

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

Laura A. Hernández\*

*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 entry into that world of financial security.*

*Because this particular tale of the American Dream has such a strong hold on the country's psyche, it is understandable why laws that appear to favor undocumented immigrants in post-secondary education are under increasing attack. 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 compounds the problem. One of these emerging legal challenges involves state universities and the volatile subject of tuition rates.*

*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"), codified as 8 U.S.C. § 1623(a), which prohibits the conferral of a residency-based benefit on an undocumented immigrant when that same benefit is not available to non-resident citizens. Currently twelve states have enacted legislation that allows undocumented immigrants to qualify for in-state tuition rates if they fulfill a number of requirements such as graduating from a high*

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\* Associate Professor of Law, Baylor Law School. Special thanks to A. Grace Taylor for her invaluable research and editing assistance. Thank you to Kody Silva and Kelly Hodge for their research assistance.

*school located within the state and promising to seek citizenship. Critics of these statutes argue that they employ a de facto residency requirement to avoid the issue of 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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## 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 entry into that world of financial security.

Because this particular tale of the American Dream has such a strong hold on the American psyche, it is perhaps understandable why laws that appear to favor undocumented immigrants in post-secondary education are under increasing attack. 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 compound the problem.

One of these emerging legal challenges involves state universities and the volatile subject of tuition rates. Every aspiring student, 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. Adding another burden on out-of-state residents, state universities usually limit the number of these students it will accept.

This issue caught fire during the 2012 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 who are here in the United States illegally. That is not the American way."<sup>1</sup> During the televised debate on September 22, 2012, former Massachusetts governor, Mitt Romney stated:

It's an argument I just can't follow. I've got to be honest with you, 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? That's \$22,000 a year. Four years of college, almost [a] \$100,000 discount if you are an illegal alien [to] go to University of Texas. If you are a United States citizen from any one of the other 49

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<sup>1</sup> *Full Transcript of CNN-Tea Party Republican Debate* (CNN television broadcast Sept. 12, 2011), <http://archives.cnn.com/TRANSCRIPTS/110912/se.06.html> (last visited Nov. 10, 2011) [hereinafter "*CNN-Tea Party Republican Debate*"].

states, you have to pay \$100,000 more. That doesn't make sense to me.<sup>2</sup>

Texas governor Rick Perry responded:

[T]here 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.<sup>3</sup>

Political commentators have argued that Perry's response caused him to lose the debate.<sup>4</sup>

On its face, it appears beyond dispute that undocumented immigrants should not enjoy privileges that are denied to bona fide citizens. Yet, in post-secondary education, 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.<sup>5</sup> However, the Supreme Court did not prohibit all restrictions on enrollment.<sup>6</sup> *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.<sup>7</sup> Thus, requiring residency appeared to be a legally acceptable circumvention of the issue of immigration status and access to education.

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), codified as 8 U.S.C. § 1623(a), which prohibits conferring a residency-based benefit on an undocumented im-

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<sup>2</sup> *Fox News: Google GOP Debate* (Fox News television broadcast Sept. 22, 2011), <http://www.foxnews.com/politics/2011/09/22/fox-news-google-gop-2012-presidential-debate/> (last visited Nov. 10, 2011) [hereinafter "*Fox News-Google GOP Debate*"].

<sup>3</sup> *Id.*

<sup>4</sup> See Robert Abacarian, *GOP debate: Under fire, Rick Perry defends immigration stance*, L.A. TIMES, Sept. 22, 2011, available at <http://articles.latimes.com/2011/sep/22/news/la-pn-debate-immigration-20110922> (last visited Nov. 10, 2011).

<sup>5</sup> See 457 U.S. at 229–30.

<sup>6</sup> See *id.* at 240 n.4 (Powell, J., concurring).

<sup>7</sup> See *id.*

migrant when that same benefit is not available to non-resident citizens.<sup>8</sup> 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 graduating from a high school located within the state and promising to seek citizenship.<sup>9</sup> Critics of these statutes argue that they employ a de facto residency requirement to avoid the issue of 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.<sup>10</sup>

The United States' struggle with a viable immigration policy 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.<sup>11</sup> 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 education's crucial role in a functional and thriving democracy.<sup>12</sup> Without an extension of *Plyler*, a second class citizenry may well form—compromised of graduates of American high schools, fluent only in English, American for all practical purposes, lacking a country to “return to,” but prevented from contributing meaningfully to American society due to the acts of their parents.<sup>13</sup>

Part I of this Article will discuss the United States Supreme Court's approach to education and immigration status. Part II will analyze the

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<sup>8</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 505, 110 Stat. 3009–546 (1996).

<sup>9</sup> These states are Arizona, California, Illinois, Kansas, Minnesota, Nebraska, Nevada, New Mexico, New York, Texas, Utah, Washington, and Wisconsin. See ALENE RUSSELL, AM. ASS'N OF STATE COLLS. AND UNIVS., STATE POLICIES REGARDING UNDOCUMENTED STUDENTS: A NARRATIVE OF UNRESOLVED ISSUES, ONGOING DEBATE AND MISSED OPPORTUNITIES 4 (Mar. 2011), available at <http://www.aascu.org/uploadedFiles/AASCU/Content/Home/MediaAndPublications/PolicyMattersMagazine/Article/2011.marchpm.pdf>.

<sup>10</sup> See *Plyler*, 457 U.S. at 221–23, 229–30.

<sup>11</sup> See CNN-Tea Party Republican Debate, *supra* note 1; Fox News-Google GOP Debate, *supra* note 2.

<sup>12</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–39 (1973).

<sup>13</sup> See *Plyler*, 457 U.S. at 229–30.

language of section 505 of the IIRIRA and compare it with legislation passed concurrently, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.<sup>14</sup> Part III 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*.<sup>15</sup> Part IV 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 V 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.

## I. EDUCATION, IMMIGRATION STATUTES, 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.<sup>16</sup>

### A. *Plyler v. Doe*

In 1975, allegedly due to budgetary concerns and the rising cost of public education,<sup>17</sup> the State of Texas revised its laws to withhold funds from local school districts for the education of students of questionable immigration status.<sup>18</sup> The statute further empowered local school districts to deny enrollment to students who were unable to prove their legal status.<sup>19</sup>

The United States Supreme Court evaluated the constitutionality of the statute in *Plyler v. Doe*.<sup>20</sup> After concluding that the Equal Protection Clause applied to every individual domiciled in the United States, whether or not lawfully present,<sup>21</sup> the Court reiterated that “[t]he Equal

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<sup>14</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>15</sup> 241 P.3d 855, 859 (Cal. 2010).

<sup>16</sup> See *Plyler*, 457 U.S. at 205.

<sup>17</sup> *Id.* at 227. *Plyler v. Doe* is a consolidation of several class actions that were filed challenging the constitutionality of the Texas statute. *Id.* at 206–09.

<sup>18</sup> *Id.* at 205; see TEX. EDUC. CODE ANN. § 21.031 (Vernon 1987).

<sup>19</sup> *Plyler*, 457 U.S. at 205.

<sup>20</sup> *Id.*

<sup>21</sup> See *id.* at 211 n.10 (“[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.” (quoting *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898))). Therefore, the Court concluded that the Equal Protection Clause was applicable to all persons within the boundaries of a state because undocumented aliens are clearly subject to protection while domiciled in the United States. See *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

Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.”<sup>22</sup> The Court found that the state creates an impermissible sub-class of residents when it subjects individuals to its laws while simultaneously withholding from them the law’s protections.<sup>23</sup> The *Plyler* Court declined to apply a heightened level of scrutiny but nonetheless held the Texas statute unconstitutional under the Equal Protection Clause.<sup>24</sup> While the Court did not recognize education as a fundamental right,<sup>25</sup> the Court did not appear to be applying a traditional rational basis standard of review in its analysis either.<sup>26</sup> 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).<sup>27</sup>

Two factors drove the Court’s analysis. First, the plaintiffs in *Plyler* were minor children, whose unlawful entry into the country was not within their control.<sup>28</sup> 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 acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”<sup>29</sup> The majority of the Court could not conceive of any rational justification for penalizing the children.<sup>30</sup> Second, while the Supreme Court did not (and still does not) define education as a fundamental right, the Court recognized that “neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”<sup>31</sup> Nonetheless, the *Plyler* Court reviewed the Texas statute under rational basis because public education is not a right provided by the Constitution.<sup>32</sup>

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leaves the jurisdiction . . . he is entitled to the equal protection of the laws that a State may choose to establish.”).

<sup>22</sup> *Id.* at 213.

<sup>23</sup> *See id.*

<sup>24</sup> *Id.* at 223–24. Using the analysis it adopted in *Rodriguez v. San Antonio Independent School District*, 411 U.S. 1 (1973), the Court rejected the application of strict scrutiny because a suspect class did not exist. *See id.* at 219 n.19. According to the Court’s reasoning, the legal status of undocumented immigrants is voluntary in nature. *See id.* (“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.”).

<sup>25</sup> *Id.* at 221–22.

<sup>26</sup> *See id.* at 223–24.

<sup>27</sup> *Id.*

<sup>28</sup> *See id.* at 219–20.

<sup>29</sup> *Id.* at 220.

<sup>30</sup> *See id.*

<sup>31</sup> *Id.* at 221.

<sup>32</sup> *See id.* at 223–24 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–39 (1973)). To pass constitutional muster, the Texas statute would have to further some substantial goal of the state that would justify the classification. *See id.* at 224.

Recognizing that education provides tools by which individuals can participate beneficially in society, the Court found that it played a fundamental role in maintaining the country's political and cultural heritage.<sup>33</sup> The Court determined that the wholesale denial of secondary public education to undocumented children would result in a permanent "underclass"<sup>34</sup> of individuals who lacked the skills and resources to better their status in American society.<sup>35</sup> Invoking the memory of *Brown v. Board of Education*,<sup>36</sup> the Court analogized the situation faced by undocumented immigrant children to that faced by black children educated in a segregated school system.<sup>37</sup> This scenario was especially troubling to the Court because, as it opined, many of the then-undocumented children would become legal citizens in the future.<sup>38</sup>

The Court also addressed the issue of cost.<sup>39</sup> 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.<sup>40</sup> The Supreme Court quickly dismissed this argument finding that: "It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation."<sup>41</sup>

Thus, under rational scrutiny, legislation that deprived undocumented immigrant children of primary and secondary public school education was impermissible under the Equal Protection Clause.<sup>42</sup> The Court struck down the Texas statute.<sup>43</sup>

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<sup>33</sup> See *id.* at 221 ("In sum, education has a fundamental role in maintaining the fabric of our society.").

<sup>34</sup> *E.g., id.* at 219 ("The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.").

<sup>35</sup> *Id.* at 221–22. The Court recognized the fact that undocumented immigrant children were unlikely to be deported to their country of origin. See *id.* at 230. Moreover, the Court concluded that "[i]n terms of educational cost and need . . . undocumented children are 'basically indistinguishable' from legally resident alien children," making the savings generated by denying these children a public education "wholly insubstantial in light of the costs." *Id.* at 229–30.

<sup>36</sup> 347 U.S. 483 (1953).

<sup>37</sup> *Plyler*, 457 U.S. at 222–23 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1953)). The *Plyler* Court also appeared to believe that some of the undocumented immigrant children might one day become American citizens. See *id.* at 230.

<sup>38</sup> See *id.* at 230.

<sup>39</sup> See *id.* at 229–30.

<sup>40</sup> See *id.*

<sup>41</sup> *Id.* at 230.

<sup>42</sup> See *id.*

<sup>43</sup> *Id.*



### 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.”<sup>44</sup> 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.”<sup>45</sup> While the Supreme Court did not specifically extend *Plyler*,<sup>46</sup> its reasoning is equally applicable to post-secondary education. If the Court declined to punish undocumented children for the actions of their parents in relation to primary and secondary education,<sup>47</sup> it would be illogical to punish these same children once they reach college. If the purpose of *Plyler* was to remove unreasonable obstacles to education, a legislatively created barrier—such as increased tuition rates—must violate it.

Given the rhetoric of the upcoming presidential election and the economic crisis, claims that educating undocumented immigrants imposes unacceptable taxpayer costs have gained traction.<sup>48</sup> Instead of educating undocumented immigrants, proponents advocate for enforcing immigration laws more vigorously and deporting undocumented immigrants.<sup>49</sup>

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<sup>44</sup> *Id.* at 221.

<sup>45</sup> *Id.* at 221–22.

<sup>46</sup> *See id.* at 230.

<sup>47</sup> *See id.* at 221–22, 229–30.

<sup>48</sup> During the CNN-Tea Party Republican Debate televised on September 12, 2011, Republican presidential primary candidate and Minnesota Representative, Michele Bachmann, stated: “I think that the American way is not to give taxpayer subsidized benefits to people who have broken our laws or who are here in the United States illegally. That is not the American way.” *CNN-Tea Party Republican Debate*, *supra* note 1.

However, 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 parent contributions; 17% from the federal government; 33% from the State of Texas including state appropriations, state grants and contracts, research development funds, Higher Education Assistance Funds and the Available University Fund; and 23% from institutional resources, including investments, grants from local government, auxiliary enterprises and private gifts and grants. *See* DIV. OF PLANNING AND ACCOUNTABILITY FIN. AND RES. PLANNING, TEX. HIGHER EDUC. COORDINATING BD., SOURCES AND USES OF FUNDS UNIVERSITIES, HEALTH-RELATED INSTITUTIONS, AND LAMAR STATE COLLEGES AND TEXAS STATE TECHNICAL COLLEGES § 1 (2011), available at <http://www.thecb.state.tx.us/reports/PDF/2106.PDF?CFID=22660815&CFTOKEN=78067984>.

<sup>49</sup> For example, Representative Bachmann has 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, ISSUES: IMMIGRATION, <http://bachmann.house.gov/> (last visited Nov. 6, 2011).

However, the *Plyler* Court considered this argument and found it unpersuasive; it downplayed any additional economic burden as slight when compared with the costs brought on by large numbers of uneducated residents—documented or not.<sup>50</sup> Moreover, history has proven that the *Plyler* Court was correct<sup>51</sup>—instead of deporting undocumented immigrants, the United States has passed asylum laws allowing certain classes of undocumented immigrants to remain in the United States and earn citizenship.<sup>52</sup> In this context, encouraging deportation over education appears unrealistic and shortsighted.

Furthermore, *Nyquist v. Mauclet* provides some guidance in expanding constitutional protection for immigrants in higher education.<sup>53</sup> In *Nyquist*, a New York statute barred certain resident aliens from receiving state financial assistance for higher education.<sup>54</sup> At the time of litigation, New York Education Law section 661(3) read:

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.<sup>55</sup>

New York provided three types of financial assistance to students: performance-based scholarships, tuition assistance awards, and subsidized student loans.<sup>56</sup> The eligibility requirements were the same for each type

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<sup>50</sup> See *Plyler*, 457 U.S. at 221–22, 229–30.

<sup>51</sup> See *id.* at 230 (predicting that many then-undocumented immigrants would become naturalized citizens).

<sup>52</sup> See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (conferring amnesty to undocumented immigrants who were able to prove they were present in the United States continuously for five years); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (establishing an explicit asylum provision in the United States immigration law); see also NANCY RYTINA, U.S. IMMIGRATION & NATURALIZATION SERV., IRCA LEGALIZATION EFFECTS: LAWFUL PERMANENT RESIDENCE AND NATURALIZATION THROUGH 2001 (2002), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/irca0114int.pdf> (finding that nearly 2.7 million illegal immigrants became permanent residents under the Immigration Reform and Control Act).

<sup>53</sup> 432 U.S. 1 (1977).

<sup>54</sup> See *id.* at 2.

<sup>55</sup> *Id.* at 3–4 (citing N.Y. EDUC. LAW § 661(3) (McKinney 1975)).

<sup>56</sup> See *id.* at 2–3.

of financial assistance.<sup>57</sup> Effectively, the statute barred only resident aliens from participating in these programs.<sup>58</sup>

Two individuals filed separate lawsuits challenging the constitutionality of the statute under the Equal Protection Clause.<sup>59</sup> 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.<sup>60</sup> However, this plaintiff did not want to relinquish his French citizenship.<sup>61</sup> The second plaintiff was a Canadian citizen who had been living in New York for most of his life.<sup>62</sup> He had graduated from an American public high school and would have met all the qualifications for tuition assistance and scholarship but for his resident alien status.<sup>63</sup> Like the French plaintiff, the Canadian plaintiff did not intend to become a naturalized American, although he did intend to remain in New York.<sup>64</sup> After the two cases were consolidated, the lower federal courts enjoined enforcement of the statute on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment.<sup>65</sup>

The Supreme Court affirmed the unconstitutionality of the statute.<sup>66</sup> Applying strict scrutiny, the Supreme Court rejected the state's argument that the statute did not discriminate improperly because it did not apply to aliens who intended to become United States citizens.<sup>67</sup> Writing for the majority, Justice Harry Blackmun stated: "The 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."<sup>68</sup> Justice Blackmun

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<sup>57</sup> See *id.* at 3.

<sup>58</sup> See *id.* at 4 ("Since many aliens . . . may be precluded by federal law from establishing a permanent residence in this country . . . [the statute] is of practical significance only to resident aliens.").

<sup>59</sup> See *id.* at 4–5.

<sup>60</sup> See *id.* at 4.

<sup>61</sup> *Id.* at 4–5. The French plaintiff was married to a United States citizen and was also the parent of a child with United States citizenship. *Id.*

<sup>62</sup> See *id.* at 5.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See *id.* at 5–6.

<sup>66</sup> *Id.* at 12 ("Since we hold that the challenged statute violates the Fourteenth Amendment's equal protection guarantee, we need not reach appellees' claim that it also intrudes upon Congress' comprehensive authority over immigration and naturalization.").

<sup>67</sup> See *id.* at 7–9. Previously, the Court had considered whether an Arizona statute that imposed a durational residency requirement on resident aliens who wished to receive welfare benefits was unconstitutional. See *Graham v. Richardson*, 403 U.S. 365, 366–67 (1971). Like the New York Education statute at issue in *Mauclet*, the Arizona statute did not categorically discriminate against all aliens, just those individuals who failed to fulfill the residency requirement. See *id.* at 367. Applying strict scrutiny, the *Graham* Court found the Arizona statute unconstitutional. See *id.* at 376.

<sup>68</sup> *Mauclet*, 432 U.S. at 9.

also rejected the state's argument that financial aid programs for higher education could not be considered a "necessit[y] of life."<sup>69</sup> 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."<sup>70</sup> 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.<sup>71</sup> Therefore, the Court concluded: "The State surely is not harmed by providing resident aliens the same educational opportunity it offers to others."<sup>72</sup>

Post-secondary education is as vital and important for advancement in American society today as secondary education was in 1977 and 1982.<sup>73</sup> Thus, the denial of equal treatment with regard to post-secondary tuition rates raises a barrier that *Plyler* explicitly sought to abolish.<sup>74</sup> As discussed below, most requirements for in-state tuition rates are based

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<sup>69</sup> *Id.* at 8 n.9.

<sup>70</sup> *Id.* at 8 n.9 (quoting 1961 N.Y. LAWS, ch. 389, § 1(a)). The Court further stated: "If the encouragement of naturalization through these programs were seen as adequate, then every discrimination against aliens could be similarly justified." *Id.* at 11.

<sup>71</sup> *See id.* at 11 n.15.

<sup>72</sup> *Id.* at 11–12. The Court found that the resident aliens' payment of taxes in support of this state program to be persuasive in allowing their participation in the program. *See id.* While undocumented immigrants do not participate in formal tax requirements, there is little doubt that they contribute to tax rolls through their use of services and purchase of goods. *See* MICHAEL CASSIDY & SARAH OKOS, COMMONWEALTH INST., FISCAL FACTS: TAX CONTRIBUTIONS OF VIRGINIA'S UNDOCUMENTED IMMIGRANTS (2008), available at [http://www.thecommonwealthinstitute.org/wp-content/uploads/2011/08/080200\\_tax\\_contributions\\_undoc\\_workers\\_REPORT.pdf](http://www.thecommonwealthinstitute.org/wp-content/uploads/2011/08/080200_tax_contributions_undoc_workers_REPORT.pdf) (indicating that the undocumented immigrants residing in Virginia annually paid between \$260 to \$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 to \$453 million).

<sup>73</sup> *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, POST-SECONDARY EDUCATION: OVERVIEW, <http://www.ncsl.org/default.aspx?tabid=12925> (last visited Nov. 5, 2011) ("The importance of postsecondary education has increased significantly in the last decade. A high school diploma is no longer sufficient in the 21st century. In order to be successful in today's global economy, a person must receive some form of postsecondary education."); ELENA ROCHA, CTR. FOR AM. PROGRESS, EDUCATION: THE STATE WE'RE IN (2005), available at [http://www.americanprogress.org/projects/education/files/college\\_pipeline.pdf](http://www.americanprogress.org/projects/education/files/college_pipeline.pdf) ("[I]n today's global, technology- and information-driven society, a high-school diploma is no longer sufficient for achieving the American dream of a middle-class lifestyle. Our global society and economy demand many more employees with knowledge and skill sets beyond those typically learned in high school, and a college or post-secondary vocational credential is often necessary to prove that students have developed such abilities."); *see also* ANTHONY P. CARNEVALE & DONNA M. DESROCHERS, EDUC. TESTING SERV., STANDARDS FOR WHAT? THE ECONOMIC ROOTS OF K–16 REFORM (2003), available at <http://www.learndoeearn.org/For-Educators/Standards-for-What.pdf> (emphasizing that for most Americans education beyond high school is now a necessary condition for developing skills required by most well-paying jobs).

<sup>74</sup> *See Plyler v. Doe*, 457 U.S. 202, 222 (1982).

on the student's physical presence within the state, for a specified amount of time, while the student is a minor.<sup>75</sup> However, an undocumented student's physical presence in the state is the direct result of the parent's decision to enter the United States without documentation.<sup>76</sup> It is undeniable that the crux of the *Plyler* decision is that these children should not bear the consequences of their parents' misconduct.<sup>77</sup> Thus, logically extending *Plyler*, it is unconstitutional to treat undocumented students differently from documented and citizen-students who are accepted into post-secondary institutions.

## II. 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.<sup>78</sup> Instead of addressing the dysfunctional immigration laws and creating a workable immigration scheme, Congress implemented punitive measures on those present in the country without proper documentation.<sup>79</sup> 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).<sup>80</sup>

Section 505 of the IIRIRA 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 the benefit.<sup>81</sup> Section 505 states:

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<sup>75</sup> See *infra* Part V.A.

<sup>76</sup> See *e.g.*, *Trimble v. Gordon*, 430 U.S. 762, 770 (1977).

<sup>77</sup> See *Plyler*, 457 U.S. at 220.

<sup>78</sup> Assigning Border Patrol agent manpower to the Southwest border remains a high priority. See *Homeland Security Department's Budget Submission for Fiscal Year 2011: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. 5 (2010) (statement of Sen. Collins); see also RANDY CAPPS & JEFFREY S. PASSEL, THE URBAN INSTITUTE, THE NEW NEIGHBORS: A USERS' GUIDE TO DATA ON IMMIGRANTS IN U.S. COMMUNITIES (2003) (indicating that twenty-two states that had relatively low percentages of immigrants saw these populations grow by more than 90% between 1990 and 2000); Eduardo Porter, *Number of Hispanics Ballooned in '90s; Group is About to Become Biggest Minority*, WALL ST. J., Mar. 8, 2001, at A24 (explaining that the Census Bureau discovered that the Hispanic population grew by 58% over the 1990s to reach 35.3 million, outpacing the agency's previously issued figure by 2.5 million and concluding that the majority of that difference was attributable to an increase in undocumented immigrants during the decade).

<sup>79</sup> See, *e.g.*, *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

<sup>80</sup> *Id.*; *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>81</sup> *Illegal Immigration Reform and Immigrant Responsibility Act*, § 505, 110 Stat. 3009-672 (codified 8 U.S.C. § 1623).

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.<sup>82</sup>

The United States Code does not have a singular definition of the term “benefit.” Moreover, even where Congress legislates with respect of one subject matter, “benefit” may have different definitions. Reference to the IIRIRA and its companion legislation, the PRWORA, demonstrates that, even though both statutes regulate immigration, the meaning of “benefit” is specifically tailored to each statutory scheme. For example, section 401 of PRWORA, defines a “Federal public benefit” as any “grant, contract, loan, professional license, or commercial license” that is conferred by the federal government.<sup>83</sup> Further, “any retirement, welfare, health, disability, public or assisted housing, *postsecondary education*, food assistance, unemployment benefit, or any other similar benefit” provided to “an individual, household, or family eligibility unit” by the federal government similarly qualifies as a “benefit.”<sup>84</sup> On the other hand, at least one statutory section in the IIRIRA defines “the issuance of any grant, contract, loan, professional license, or commercial license” by the federal government<sup>85</sup> or “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<sup>86</sup> as a “federal public benefit.”

Comparing these 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 on an individual, household, or family eligibility unit.<sup>87</sup> It is worth noting, however, that the IIRIRA definition is contained within a section that addresses criminal activity, while the

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<sup>82</sup> *Id.*

<sup>83</sup> Personal Responsibility and Work Opportunity Reconciliation Act, § 401, 110 Stat. 2261 (codified at 8 U.S.C. § 1611).

<sup>84</sup> *See id.* §401(c)(1)(B) (codified at 8 U.S.C. § 1611(c)(1)(B)) (emphasis added).

<sup>85</sup> *See* Illegal Immigration Reform and Immigrant Responsibility Act, § 561(c)(1)(A), 110 Stat. 3009-682 (codified at 8 U.S.C. § 506 (c)(1)(A)).

<sup>86</sup> *See id.* § 561(c)(1)(B) (codified at 8 U.S.C. § 506(c)(1)(B)).

<sup>87</sup> *See* Interpretation of “Federal Public Benefit,” 63 Fed. Reg. 41658, 41658–59 (Aug. 4, 1998) (describing the Department of Health and Human Services comparison of the definition of “benefit” under the PRWORA and the IIRIRA).

PRWORA definition is aimed specifically at the distribution of federal public benefits.<sup>88</sup>

Section 1621 (part of the PRWORA) further differentiates “[s]tate and local public benefits” from “federal benefits,” defining state and local benefits as aid bestowed by state and local governments.<sup>89</sup> To complicate matters, section 505 of the IIRIRA (8 U.S.C. § 1623), is placed within the statutory chapter created for the PRWORA.<sup>90</sup> From this often confusing legislative history, courts must determine the full reach of section 505 and its application to education.

### III. FEDERAL AND STATE COURTS INTERPRET SECTION 505 IN CONTEXT OF IN-STATE TUITION RATES

Efforts were made to legislatively foreclose the application of section 505 to post-secondary education. The 2005 draft of the Development, Relief, and Education for Alien Minors Act of 2005 (“DREAM Act of 2005”) expressly repealed section 505 of the IIRIRA.<sup>91</sup> Unfortunately, this provision did not survive the legislative process to later versions of the bill.<sup>92</sup> Thus, the latest incarnation of the DREAM Act would not resolve the dispute over the reach of § 505 of the IIRIRA. This legislative 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 505 to post-secondary tuition rates.<sup>93</sup> The United States Dis-

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<sup>88</sup> Compare Personal Responsibility and Work Opportunity Reconciliation Act, § 401 (codified at 8 U.S.C. § 1611) with Illegal Immigration Reform and Immigrant Responsibility Act, § 561 (codified at 8 U.S.C. § 506).

<sup>89</sup> Personal Responsibility and Work Opportunity Reconciliation Act, § 411 (codified at 8 U.S.C. § 1621(c)) (“(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.”).

<sup>90</sup> See Illegal Immigration Reform and Immigrant Responsibility Act, § 505 (codified at 8 U.S.C. § 1623).

<sup>91</sup> See Development, Relief, and Education for Alien Minors Act of 2005 (“DREAM Act of 2005”), S. 2075, 109th Cong. § 3(a) (2005).

<sup>92</sup> See Development, Relief, and Education for Alien Minors Act of 2005 (“DREAM Act of 2010”), 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. ANDORRA BRUNO, CONG. RESEARCH SERV., UNAUTHORIZED ALIEN STUDENTS: ISSUES AND “DREAM ACT” LEGISLATION, 4 (2010), available at <http://www.fas.org/sgp/crs/misc/RL33863.pdf>.

<sup>93</sup> See *Day v. Sebelius*, 376 F. Supp. 2d 1022, (D. Kan. 2005), *aff’d*, 500 F.3d 1127 (10th Cir. 2007).

strict Court for the District of Kansas was the first to take up the issue in *Day v. Sebelius*.<sup>94</sup>

#### A. *Day v. Sebelius*

The Kansas legislature enacted section 76-731a of the Kansas Code on July 1, 2004, to provide a statutory basis for the assessment of in-state tuition rates to undocumented immigrants attending Kansas state universities.<sup>95</sup> Section 76-731a states:

(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.<sup>96</sup>

Plaintiffs in the suit contended that section 76-731a unlawfully bestowed the lower, in-state tuition rate to undocumented immigrants in violation of section 505 of the IIRIRA (8 U.S.C. § 1621).<sup>97</sup> The district

<sup>94</sup> *Id.*

<sup>95</sup> See *id.* at 1025–26; KAN. STAT. ANN. § 76-731a (Supp. 2010).

<sup>96</sup> KAN. STAT. ANN. § 76-731a (emphasis added).

<sup>97</sup> See *Day*, 376 F. Supp. 2d at 1025–26. 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 (quoting KAN. CONST. art. I, § 3). The court determined that this general enforcement



court disposed of many of plaintiffs' claims due to their lack of standing because they did not have an injury-in-fact.<sup>98</sup> None of the plaintiffs were subject to the provisions of section 76-731a; therefore, their alleged harm was hypothetical or conjectural.<sup>99</sup> Thus, a procedural issue allowed the court to circumvent the thornier substantive, constitutional issues.<sup>100</sup> Notably, the district court also ruled that section 505 did not create a private right of action.<sup>101</sup>

On appeal, the Tenth Circuit affirmed the district court's holding that plaintiffs failed to demonstrate an injury-in-fact under their equal protection claim.<sup>102</sup> The alleged improper burden caused by increased

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power is not sufficient to establish the connection required to meet an exception to immunity under *Ex parte Young*. *Id.* (citing *Women's Emergency Network v. Bush*, 323 F.3d 937, 949–50 (11th Cir. 2003))

<sup>98</sup> See *id.* at 1031–32 (“An injury-in-fact is an ‘invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent.’” (quoting *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 560 (1992))).

<sup>99</sup> *Id.* at 1033. As a result, the court dismissed counts 1, 3, 4, 5 and 6 of the complaint. *Id.* at 1033–34.

<sup>100</sup> The Fourteenth Amendment guarantees that “No 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, 452–53 (1973)). Kansas took advantage of this authority in section 76-729, not section 76-731a. *Id.* Section 76-729(a)(1) of the Kansas Code states:

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) (Supp. 2010). 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 thereby demonstrating an injury-in-fact. *Day*, 376 F. Supp. 2d at 1033.

<sup>101</sup> *Day*, 376 F. Supp. at 1034–35 (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,” *id.* at 1036 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001)), and “language identifying “the class for whose especial benefit the statute was enacted,” *id.* (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 n.9 (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. See *id.* at 1036–37. Moreover, the 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.* at 1037 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)).

<sup>102</sup> See *Day v. Bond*, 500 F.3d 1127, 1132 (10th Cir. 2007).

tuition rates due to section 76-731a's subsidization of undocumented alien beneficiaries<sup>103</sup> and the alleged injury due to competition over scarce tuition resources<sup>104</sup> were too speculative to support standing.<sup>105</sup> Further, while non-resident U.S. citizens were denied equal treatment by section 76-731a's qualification barriers<sup>106</sup> and paid more tuition than qualifying undocumented immigrants,<sup>107</sup> plaintiffs failed to show that these alleged injuries stemmed from improper discrimination.<sup>108</sup>

The Tenth Circuit, agreeing with the lower court, also dismissed the plaintiffs' claim that section 505 of the IIRIRA (8 U.S.C. § 1623) pre-empted section 76-731a, holding that it did not confer a private, actionable right.<sup>109</sup> Analogizing the facts before them to *Gonzaga University v. Doe*,<sup>110</sup>—where the Supreme Court determined that the Family Educational Rights and Privacy Act (FERPA) did not create a private right of action<sup>111</sup>—the Tenth Circuit focused on the lack of “rights-creating language.”<sup>112</sup> The language of FERPA focused on institutional policy and practice, and provided for enforcement through the Secretary of Education; it also did not mandate individual instances of disclosure.<sup>113</sup> Similarly, section 505 lacks the same “rights-creating language.”<sup>114</sup> Section 505 addresses itself to the institutions affected, not the class of non-resident citizens who incidentally benefit from its provisions.<sup>115</sup> Further, the Secretary of Homeland Security is charged with the statute's enforcement.<sup>116</sup> Therefore, plaintiffs lacked standing to allege an injury that was essentially the invasion of a putative statutory right created by section 505.<sup>117</sup>

## B. *Martinez v. Regents of the University of California*

In 2010, in *Martinez v. Regents of the University of California*, the California Supreme Court analyzed section 505 of the IIRIRA against a

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<sup>103</sup> See *id.* at 1132–33.

<sup>104</sup> See *id.* at 1133–34.

<sup>105</sup> See *id.* at 1134. 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. See *id.* at 1133–34.

<sup>106</sup> See *id.* at 1132.

<sup>107</sup> See *id.* at 1133.

<sup>108</sup> See *id.* at 1133–34.

<sup>109</sup> See *id.* at 1136–39.

<sup>110</sup> 536 U.S. 273, 282 (2002).

<sup>111</sup> See *Day*, 500 F.3d at 1138–39 (citing *Gonzaga*, 536 U.S. at 282–87).

<sup>112</sup> *Id.* at 1138–39 (quoting *Gonzaga*, 536 U.S. at 287–88).

<sup>113</sup> *Id.* at 1138–39.

<sup>114</sup> *Id.* at 1139 (quoting *Gonzaga*, 536 U.S. at 287).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1136–39.

state statute that allowed undocumented immigrants to receive in-state tuition rates if they met certain educational requirements and intended to pursue American citizenship.<sup>118</sup> 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.<sup>119</sup> Alleging they improperly were denied exemption from non-resident tuition under California Education Code section 68130.5,<sup>120</sup> the plaintiffs challenged the section's enforceability.<sup>121</sup>

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.<sup>122</sup> Further, section 68130.5 of the California Education Code provides:

Notwithstanding any other provision of law:

(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<sup>123</sup>

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<sup>118</sup> 241 P.3d 855, 859 (Cal. 2010).

<sup>119</sup> *Id.* at 860.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* ("Plaintiffs seek a determination that section 68130.5 is invalid on each alleged ground, reimbursement of nonresident tuition fees, damages, and attorney fees.")

<sup>122</sup> *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, nonresident tuition." CAL. EDUC. CODE § 68050 (West 2003).

<sup>123</sup> CAL. EDUC. CODE § 68130.5(a) (West 2003).

Plaintiffs asserted that two federal statutes, 8 U.S.C. §§ 1623<sup>124</sup> and 1621,<sup>125</sup> expressly preempted section 68130.5.<sup>126</sup> 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.<sup>127</sup> 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.<sup>128</sup> Because section 68130.5 did not purport to regulate admission into the country, the court focused on congressional intent.<sup>129</sup>

Plaintiffs alleged that section 505 of IIRIRA (8 U.S.C. § 1623(a)) preempted 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.<sup>130</sup> The court disagreed. Reiterating the statute’s facial requirements for a reduced tuition rate—that individuals must have a California high school degree or equivalent, or attend at a high school in California for three or more years—the Court held that this language did not prescribe a residency requirement.<sup>131</sup> Moreover, section 68130.5 did not ignore a recipient’s immigration status.<sup>132</sup> 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.<sup>133</sup>

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<sup>124</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 505, 110 Stat. 3009-672 (1996).

<sup>125</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 411, 110 Stat. 2268 (1996).

<sup>126</sup> *Martinez*, 241 P.3d at 860–61.

<sup>127</sup> *Id.* at 861 (citing *De Canas v. Bica*, 424 U.S. 351, 355 (1976)).

<sup>128</sup> *See id.* at 861–62.

<sup>129</sup> *See id.* at 862 (“Because section 68130.5 does not ‘regulate[ ] who may enter or remain in the United States, we proceed under the usual preemption rules.’” (quoting *In re Jose C. 198* P.3d 1087, 1098 (Cal. 2009))).

<sup>130</sup> *Id.* Section 505 of the IIRIRA 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.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 505, 110 Stat. 3009-672 (1996) (codified 8 U.S.C. § 1623(a) (2006)).

<sup>131</sup> *See Martinez*, 241 P.3d at 863.

<sup>132</sup> *Id.* at 863–64.

<sup>133</sup> *Id.* at 863 (citing CAL. EDUC. CODE § 68130.5(a)(4) (West 2003)).

Plaintiffs' reading also created a conflict with another California statute, Education Code section 68062, which describes California's residency requirements.<sup>134</sup> Section 68062(h) expressly states: "An alien, including an unmarried minor alien, may establish his or her residence, unless precluded by the Immigration and Nationality Act (8 U.S.C. [§] 1101, et seq.) from establishing domicile in the United States."<sup>135</sup> Since an undocumented individual is prohibited from establishing domicile in the United States, the individual could not establish California residence. 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.<sup>136</sup>

The court further noted that section 68130.5 did not impliedly invoke a residency requirement.<sup>137</sup> Possessing a California high school diploma or attending a California high school for at least three years were not the statutory equivalents of establishing residency in California.<sup>138</sup> Plaintiffs' argument appeared to depend on the premise that the California legislature passed section 68130.5 to circumvent the federal statute.<sup>139</sup> But, the language of section 68130.5 made it possible for a non-resident United States citizen to qualify for in-state tuition.<sup>140</sup> Therefore, neither immigration status nor California residency are the crux of receipt of the benefit.

Moreover, the California Supreme Court did not find any evidence to support an affirmative congressional intent under § 1623 to prohibit states from categorically denying undocumented immigrants access to an in-state tuition rate.<sup>141</sup> Instead, Congress only expressed its intent to prohibit conferral of a benefit—such as in-state tuition rates—on undocumented immigrants on the basis of residency where that benefit was not available to non-resident citizens.<sup>142</sup> Thus, section 68130.5 did not violate section 505 of the IIRIRA (codified 8 U.S.C. § 1623).<sup>143</sup>

Plaintiffs also claimed preemption under section 411 of the PRWORA (codified 8 U.S.C. § 1621), which the court described in two

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<sup>134</sup> *Id.*; see CAL. EDUC. CODE § 68062(h) (West 1989).

<sup>135</sup> *Id.*

<sup>136</sup> *Martinez*, 241 P.3d at 863 (citing CAL. EDUC. CODE § 68062).

<sup>137</sup> See *id.* at 864.

<sup>138</sup> See *id.*

<sup>139</sup> See *id.* at 864–66.

<sup>140</sup> See *id.* at 864; see also CAL. EDUC. CODE § 68130.5(a)(4) (West 2003).

<sup>141</sup> See *Martinez*, 241 P.3d at 863–65.

<sup>142</sup> *Id.* at 864 ("In determining Congress's intent, courts may also consider 'the structure and purpose of the statute as a whole.'" (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996))). The court found the ban was to remove ostensibly the incentive for undocumented immigration provided by the availability of public benefits. *Id.*

<sup>143</sup> See *id.* at 866.

parts.<sup>144</sup> First, as a general rule, undocumented immigrants are not eligible for state or local public benefits.<sup>145</sup> Second, section 411 provides a description of when a state *may* make an unlawful alien eligible for those public benefits.<sup>146</sup> Specifically, section 411(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 . . . .”<sup>147</sup> While the California Court of Appeal found that section 68130.5 fell within the principle of implied preemption, the California Supreme Court disagreed.<sup>148</sup> Within the statutory language of section 411 itself, Congress expressly allowed a state to provide public benefits for undocumented aliens if it did so in compliance with the statute.<sup>149</sup> As such, Congress did not intend to occupy the field fully.<sup>150</sup> Because section 68130.5 complies with affirmative expressions of congressional intent in section 411 of the PRWORA and section 505 of the IIRIRA (8 U.S.C. §§ 1621 and 1623), those federal statutes cannot impliedly preempt section 68130.5.<sup>151</sup>

The California Supreme Court also rejected the plaintiffs’ claim under the Privileges and Immunities Clause of the United States Constitution.<sup>152</sup> 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 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.<sup>153</sup>

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<sup>144</sup> See *id.* at 866–68. Unlike 8 U.S.C. § 1623, which is codified section 505 of the IIRIRA, 8 U.S.C. § 1621 codified section 411 of the PRWORA. See *supra* text accompanying note 92.

<sup>145</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104–193, § 411, 110 Stat. 2268 (codified at 8 U.S.C. § 1621(d) (2006)); see *Martínez*, 241 P.3d at 866.

<sup>146</sup> See Personal Responsibility and Work Opportunity Reconciliation Act, § 411(d) (codified at 8 U.S.C. § 1621(d) (emphasis added)).

<sup>147</sup> *Id.* (emphasis added).

<sup>148</sup> *Martínez*, 241 P.3d at 868.

<sup>149</sup> See *id.*

<sup>150</sup> See *id.*

<sup>151</sup> *Id.* at 868–69.

<sup>152</sup> *Id.* at 869 (citing U.S. CONST. amend. XIV, § 1).

<sup>153</sup> U.S. CONST. amend. XIV, § 1 (emphasis added).

The court reiterated that the Privileges and Immunities Clause applied only to citizens.<sup>154</sup> 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 on resident aliens that are not conferred on all United States citizens.<sup>155</sup> Recognizing that the clause did operate in some circumstances to prevent states from treating non-resident citizens less favorably than resident citizens,<sup>156</sup> 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.<sup>157</sup> Tacitly recognizing an assault on the foundation of *Plyler v. Doe*, the California 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 United States citizens; otherwise, the United States Supreme Court would have denied access to secondary education to undocumented immigrants.<sup>158</sup> In conclusion, the California Supreme Court rejected the application of the Privileges and Immunities Clause to the conferral of post-secondary education benefits on unlawful aliens.<sup>159</sup> Section 68130.5 did not violate 8 U.S.C. § 1623.<sup>160</sup>

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<sup>154</sup> *Martinez*, 241 P.3d at 869 (citing *Matthews v. Diaz*, 426 U.S. 67, 78 (1976)).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 870.

<sup>157</sup> See *id.* (citing *Vlandis v. Kline*, 412 U.S. 441, 452–53 (1973)). Plaintiffs' reliance on *Saenz v. Roe* was misplaced according to the Court. *Id.* (citing *Saenz*, 526 U.S. 489, 503 (1999)). *Saenz* involved a statutory limitation on state welfare benefits for recently arrived residents. *Id.* The United States Supreme Court struck down the limitation as in violation of the federal right of interstate travel. *Id.* According to the California Supreme Court, *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. *Id.*

<sup>158</sup> See *id.* (citing *Plyler v. Doe*, 457 U.S. 202, 205 (1982)). The United States District Court for the Eastern District of Virginia, in *Equal Access to Education v. Merten* did, however, allow for the possibility that a state could bar undocumented immigrants from enrollment at a post-secondary institution. See 305 F. Supp. 2d 585, 605–08 (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. *Id.* at 605–06. Thus, according to the *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. *Id.* Therefore, Congress had not “occupied” any part of this area of legislation, either completely or otherwise. *Id.*

<sup>159</sup> *Martinez*, 214 P.3d at 870.

<sup>160</sup> *Id.*

#### IV. A SURVEY OF STATE STATUTES REGARDING IN-STATE TUITION RATES

Given the amount of news coverage dedicated to inappropriate “benefits” conferred to undocumented immigrants,<sup>161</sup> 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 who met certain requirements to receive in-state tuition rates.<sup>162</sup> In 2001, California passed Assembly Bill 540, which allowed undocumented aliens to qualify for in-state tuition rates.<sup>163</sup> The same year, Texas passed House Bill 1403 which, similar to the California bill, set out multiple residency requirements in order to

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<sup>161</sup> See *CNN-Tea Party Republican Debate*, *supra* note 1; *Fox News-Google GOP Debate*, *supra* note 2.

<sup>162</sup> Assem. 540, 2001-02 Leg., Reg. Sess. (Cal. 2001), H.R. 1403, 77th Leg., 2001 Reg. Sess. (Tex. 2001).

<sup>163</sup> Assem. 540, 2001-02 Leg., Reg. Sess. (Cal. 2001). Assembly Bill 540, which added section 68130.5 to the California Education Code, states:

The Legislature hereby finds and declares all of the following:

(1) 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.

(2) These pupils have already proven their academic eligibility and merit by being accepted into our state’s colleges and universities.

(3) 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.

(4) 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.

(5) This act . . . does not confer postsecondary education benefits on the basis of residence . . .

(a) 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 at, or current enrollment at, an accredited institution of higher education in California . . .

(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 or she is eligible to do so.



qualify for in-state tuition.<sup>164</sup> In 2005, Texas passed Senate Bill 1528, confirming that undocumented aliens are eligible for in-state tuition based on certain requirements and that undocumented aliens are eligible to attend state universities.<sup>165</sup>

Several other states have passed legislation similar to that passed in California and Texas—including Connecticut, Illinois, Kansas, Maryland, Nebraska, New Mexico, New York, Oklahoma, Utah, Washington, and Wisconsin.<sup>166</sup> In 2011, Connecticut passed House Bill 6390, which allows undocumented students who fulfill certain residency requirements and file an affidavit to receive in-state tuition.<sup>167</sup> In 2003, Illinois passed House Bill 60, which allows undocumented students to receive in-state tuition upon fulfilling certain requirements.<sup>168</sup> The same year, Kansas passed a bill with similar requirements for undocumented students work-

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<sup>164</sup> H.R. 1403, 77th Leg., 2001 Reg. Sess. (Tex. 2001) (“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.”)

<sup>165</sup> S. 1528, 79th Leg., 2005 Reg. Sess. (Tex. 2005) (“Unless the student establishes residency or is entitled or permitted to pay resident tuition . . . tuition for a student who is a citizen of any country other than the United States of America is the same as the tuition required of other nonresident students.”).

<sup>166</sup> See RUSSELL, *supra* note 9, at 4.

<sup>167</sup> H.R. 6390, 2011 Gen. Assem., 2011 Reg. Sess. (Conn. 2011) (“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 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.”).

<sup>168</sup> H.R. 60, 93rd Gen. Assem., 2003-04 Reg. Sess. (Ill. 2003) (“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.”).

ing to obtain in-state tuition.<sup>169</sup> 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.<sup>170</sup> Nebraska passed Legislative Bill 239, over the governor's veto, which included similar residency requirements.<sup>171</sup> In 2005, New Mexico passed Senate Bill 582 that allowed undocumented students to pay in-state tuition rates based on similar requirements<sup>172</sup>; however, in 2007, New Mexico unsuccessfully attempted to expand the state's definition of "resident student".<sup>173</sup> In 2002, New York passed Senate Bill 7784, which provides

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<sup>169</sup> H.R. 2145, 172nd Leg., Reg. Sess. (Kan. 2004) ("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 . . . [I]ndividual 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 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.").

<sup>170</sup> S. 167, 2011 Leg., Reg. Sess. (Md. 2011) ("[A]n undocumented immigrant 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 . . .").

<sup>171</sup> Leg. 239, 99th Leg., 2d Reg. Sess. (Neb. 2006) ("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 make this state his or her permanent residence, supported by documentary proof.").

<sup>172</sup> See S. 582, 47th Leg., 1st Reg. Sess. (N.M. 2005). Senate Bill 582 states:

A. A public post-secondary educational institution shall not deny admission to a student on account of the student's immigration status.

B. 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.

*Id.*

<sup>173</sup> S. 374, 48th Leg., 1st Reg. Sess. (N.M. 2007) ("For the purpose 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.").

in-state tuition rates to individuals who file a proper affidavit along with certain residency requirements.<sup>174</sup> Oklahoma passed a similar affidavit requirement for in-state tuition in 2003<sup>175</sup>; however, in 2007, Oklahoma passed additional requirements regarding the affidavit procedures and gave the Oklahoma State Regents more discretion in determining whether or not to grant in-state tuition to undocumented students.<sup>176</sup> In

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<sup>174</sup> S. 7784, 225th Leg., 2001-02 Sess. (N.Y. 2002) (“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: (I) 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 state university within five years of receiving a New York state high school diploma; or (II) 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 (III) was enrolled in an institution or educational unit of the state 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.”).

<sup>175</sup> S. 596, 49th Leg., Reg. Sess. (Okla. 2003) (“A. 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: a. graduation from high school, or b. successful completion of the General Educational Development test. B. To be eligible for the provisions of subsection A of this section, an eligible student shall: 1. Satisfy admission standards . . . and have secured admission to, and enrolled in, an institution within The Oklahoma State System of Higher Education; and 2. If the student is without lawful immigration status: a. 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 b. 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 . . .”).

<sup>176</sup> H.R. 1804, 51st Leg., Reg. Sess. (Okla. 2007) (“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 . . . file[s] 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 (1) 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 (1) year after the date the United States Citizenship and Immigration Services provide such a formal process . . .”).

2002, Utah passed House Bill 331<sup>177</sup> and House Bill 144,<sup>178</sup> which allow undocumented students to apply for in-state tuition based on residency requirements and the filing of an affidavit; Utah subsequently has attempted to repeal its 2002 laws at least six different times—failing each time.<sup>179</sup> 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.<sup>180</sup> Wisconsin passed a bill that allowed undocumented students access to in-state tuition based on similar re-

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<sup>177</sup> H.R. 331, 54th Leg., 2002 Gen. Sess. (Utah 2002) (“(1) The meaning of “resident student” is determined by reference to the general law on the subject of domicile, except as provided in this section. (2) 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, the establishment of a domicile in Utah and that the student does not maintain a residence elsewhere.”).

<sup>178</sup> H.R. 144, 54th Leg., 2002 Gen. Sess. (Utah 2002) (“(1) 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; (b) graduated from a high school in this state or received the equivalent of a high school diploma in this state; and (c) registers as an entering student at an institution of higher education not earlier than the fall of the 2002-03 academic year. (2) In addition to the requirements under Subsection (1), a student without lawful immigration status shall file 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.”).

<sup>179</sup> See H.R. 437, 57th Leg., 2007 Gen. Sess. (Utah 2007); H.R. 224, 57th Leg., 2007 Gen. Sess. (Utah 2007); H.R. 7, 56th Leg., 2006 Gen. Sess. (Utah 2006); H.R. 156, 55th Leg., 2004 Gen. Sess. (Utah 2004).

<sup>180</sup> H.R. 1079, 58th Leg., 2003 Reg. Sess. (Wash. 2003) (“The term “resident student” shall mean: . . . (e) 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 . . . 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 . . .”).

quirements;<sup>181</sup> however, in 2011, Wisconsin introduced bills to repeal this law.<sup>182</sup>

Of the states that currently allow undocumented students to receive in-state tuition rates, only New Mexico and Texas allow undocumented students to receive financial aid.<sup>183</sup> In 2011, California,<sup>184</sup> Kansas,<sup>185</sup> Nebraska,<sup>186</sup> New York,<sup>187</sup> Oklahoma,<sup>188</sup> Texas,<sup>189</sup> Washington<sup>190</sup>, and Wisconsin<sup>191</sup> introduced bills to repeal existing laws that grant in-state tuition to undocumented students.

Currently, Arkansas, Delaware, Florida, Hawaii, Massachusetts, New Jersey, Oregon, Rhode Island, and Virginia do not have state-wide policies regarding undocumented students.<sup>192</sup> However, many of these states recently have unsuccessfully proposed legislation that would permit undocumented students to be eligible for in-state tuition rates.<sup>193</sup> The following states have unsuccessfully introduced similar bills that would allow undocumented students to pay in-state tuition based on residency and affidavit requirements: Arkansas,<sup>194</sup>

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<sup>181</sup> Assem. 75, 2009-2010 Leg., Reg. Sess. (Wis. 2009) ("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: 1) graduated from a Wisconsin high school or received a declaration of equivalency of high school graduation from Wisconsin; 2) 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 3) 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.").

<sup>182</sup> See NATIONAL CONFERENCE OF STATE LEGISLATURES, UNDOCUMENTED STUDENT TUITION: STATE ACTION (October 2011), <http://www.ncsl.org/issues-research/education/undocumented-student-tuition-state-action.aspx>.

<sup>183</sup> See EDUCATORS FOR FAIR CONSIDERATION, AN OVERVIEW OF COLLEGE-BOUND UNDOCUMENTED STUDENTS (Oct. 2011), *available at* <http://www.e4fc.org/advocacycenter/undocumentedstudents.html>; RUSSELL, *supra* note 9, at 4.

<sup>184</sup> Assem. 63, 2011-12 Leg., Reg. Sess. (Cal. 2010) (bill failed).

<sup>185</sup> H.R. 2006, 84th Leg., 2011 Reg. Sess. (Kan. 2011) (bill failed).

<sup>186</sup> Leg. 657, 102nd Leg., 1st Reg. Sess. (Neb. 2011) (bill failed).

<sup>187</sup> Assem. 4394, 234th Leg., 2011-2012 Reg. Sess. (N.Y. 2011) (bill failed).

<sup>188</sup> H.R. 2110, 53rd Leg., 1st Reg. Sess. (Okla. 2011) (bill failed).

<sup>189</sup> H.R. 1857, 82nd Leg., 2011 Reg. Sess. (Tex. 2011) (bill failed).

<sup>190</sup> S. 5828, 62nd Leg., 2011 Reg. Sess. (Wash. 2011) (bill pending).

<sup>191</sup> S. 27, 2011-12 Leg., Reg. Sess. (Wis. 2011) (bill tabled).

<sup>192</sup> See RUSSELL, *supra* note 9, at 4.

<sup>193</sup> See *id.*; NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 182.

<sup>194</sup> S.B. 799, 87th General Assem., 2009 Reg. Sess. (Ark. 2009) ("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 (3) years and who have either graduated from and 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 intent to legalize his or her immigration status.").

Connecticut,<sup>195</sup> Florida,<sup>196</sup> Hawaii,<sup>197</sup> New Jersey,<sup>198</sup> Oregon,<sup>199</sup> and Virginia.<sup>200</sup> Rhode Island unsuccessfully introduced a bill with similar

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<sup>195</sup> H.R. 6390, 2011 Gen. Assem., 2011 Reg. Sess. (Conn. 2011) (“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 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.”).

<sup>196</sup> H.R. 27, 18th Leg., 1st Reg. Sess. (Fla. 2003). House Bill 27 states:

The following persons shall be classified as residents for tuition purposes:

(k) Nonresident aliens who:

1. Have resided in Florida for at least 2 years.
2. Have attended a State Board of Education approved Florida high school.
3. Have graduated from a State Board of Education approved Florida high school . . . .
4. 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.

*Id.*

<sup>197</sup> H.R. 873, 22nd Leg., 2003 Sess. (Haw. 2003) (“In the case of an alien student, other than a non-immigrant alien . . . the student meets all of the following requirements: (A) High school attendance in Hawaii for two or more years; (B) Graduation from high school in Hawaii or attainment of the equivalent; and (C) Registration as an entering student at, or current enrollment in, the University of Hawaii system; and (4) 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.”).

<sup>198</sup> S. 1036, 213th Leg., 2008 Sess. (N.J. 2008) (“A student, other than a nonimmigrant alien . . . shall be exempt from paying nonresident tuition at a public institution of higher education if the student: (1) attended high school in this State for three or more years; (2) graduated from high school in this State or received the equivalent of a high school diploma in this State; (3) registers as an entering student or is currently enrolled in a public institution of higher education not earlier than the fall semester of the 2008-09 academic year; and (4) 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.”).

<sup>199</sup> H.R. 2939, 75th Leg. Assem., 2009 Reg. Sess. (Or. 2009) (“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: (a) 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; (b) Received a high school diploma from a secondary school in this state or received the equivalent of a high school diploma; (c) Did not establish residency outside this state after receiving a high school diploma or leaving school before receiving a high school diploma; and (d) Plans, as determined by the board by rule, to become a citizen or a lawful permanent resident of the United States.”).

<sup>200</sup> S. 1037, 2009 Gen. Assem., 2009 Sess. (Va. 2009) (“[A] student shall be considered lawfully present for purposes of in-state tuition if he meets all of the following criteria: 1. He has resided with his parent, guardian, or other person standing in loco parentis while attending

residency and affidavit requirements, but its bill provides that the requirements are in the alternative instead mandatory.<sup>201</sup> Previously, Massachusetts had passed legislation urging Congress to take action regarding the subject.<sup>202</sup> In 2011, Massachusetts proposed a bill that would allow undocumented students to receive in-state tuition.<sup>203</sup>

Although Minnesota and Nevada do not have legislation regarding undocumented students, both have tuition policies that permit many undocumented students to pay in-state tuition rates.<sup>204</sup> In 2007, Minnesota introduced a bill to provide appropriations for educational programs and funding for new requirements.<sup>205</sup> Additionally, the bill proposed elimi-

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a public or private high school in this state; 2. He has graduated from a public or private high school in Virginia or has received a General Education Development (GED) certificate in Virginia; 3. He has resided in the Commonwealth for at least three years as of the date he graduated from high school, or one year of residency if a veteran or an active duty member of the U.S. Armed Forces; 4. He has registered as an entering student in an institution of higher education; 5. 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 6. He has submitted evidence that he, or in the case of a dependent student, at least one parent . . . has filed . . . Virginia income tax returns for at least three years prior to the date of enrollment.”).

<sup>201</sup> H.R. 7973, 2006 Gen. Assem., Jan. Sess. (R.I. 2006) (“All tuition or free schedules in effect in Rhode Island public institutions of higher education shall provide that the 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: (1) has attended an approved Rhode Island High School for three (3) or more years; or (2) has graduated from an approved Rhode Island high school or received a high school equivalency diploma from the state of Rhode Island; or (3) has registered as an entering student or is currently enrolled in an accredited public institution of higher education in Rhode Island . . . ; or (4) 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.”).

<sup>202</sup> H.R. 4629, 184th General Court, 2006 Sess. (Mass. 2006) (“[T]he General Court of Massachusetts respectfully urges the 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.”).

<sup>203</sup> S. 566, 187th General Court, 2011 Sess. (Mass. 2011) (“[A]ny 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 . . . [I]f 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.”).

<sup>204</sup> See RUSSELL, *supra* note 9, at 4.

<sup>205</sup> S. 1989, 85th Leg., 3rd Engrossment (Minn. 2007) (“[T]he 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

nating non-resident tuition at certain schools through funding.<sup>206</sup> However, this bill was vetoed by the governor.<sup>207</sup> Nevada's System of Higher Education currently does not require students to prove that they are United States citizens to attend public universities or colleges.<sup>208</sup>

In 2011, Montana passed House Bill 638, which places a referendum on the 2012 ballot asking voters to decide if the state should deny services—including public university in-state tuition rates and financial aid—to undocumented immigrants.<sup>209</sup> In 2004, Delaware passed a bill that encouraged the state legislature to support and vote for the DREAM Act.<sup>210</sup>

### *B. States with Unfavorable Treatment of Undocumented immigrants*

Currently, four states—Arizona, Colorado, Georgia, and Indiana—have banned undocumented students from receiving in-state tuition rates.

Arizona passed Proposition 300 in 2006, which provides that university students who are not United States citizens or legal residents are not eligible for in-state tuition status or state-funded financial aid.<sup>211</sup> Arizona subsequently introduced House Bill 2471, which proposed to remove all public benefits from persons born in the state whose parents

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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, Rochester Community and Technical College, Inver Hills Community College, St. Cloud Technical College, and Normandale Community College . . . . This appropriation includes funding to establish banded tuition.”).

<sup>206</sup> See *id.*

<sup>207</sup> See MINNESOTA LEGISLATIVE REFERENCE LIBRARY, VETO DETAILS, <http://www.leg.state.mn.us/lrl/vetoes/vetodetails.aspx?years=2007> (last visited Nov. 7, 2011).

<sup>208</sup> NIRJAN RAI, INST. FOR HIGHER EDUC. POLICY, SHAPING NEVADA'S FUTURE: WHAT THE STATE CAN DO TO INVEST IN COLLEGE ACCESS AND SUCCESS, INSTITUTE FOR HIGHER EDUCATION POLICY, 20 (Nov. 2008), available at <http://www.ihep.org/assets/files/publications/s-z/ShapingNevadasFutureRpt.pdf>.

<sup>209</sup> H.R. 638, 62nd Leg., 2011 Session, (Mont. 2011). House Bill 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.

*Id.*

<sup>210</sup> H.R. 59, 142nd Gen. Assem., 2004 Sess. (Del. 2004) (“Be it resolved . . . that the Delaware Congressional Delegation be encouraged to support and vote for DREAM Act 2003.”).

<sup>211</sup> S. Con. Res. 1031, 47th Leg., 2d Reg. Sess. (Ariz. 2006) (“[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 . . .”).



were undocumented aliens at the time of birth.<sup>212</sup> In 2010, Arizona passed one of the most controversial immigration laws to date, Senate Bill 1070, which requires Arizona law enforcement officials to fully comply with and assist in the enforcement of federal immigration laws.<sup>213</sup> Several states have introduced similar bills in the 2011 legislative session.<sup>214</sup>

In 2006, Colorado passed House Bill 1023 that prevents undocumented aliens from being eligible to receive in-state tuition rates.<sup>215</sup> In 2009, the Colorado Senate rejected Senate Bill 170, which would have reversed House Bill 1023 and allowed undocumented aliens to receive in-state tuition rates.<sup>216</sup> Similarly, in 2011, Colorado rejected Senate Bill 126, which would have allowed undocumented students to receive in-state tuition rates.<sup>217</sup>

Georgia has passed two provisions governing undocumented students. In 2006, Georgia passed Senate Bill 529, which required the Board of Regents of Universities to comply with federal law—including, but not limited to, public benefits.<sup>218</sup> In 2008, Georgia passed Senate Bill 492, which prevents undocumented aliens from obtaining in-state tuition rates.<sup>219</sup> In October 2010, Georgia's State Board of Regents

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<sup>212</sup> H.R. 2471, 48th Leg., 1st Reg. Sess. (Ariz. 2007) ("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.").

<sup>213</sup> S.B. 1070, 49th Leg., 2nd Reg. Sess. (Ariz. 2010) ("No official or agency of this state or a county, city, town or other political subdivision of this state may adopt a policy that limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law.").

<sup>214</sup> See H.R. 87, 151st Gen. Assem., 2011 Reg. Sess. (Ga. 2011); S. 2179, 126th Leg., 2011 Reg. Sess. (Miss. 2011); S. 179, 2011 Gen. Assem., 2011 Reg. Sess. (N.C. 2011).

<sup>215</sup> H.R. 1023, 65th Gen. Assem., 1st Extraordinary Sess. (Colo. 2006) ("State or local public benefits' shall have the same meaning as provided in 8 U.S.C. sec. 1621 . . . . It shall be unlawful for an agency or political subdivision of this state to provide a federal public benefit or a state or local public benefit in violation of this section.").

<sup>216</sup> S. 170, 67th Gen. Assem., 1st Reg. Sess. (Colo. 2009) ("[R]egardless of immigration status, a person shall be charged the same tuition rate that is charged to persons who establish a domicile in this state and may receive state-funded tuition assistance subject to the same criteria as are applied to persons who establish domicile in this state. . . .").

<sup>217</sup> S. 126, 68th Gen. Assem., 1st Reg. Sess. (Colo. 2011) ("A student applying for the tuition classification who does not have documentation of lawful immigration or nationality status shall submit an affidavit to the institution of higher education, stating that he or she is requesting documentation of, has applied for, or will be applying for lawful status as soon as he or she is eligible.").

<sup>218</sup> S. 529, 148th Gen. Assem., 2006 Reg. Sess. (Ga. 2006) ("For postsecondary education, whereby the Board of Regents of the University System of Georgia or the State Board of Technical and Adult Education shall set forth, or cause to be set forth, policies regarding postsecondary benefits that comply with all federal law including but not limited to public benefits as described in 8 U.S.C. Section 1611, 1621, or 1623.").

<sup>219</sup> S. 492, 149th Gen. Assem., 2008 Reg. Sess. (Ga. 2008) ("Noncitizen students shall not be classified as in-state for tuition purposes unless the student is legally in this state and

passed new rules regulating the admission of undocumented students.<sup>220</sup> All institutions in the University System of Georgia must verify the “lawful presence” of all students seeking in-state tuition rates.<sup>221</sup> 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.<sup>222</sup>

Recently, Indiana passed House Bill 1402, which went into effect July 1, 2011, which prohibits in-state tuition for undocumented aliens.<sup>223</sup>

Wyoming passed Senate Bill 85 that bars non-citizens from receiving scholarship funding in 2006.<sup>224</sup>

Four states—Alabama, Georgia, 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.<sup>225</sup> In 2011, Alabama passed Senate Bill 256, which—in addition to criminalizing several aspects of everyday life—prohibits undocumented students from attending any and all public colleges and universities.<sup>226</sup> In 2008, South Carolina passed House Bill 4400, becoming the first state to deny undocumented aliens

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there is evidence to warrant consideration of in-state classification as determined by the board of regents.”).

<sup>220</sup> UNIV. SYS. OF GA., BOARD OF REGENTS POLICY MANUAL § 4.1.6 ADMISSION OF PERSONS NOT LAWFULLY PRESENT IN THE UNITED STATES (2010), *available at* <http://www.usg.edu/policymanual/section4/> (“A person who is not lawfully present in the United States shall not be eligible for admission to any University System institution which, for the two most recent academic years, did not admit all academically qualified applicants.”); *id.* § 4.3.4: VERIFICATION OF LAWFUL PRESENCE (2010) (“Each University System institution shall verify the lawful presence in the United States of every successfully admitted person applying for resident tuition status . . .”).

<sup>221</sup> *See id.* §§ 4.1.6, 4.3.4.

<sup>222</sup> *See id.* §§ 4.1.6, 4.3.4

<sup>223</sup> H.R. 1402, 117th Gen. Assem., 1st Reg. Sess. (Ind. 2011) (“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.”).

<sup>224</sup> S. 85, 58th Leg., 2006 Budget Sess. (Wyo. 2006) (“A student is not eligible for a scholarship under this article if he: (i) Is not a United States citizen or a permanent resident alien who meets the definition of an eligible noncitizen . . .”).

<sup>225</sup> *See* RUSSELL, *supra* note 9, at 7.

<sup>226</sup> *See* S. 256, 2011 Leg., Reg. Sess. (Ala. 2011) (“(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. . . .”).

access to any public university and any type of public higher education benefit.<sup>227</sup>

Since 2001, the North Carolina Community College System has changed its admissions policy for undocumented students five times.<sup>228</sup> First, the system banned undocumented students from enrolling; it then allowed each campus to decide whether to admit undocumented students; it next allowed undocumented students to enroll system-wide; finally, it again banned undocumented students from enrolling.<sup>229</sup> Following the North Carolina Department of Justice's inquiry regarding the legality of allowing undocumented students to enroll in public universities, the U.S. Department of Homeland Security, Immigration and Customs Enforcement stated in 2008 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.<sup>230</sup> Based on this guidance, undocumented students who (i) graduate from a North Carolina high school and (ii) are able to pay out-of-state tuition may enroll in a North Carolina Community College.<sup>231</sup> In 2011, North Carolina introduced a bill that would again deny undocumented students admission to public universities.<sup>232</sup>

Other states have unsuccessfully attempted to deny in-state tuition benefits to undocumented students. Alaska unsuccessfully introduced House Bill 39 that would require students to be a United States citizen or legal alien to qualify as a state resident for purposes of tuition.<sup>233</sup> Iowa unsuccessfully introduced House File 581 to deny state assistance to unauthorized aliens.<sup>234</sup> The Michigan's legislature passed a similar bill that

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<sup>227</sup> H.R. 4400, 117th Sess., 2007-2008 Gen. Assem. (S.C. 2008) ("An alien unlawfully present in the United States is not eligible to attend a public institution of higher learning in this State . . . . An alien unlawfully present in the United States is not eligible on the basis of residence for a public higher education benefit . . . .").

<sup>228</sup> See NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 182.

<sup>229</sup> RUSSELL, *supra* note 9, at 7-8.

<sup>230</sup> Letter from U.S. Immigration and Customs Enforcement to Thomas J. Ziko, Special Deputy Attorney Gen., North Carolina Dep't of Justice (July 9, 2008), *available at* <http://www.nilc.org/immlawpolicy/DREAM/DHS-letter-re-undoc-students-2008-07-9.pdf>.

<sup>231</sup> See NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 182.

<sup>232</sup> H.R. 11, 2011 Gen. Assem., Reg. Sess. (N.C. 2011) ("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.").

<sup>233</sup> H.R. 39, 23rd Leg., 1st Sess. (Ala. 2003) ("[T]he board 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.").

<sup>234</sup> H.R. 581, 82nd Gen. Assem., 2007 Reg. Sess. (Iowa 2007) ("A state department, institution, or agency shall not provide any state aid to an unauthorized adult alien . . . . [A]n unauthorized alien is not entitled to receive any state financial aid, benefit, or assistance from the state.").

was vetoed by the governor.<sup>235</sup> In 2007, Mississippi unsuccessfully introduced a bill that would deny in-state tuition rates to undocumented aliens<sup>236</sup>; subsequently in 2011, Mississippi unsuccessfully introduced a bill that would allow undocumented aliens to receive in-state tuition rates and financial aid.<sup>237</sup> In 2011, Louisiana unsuccessfully introduced a bill that would deny in-state tuition to undocumented immigrants.<sup>238</sup>

In 2007, Missouri unsuccessfully introduced Senate Bill 858, which would deny undocumented aliens any type of public benefit—including access to universities, colleges, or community colleges.<sup>239</sup> Tennessee unsuccessfully introduced a similar bill, House Bill 808, in 2009.<sup>240</sup> Kentucky unsuccessfully introduced a similar bill in 2011, which would have banned undocumented aliens from access to universities.<sup>241</sup>

In 2003, Oklahoma passed Senate Bill 596, which granted in-state tuition rates to undocumented aliens.<sup>242</sup> In 2007, Oklahoma amended its

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<sup>235</sup> H.R. 5307, 93rd Leg., 2006 Reg. Sess. (Mich. 2006) (“Michigan higher education assistance authority 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: (a) Is a United States citizen . . . .”); see Michigan Legislature, House Bill 5307, <http://www.legislature.mi.gov/> (search for House Bill 5307 to see status) (last visited Nov. 8, 2011).

<sup>236</sup> H.R. 1144, 2007 Leg., Reg. Sess. (Miss. 2007) (“A student, other than an alien of a foreign county who is unlawfully present in the United States, residing within the State of Mississippi . . . shall not be required to pay out-of-state tuition.”).

<sup>237</sup> H.R. 387, 126th Leg., 2011 Reg. Sess. (Miss. 2011) (“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.”).

<sup>238</sup> H.R. 59, 2011 Leg., 37th Reg. Sess. (La. 2011) (“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.”).

<sup>239</sup> S. 858, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2007) (“[A]liens unlawfully present in the United States shall not be eligible for admission to the university or college . . . . The coordinating board for higher education shall . . . 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 . . . .”).

<sup>240</sup> H.R. 808, 106th Gen. Assem., 1st Reg. Sess. (Tenn. 2009) (“[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.”).

<sup>241</sup> H.R. 112, 2011 Gen. Assem., 2011 Reg. Sess. (Ky. 2011) (“The minimum qualifications for admission shall include a requirement that a person: 1. Is a citizen or national of the United States . . . 2. Is lawfully admitted for permanent residence in the United States . . . 3. Holds a nonimmigrant visa permitting him or her to lawfully attend the postsecondary institution to which he or she has applied.”).

<sup>242</sup> S. 596, 49th Leg., 1st Reg. Sess., (Okla. 2003) (“If the student is without lawful immigration status: a. 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 b. 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.”).

law, giving the Oklahoma Board of Regents the discretion to grant in-state tuition rates to undocumented students.<sup>243</sup> Oklahoma's current law also restricts eligibility for scholarships to legal residents.<sup>244</sup> The Board of Regents currently allows undocumented students, who meet Oklahoma's original statutory requirements, to receive in-state tuition.<sup>245</sup>

## V. USING SECTION 505 OF THE IIRIRA AS A COLLATERAL ASSAULT ON *PLYLER*

It is undisputed that educating non-citizens at public expense is outrageous to a certain segment of the American population. Opposition to *Plyler* has gained traction politically and, as such, conservative politicians currently are exploiting the issue for votes in the 2012 Republican presidential primaries.<sup>246</sup> What is truly ironic is that these same politi-

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<sup>243</sup> H.R. 1804, 51st Leg., 1st Reg. Sess. (Okla. 2007) ("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: 1. Graduated from a public or private high school in this state; and 2. Resided in 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 (2) years prior to graduation.").

<sup>244</sup> S. 820, 51st Leg., 1st Reg. Sess. (Okla. 2007) ("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: 1. Be a resident of this state; 2. 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.").

<sup>245</sup> See NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 182.

<sup>246</sup> For example, Representative Bachmann's statements during the televised debate on September 12, 2011. *Supra* n. 48. Also, during the televised debate on September 22, 2012, 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 are an illegal alien to go to University of Texas. If you are 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.

*Fox News-Google GOP Debate*, *supra* note 2. Michele 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:

[T]here 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.

cians—who generally disdain federal government intervention—favor using section 505 of the IIRIRA (8 U.S.C. § 1623), a federal statute, to override state legislation that allows undocumented immigrants to qualify for in-state tuition rates. Regardless, ideology is not the law. What is true, however, is that legislative attempts to forbid the grant of in-state tuition rates are simply the first steps towards reversing *Plyler*.<sup>247</sup>

#### A. *The Profile of College-Ready Undocumented Immigrants*

It is often acknowledged that the federal immigration laws do not effectively regulate 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. However, a cogent description of the immigrants who qualify for in-state tuition rates is omitted from the popular discussion.

First, according to a 2009 Pew Hispanic Center study, 13% of undocumented immigrants in 2008 (1.5 million) were children<sup>248</sup>; nearly all of these children lived with their parents.<sup>249</sup> Second, 73% of the children of undocumented immigrants were born in the United States.<sup>250</sup> While the number of children of undocumented immigrants grew by 1.2 million from 2003 to 2008, most of this growth was due to children *born in the United States*.<sup>251</sup>

The Pew Hispanic Center also has determined that the younger an undocumented immigrant is upon his or her arrival in the United States, the higher that child's educational achievement.<sup>252</sup> According to the Pew Hispanic Center: "Among high school graduates ages 18–24 who are unauthorized immigrants, 49% are in college or have attended college."<sup>253</sup> 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 age 14.<sup>254</sup>

According to the Immigration Policy Center, of the 65,000 undocumented students who graduate from high school each year, only 5–10%

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*Id.* Commentators have argued that Perry's stance on immigration caused him to lose the debate. See Abacarian, *supra* note 4.

<sup>247</sup> See NATIONAL CONFERENCE ON STATE LEGISLATURES, *supra* note 182.

<sup>248</sup> JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 5 (2009), available at <http://pewhispanic.org/reports/report.php?ReportID=107>.

<sup>249</sup> *Id.* at 6–7.

<sup>250</sup> *Id.* at 7.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 12.

<sup>253</sup> *Id.*

<sup>254</sup> See *id.*

attend college.<sup>255</sup> Additionally, the Migration Policy Institute estimated there are approximately 50,000 undocumented students currently enrolled in colleges within the United States.<sup>256</sup> Studies estimate that annual college enrollment of undocumented immigrants is between 7,000 and 13,000.<sup>257</sup> The Immigration Policy Center has also estimated that the majority of undocumented students attend community colleges.<sup>258</sup> California has the largest number of undocumented students, followed by Texas.<sup>259</sup>

The Educators for Fair Consideration 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; and (5) due to current immigration laws, these students currently lack a way to become legal residents or citizens of the United States.<sup>260</sup>

American in appearance, the product of American public schools, and American in their hearts—these children are indistinguishable from their citizen counterparts.<sup>261</sup> They are here. They have been here for many years. Moreover, their interest in college education will prevent them from being the alleged drain on our society that anti-immigration advocates are so quick to decry.<sup>262</sup> This fundamental reality led the *Plyler* court to hold that education should not be withheld in a futile attempt to staunch illegal immigration.<sup>263</sup>

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<sup>255</sup> Roberto G. Gonzales, Immigration Pol’y Ctr., *Wasted Talent and Broken Dreams: The Lost Potential of Undocumented Students*, 5 IMMIGRATION POLICY: IN FOCUS, Oct. 2007, at 1, available at <http://www.immigrationpolicy.org/special-reports/wasted-talent-and-broken-dreams-lost-potential-undocumented-students>.

<sup>256</sup> Jeanne Batalova & Michael Fix, Migration Pol’y Inst., *New Estimates of Unauthorized Youth Eligible for Legal Status under the DREAM Act*, IMMIGRATION BACKGROUNDER 5 (2006), available at [http://www.migrationpolicy.org/pubs/Backgrounder1\\_Dream\\_Act.pdf](http://www.migrationpolicy.org/pubs/Backgrounder1_Dream_Act.pdf) (“To approximate the number of unauthorized students who would enroll in college even in the absence of the DREAM Act’s passage, we obtained estimates of the number of apparently unauthorized students currently enrolled in colleges and universities in California and then extrapolated it to the nation as a whole.”); see JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 22 (2005), available at <http://pewhispanic.org/files/reports/46.pdf>.

<sup>257</sup> JEFFREY S. PASSEL, URBAN INST., FURTHER DEMOGRAPHIC INFORMATION RELATING TO THE DREAM ACT 2 (2003) available at [http://www.nilc.org/immlawpolicy/dream/dream\\_demographics.pdf](http://www.nilc.org/immlawpolicy/dream/dream_demographics.pdf).

<sup>258</sup> See Gonzales, *supra* note 255, at 9, n.25; Batalova & Fix, *supra* note 256, at 4.

<sup>259</sup> See PASSEL, *supra* note 257, at 11.

<sup>260</sup> EDUCATORS FOR FAIR CONSIDERATION, *supra* note 183.

<sup>261</sup> See *id.*

<sup>262</sup> See Gonzales, *supra* note 255, at 3–4.

<sup>263</sup> See *Plyler v. Doe*, 457 U.S. 202, 208 (1982).

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

Justice Thurgood Marshall described the pivotal role of education in American society in his dissenting opinion in *San Antonio Independent School District v. Rodriguez*.<sup>264</sup> In *Rodriguez*, the United States Supreme Court considered whether Texas's 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.<sup>265</sup> The Court upheld the statutory scheme to Justice Marshall's dismay.<sup>266</sup> Prior to *Rodriguez*, courts consistently had held state statutes unconstitutional if they depended on taxable local wealth for education financing.<sup>267</sup> Justice 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."<sup>268</sup> Justice Marshall argued that every American had a constitutional right to "an equal start in life," which included an education.<sup>269</sup>

Apart from his disagreement on the constitutionality of the Texas taxing scheme itself, Justice Marshall took issue with the majority's treatment of education.<sup>270</sup> While the majority appeared to hold that strict scrutiny applied only to those fundamental rights expressly created in the Constitution,<sup>271</sup> Justice Marshall demonstrated that the Supreme Court had applied strict scrutiny to other important rights such as the right to vote, the right to procreate, and the right to appeal a criminal conviction.<sup>272</sup> Justice Marshall offered an alternate basis for the application of strict scrutiny: the fundamental nature of a non-constitutional interest is determined by the nexus between that interest and an express constitutional right or guarantee.<sup>273</sup> While the *Rodriguez* majority concluded that public education was not constitutionally guaranteed, Justice Marshall stated that prior decisions of the Court afforded public education a unique status<sup>274</sup>—a status based on public education's connection to

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<sup>264</sup> 411 U.S. 1, 70–71 (1973) (Marshall, J., dissenting).

<sup>265</sup> *Id.* at 15–17.

<sup>266</sup> *Id.* at 55.

<sup>267</sup> *See id.* at 70–71 (Marshall, J., dissenting).

<sup>268</sup> *Id.* at 71 (Marshall, J., dissenting).

<sup>269</sup> *Id.* at 71–72 (Marshall, J., dissenting).

<sup>270</sup> *Id.* at 83–84 (Marshall, J., dissenting).

<sup>271</sup> *See id.* at 38–39.

<sup>272</sup> *Id.* at 99–100 (Marshall, J., dissenting).

<sup>273</sup> *See id.* at 102–03 (Marshall, J., dissenting).

<sup>274</sup> *Id.* at 111–12 (Marshall, J., dissenting).



First Amendment rights as well as the relationship between education and the political process.<sup>275</sup>

Justice Marshall's legal treatment of access to education was arguably adopted by the *Plyler* court nine years later.<sup>276</sup> Not only did the Supreme Court agree that every American citizen had a right to a basic education, it extended access to basic education to undocumented immigrants, knowing that this population was burgeoning.<sup>277</sup> The Court's decision implicitly recognized 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.<sup>278</sup> The existence of a large uneducated population would necessarily create an underclass.<sup>279</sup> Of more concern to the Court, this underclass might attain citizenship but remain under-educated for purpose of contributing meaningfully to American society, thereby becoming the drain on resources that conservative politicians fear.<sup>280</sup>

By imposing barriers to education, states are undercutting the future value of undocumented residents who reside within their borders.<sup>281</sup> The short-term savings achieved by denying undocumented students admission and in-state tuition are more than offset by these immigrants' continued presence within the state, their inability to achieve greater financial success, and the concomitant loss of taxable revenue associated with greater financial success.<sup>282</sup> 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 is that many do not. And once within our borders, these immigrants are unlikely to leave.<sup>283</sup> 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.<sup>284</sup> More importantly, this

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<sup>275</sup> *Id.* at 112–15 (Marshall, J., dissenting).

<sup>276</sup> *See Plyler v. Doe*, 457 U.S. 202, 221–23 (1982).

<sup>277</sup> *See id.*

<sup>278</sup> *Id.* at 230.

<sup>279</sup> *See id.* at 234 (Blackmun, J., concurring).

<sup>280</sup> *Id.* at 221, 229–30.

<sup>281</sup> *See Gonzales*, *supra* note 255, at 3–4.

<sup>282</sup> *Plyler*, 457 U.S. at 229–30.

<sup>283</sup> *See RYTINA*, *supra* note 52.

<sup>284</sup> 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. 256, 2011 Leg., Reg. Sess. (Ala. 2011) (“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: . . . (3) Participation in any extracurricular activity outside of the basic course of study in any primary, secondary, or postsecondary educational program.”). This type of legislation furthers the “uniformly negative” effects on undocumented immigrants’ social development. *See* Julia Preston, *Illegal Immigrant Parents Pass a*

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 and is exceptional because of them—and that this exceptionalism is a product of access to education combined with a realistic path to citizenship.<sup>285</sup> The tenets of *Plyler* must not be abridged.

#### CONCLUSION

Allowing undocumented immigrants to qualify for in-state tuition rates at universities will not promote further illegal immigration.<sup>286</sup> 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. Improperly extending section 505 of the IIRIRA (8 U.S.C. § 1623) to forbid lower tuition rates as an alleged benefit puts the very foundation of *Plyler* at risk.<sup>287</sup> Barriers to education based on immigration status can have no other effect than that which the *Plyler* majority feared—the creation of an underclass.<sup>288</sup> Current efforts to repeal the Fourteenth Amendment’s automatic conferral of citizenship through birth in the United States would have the same result.<sup>289</sup> But that is the intended outcome that advocates for such outsized punitive measures desire. This legal position disregards 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 demagoguery. The proper method for stemming illegal immigration is through revision of the federal immigration laws, not through the denial of educational opportunities.

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*Burden, Study Says*, N.Y. TIMES, Sept. 21, 2011, at A21 (citing Carola Suárez-Orozco, et al., *Growing Up in the Shadows: The Developmental Implications of Unauthorized Status*, 81 HARV. EDUC. REV. 438 (2011)), available at [http://www.nytimes.com/2011/09/21/us/illegal-immigrant-parents-pass-a-burden-study-says.html?\\_r=1](http://www.nytimes.com/2011/09/21/us/illegal-immigrant-parents-pass-a-burden-study-says.html?_r=1)).

<sup>285</sup> See *Plyler*, 457 U.S. at 221–23.

<sup>286</sup> See PASSEL, *supra* note 257, at 44 (“The flows respond to economic conditions in the U.S. and abroad. For Mexico and many other countries, conditions in the U.S. are almost always better than abroad so that worsening conditions in Mexico and elsewhere lead to increased migration to the United States.”).

<sup>287</sup> See *Plyler*, 457 U.S. at 229–30.

<sup>288</sup> See *id.* at 221–23.

<sup>289</sup> See Marc Lacey, *Birthright Citizenship Looms as Next Immigration Battle*, N.Y. TIMES, Jan. 5, 2011, at A1, available at <http://www.nytimes.com/2011/01/05/us/politics/05babies.html?pagewanted=all>.