tuition rates. Every aspirant to, or graduate of, a state university is well aware of the nuances of tuition as it relates to residency. In-state residents enjoy a lower fee, usually on both the hourly tuition rate and administrative fees. To add another burden to out-of-state residents, state universities usually limit the number of these students it will accept.

On its face, it appears beyond dispute that undocumented immigrants should not enjoy privileges that are denied to bona fide citizens. In post-secondary education, however, the lines are not so easily drawn. It begins with the constitutional framework regulating access to primary and secondary education. In 1982, the United States Supreme Court held in Plyler v. Doe that state school districts are constitutionally prohibited from denying a student access to public primary and secondary school education based on immigration status. The Supreme Court, however, did not prohibit all restrictions to enrollment. Plyler endorsed a school district’s use of a residency requirement as a legitimate barrier to entry to those students who did not reside within its boundaries. Thus, residency appeared to be a legally acceptable circumvention to the issue of immigration status and access to educational opportunities.

Questions regarding the reach of Plyler began anew when Congress passed section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), prohibiting the conferral of a benefit, based on residency, to an undocumented immigrant when that same benefit is not available to non-resident citizens. Currently, twelve states have enacted legislation that allow undocumented immigrants to qualify for in-state tuition rates if they fulfill a number of requirements such as graduation from a high school located within the state, and the promise to seek citizenship. Critics of these
statutes argue that they employ a *de facto* residency requirement to avoid the issue or immigration status and, on that basis, directly violate section 505 of the IIRIRA.

This article will argue that section 505 of the IIRIRA should not be applied to post-secondary tuition rates because it directly conflicts with the Supreme Court’s decision in *Plyler* and Congress did not enact section 505 with this result in mind. Moreover, the *Plyler* reasoning should be extended to higher education because the prospect of an underclass in American society, coupled with the innocence of minor children brought to the United States by their undocumented parents, is as relevant in post-secondary education as it is in primary and secondary education.

The United States’ struggle with a viable immigration scheme will only exacerbate these problems unless *Plyler* is extended. Politicians are exploiting the deep emotions associated with illegal immigration to enact punitive legislation that will not staunch the flow of immigrants to the United States. In so doing, these politicians are eviscerating constitutional principles in exchange for short-term political gain.

While the United States Supreme Court has refused to recognize education as a fundamental right, it has never shied away from acknowledging its crucial role in a functional and thriving democracy. Without an extension of *Plyler*, a second class citizenry may well form - compromised of graduates of American high schools, fluent in English but not a foreign language, American for all practical purposes, lacking a country to “return to” but because of the acts of their parents, are prevented from contributing meaningfully to American society.

Part II of this article will discuss the United States Supreme Court’s approach to education and immigration status.

Part III of this article will analyze the language of section 505 of the IIRIRA, codified as 8 U.S.C. section 1623, and compare it with legislation passed concurrently, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

Part IV of this article will analyze federal and state case law on the issue of tuition rates as a “benefit” under section 505 of the IIRIRA, including the most recent decision by the California Supreme Court, *Martinez v. Regents of the University of California*.

Part V of this article is a survey of state statutes that permit undocumented immigrants to qualify for in-state tuition rates, as well as those states that do not.
Part VI of this article will argue that attempts to apply section 505 of the IIRIRA to post-secondary tuition rates is a collateral attack on Plyler that should not be allowed to succeed.

II. EDUCATION, IMMIGRATION STATUS AND THE UNITED STATES SUPREME COURT

In the early 1980s, the United States Supreme Court considered whether immigration status should affect a child’s access to primary and secondary public education provided by the government.¹

A. Plyler v. Doe

Due to an alleged budget crisis and ostensibly responding to the rising cost of public education,² the State of Texas enacted legislation to withhold funds from local school districts for students of questionable immigration status.³ The statute further empowered local school districts to deny enrollment to students who were unable to prove their lawful status.⁴

After concluding that the Equal Protection Clause applied to every individual domiciled in the United States, whether lawfully present or not,⁵ the Plyler Court reiterated, “[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.”⁶ The Court found that an impermissible sub-class of residents is created when a state subjects an individual, or group, to its laws while simultaneously withholding the law’s protections.⁷

The Plyler Court declined to apply a heightened level of scrutiny but nonetheless held the Texas statute unconstitutional under the Equal Protection

² Id. at 227. Plyer v. Doe is a consolidation of several class actions that were filed challenging the constitutionality of the Texas statute. Id. at 206-9.
⁴ Plyer, 457 U.S. at 205.
⁵ “[E]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction of the United States.” Id. at 211 n.10. Therefore, undocumented aliens are clearly subject to protection, while domiciled in the state. Id. at 215. “That a person’s initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State’s territorial perimeter...And until he leaves the jurisdiction...he is entitled to the equal protection of the laws that a State may choose to establish.” Id. The Court concluded that the Equal Protection was applicable to all persons within the boundaries of a state. Id.
⁶ Id. at 213.
⁷ Id.
While the Supreme Court did not recognize education as a fundamental right, it did not appear to be applying a traditional rational standard of review in its analysis. Instead, to pass constitutional muster, the Texas statute would have to further some substantial goal of the state that would justify the discrimination, as opposed to a legitimate goal. Two factors drove the Court's analysis.

The plaintiffs in Plyler were minor children, whose unlawful entry into the country was not within their control. Explaining that children should not be punished for the actions of their parents, the Court held that “even if the State found it expedient to control the conduct of adults by action against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.” The majority of the Court could not conceive of any rational justification for penalizing the children.

Further, while the Supreme Court did not (and still does not) define education as a fundamental right, “neither is it merely some governmental ‘benefit,’ indistinguishable from other forms of social welfare legislation.” Nonetheless, the Plyler court analyzed the Texas statute under the rational basis of review because public education is not a right provided by the Constitution.

Recognizing that education provides tools by which individuals can beneficially participate in society, the Court found that it played a fundamental role in maintaining the country’s political and cultural heritage. The wholesale denial of secondary public education to undocumented children would result in a permanent underclass of individuals who lacked the skills and resources to better their status in American society. Invoking the memory of Brown v. Board of Education.

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8 Id. at 223-4. Using the analysis it adopted in Rodriguez v, San Antonio Independent School District, the Court rejected the application of strict scrutiny because a suspect class did not exist. Id. at 219. According to the Court’s reasoning, the legal status of undocumented immigrants is voluntary in nature. Id. at 219 n.19. (“Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action.”)
9 Id. at 221-2.
10 Id. at 223-4.
11 Id. at 223-4.
12 Id. at 220.
13 Id.
14 Id.
15 Id. at 220-1.
16 Id. at 223-4 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 US 1, 35 (1973)). To pass constitutional muster, the Texas statute would have to further some substantial goal of the state that would justify the discrimination. 457 U.S. at 223-4.
17 Id. at 221. One could argue that Plyler took the story of the “American dream” and enshrined it into common law.
18 Id. at 222. The Court recognized the fact that undocumented immigrant children were unlikely to be deported to their country of origin. Id. at 230. Moreover, “undocumented children are ‘basically indistinguishable’ from legally resident alien children,” so the savings generated by
Education, the Court analogized the situation faced by undocumented immigrant children to that faced by black children educated in a segregated school system. This scenario was especially troubling to the Court because, as it opined, many of the undocumented children would become tomorrow’s legal citizens.

The Court also addressed the issue of cost. The Texas school districts argued that it was unfair for the children of undocumented immigrants to impose burdens and costs on the education system that had to be borne by the district and citizen-students. The Supreme Court quickly dismissed this argument finding that “[i]t is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State and the Nation.”

Thus, under a rational scrutiny, legislation that resulted in the deprivation of primary and secondary public school education to undocumented immigrant children was impermissible under the Equal Protection Clause. The Court struck down the Texas statute.

B. Plyler As It Relates to Post-Secondary Education

The Plyler Court was explicit: education plays a pivotal role in sustaining our political and cultural heritage. For this reason, the Texas statute “pose[d] an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”

While the Supreme Court did not extend Plyler to post-secondary education, its reasoning is equally applicable in this context. If the Court declined to punish undocumented children for the actions of their parents in relation to primary and secondary education, it is illogical to punish these same children once they reach college age. If the spirit of Plyler was to remove unreasonable obstacles to education, a legislatively created barrier, such as increased tuition rates, must violate it.

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19 Id. at 222-3 (citing Brown v. Bd. of Educ., 347 U.S. 483 (1953)). The Plyler Court also appeared to believe that some of the undocumented immigrant children might one day become American citizens. Id. at 230.
20 Id. at 230.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id. at 221-2.
27 Id. (emphasis added).
In this season of presidential election rhetoric and economic crisis, claims that educating undocumented immigrants results in unacceptable taxpayer costs has gained traction. Instead of educating undocumented immigrants, those with this viewpoint advocate for vigorous enforcement of immigration laws and deportation. The Plyler court, however, considered this argument and found it unpersuasive, downplaying any additional economic burden as slight when compared with the costs brought on by large numbers of uneducated residents – documented or not. Moreover, history has proven that the Plyler court was correct. Instead of deporting undocumented immigrants, the United States has passed asylum laws to allow certain classes of undocumented immigrants to remain in the United States and earn citizenship. In this context, deportation over education appears unrealistic and shortsighted.

There is some guidance in Supreme Court precedent for the expansion of constitutional protection for immigrants in the context of higher education in Nyquist v. Mauclet. In Nyquist, a New York statute barred certain resident

28 During the televised debate on September 12, 2011, GOP presidential candidate and Minnesota Representative, Michele Bachmann, stated: “I think the American way is not to give taxpayer subsidized benefits to people who have broken our laws or are here in the United States illegally. That is not the American way.” MSNBC, http://www.msnbc.msn.com/ (last visited Sept. 14, 2011).

Indeed, the argument of increased costs to the taxpayer rings hollow when one looks at funding sources for state universities. In the state of Texas, for example, disclosures by state universities indicate that their operating budgets are funded through the following sources: 27% from student and/or parent contributions; 13% from the federal government; 35% from the State of Texas through state appropriations, state grants and contracts, HEAF fund and earnings from the PUF fund; and 25% from institutional resources, including investments, grants from local government, auxiliary enterprises and private gifts and grants. Sources and Uses of Funds [-] Universities, Health Related Institutions, Lamar State Colleges and Texas State Technical Colleges, Texas Higher Education Coordinating Board, FY 2010 at Section 1, University Institutions Statewide Summary (January 2011, Division of Planning and Accountability Finance and resource Planning).

29 Republican presidential contender Michele Bachmann recently stated: “The last time our immigration laws were overhauled was in 1986, when Congress granted amnesty to almost three million illegal immigrants in the U.S. and promised increased border security in the near future. Twenty years later, the number of illegal immigrants in our country has quadrupled, with no end in sight. Rather than repeating the mistakes of our past, I believe Congress must work to secure our nation’s borders and enforce the immigration laws already in place. Once this is achieved, improvements to the current system can be considered.” Congresswoman Michele Bachmann, http://bachmann.house.gov/ (last visited Sept. 14, 2011).

457 U.S. at 229.


aliens from state financial assistance for higher education. At the time of litigation, New York Education Law section 661(3) stated:

Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship, or (d) must be an individual of a class of refugees paroled by the attorney general of the United States under his parole authority pertaining to the admission of aliens to the United States."

New York provided three types of financial assistance to students: performance-based scholarships, tuition assistance and subsidized student loans. The eligibility requirements were the same for each. By statute, resident aliens were the only class effectively barred from participating in these programs.

Two individuals filed separate lawsuits challenging the constitutionality of the statute under the Equal Protection Clause. The first plaintiff was a French citizen who had been a long-term resident of New York with the intent to permanently reside in New York. This plaintiff, however, did not want to relinquish his French citizenship. The second plaintiff was a Canadian national who had been living in New York for most of his life. He graduated from an American public high school and had met all the qualifications for tuition assistance and scholarship, except for his resident alien status. Like the French plaintiff, he did not intend to become a naturalized American, although he did not intend to leave New York. After the two cases were combined, the lower federal courts enjoined enforcement of the statute on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment.

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33 Id.
34 Id. at 3-4 (citing N.Y. Educ. Law § 661(3) (McKinney 1975), replacing N.Y. Educ. Law § 602(2) (McKinney 1974)).
35 Id. at 2-3.
36 Id. at 3.
37 Id. Specifically, the statute was drafted in such a way that it would not impact anyone except those persons who were unwilling to give up their citizenship elsewhere. See N.Y. Educ. Law § 661(3).
38 Id. at 5.
39 Id. at 4.
40 Id. at 4-5. The French plaintiff was also the parent of a child with United States citizenship. Id.
41 Id. at 5.
42 Id.
43 Id.
44 Id. at 5-6.
The Supreme Court affirmed the unconstitutionality of the statute.\textsuperscript{45} Applying strict scrutiny, the Supreme Court rejected the state’s argument that the statute did not improperly discriminate because it did not apply to aliens who intended to become United States citizens.\textsuperscript{46} Writing for the majority, Justice Harry Blackmun wrote “[t]he important points are that [the New York statute] is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class.”\textsuperscript{47}

Justice Blackmun also rejected the State’s argument that financial aid programs for higher education could not be considered a “necessit[y] of life.”\textsuperscript{48} Quoting from New York statutes, Blackmun affirmed the importance of access to higher education: “[L]earning has never been more crucial to man’s safety, progress and individual fulfillment. In the state and nation higher education no longer is a luxury; it is a necessity for strength, fulfillment and survival.”\textsuperscript{49} Further, evidence before the Court showed that the number of resident aliens affected by this statute was very small; thus, negating budgetary concerns voiced by the State.\textsuperscript{50} “The State surely is not harmed by providing resident aliens the same educational opportunity it offers to others.”\textsuperscript{51}

Today, post-secondary education is as vital and important for advancement in American society as secondary education was in 1977 and

\textsuperscript{45} Id. at 12 (“Because the Court finds the statute to be unconstitutional, it does not reach the claim that the statute intrudes upon Congress’ comprehensive authority over immigration and naturalization.”)  
\textsuperscript{46} Id. at 8. In \textit{Graham v. Richardson}, the Court considered whether an Arizona statute which imposed a durational residency requirement on resident aliens who wished to receive welfare benefits was unconstitutional. 403 U.S. 365 (1971). Like \textit{Nyquist}, the statute did not categorically discriminate against all aliens, just those who failed the residency requirement. \textit{Id.} at 367. Applying strict scrutiny, the \textit{Graham} court found held the statute unconstitutional. \textit{Id.} at 376.  
\textsuperscript{47} \textit{Nyquist}, 432 U.S. at 9.  
\textsuperscript{48} \textit{Id.} at 8, FN9.  
\textsuperscript{49} \textit{Id.} at 8, FN9 (citing 1961 N.Y. Laws, c. 389, s 1(a)). The Supreme Court further explained, “If the encouragement of naturalization through these programs were seen as adequate, then every discrimination against aliens could be similarly justified.” \textit{Id.} at 11.  
\textsuperscript{50} \textit{Id.} at 11, FN15.  
\textsuperscript{51} \textit{Id.} The Supreme Court found the resident aliens’ payment of taxes in support of this state program to be persuasive in allowing their participation in it. \textit{Id.} While undocumented immigrants do not participate in formal tax requirements, there is little doubt that they contribute to tax roles through their use of services and purchase of goods. Cassidy, Michael & Okos, Sarah (Feb. 1, 2008), \textit{Fiscal Facts: Tax Contributions of Virginia’s Undocumented Immigrants}, The Commonwealth Inst., Retrieved Sept. 19, 2011, from http://www.thecommonwealthinstitute.org/2008/02/01/undocumented-immigrants-pay-taxes-too/ (study indicating that the undocumented immigrants of Virginia annually paid between $260 and $311 million in taxes through state income tax, excise and property taxes, along with Social Security and Medicare taxes, and when payroll taxes of employers of undocumented immigrants were considered, these numbers increase to between $379 million and $453 million).
Thus, the denial of equal treatment on post-secondary tuition rates raises a barrier that Plyler explicitly sought to abolish. As discussed more in-depth supra, most requirements for in-state tuition rates are based on the student’s physical presence within the state, for a specified amount of time, while the student is still a minor. As such, his or her presence in the United States is still the direct result of the parent’s decision to enter the United States without documentation. It is undeniable that the crux of the Plyler decision was that these children should not bear the consequences of their parents’ misconduct. Thus, extending Plyler to its logical conclusion, it is unconstitutional to treat undocumented students differently from documented and citizen-students who are accepted into post-secondary institutions.

III. THE LANGUAGE OF SECTION 505: WHAT IS A BENEFIT?

During the 1990s, national commentary became increasingly focused on the presence of undocumented immigrants, especially those from Mexico. Instead of turning legislative attention to dysfunctional immigration laws and the
creation of a workable immigration scheme, Congress implemented punitive measures on those who were present in the country without proper documentation. Congress passed two statutory schemes in 1996 - the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”).

Enacted as part of the IIRIRA, section 1623 purports to ensure that states do not allow an undocumented immigrant to qualify for a “benefit” based on residency status where a non-resident American citizen would be denied. Section 1623 states:

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

The United States Code does not have a singular definition of the term, “benefit.” Reference to the IIRIRA and its companion legislation, the PRWORA, however, demonstrates that the meaning of “benefit” is specifically tailored to each statutory scheme, even though both statutes regulate the same subject of immigration.

For example, section 1611 of the PRWORA defines what qualifies as a “Federal Public Benefit.” First, the alleged assistance is deemed a benefit if it

59 Id.
61 Id. (emphasis added).
62 8 U.S.C.A. § 1611(c) (2011) (“(1) Except as provided in paragraph (2), for purposes of this chapter the term “Federal public benefit” means--(A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States. (2) Such term shall not apply--(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States, or to a citizen of a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99-239 or 99-658 (or a successor provision) is in effect; (B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.] qualified for such benefits and for whom the United States under reciprocal treaty agreements is
is a “grant, contract, loan, professional license, or commercial license” conferred by the federal government. Second, if the alleged assistance does not satisfy this criterion, then section 1611 mandates another two-part inquiry. The assistance is a benefit if: (a) it is “any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit” and, (b) the aid is provided to “an individual, household, or family eligibility unit” by the federal government.

On the other hand, at least one statutory section in the IIRIRA defines a “Federal Benefit” as: (a) “the issuance of any grant, contract, loan, professional license, or commercial license” by the federal government; and, (b) “any retirement, welfare, Social Security, health . . . , disability, veterans, public housing, education, supplemental nutrition assistance program benefits, or unemployment benefit, or any similar benefit” provided by the federal government.

Comparing the two definitions, at least one federal agency has concluded that the IIRIRA’s definition is significantly different because it encompasses more categories of federal aid and does not limit itself to that aid which is bestowed solely to an individual, household, or family eligibility unit. It is worth noting, however, that the IIRIRA definition is contained within a section that addresses criminal activity, while the PRWORA section is aimed specifically at the distribution of federal public benefits.

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64 8 U.S.C.A. § 1611(c)(1)(B).
65 Id. (emphasis added).
66 Id. (emphasis added).
68 18 U.S.C.A. § 506(c)(1)(B). The unedited text of § 506(c) is as follows: “(1) the term “Federal Benefit” means-- (A) the issuance of any grant, contract, loan, professional license, or commercial license provided by any agency of the United States or by appropriated funds of the United States; and (B) any retirement, welfare, Social Security, health (including treatment of an emergency medical condition in accordance with section 1903(v) of the Social Security Act (19 U.S.C. 1396b(v))), disability, veterans, public housing, education, supplemental nutrition assistance program benefits, or unemployment benefit, or any similar benefit for which payments or assistance are provided by an agency of the United States or by appropriated funds of the United States; and (2) each instance of forgery, counterfeiting, mutilation, or alteration shall constitute a separate offense under this section.” Id.
Section 1621 of the PRWORA further differentiates “state and local public benefits” as the same type of aid bestowed by state governments.\textsuperscript{71} To complicate matters, while section 1623 is codified as part of the IIRIRA, it is placed within the statutory chapter created for the PRWORA. From this often confusing legislative history, courts must now decide the full reach of section 1623, and its application to educational matters.

IV. FEDERAL AND STATE COURTS INTERPRET SECTION 505 IN THE CONTEXT OF IN-STATE TUITION RATES

Efforts were made to legislatively foreclose the application of section 1623 to post-secondary education. The 2005 versions of the DREAM Act expressly repealed section 505 of the IIRIRA.\textsuperscript{72} Unfortunately, this provision did not survive the legislative process to later versions of the bill.\textsuperscript{73} Thus, the latest incarnation of the DREAM Act would not resolve the dispute over the reach of section 1623.\textsuperscript{74} This omission places the issue squarely in the hands of the judiciary.

A handful of courts, both federal and state, have ruled on the applicability of section 1623 to post-secondary tuition rates. The District of Kansas federal court was the first to take up the issue.

A. Day v. Sebelius

The Kansas legislature enacted K.S.A. 76-731a on July 1, 2004, to provide a statutory basis for the assessment of in-state tuition rates to undocumented immigrants attending Kansas state universities.\textsuperscript{75}

Section 76-731a states:

\textsuperscript{71} 8 U.S.C.A. § 1621(c) (2011) (“(1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term “State or local public benefit” means--(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.”)

\textsuperscript{72} S. 2075, 109th Cong. (2005).

\textsuperscript{73} H.R. 5281, 111th Cong. (2010). The DREAM Act was passed only in the House of Representatives and that version of the bill did not contain language repealing the IIRIRA. Bruno, Andorra, Unauthorized Alien Students: Issues and “DREAM Act” Legislation, Congressional Research Service, Dec. 2010, at 4.

\textsuperscript{74} Id.; 8 U.S.C.A. § 1623 (stating an unauthorized alien “shall not be eligible on the basis of residence within a State for any postsecondary education benefit unless a citizen or national of the United States is eligible for such benefit without regard to whether the citizen or national is such a resident.”) (parenthetical omitted).

a) Any individual who is enrolled or has been accepted for admission at a postsecondary educational institution as a postsecondary student shall be deemed to be a resident of Kansas for the purpose of tuition and fees for attendance at such postsecondary educational institution.

(b)(2) “individual” means a person who (A) has attended an accredited Kansas high school for three or more years, (B) has either graduated from an accredited Kansas high school or has earned a general educational development (GED) certificate issued within Kansas, regardless of whether the person is or is not a citizen of the United States of America; and (C) in the case of a person without lawful immigration status, has filed with the postsecondary educational institution an affidavit stating that the person or the person's parents have filed an application to legalize such person's immigration status, or such person will file such an application as soon as such person is eligible to do so, or, in the case of a person with a legal, nonpermanent immigration status, has filed with the postsecondary educational institution an affidavit stating that such person has filed an application to begin the process for citizenship of the United States or will file such application as soon as such person is eligible to do so.

Plaintiffs in the suit contended that section 76-731a unlawfully bestowed the lower, in-state tuition rate to undocumented immigrants in violation of 8 U.S.C. section 1621. The federal district court disposed of many of plaintiffs' claims due to their lack of standing because they did not have an injury-in-fact. None of the plaintiffs were subject to the provisions of section 76-731a; therefore, their alleged harm was categorized by the court as hypothetical or conjectural. Thus, a procedural detail allowed the court to circumvent the thornier constitutional issues. Notably, the district court also ruled that section 1623 did not create a private right of action.

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77 Day, 376 F.Supp.2d at 1025-6. Ultimately, the district court dismissed then-Governor Kathleen Sebelius as a party to the lawsuit because the Kansas Constitution merely gives the Governor generalized responsibility for “enforcement of the laws of this state. Id. at 1031 (citing Kansas Const. Art. 1 § 3). This general enforcement power is not sufficient to establish the connection required under Ex Parte Young. Id. (citing Women’s Emergency Network v. Bush, 323 F.3d 937, 949–50 (11th Cir. 2003)).
78 Id. at 1032 (citing Article III of the United States Constitution). An injury-in-fact is an “invasion of a legally protected interest that is “(a) concrete and particularized and (b) actual or imminent.” Id. (citing Essence Inc. v. City of Fed. Heights, 285 F.3d 1272, 1280 (2002)).
79 Id. (citing Essence Inc., 285 F.3d at 1281). As a result, the District Court dismissed counts 1, 3, 4, 5 and 6 of the complaint. Id.
80 The Fourteenth Amendment guarantees that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The court explained that it is commonly understood that states are permitted under the United States Constitution to charge out-of-state residents more in tuition. Day, 376 F.Supp.2d at 1039 (citing Vlandis v. Kline, 412 U.S. 441, 452–3 (1973)). Kansas took advantage of this authority in section 76-729, not
B. The Tenth Circuit Considers Day

On appeal, the Tenth Circuit affirmed the district court that plaintiffs failed to demonstrate an injury-in-fact under their equal protection claim. Plaintiffs' allegations concerning the creation of an improper burden as a result of increased tuition rates due to the subsidization of undocumented alien beneficiaries of section 76-731a and the alleged injury from competition over scarce tuition resources were not concrete and too speculative to support standing. While there was an injury-in-fact associated with the denial of equal treatment due to the qualification barriers in section 76-731a for non-resident citizens, as well as the fact the non-resident citizens pay more tuition than qualifying undocumented immigrants, plaintiffs failed to show these alleged injuries stemmed from improper discrimination under section 76-731a.

Agreeing with the lower court, the Tenth Circuit dismissed plaintiffs' claim that section 76-731a was pre-empted by 8 U.S.C. section 1623 because section 76-731a. Id. ("Persons enrolling at the state educational institutions under the control and supervision of the state board of regents who, if such persons are adults, have been domiciliary residents of the state of Kansas or, if such persons are minors, whose parents have been domiciliary residents of the state of Kansas for at least 12 months prior to enrollment for any term or session at a state educational institution are residents for fee purposes. A person who has been a resident of the state of Kansas for fee purposes and who leaves the state of Kansas to become a resident of another state or country shall retain status as a resident of the state of Kansas for fee purposes if the person returns to domiciliary residency in the state of Kansas within 60 months of departure. All other persons are nonresidents of the state of Kansas for fee purposes." Kan. Stat. Ann. §76-729(a)(1).) The court held that a general denial of equal opportunity does not confer standing on a particular individual unless that individual would have had access to the benefit at stake in the absence of discrimination, i.e. an injury-in-fact. Day, 376 F.Supp.2d at 1033.

81 Id. at 1034 (stating that a private cause of action exists when Congress expressly or by implication intends to create one). The court examined the newly enacted statute for "rights-creating language," and language identifying "the class for whose special benefit the statute was produced." Id. at 1036 (citing Alexander v. Sandoval, 532 U.S. 275, 288 (2001); Cannon v. Univ. of Chicago, 441 U.S. 677, 690 n.3 (1979)). In its analysis of congressional intent, the Court found that because Congress specifically designated the Secretary of Homeland Security as the individual in charge of enforcing immigration laws, evidence of congressional intent to create a private right of action did not exist. Id. (citing N.A.A.C.P., Boston Chapter v. Harris, 607 F.2d 514, 520 (1st Cir. 1979)). Moreover, the district court noted that "legislatures are presumed to have acted within their constitutional power despite the fact, in practice, their laws result in some inequality." Id. (quoting Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)).

82 Day v. Bond, 500 F.3d 1127, 1132 (10th Cir. 2007).

83 Id.

84 Id.

85 Id. The court based its decision on plaintiffs' failure to show a causal connection between the tuition subsidy and non-resident tuition, as well as the lack of any evidence showing competition between the plaintiffs and illegal aliens over a limited pool of funds. Id. at 1133-4.

86 Id. at 1132.

87 Id. at 1133.

88 Id.
1623 did not confer a private, actionable right. Analogizing the facts before them to *Gonzaga University v. Doe*, where the Supreme Court determined there was no private action created by the Family Educational Rights and Privacy Act ("FERPA"), the Tenth Circuit focused on the lack of "rights-creating language." The language of the FERPA focuses on institutional policy and practice, and provides for enforcement through the Secretary of Education, and does not mandate individual instances of disclosure. Similarly, section 1623 lacks the same "rights-creating language." Section 1623 addresses itself to the institutions affected, not the class of non-resident citizens who incidentally benefit from its provisions. Further, the Secretary of Homeland Security is charged with the statute’s enforcement. Therefore, plaintiffs lacked standing to allege an injury that was essentially the invasion of a putative statutory right created by section 1623.

**C. Martinez v. Regents of the University of California**

In 2010, the California Supreme Court analyzed section 1623 against a state statute, which allows undocumented immigrants to receive in-state tuition rates if they met certain educational requirements and intended to pursue American citizenship.

Plaintiffs were United States citizens who, at the time of suit, were or had been students paying non-resident tuition at a public university or college in California. Alleging they were improperly denied exemption from non-resident tuition under California Education Code section 68130.5, the plaintiffs challenged the enforceability of section 68130.5.

Section 68050 of the California Education Code empowers the state of California to charge non-residents a higher rate of tuition than in-state residents. Further, section 68130.5 of the California Education Code provides:

Notwithstanding any other provision of law:

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89 Id.
90 Id. (citing 536 U.S. 273, 282 (2002)).
91 Id. at 1138–9.
92 Id. at 1138–9.
93 Id. at 1139.
94 Id.
95 Id.
96 Id. at 1136.
97 *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 860 (Cal. 2010).
98 Id.
99 Id. (Plaintiffs sought reimbursement of non-resident tuition fees, damages and attorney fees.)
100 Id. at 861. Section 68050 states: “A student classified as a non-resident shall be required, except as otherwise provided in this part, to pay, in addition to other fees required by the institution, non-resident tuition.” Id.
(a) A student . . . who meets all of the following requirements shall be exempt from paying non-resident tuition at the California State University and the California Community Colleges:

(1) High school attendance in California for three or more years.

(2) Graduation from a California high school or attainment of the equivalent thereof.

(3) Registration as an entering student at, or current enrollment at, an accredited institution of higher education in California not earlier than the fall semester or quarter of the 2001-02 academic year.

(4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he is eligible to do so.\(^\text{101}\)

Plaintiffs’ asserted that two federal statutes, 8 U.S.C. sections 1623 and 1621, expressly pre-empted section 68130.5.\(^\text{102}\) While recognizing the exclusivity of the federal immigration power, the California Supreme Court noted that not every state regulation touching on alienage is necessarily preempted.\(^\text{103}\) Unless the state statute purports to regulate who is legally allowed in the United States, the usual rules of preemption hold that state law will only be displaced when affirmative congressional action compels that it must be displaced.\(^\text{104}\) Because section 68130.5 did not purport to regulate admission into the country, the Court focused on congressional intent.\(^\text{105}\)

Plaintiffs alleged that section 1623(a) pre-empted the California statute because the in–state tuition rate was a benefit conferred to undocumented immigrants based on their California residency - a benefit that was not similarly available to citizens who resided outside of the State of California.\(^\text{106}\) The Court disagreed. Reiterating the statute’s facial requirements for a reduced tuition rate: (1) a California high school degree or equivalent; or, (2) attendance at a high school in California for three or more years, the Court held that this language did

\(^{101}\) CAL. EDUC. CODE § 68130.5 (2002).

\(^{102}\) \textit{Martinez}, 241 P.3d at 861.

\(^{103}\) \textit{Id.} (citing \textit{De Canas v. Bica}, 424 U.S. 351, 355 (1976)).

\(^{104}\) \textit{Id.} at 862.

\(^{105}\) \textit{Id.}

\(^{106}\) \textit{Id.} Section 1623(a) states: “Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.” 8 U.S.C.A. § 1623(a).
not prescribe a residency requirement.\textsuperscript{107} Moreover, section 68130.5 did not ignore a recipient’s immigration status.\textsuperscript{108} Section 68130.5(a)(4) requires that qualifying persons who are undocumented must also file an affidavit with the institution of higher education attesting to their application for citizenship or their intent to do so, as soon as they are eligible.\textsuperscript{109}

Plaintiffs' reading also created a conflict with another California statute, Education Code section 68062, which does describe California’s residency requirements.\textsuperscript{110} Section 68062(h) expressly states:

An alien, including an unmarried minor alien, may establish his or her residence, \textit{unless precluded by the Immigration and Nationality Act (8 U.S.C. 1101, et seq.) from establishing domicile in the United States}.\textsuperscript{111}

As such, both before and after the enactment of section 68130.5, California law has refused to recognize undocumented immigrants as California residents for purposes of paying in-state, resident tuition.\textsuperscript{112}

The Court further noted that section 68130.5 did not impliedly invoke a residency requirement.\textsuperscript{113} Possession of a California high school diploma or attendance at a California high school for at least three years was not the statutory equivalent of establishing residency in California.\textsuperscript{114} Plaintiffs’ argument appeared to depend on the premise that the California legislature passed section 68130.5 to circumvent the federal statute. But, the language of section 68130.5 made it possible for a non-resident United States citizen to qualify for in–state tuition.\textsuperscript{115} Therefore, neither immigration status nor California residency is the crux for receipt of the benefit.

Moreover, the California Supreme Court did not find any evidence to support an affirmative congressional intent under section 1623 to prohibit states from categorically denying undocumented immigrants access to an in-state tuition rate.\textsuperscript{116} Instead, Congress only expressed its intent to prohibit a benefit, such as in-state tuition rates, for undocumented immigrants on the basis of

\begin{footnotesize}
\begin{itemize}
\item[107] Id.
\item[108] Id.
\item[109] Id. (citing \textsc{Cal. Educ. Code} § 68130.5(a)(4)).
\item[110] Id. (citing \textsc{Cal. Educ. Code} § 68062).
\item[112] \textit{Martinez}, 241 P.3d at 862 (citing \textsc{Cal. Educ. Code} § 68062).
\item[113] Id. at 864.
\item[114] Id.
\item[115] Id.
\item[116] Id.
\end{itemize}
\end{footnotesize}
residency, but only where that benefit was not available to non-resident citizens. Thus, section 68130.5 did not violate 8 U.S.C.A. section 1623.

Plaintiffs also claimed pre-emption under 8 U.S.C.A. section 1621, which the Court described in two parts. First, as a general rule, undocumented immigrants are not eligible for state or local public benefits. Second, section 1621 provides a description of when a state may make an unlawful alien eligible for those public benefits. Specifically, section 1621(d) provides:

A state may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible . . . through the enactment of a state law.

While the appellate court found that section 68130.5 fell within the principle of implied preemption, the Supreme Court disagreed. Within the statutory language of section 1621 itself, Congress expressly allowed a state to provide public benefits for unlawful aliens if it did so in compliance with the statute. As such, Congress did not intend to occupy the field fully. Because section 68130.5 complies with affirmative expressions of congressional intent in 8 U.S.C. sections 1621 and 1623, those federal statutes cannot impliedly preempt section 68130.5.

The California Supreme Court also rejected the plaintiffs’ claim under the Privileges and Immunities Clause of the United States Constitution. Section 1 of the Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens.

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117 Id. (stating in determining Congress’s intent, courts may also consider “the structure and purpose of the statute as a whole.”) Id. (citing Medtronic, 518 U.S. at 486). The Court found the ban was to ostensibly remove the incentive for undocumented immigration provided by the availability of public benefits. Id.
118 Id. at 866.
119 Id. Unlike section 1623, which is codified under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), section 1621 is a part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”). Id.
120 Id.
121 8 U.S.C.A. § 1621(d).
122 Id. (emphasis added).
123 Martinez, 241 P.3d at 868.
124 Id.
125 Id.
126 Id.
127 Id. at 869 (citing U.S. Const.. amend. XIV, § 1).
of the United States; nor shall any State 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.\textsuperscript{128}

The court reiterated that the Privileges and Immunities Clause applied only to citizens.\textsuperscript{129} While it was true that neither lawful nor unlawful aliens could claim a deprivation under the clause, no authority suggested that the clause prohibited states from conferring benefits to resident aliens that are not conferred to all American citizens.\textsuperscript{130} Recognizing that the clause did operate in some circumstances to prevent states from treating non-resident citizens less favorably than resident citizens, the California Supreme Court noted the plaintiffs’ failure to cite any authority contradicting prior United States Supreme Court precedent allowing states to charge non-residents more for attending public schools.\textsuperscript{131} Tactily recognizing an assault on the foundation of \textit{Plyler v. Doe}, the Supreme Court maintained that it cannot be the case that states may never give a benefit to unlawful aliens without giving the same benefit to all American citizens; otherwise, the United States Supreme Court would have denied access to secondary education to undocumented immigrants.\textsuperscript{132} In conclusion, the California court rejected the application of the Privileges and Immunities Clause to post-secondary education benefits for unlawful aliens.\textsuperscript{133} Section 68130.5 did not violate 8 U.S.C.A. section 1623.\textsuperscript{134}

\begin{itemize}
  \item \textsuperscript{128} U.S. Const.. amend. XIV, § 1 (emphasis added).
  \item \textsuperscript{129} \textit{Martinez}, 241 P.3d at 868 (citing \textit{Matthews v. Diaz}, 426 U.S. 67, 78 (1976)).
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} Id. (citing \textit{Vlandis v. Kline}, 412 U.S. 441, 452–3 (1973)). Plaintiffs’ reliance on \textit{Saenz v. Roe} was misplaced according to the Court. \textit{Id.} at 870 (citing 526 U.S. 489 (1999)). \textit{Saenz} involved a statutory limitation on state welfare benefits for recently arrived residents. \textit{Id.} The United States Supreme Court struck down the limitation as violative of the federal right of interstate travel. \textit{Id.} According to the California Supreme Court, \textit{Saenz} was not dispositive because it did not involve aliens and nothing in its language provides support that a citizen is guaranteed to treatment that is no worse than an undocumented alien. \textit{Id.}
  \item \textsuperscript{132} Id. (citing \textit{Plyler v. Doe}, 457 U.S. 202 (1982)). The Eastern District of Virginia in \textit{Equal Access to Educ. v. Merten} did, however, allow for the possibility that a state could bar undocumented immigrants from enrollment at a post-secondary institution. 306 F.Supp.2d 585 (E.D. Va. 2004). The Eastern District held that Congress, through the federal immigration scheme, had not occupied the field of alien access to educational institutions. \textit{Id.} at 606. Thus, according to the \textit{Merten} court, not only had Congress failed to occupy completely the field of illegal alien eligibility for public post-secondary education, it had failed to legislate in this field at all. \textit{Id.} Therefore, Congress had not “occupied” any part of this area of legislation, either completely or otherwise. \textit{Id.}
  \item \textsuperscript{133} \textit{Martinez}, 214 P.3d at 868.
  \item \textsuperscript{134} \textit{Id.}
\end{itemize}
V. A SURVEY OF STATE STATUTES REGARDING IN-STATE TUITION RATES

Given the amount of news coverage dedicated to inappropriate “benefits” conferred to undocumented immigrants, it is worthwhile to analyze how the 50 states approach the issue of tuition rates and immigration status.

A. States with a Favorable Treatment of Undocumented Immigrants

California and Texas were the first states to pass legislation allowing undocumented students that met certain requirements to receive in-state tuition rates. In 2001, California passed A.B. 540 that allowed undocumented aliens access to in-state tuition rates. The same year Texas passed H.B. 1403, which is similar to the California bill in that there are multiple residency requirements in order to qualify for in-state tuition. In 2005, Texas passed S.B. 1528, which confirms that undocumented aliens are eligible for in-state tuition based on certain requirements along with providing that undocumented aliens are eligible for access to universities.

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135 A.B. 540, Comm. on Higher Educ., 2001-02 Cal. Sess. (Cal. 2001). A.B. 540 states: There are high school pupils who have attended elementary and secondary schools in this state for most of their lives and who are likely to remain, but are precluded from obtaining an affordable college education because they are required to pay nonresident tuition rates. These pupils have already proven their academic eligibility and merit by being accepted into our state's colleges and universities. A fair tuition policy for all high school pupils in California ensures access to our state's colleges and universities, and thereby increases the state's collective productivity and economic growth. This…act allows all persons, including undocumented immigrant students who meet the requirements set forth…to be exempt from nonresident tuition in California's colleges and universities. This act…does not confer postsecondary education benefits on the basis of residence. A student, other than a nonimmigrant alien…who meets all of the following requirements shall be exempt from paying nonresident tuition at the California State University and the California Community Colleges: (1) high school attendance in California for three or more years; (2) graduation from a California high school or attainment of the equivalent thereof; (3) registration as an entering student in an institution of higher education not earlier than the 2001 fall semester; and (4) provides to the institution an affidavit stating that the individual will file an application to become a permanent resident at the earliest opportunity the individual is eligible to do so.” Id.

136 H.B. 1403, 77th Leg., 2001 Reg. Sess. (Tex. 2001). H.B. 1403 states: “An individual shall be classified as a Texas resident until the individual establishes a residence outside this state if the individual resided with the individual's parent, guardian, or conservator while attending a public or private high school in this state and: (1) graduated from a public or private high school or received the equivalent of a high school diploma in this state; (2) resided in this state for at least three years as of the date the person graduated from high school or received the equivalent of a high school diploma; (3) registers as an entering student in an institution of higher education not earlier than the 2001 fall semester; and (4) provides to the institution an affidavit stating that the individual will file an application to become a permanent resident at the earliest opportunity the individual is eligible to do so.” Id.

137 S.B. 1528, 79th Leg., 2005 Reg. Sess. (Tex. 2005). S.B. 1528 states: “Unless the student establishes residency or is entitled or permitted to pay resident tuition…tuition for a student who
Several other states have passed legislation similar to California and Texas, including Illinois, Nebraska, New Mexico, New York, Oklahoma, Utah, Washington, Maryland, Kansas, and Wisconsin. Illinois passed H.B. 60, which includes certain requirements for undocumented students to receive in-state tuition. Nebraska passed L.B. 239 over the governor’s veto, which included similar residency requirements. In 2005, New Mexico passed S.B. 582 that allowed undocumented students in-state tuition rates based on similar requirements. However, in 2007, New Mexico unsuccessfully attempted to expand the state’s definition of “resident student”. New York passed S.B. 7784 that allows in-state tuition rates for individuals that file a proper affidavit along with certain residency requirements. Oklahoma passed a similar affidavit.

138 H.B. 60, 93rd Gen. Assem., 2003 Leg. Serv. (Ill. 2003). H.B. 60 states: “For tuition purposes, the Board of Trustees shall deem an individual an Illinois resident, until the individual establishes a residence outside of this State, if all of the following conditions are met: (1) the individual resided with his or her parent or guardian while attending a public or private high school in this State; (2) the individual graduated from a public or private high school or received the equivalent of a high school diploma in this State; (3) the individual attended school in this State for at least 3 years as of the date the individual graduated from high school or received the equivalent of a high school diploma; (4) the individual registers as an entering student in the University not earlier than the 2003 fall semester; (5) in the case of an individual who is not a citizen or a permanent resident of the United States, the individual provides the University with an affidavit stating that the individual will file an application to become a permanent resident of the United States at the earliest opportunity the individual is eligible to do so.”

139 L.B. 239, 99th Leg., 2d Reg. Sess. (Neb. 2006). L.B. 239 states: “Such student, if an alien, has applied to or has a petition pending with the United States Immigration and Naturalization Service to attain lawful status under federal immigration law and has established a home in Nebraska for a period of at least one hundred eighty days where he or she is habitually present with the bona fide intention to and make this state his or her permanent residence, supported by documentary proof.”

140 S.B. 582, 47th Leg., 1st Reg. Sess. (N.M. 2005). S.B. 582 states: “A public post-secondary educational institution shall not deny admission to a student on account of the student’s immigration status. Any tuition rate or state-funded financial aid that is granted to residents of New Mexico shall also be granted on the same terms to all persons, regardless of immigration status, who have attended a secondary educational institution in New Mexico for at least one year and who have either graduated from a New Mexico high school or received a general educational development certificate in New Mexico.”

141 S.B. 374, 48th Leg., 1st Reg. Sess. (N.M. 2007). S.B. 374 states: “For the purposes of tuition payment at resident student rates and budget and revenue calculations at state educational institutions...“resident student” includes a student who is a citizen of Mexico, Latin America, or the Iberian peninsula and who attends a four-year institution.”

142 S.B. 7784, 225th Leg., 2002 Sess. (N.Y. 2002). S.B. 7784 states: “The payment of tuition and fees by any student who is not a resident of New York state...a student without lawful immigration status shall also be required to file an affidavit with such institution or educational unit stating that the student has filed an application to legalize his or her immigration status, or will file such an application as soon as he or she is eligible to do so. The payment of tuition and fees by any student who is not a resident of New York state...shall be paid at a rate or charge no greater than that imposed for students who are residents of the state if such student: attended an approved New York high school for two or more years, graduated from an approved New York high school and applied for attendance at an institution or educational unit of the city university within five
requirement for in-state tuition in 2003. In 2007, Oklahoma passed additional requirements regarding the affidavit procedures along with giving the Oklahoma State Regents more discretion in adopting such a policy. In 2002, Utah passed H.B 331 and H.B 144 which allows undocumented students access to in-

years of receiving a New York state high school diploma; or attended an approved New York state program for general equivalency diploma exam preparation, received a general equivalency diploma issued within New York state and applied for attendance at an institution or educational unit of the city university within five years of receiving a general equivalency diploma issued within New York state; or was enrolled in an institution or educational unit of the city university in the fall semester or quarter of the two thousand one—two thousand two academic year and was authorized by such institution or educational unit to pay tuition at the rate or charge imposed for students who are residents of the state. A student without lawful immigration status shall also be required to file an affidavit with such institution or educational unit stating that the student has filed an application to legalize his or her immigration status, or will file such an application as soon as he or she is eligible to do so.”

S.B. 596, 49th Leg., 1st Reg. Sess. (Okla. 2003). S.B. 596 states: “The Oklahoma State Regents for Higher Education shall adopt a policy which allows a student to enroll in an institution within The Oklahoma State System of Higher Education and allows a student to be eligible for resident tuition if the student: (1) graduated from a public or private high school in this state or successfully completed the General Educational Development test in this state; and (2) resided in this state with a parent or guardian for at least two years prior to: graduation from high school, or successful completion of the General Educational Development test. To be eligible…an eligible student shall: satisfy admission standards…and have secured admission to, and enrolled in, an institution within The Oklahoma State System of Higher Education. If the student is without lawful immigration status: file an affidavit with the institution stating that the student has filed an application or has a petition pending with the Bureau of Citizenship and Immigration Services to legalize the student’s immigration status, or file an affidavit with the institution stating that the student will file an application to legalize his or her immigration status at the earliest opportunity the student is eligible to do so.”

H.B. 1804, 51st Leg., 1st Reg. Sess. (Okla. 2007). H.B. 1804 states: “The Oklahoma State Regents for Higher Education may adopt a policy which allows a student to enroll in an institution within The Oklahoma State System of Higher Education and allows a student to be eligible for resident tuition…file an affidavit with the institution stating that the student will file an application to legalize his or her immigration status at the earliest opportunity the student is eligible to do so. but in no case later than: (1) one year after the date on which the student enrolls for study at the institution, or (2) if there is no formal process to permit children of parents without lawful immigration status to apply for lawful status without risk of deportation, one year after the date the United States Citizenship and Immigration Services provide such a formal process, and if the student files an affidavit…present to the institution a copy of a true and correct application or petition filed with the United States Citizenship and Immigration Services.”

H.B. 331, 54th Leg., 2002 Gen. Sess. (Utah 2002). H.B. 331 states: “The meaning of “resident student” is determined by reference to the general law on the subject of domicile, except as provided in this section. A person who has come to Utah and established residency for the purpose of attending an institution of higher education shall, prior to registration as a resident student: (a) maintain continuous Utah residency status while completing 60 semester credit hours at a regionally accredited Utah higher education institution or an equivalent number of applicable contact hours at the Utah College of Applied Technology; and (b) demonstrate by additional objective evidence, including Utah voter registration, Utah drivers license, Utah vehicle registration, employment in Utah, payment of Utah resident income taxes, and Utah banking connections.”

H.B. 144, 54th Leg., 2002 Gen. Sess. (Utah 2002). H.B. 144 states: “If allowed under federal law, a student, other than a nonimmigrant alien, shall be exempt from paying the nonresident portion of total tuition if the student: (a) attended high school in this state for three or more years;
state tuition based on residency requirements and filing of an affidavit. Subsequently, Utah has attempted to repeal its 2002 law at least six different times.\textsuperscript{147}

In 2003, Washington passed a bill that allows undocumented students to receive in-state tuition rates based on residency requirements and the filing of an affidavit.\textsuperscript{148} In 2011, Maryland passed a bill that allows undocumented students to receive in-state tuition rates based on similar residency requirements and the filing of an affidavit.\textsuperscript{149} In 2003, Kansas passed a bill with similar requirements for undocumented students working to obtain in-state tuition.\textsuperscript{150} Wisconsin passed a


\textsuperscript{148} H.B. 1079, 58th Leg., 2003 Reg. Sess. (Wash. 2003). H.B. 1079 states: “Resident student shall mean...any person who has completed the full senior year of high school and obtained a high school diploma, both at a Washington public high school or private high school...and who has lived in Washington for at least three years immediately prior to receiving the diploma or its equivalent; who has continuously lived in the state of Washington after receiving the diploma and until such time as the individual is admitted to an institution of higher education; and who provides to the institution an affidavit indicating that the individual will file an application to become a permanent resident at the earliest opportunity the individual is eligible to do so and a willingness to engage in any other activities necessary to acquire citizenship.” \textit{Id.}

\textsuperscript{149} S.B. 167, 2011 Leg., Reg. Sess. (Md. 2011). S.B. 167 states: “In this section, “individual” includes an undocumented immigrant individual. An individual shall be exempt from paying the out-of-state tuition rate at a community college in the State, if the individual: (1) beginning with the 2005–2006 school year, attended a public or nonpublic secondary school in the State for at least 3 years; (2) beginning with the 2007–2008 school year, graduated from a public or nonpublic secondary school in the State or received the equivalent of a high school diploma in the State; (3) registers as an entering student in a community college in the State not earlier than the 2011 fall semester; (4) provides to the community college documentation that the individual or the individual's parent or legal guardian has filed a Maryland income tax return; (5) in the case of an individual who is not a permanent resident, provides to the community college an affidavit stating that the individual will file an application to become a permanent resident within 30 days after the individual becomes eligible to do so.” \textit{Id.}

\textsuperscript{150} H.B. 2145, 172nd Leg., Reg. Sess. (Kan. 2004). H.B. 2145 states: “Student shall be deemed to be a resident of Kansas for the purpose of tuition and fees for attendance at such postsecondary educational institution... (A) has attended an accredited Kansas high school for three or more years, (B) has either graduated from an accredited Kansas high school or has earned a general educational development certificate issued within Kansas, regardless of whether the person is or is not a citizen of the United States of America; and (C) in the case of a person without lawful immigration status, has filed with the postsecondary educational institution an affidavit stating that the person or the person's parents have filed an application to legalize such person's immigration status, or such person will file such an application as soon as such person is eligible to do so.” \textit{Id.}
bill that allowed undocumented students access to in-state tuition based on similar requirements.\textsuperscript{151} Of the states that currently allow undocumented students to receive in-state tuition rates, only Oklahoma and Texas allow undocumented students to receive financial aid.\textsuperscript{152} In 2011, California,\textsuperscript{153} Kansas,\textsuperscript{154} Nebraska,\textsuperscript{155} New York,\textsuperscript{156} Oklahoma,\textsuperscript{157} Texas,\textsuperscript{158} Washington\textsuperscript{159}, and Wisconsin\textsuperscript{160} introduced bills to repeal their existing laws that grant in-state tuition to undocumented students.

Currently, Arkansas, Connecticut, Delaware, Florida, Hawaii, Massachusetts, New Jersey, Oregon, Rhode Island, and Virginia do not have statewide policy regarding undocumented students; however, all of these states have attempted to recently pass legislation that would allow undocumented students access to in-state tuition rates. Arkansas unsuccessfully passed a bill that would have allowed undocumented students in-state tuition rates based on residency and affidavit requirements.\textsuperscript{161} The following states have unsuccessfully attempted to pass bills similar that would allow in-state tuition based on residency and affidavit requirements: Connecticut,\textsuperscript{162} Florida,\textsuperscript{163} Hawaii,\textsuperscript{164} New Jersey,\textsuperscript{165}

\textsuperscript{151} A.B. 75, J. Comm. on Finance, 2009-10 Leg. (Wis. 2009). A.B. 75 states: “This bill allows an alien who is not a legal permanent resident of the United States to pay resident, as opposed to nonresident, tuition if he or she: graduated from a Wisconsin high school or received a declaration of equivalency of high school graduation from Wisconsin; was continuously present in Wisconsin for at least three years following the first day of attending a Wisconsin high school or immediately preceding receipt of a declaration of equivalency of high school graduation; and enrolls in a UW System institution and provides the institution with an affidavit stating that he or she has filed or will file an application for permanent residency with U.S. Citizenship and Immigration Services as soon as the person is eligible to do so. The bill also provides that such persons are to be considered residents of this state for purposes of admission to and payment of fees at a technical college.” \textit{Id.}


\textsuperscript{160} S.N. 27, J. Comm. on Finance, 2011-12 Leg. (Wis. 2011) (bill enacted).

\textsuperscript{161} S.B. 799, 87th Gen. Assem., 2009 Reg. Sess. (Ark. 2009). S.B. 799 states: “Any tuition rate that is granted to residents of Arkansas shall be granted on the same terms to all persons who have attended a secondary educational institution in Arkansas for at least three years and who have either graduated from an Arkansas high school or received a general education diploma in the state. A student without documented immigration status shall file an affidavit with the state-supported institution of higher education stating that the student has an intent to legalize his or her immigration status.” \textit{Id.}

\textsuperscript{162} H.B. 6390, 2011 Gen. Assem., 2011 Reg. Sess. (Conn. 2011). H.B. 6390 states: “In accordance with 8 USC 1621(d), a person, other than a nonimmigrant alien as described in 8 USC 1101(a)(15), shall be entitled to classification as an in-state student for tuition purposes, (A) if such person (i) resides in this state, (ii) attended any educational institution in this state and completed at least four years of high school level education in this state, (iii) graduated from a

24
Oregon,\textsuperscript{166} and Virginia.\textsuperscript{167} Rhode Island has attempted to pass a bill with similar requirements, but its bill provides that the requirements are either/or instead of all being mandatory.\textsuperscript{168}

high school in this state, or the equivalent thereof, and (iv) is registered as an entering student, or is enrolled at a public institution of higher education in this state, and (B) if such person is without legal immigration status, such person files an affidavit with such institution of higher education stating that he or she has filed an application to legalize his or her immigration status, or will file such an application as soon as he or she is eligible to do so.\textsuperscript{168}

\textsuperscript{163} H.B. 27, 18th Leg., 1st Reg. Sess. (Fla. 2003). H.B. 27 states: “The following persons shall be classified as residents for tuition purposes: nonresident aliens who have resided in Florida for at least 2 years; have attended a State Board of Education approved Florida high school; have graduated from a State Board of Education approved Florida high school; and have filed an affidavit with a community college or a state university which states that the student has applied for legal immigrant status or will apply when the student becomes eligible for such application.” \textit{id.}

\textsuperscript{164} H.B. 873, 22nd Leg., 2003 Sess. (Haw. 2003). H.B. 873 states: “In the case of an alien student, other than a non-immigrant alien, the student meets all of the following requirements: high school attendance in Hawaii for two or more years; graduation from high school in Hawaii or attainment of the equivalent; registration as an entering student at the University of Hawaii system; and in the case of a student without legal immigration status, the filing of an affidavit with the university stating that the student has filed an application to legalize the student’s immigration status or will file an application when eligible to do so.” \textit{id.}

\textsuperscript{165} S.B. 1036, 213th Leg., 2008 Sess. (N.J. 2008). S.B 1036 states: “A student, other than a nonimmigrant alien, shall be exempt from paying nonresident tuition at a public institution of higher education if the student: attended high school in this State for three or more years; graduated from high school in this State or received the equivalent; registers as an entering student or is currently enrolled in a public institution of higher education; and in the case of a person without lawful immigration status, files an affidavit with the institution of higher education stating that the student has filed an application to legalize his immigration status or will file an application as soon as he is eligible to do so.” \textit{id.}

\textsuperscript{166} H.B. 2939, 75th Leg. Assem., 2009 Reg. Sess. (Or. 2009). H.B. 2939 states: “For the purpose of determining tuition and fees for a financially independent student, an institution of higher education...shall consider a student who is not a citizen or a lawful permanent resident of the United States to be a resident of this state if the student: during the five years immediately prior to receiving a high school diploma or leaving school before receiving a high school diploma, attended an elementary or a secondary school in this state and resided in this state; received a high school diploma from a secondary school in this state or received the equivalent of a high school diploma; did not establish residency outside this state after receiving a high school diploma or leaving school before receiving a high school diploma; and plans, as determined by the board by rule, to become a citizen or a lawful permanent resident of the United States.” \textit{id.}

\textsuperscript{167} S.B. 1037, 2009 Gen. Assem., 2009 Sess. (Va. 2009). S.B. 1037 states: “A student shall be considered lawfully present for purposes of in-state tuition if he meets all of the following criteria: he has resided with his parent, guardian, or other person standing in loco parentis while attending a public or private high school in this state; he has graduated from a public or private high school in Virginia or has received a General Education Development certificate in Virginia; he has resided in the Commonwealth for at least three years as of the date he graduated from high school; he has provided an affidavit to the institution stating that he has filed an application to become a permanent resident of the United States and is actively pursuing such permanent residency or will do so as soon as he is eligible; and he has submitted evidence that he or at least one parent...has filed...Virginia income tax returns for at least three years prior to the date of enrollment.” \textit{id.}

\textsuperscript{168} H.B. 7973, 2006 Gen. Assem., Jan. Sess. (R.I. 2006). H.B. 7973 states: “All tuition or free schedules in effect in Rhode Island public institutions of higher education shall provide that the
In the past, Massachusetts has passed legislation urging Congress to take action regarding the subject.\textsuperscript{169} In 2011, Massachusetts has proposed a bill that would allow in-state tuition.\textsuperscript{170}

Although Minnesota and Nevada do not have legislation regarding undocumented students, these two states have tuition policies that result in many undocumented students paying in-state tuition rates.\textsuperscript{171} In 2007, Minnesota attempted to pass a bill that would have provided appropriations for educational programs and to fund new requirements.\textsuperscript{172} Additionally, the bill would have eliminated non-resident tuition at certain schools through funding.\textsuperscript{173} However, this bill was vetoed by the governor.\textsuperscript{174} Nevada’s System of Higher Education

payment of tuition and fees by any student who is an undocumented immigrant and is not a resident of the state of Rhode Island...shall be paid at a rate or charge no greater than that imposed on students who are residents of this state, provided that such student: has attended an approved Rhode Island High School for three or more years; or has graduated from an approved Rhode Island high school or received a high school equivalency diploma from the state of Rhode Island; or has registered as an entering student or is currently enrolled in an accredited public institution of higher education in Rhode Island; or has filed an affidavit with the public institution of higher education stating that such student has filed an application to legalize his or her immigration status, or will file such application as soon as he or she is eligible to do so.” \textit{Id.}

\textsuperscript{169}H.B. 4629, 2006 Leg., 2006 Sess. (Mass. 2006). H.B 4629 states: “The General Court of Massachusetts respectfully urges Congress of the United States to enact legislation that will resolve the current state of the flux surrounding policies for in-state tuition rates for in-state, undocumented immigrants who attend public institutions of higher education.” \textit{Id.}

\textsuperscript{170}S.B. 566, 187 Gen. Ct., 2011 Sess. (Mass. 2011). S.B. 566 states: "Any person admitted to such public institutions of higher education, other than a nonimmigrant alien, who has attended high school in the commonwealth for 3 or more years and has graduated from a high school in the commonwealth or attained the equivalent thereof in the commonwealth, shall be eligible to pay in-state tuition rates and fees at the University of Massachusetts, or any other state university or state college or community college in the commonwealth. If that person is not a citizen of the United States or a legal permanent resident of the United States, an affidavit signed under the pains and penalties of perjury stating that the person has applied for citizenship or legal permanent residence or will apply for citizenship or legal permanent residence in accordance with federal statute and federal regulations within 120 days of eligibility for such status and documentation of registration with the selective service, if applicable.” \textit{Id.}


\textsuperscript{172}S. File 1989, 3rd Engrossment, 85th Leg. (Minn. 2007). S. File 1989 states: “The tuition maximum for students in four-year programs is $9,838 in each year for students in four-year programs, and for students in two-year programs, is $6,114 in the first year and $5,808 in the second year...If the appropriation in this subdivision for either year is insufficient, the appropriation for the other year is available to meet reciprocity contract obligations...this appropriation includes funding to eliminate nonresident undergraduate tuition at Saint Paul College, Minneapolis Community and Technical College, Inver Hills Community College, St. Cloud Technical College, and Normandale Community College...this appropriation includes funding to establish banded tuition.” \textit{Id.}

\textsuperscript{173} \textit{Id.}

\textsuperscript{174} \textit{Id.}
currently does not require students to prove that they are United States citizens to attend public universities or colleges.\textsuperscript{175}

In 2011, Montana passed H.B. 638, which places a referendum on the 2012 ballot asking voters to decide if the state should deny services to undocumented immigrants.\textsuperscript{176} Included in the Montana bill is whether to deny undocumented immigrants access to public universities and financial aid.\textsuperscript{177} In 2004, Delaware passed a bill that encouraged the state legislature to support and vote for the DREAM Act.\textsuperscript{178}

\textbf{B. States with Unfavorable Treatment of Undocumented immigrants}

Currently, three states—Arizona, Colorado, and Georgia—have banned undocumented students’ access to in-state tuition rates. Arizona passed Proposition 300 in 2006.\textsuperscript{179} It provides that university students who are not United States citizens or legal residents are not eligible for in-state tuition status or financial aid that is funded or subsidized by state monies.\textsuperscript{180} Subsequently, Arizona unsuccessfully attempted to pass H.B. 2471, which would remove all public benefits from persons born in the state whose parents were undocumented aliens at the time of birth.\textsuperscript{181} In 2010, Arizona passed one of the most controversial immigration laws to date. S.B. 1070 requires Arizona law enforcement officials to fully comply with and assist in the enforcement of federal immigration laws.\textsuperscript{182} Several states have proposed similar bills in the 2011 legislative session.\textsuperscript{183}


\textsuperscript{176} H.B. 638, 62nd Leg., 2011 Session, (Mont. 2011). H.B. 638 states: “To the extent allowed by federal law and the Montana constitution and notwithstanding any other state law, a state agency may not provide a state service to an illegal alien and shall comply with the requirements of this section… [This act] shall be submitted to the qualified electors of Montana at the general election to be held in November 2012 by printing on the ballot the full title of [this act] and the following: FOR denying certain state services to illegal aliens…AGAINST denying certain state services to illegal aliens.” \textit{Id.}

\textsuperscript{177} \textit{Id.}


\textsuperscript{179} S. Con. Res. 1031, 47th Leg., 2d Reg. Sess. (Ariz. 2006). S. Con. Res. 1031 states: “A person who was not a citizen or legal resident of the United States or who is without lawful immigration status is not entitled to classification as an in-state student…or entitled to classification as a country resident.” \textit{Id.}

\textsuperscript{180} \textit{Id.}

\textsuperscript{181} H.B. 2471, 48th Leg., 1st Reg. Sess. (Ariz. 2007). H.B. 2471 states: “A person who is born in this state…and whose parents are illegal aliens at the time the person is born is not eligible to receive any public benefit that is provided by this state.” \textit{Id.}

\textsuperscript{182} S.B. 1070, 49th Leg., 2nd Reg. Sess. (Ariz. 2010). S.B. 1070 states: “No official or agency of this state or a county, city, town or other political subdivision of this state may adopt a policy that
In 2006, Colorado passed a bill that prevents undocumented aliens from accessing in-state tuition rates.\textsuperscript{184} Subsequently in 2009, the Colorado Senate rejected S.B. 170 that would have reversed H.B. 1023 and allowed undocumented aliens to access in-state tuition rates.\textsuperscript{185} Similarly, in 2011, Colorado unsuccessfully passed S.B. 126, which would have allowed in-state tuition rates.\textsuperscript{186}

Georgia has passed two provisions governing undocumented students. In 2006, Georgia passed S.B. 529, which required the Board of Regents of Universities to comply with federal law, including but not limited to public benefits.\textsuperscript{187} In 2008, Georgia passed S.B. 492, which prevents undocumented aliens from obtaining in-state tuition rates.\textsuperscript{188} In October 2010, Georgia's State Board of Regents passed new rules regulating the admission of undocumented students.\textsuperscript{189,190} The 35 institutions in the University System of Georgia must verify the "lawful presence" of all students seeking in-state tuition rates.\textsuperscript{191} In addition,
any institution that has not admitted all academically qualified applicants in the two most recent years is not allowed to enroll undocumented students.\textsuperscript{192}

In 2011, Indiana passed H.B. 1402, which prohibits resident tuition for undocumented aliens.\textsuperscript{193} H.B. 1402 becomes effective July 1, 2011.\textsuperscript{194} Wyoming passed S.B. 85 that bars non-citizens from receiving scholarship funding in 2006.\textsuperscript{195}

Four states—Georgia, Alabama, North Carolina, and South Carolina—prohibit undocumented students from attending some or all public colleges and universities. In 2008, the State Board of Education of Alabama passed a new policy that denies undocumented immigrants admission to Alabama’s two-year colleges.\textsuperscript{196} In 2011, Alabama passed the highly controversial S.B. 256, which prohibits undocumented students from attending any and all public colleges and universities along with effectively criminalizing every aspect of life for undocumented immigrants.\textsuperscript{197} In 2008, South Carolina passed H.B. 4400 and became the first state to deny undocumented aliens access to any public university and any type of public higher education benefit.\textsuperscript{198}

Since 2001, the North Carolina Community College System has changed its admissions policy for undocumented students five times.\textsuperscript{199} In the past

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\item H.B. 1402, 117th Gen. Assem., 1st Reg. Sess. (Ind. 2011). H.B. 1402 states: “An individual who is not lawfully present in the United States is not eligible to pay the resident tuition rate that is determined by the state educational institution.” \textit{Id.}
\item Id.
\item S.B. 85, 58th Leg., Budget Sess. (Wyo. 2006). S.B. 85 states: “A student is not eligible for a scholarship under this article if he is not a United States citizen or a permanent resident alien who meets the definition of an eligible noncitizen.” \textit{Id.}
\item S.B. 256, Reg. Sess. 2011 (Ala. 2011). S.B. 256 states: “(c) Except as provided by this act, officials or agencies of this state or any political subdivision thereof, including, but not limited to, an officer of a court of this state, may not be prohibited or in any way be restricted from sending, receiving, or maintaining information relating to the immigration status, lawful or unlawful, of any individual or exchanging that information with any other federal, state, or local governmental entity for any of the following official purposes: (1) Determining the eligibility for any public benefit, service, or license provided by any state, local, or other political subdivision of this state.” \textit{Id.}
\item Alene Russell, \textit{State Policies Regarding Undocumented College Students: A Narrative of Unresolved Issues, Ongoing Debate, and Missed Opportunities}, American Association of State Colleges and Universities, Mar. 2011, at 7-8. Letters from DHS state: “The Department of Homeland Security (DHS) does not require any school to determine a student’s status (i.e., whether or not he or she is legally allowed to study). DHS also does not require any school to request immigration status information prior to enrolling students or to report to the government if
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decade, the system has banned undocumented students from enrolling, allowed each campus to decide whether to admit undocumented students, allowed undocumented students, and then again banned undocumented students from enrolling.200 Following a request from North Carolina for explanation, the United States Department of Homeland Security, Immigration and Customs Enforcement, issued two letters in 2008 demonstrating that: (1) enrollment of undocumented students does not violate federal law; (2) it is a matter left to the states to decide; and (3) In the absence of state law, it is a matter left to institutions to decide.201 Based on this guidance, undocumented students who graduated from a North Carolina high school, and who are able to pay out-of-state tuition, are allowed to enroll in the North Carolina Community College System.202 In 2011, North Carolina unsuccessfully passed a bill that would have denied undocumented students the ability to attend universities.203

Alaska unsuccessfully passed H.B. 39 that would have required students to be a United States citizen or legal alien to qualify as a state resident for purposes of tuition.204 Iowa unsuccessfully passed H. File 581, which attempted to deny state assistance to unauthorized aliens.205 A similar bill was proposed by Michigan’s legislature, but it was vetoed by the Michigan governor.206 In 2007, Mississippi unsuccessfully passed a bill that denied undocumented aliens in-state tuition rates.207 Subsequently in 2011, Mississippi unsuccessfully passed a

they know a student is out of status, except in the case of those who came on student visas or for exchange purposes and are registered with the Student Exchange and Visitor Program… individual states must decide for themselves whether or not to admit illegal aliens into their public post-secondary systems. States may bar or admit illegal aliens from enrolling in public post-secondary institutions either as a matter of policy or through legislation…In the absence of any state policy or legislation addressing this issue, it is up to the schools to decide whether or not to enroll illegal aliens.” Id.

200 Id.
201 Id.
203 H.B. 11, 2011 Gen. Assem., 2011 Reg. Sess. (N.C. 2011). H.B. 11 states: “A person who is not lawfully present in the United States shall not be admitted to, or take any class at, a community college… a person who is not lawfully present in the United States shall not be admitted to, or take any class at, a constituent institution of The University of North Carolina.” Id.
204 H.B. 39, 23rd Leg., 1st Sess. (Alaska 2003). H.B. 39 states: “The Board of Regents shall require that a student, in order to qualify as a state resident for purposes of tuition, be a resident of the state for at least one year and a United States citizen or a legal alien.” Id.
206 H.B. 5307, 93rd Leg., 2006 Reg. Sess. (Mich. 2006). H.B. 5307 states: “Michigan higher education shall grant an amount as provided in this act for each semester of attendance to an eligible resident student who meets all of the following: is a United states citizen…” Id.
bill that would allow undocumented aliens in-state tuition rates along with access to state financial aid.\textsuperscript{208} In 2011, Louisiana unsuccessfully passed a bill that would have denied in-state tuition to undocumented immigrants.\textsuperscript{209}

Missouri unsuccessfully attempted to pass S.B. 858, which would deny undocumented aliens access to universities, colleges, or community colleges along with denying undocumented aliens any type of public benefit.\textsuperscript{210} Tennessee proposed a similar bill, which has not yet been adopted.\textsuperscript{211} Kentucky unsuccessfully passed a similar bill in 2011 that would have banned undocumented aliens from access to universities.\textsuperscript{212}

In 2003, Oklahoma passed S.B. 596, which granted in-state tuition rates for undocumented aliens.\textsuperscript{213} In 2007, Oklahoma amended its law, leaving granting of in-state tuition rates to undocumented students up to the Oklahoma Board of Regents;\textsuperscript{214} the current law also restricts eligibility for scholarships to

and community and junior colleges...a student, other than an alien of a foreign county who is unlawfully present in the United States, residing within the State..." \textit{Id.}

\textsuperscript{208} H.B. 387, 126th Leg., 2011 Reg. Sess. (Miss. 2011). H.B. 387 states: "To provide eligibility for in-state tuition for certain students without documented immigration status and persons holding a student or other temporary visa to attend state-supported institutions of higher learning and community and junior colleges." \textit{Id.}

\textsuperscript{209} H.B. 59, 2011 Leg., 37th Reg. Sess. (La. 2011). H.B. 59 states: "An illegal alien shall not be eligible on the basis of residence within the state for any postsecondary education public benefit including but not limited to resident tuition, restricted admissions programs for disadvantaged or minority applicants, scholarships, work-study programs, or financial aid." \textit{Id.}

\textsuperscript{210} S.B. 858, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2007). S.B. 858 states: "Aliens unlawfully present in the United States shall not be eligible for admission to the university or college...and ensure that aliens unlawfully present in the United States are not eligible for admission to any junior college...no alien unlawfully present in the United States shall receive any state or local public benefit." \textit{Id.}

\textsuperscript{211} H.B. 808, 106th Gen. Assem., 1st Reg. Sess. (Tenn. 2009). H.B. 808 states: "A student shall not be admitted to and enrolled in a public postsecondary institution in this state unless the student establishes that the student is a citizen of the United States or the student is lawfully in the United States." \textit{Id.}

\textsuperscript{212} H.B. 112, 2011 Gen. Assem., 2011 Reg. Sess. (Ky. 2011). H.B. 112 states: "The minimum qualifications for admission shall include a requirement that a person: is a citizen or national of the United States...is lawfully admitted for permanent residence in the United States...holds a nonimmigrant visa permitting him or her to lawfully attend the postsecondary institution to which he or she has applied." \textit{Id.}

\textsuperscript{213} S.B. 596, 49th Leg., 1st Reg. Sess., (Ok. 2003). S.B. 596 states: "If the student is without lawful immigration status: file an affidavit with the institution stating that the student has filed an application or has a petition pending with the Bureau of Citizenship and Immigration Services to legalize the student's immigration status, or file an affidavit with the institution stating that the student will file an application to legalize his or her immigration status at the earliest opportunity the student is eligible to do so." \textit{Id.}

\textsuperscript{214} H.B. 1804, 51st Leg., 1st Reg. Sess. (Ok. 2007). H.B. 1804 states: "The Oklahoma State Regents for Higher Education may adopt a policy which allows a student to enroll in an institution within The Oklahoma State System of Higher Education and allows a student to be eligible for resident tuition if the student: graduated from a public or private high school in this state or successfully completed the General Educational Development test in this state; and resided in
legal residents. The Board of Regents currently still allows undocumented students, who meet Oklahoma's original statutory requirements, to receive in-state tuition. 

VI. USING SECTION 505 OF THE IIRIRA AS A COLLATERAL ASSAULT ON PLYLER

It is undisputed that the idea of educating non-citizens is outrageous to a certain segment of the American population. Stances against the Plyler decision gain quite a bit of traction politically, and as such, conservative politicians are currently exploiting the issue for votes in the 2012 Republican presidential primary. What is truly ironic is that these same politicians, who generally disdain federal government intervention to the extreme, are in favor of using section 1623, a federal statute, to override state legislation allowing this state with a parent or legal guardian while attending classes at a public or private high school in this state for at least two years prior to graduation.” Id.

S.B. 820, 51st Leg., 1st Reg. Sess. (Ok. 2007). S.B. 820 states: “To be eligible to participate in the Oklahoma Higher Learning Access Program and to qualify for an award which includes payment of an amount equivalent to resident tuition or other tuition pursuant to Section 2604 of this title for the first semester or other academic unit of postsecondary enrollment, a student shall be a United States citizen or lawfully present in the United States. A student who is not a United States citizen or lawfully present in the United States shall not be eligible to participate in the Oklahoma Higher Learning Access Program and to qualify for an award.” Id.


During the televised debate on September 12, 2011, GOP presidential candidate and Minnesota Representative, Michele Bachmann, stated: “I think the American way is not to give taxpayer subsidized benefits to people who have broken our laws or are here in the United States illegally. That is not the American way.” MSNBC, http://www.msnbc.msn.com/ (last visited Sept. 14, 2011). During the televised debate on September 22, former Massachusetts governor, Mitt Romney stated: "It's an argument I just can't follow. I don't see how it is that a state like Texas, to go to the University of Texas, if you're an illegal alien, you get an in-state tuition discount. You know how much that is? It's $22,000 a year. Four years of college ... almost a $100,000 discount, if you're an illegal alien, to go to University of Texas. If you're a United States citizen from any one of the other 49 states, you have to pay $100,000 more. That doesn't make sense to me.” The New York Times, Fox News-Google Republican Presidential Debate, http://www.newyorktimes.com/ (last visited Sept. 26, 2011). Michelle Bachman stated: “I would build a fence on America's southern border, on every mile, on every yard, on every foot, on every inch of the southern border. I think that's what we have to do. Not only build it, but then also have sufficient border security and enforce the laws that are on the books...and here's the other thing I would do: I would not allow taxpayer-funded benefits for illegal aliens or for their children.” Id. Rick Perry responded by stating that “There is nobody on this stage who has spent more time working on border security than I have. For a decade I've been the governor of a state with a 1,200-mile border with Mexico. We put $400 million of our taxpayer money into securing that border...but if you say that we should not educate children who have come into our state for no other reason than they've been brought there by no fault of their own, I don't think you have a heart. We need to be educating these children because they will become a drag on our society.” Id. Commentators have argued that Perry's stance on immigration caused him to lose the debate. DailyPress.com, GOP debate: Under Fire, Rick Perry Defends Immigration Stance, http://www.dailypress.com/ (last visited Sept. 26, 2011).
undocumented immigrants to qualify for in-state tuition rates. Nonetheless, ideology is not the law. What is true, however, is that attempts to legislatively forbid the grant of in-state tuition rates is simply the first step towards reversing Plyler.

A. The Profile of College-Ready Undocumented Immigrants

It is often acknowledged that the federal immigration laws are not serving their purpose by effectively regulating the flow of migration. Complicating matters, the current economic downturn has contributed to the demonization of undocumented immigrants and the drain on resources they allegedly cause. What is omitted from the popular discussion, however, is a cogent description of the immigrants who qualify for in-state tuition rates.

According to a study conducted by the Pew Hispanic Center, 13% of undocumented immigrants are composed of children.\textsuperscript{218} The number of children born to undocumented immigrants increased by 1.2 million from 2003 to 2008, despite the fact that the number of undocumented immigrants under the age of 18 remained constant.\textsuperscript{219} In 2003, 73% of undocumented children were born in the United States.\textsuperscript{220} Additionally, nearly all of the 1.5 million undocumented children in the United States live in this country with their parents.\textsuperscript{221}

The Pew Hispanic Center has also determined that the younger an undocumented immigrant is, upon arrival in the United States, the higher that child’s educational achievement.\textsuperscript{222} Among high school graduates ages 18 to 24 who are undocumented immigrants, 49% are in college or have attended college.\textsuperscript{223} Within this age and status group (undocumented immigrants ages 18 to 24 who are in college or have attended college), 42% arrived at age 14 or older and 61% arrived before the age 14.\textsuperscript{224}

According to the Immigration Policy Center, of the 65,000 undocumented students who graduate from high school each year, only 5 to 10% attend college.\textsuperscript{225} Additionally, the Migration Policy Institute estimated there are approximately 50,000 undocumented students currently enrolled in colleges.

\textsuperscript{218} Jeffrey S. Passel & D’Vera Cohn, A Portrait of Unauthorized Immigrants in the United States, Washington, DC: Pew Hispanic Center, Apr. 2009.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} Id.
within the United States.\textsuperscript{226} Studies estimate that annual enrollment of undocumented immigrants, ages 18 to 24, is between 7,000 and 13,000.\textsuperscript{227} The Immigration Policy Center has also estimated that nearly ¾ of undocumented students attend community colleges, and as many as half are enrolled on a part-time basis.\textsuperscript{228} California is currently the state with the largest number of undocumented students followed by Texas.\textsuperscript{229}

The Educators for Fair Consideration (E4FC) have determined that most college-ready undocumented students have the following characteristics: (1) they have lived in the United States the majority of their lives; (2) a majority were brought to the United States by their parents at a young age; (3) most speak English fluently and think of themselves as American; (4) many attended elementary, middle, and high school in the United States where they excelled academically in high school; and, (5) due to current immigration laws, these students currently lack a way to become legal residents or citizens of the United States.\textsuperscript{230}

American in appearance, the product of American public schools, and American in their hearts – these children are indistinguishable from their citizen counterparts. They are here. They have been here for many years. Their interest in college education will prevent them from being the drain on our society that anti-immigration advocates are so quick to decry. And it is this fundamental reality that led the Plyler court to hold that education should not be withheld in a futile attempt to staunch illegal immigration.

**B. Education is Not the Tool to Staunch Illegal Immigration.**


\textsuperscript{226} Jeanne Batalov & Michael Fix, *New Estimates of Unauthorized Youth Eligible for Legal Status under the DREAM Act*, Washington, DC: Migration Policy Institute, Oct. 2006. To estimate the number of unauthorized students, the Migration Policy Institute obtained rough estimates of the number of undocumented students currently enrolled in California colleges and universities and then extrapolated that number to the nation as a whole. There is currently no systematic way to gauge the numbers of undocumented students in U.S. community colleges and universities, which is the primary type of college that undocumented immigrants attend. *Id. See also* Jeffrey S. Passel, *Unauthorized Migrants: Number and Characteristics*, Washington D.C.: Pew Hispanic Center, June 2005.


In *Rodriguez*, the United States Supreme Court considered whether Texas' allocation of monies for primary and secondary schools was constitutional, given that each school district’s disbursement was dependent on tax monies received from property assessments drawn from each school district. The Court upheld the statutory scheme to Justice Marshall’s dismay. Prior to the decision in *Rodriguez*, courts consistently held that state statutes were unconstitutional if they were dependent on taxable local wealth for education financing. Marshall called the reversal of this precedent: “[a] retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens.” Marshall argued that every American had a constitutional right to “an equal start in life,” which included an education.

Apart from his disagreement on the constitutionality of the Texas taxing scheme itself, Justice Marshall took issue with the majority’s treatment of education. While the majority appeared to hold that strict scrutiny applied only to those fundamental rights expressly created in the Constitution, the Supreme Court had applied the highest level of scrutiny to other important rights such as the right to vote, the right to procreate, and the right to appeal a criminal conviction. Marshall offered an alternate analysis for the application of strict scrutiny: the fundamental nature of a non-constitutional interest is determined by the proximity of the relationship between the non-constitutional interest and the constitutional right or guarantee.

While the *Rodriguez* majority concluded that public education was not constitutionally guaranteed, Marshall stated that prior decisions of the Court afforded public education a unique status. A status that is based on public education’s connection to First Amendment rights, as well as the relationship between education and the political process.

Marshall’s legal treatment of access to education was arguably adopted by the *Plyler* court nine years later. Not only did the Supreme Court agree that every American citizen had a right to a basic education, it extended access to

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232 Id. at 17.
233 Id. at 55.
234 Id.
235 Id. at 71.
236 Id. at 71-2.
237 Id. at 83.
238 Id. at 100.
239 Id. at 102-3.
240 Id. at 112.
241 Id. at 112-4.
basic education to undocumented immigrants, knowing that this population was burgeoning. Implicit in the Court’s decision was the recognition that undocumented immigrants who are present in the country are far more likely to stay in the United States than return to their home countries, either by choice or through deportation. Thus, the prospect of a meaningful segment of the resident population who are uneducated would necessarily mean the formation of an underclass. Of more concern to the Court was that this underclass might attain citizenship, but remain under-educated for purposes of a meaningful contribution to American society, and as a result, become the drain on resources that conservative politicians fear.

By imposing monetary barriers to education, states are undercutting the future value of undocumented residents who reside within their borders. Thus, the short-term monetary gain achieved by the absence of undocumented students at colleges and universities is more than offset by these immigrants’ continued presence within the state, their inability to achieve greater financial success and the loss by that state of taxable revenue associated with greater financial success. In short, this policy decision trades long term benefits for short-term gain.

While everyone can agree that it is far preferable for immigrants to arrive in our country through legal means, the reality of the situation is many do not. And once within our borders, these immigrants are unlikely to leave. The solution for the dilemma is the overhaul of federal immigration laws, not punitive measures directed at education, which are largely ineffective at staunching the flow of illegal immigration. More importantly, this type of policy is at odds with the United States Constitution and United States Supreme Court case law that recognizes that our country was founded by immigrants, is exceptional because of our immigrants, and that exceptionalism exists because of our access to education combined with a realistic path to citizenship. The tenets of *Plyler* must not be abridged.

VII. CONCLUSION

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243 Id. at 221-2.
244 Id. at 226, 230.
245 Id. at 219, 234, 239.
246 Id. at 221.
247 An Alabama state legislature has developed an even more unique curtailment of *Plyler* by sponsoring a bill that would forbid undocumented immigrants to attend any extracurricular activity, including high school proms. See S.B. 256, § 8, Reg. Sess. 2011 (Ala. 2011). S.B. 256 states: “Except as otherwise provided by law, an alien who is not lawfully present in the United States shall not be eligible for any of the following: . . . [p]articipation in any extracurricular activity outside of the basic course of study in any primary, secondary, or post-secondary educational program.” Id. This type of legislation furthers the “uniformly negative” effects on undocumented immigrants’ social development. Julia Preston, *Risks Seen for Children of Illegal Immigrants*, N.Y. TIMES, Sept. 20, 2011 (citing a study published by the Harvard Educational Review).
Allowing undocumented immigrants to qualify for in-state tuition rates at post-secondary universities will not sound a clarion call for further illegal immigration. It is disingenuous to argue that the prospect of slightly cheaper tuition rates motivates immigrants to come to the United States, regardless of their legal status. By improperly extending 8 U.S.C. section 1623 to forbid an alleged benefit of lower tuition rates, the very foundation of Plyler is at risk. Barriers to education based on immigration status can have no other effect than what the Plyler majority feared – the creation of an underclass, or second class residents. Current efforts to repeal the Fourteenth Amendment’s automatic conferral of citizenship through birth in the United States will have the same result. But that is the intended outcome that advocates for such outsized punitive measures desire. This legal position, however, discards the history of the United States and its expansive approach to immigration. Instead, these advocates play on the fear engendered by the economic crisis to further unconstitutional goals. The United States and its Constitution should not be compromised by fleeting political demagogy. The proper method for stemming illegal immigration is through revision of the federal immigration laws, not through the denial of educational opportunities.