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Evading "Residence": Undocumented Students, Higher Education, and the States

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Evading "Residence": Undocumented Students, Higher Education, and the States

Keywords

Higher education, undocumented students, federal immigration power, State police power

COMMENTS

EVADING “RESIDENCE”: UNDOCUMENTED STUDENTS, HIGHER EDUCATION, AND THE STATES

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INTRODUCTION

Alex M. was born in El Salvador but has spent the last seven years in the United States. He is fluent in both English and Spanish. The sixteen-year-old—a junior at Los Angeles High School—is an aspiring filmmaker who has already completed two films. He maintains a 3.6 grade point average, teaches Internet skills to middle school children at a community-based organization, and interns at a local television station during school vacations. While Alex's father was granted asylum due to the civil war in El Salvador, Alex faces a three to five year wait to acquire his own legal status.

Alex will likely still be waiting when he graduates from high school. He worries that his immigration status may prevent him from pursuing his dream of attending film school at the University of California, Los Angeles ("UCLA"). During the 2003-2004 school year, the mandatory fees at UCLA for undergraduates totaled \$5,819.52 for residents and \$20,029.52 for nonresidents.¹ There is simply no way that his family could afford to pay the nonresident tuition rate.²

Fortunately for Alex, legislators increasingly recognize the types of obstacles that students like him face. Since 2001, at least twenty-five states have considered or passed laws that enable undocumented students who attended high school in their state to qualify for in-state tuition.³

These efforts, however, are not entirely in the clear. They employ clever statutory wording to attempt to circumvent a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")⁴ that seeks to restrict undocumented students' access

1. REGISTRAR'S OFFICE, UCLA, GRADUATE AND UNDERGRADUATE 2003-2004 ANNUAL FEES, available at <http://www.registrar.ucla.edu/Fees/grad.htm> (last visited Jan. 7, 2004).

2. Alex M.'s experience is illustrative of the experiences of many undocumented students in this country. The details of Alex's story were found in Thomas G. Dolan, *Don't Defer the Dream: NILC, MALDEF, NCLR, Advocate for Immigrants' Children*, HISPANIC OUTLOOK, Nov. 2003, at 29.

3. See discussion *infra* Part I.B.2 (summarizing recent state legislation regarding in-state tuition for undocumented students).

4. Pub. L. No. 104-208, Div. C, Title V, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.).

to postsecondary educational benefits.⁵ This provision arguably encompasses in-state tuition.⁶

Section 505 of IIRIRA provides:

[A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary 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.⁷

A closely related United States Code provision reinforces the above provision by declaring that individuals who are not "qualified" aliens⁸ are ineligible for any state or local postsecondary education benefit.⁹ Some states believe that these provisions effectively prohibit them from granting in-state tuition to undocumented students.¹⁰

This issue continues to garner national attention.¹¹ Stories abound of hard-working students, brought to the United States illegally at a

5. See IIRIRA § 505, 8 U.S.C. § 1623 (2001) (explaining that the provision applies to aliens who are "not lawfully present"). Although the term "alien" is commonly used in immigration law, it has a negative connotation that emphasizes otherness and a lack of belonging in the community-at-large. Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 264-70 (1996). Similarly, the term "illegal" in the context of immigration implies the commission of a crime. See Michael Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990s*, 30 CASE W. RES. J. INT'L L. 57, 62-63 (1998) (preferring the term "undocumented" alien to "illegal" alien when the alien's legal status is still pending). Accordingly, I will use the term "undocumented student" where applicable.

6. But see Michael A. Olivas, *A Rebuttal to FAIR: States Can Enact Residency Statutes for the Undocumented*, 7 BENDER'S IMMIGR. BULL. 652, 653 (2002) (distinguishing between monetary and non-monetary benefits, and arguing that the benefit given through residency statutes is the "right to be considered for in-state status," rather than in-state tuition).

7. IIRIRA § 505(a).

8. See 8 U.S.C. § 1641(b) (2000) (defining qualified alien to include lawful permanent residents, asylees, refugees, and other conditional entrants).

9. See 8 U.S.C. § 1621(c) (2000) (classifying "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" as a "State or local public benefit"). The language of Section 1621 further supports the argument that "benefits" in IIRIRA refers to monetary benefits.

10. See, e.g., Letter from Robert L. Ehrlich, Jr., Governor of Maryland, to Michael E. Busch, Speaker of the House, Maryland State Legislature (May 21, 2003) (citing Section 505 as the "[f]irst and foremost" reason for vetoing House Bill 253, which would have extended in-state tuition to undocumented students in Maryland), at http://mlis.state.md.us/2003rs/veto_letters/hb0253.htm (on file with the American University Law Review); Sharif Durhams, *Non-Resident Students Take Hit*, MILWAUKEE J. SENTINEL, Sept. 1, 2001, at 2B (describing Wisconsin Governor Scott McCallum's decision to veto a plan permitting eligible undocumented students to pay in-state tuition at the state's universities because the provision conflicted with IIRIRA).

11. See AM. ASS'N OF STATE COLLS. & UNIVS., ACCESS FOR ALL? DEBATING IN-STATE TUITION FOR UNDOCUMENTED ALIEN STUDENTS 1 (2003), at http://www.aascu.org/special_report/access_for_all.htm (last visited Jan. 12, 2004) (on file with the

young age by one or more family members, who then excel in public high schools.¹² However, because out-of-state tuition rates are typically three times higher than in-state rates, or more,¹³ and undocumented students are ineligible for federal financial aid,¹⁴ the cost of a college education is entirely out of reach.¹⁵ These portraits lend further support to proposed federal legislation in both the Senate¹⁶ and House¹⁷ that would: (1) repeal Section 505 of IIRIRA¹⁸ and (2) enable undocumented students to obtain lawful permanent resident status.¹⁹

American University Law Review) (noting that the debate surrounding in-state tuition for undocumented students "has made its way to the forefront of the policy agenda"). The report also provides a survey of proposed state and federal laws that address undocumented alien eligibility for in-state tuition. *Id.*

12. See, e.g., Jill Leovy, *When No Green Card Means No College*, L.A. TIMES, Mar. 24, 2001, at A1 (reporting that in recent years, two large urban high schools in Los Angeles had valedictorians who were undocumented); Teresa Puente, *Immigrants Face College Barrier*, CHI. TRIB., June 5, 2001, at 7D (describing Tania Unzueta, a recent Chicago high school graduate and swim team captain with a year of college credit from Advanced Placement classes who, because she was brought to the United States illegally from Mexico at a young age, must apply to college as a foreign exchange student); Ruth Schubert, *A Boost for "Illegal" Teenagers; Bills Would Let Students Who Are in U.S. Unlawfully Pay Resident Tuition at Colleges*, SEATTLE POST-INTELLIGENCER, Jan. 25, 2002, at B1 (describing the struggle of an undocumented teenage girl, unable to give her name, who has resided in the United States for twelve years, has above a 3.6 GPA, and is a student government officer and dancer).

13. See, e.g., WYFF 4 THE CAROLINA CHANNEL.COM, TUITION AT TOP 20 PUBLIC UNIVERSITIES, at <http://www.thecarolinachannel.com/4moreinfo/2268769/detail.html> (last visited Jan. 14, 2004) (on file with the American University Law Review) (comparing tuition rates at *U.S. News and World Report's* twenty highest ranked public universities). In states that have passed laws enabling students to qualify for the in-state tuition rate, the tuition differential for the 2003-2004 school year is pronounced. *Id.* At the University of California-Berkeley, tuition is \$5,502 for in-state students and \$18,510 for out-of-state students. *Id.* At the University of Texas-Austin, the in-state rate is \$5,340, while the out-of-state rate is \$11,446. *Id.* For the 2002-2003 school year, in-state tuition at the University of Illinois was \$5,748, while it was \$14,352 for out-of-state students. *Id.* In 2002-2003, tuition at the University of Washington was \$4,336, in-state, and \$15,337, out-of-state. *Id.*

14. See ANDORRA BRUNO & JEFFREY J. KUENZI, CONG. RESEARCH SERVS., UNAUTHORIZED ALIEN STUDENTS: ISSUES AND LEGISLATION 2 (2001) (explaining that the Higher Education Act of 1965 prohibits undocumented students from receiving federal financial aid); Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. §§ 1001-1099 (2001)) (noting the Higher Education Act's purpose is primarily to grant financial assistance to postsecondary and college students and to support colleges and universities).

15. See BRUNO & KUENZI, *supra* note 14 (acknowledging that the inability to procure financial aid limits undocumented students' access to a college education).

16. See Development, Relief, and Education for Alien Minors ("DREAM") Act of 2003, S. 1545, 108th Cong. (2003) (aiming, in part, to repeal Section 505 of IIRIRA and to provide greater college access to undocumented students).

17. See Student Adjustment Act of 2003, H.R. 1684, 108th Cong. (2003) (attempting, in part, to repeal Section 505 and remove barriers that undocumented students face in attending college).

18. S. 1545, § 3(a); H.R. 1684, § 2.

19. S. 1545, §§ 4-5; H.R. 1684, § 3. To qualify for adjustment of status under the DREAM Act, the student may first obtain conditional permanent resident status for a

States face a unique bind in dealing with their undocumented populations.²⁰ The power to regulate immigration is "unquestionably exclusively a federal power."²¹ Yet, once undocumented individuals are within the U.S. borders, the financial burden of providing for them falls largely on the states.²² States with large immigrant populations feel this cost most heavily.²³ Frustration on the part of

period of six years, if the individual (1) has earned a high school degree or demonstrates that he or she has been admitted to an institution of higher education, (2) has been physically present in the United States for at least five years, and (3) was under the age of sixteen upon entering the United States. S. 1545, §§ 4-5; H.R. 1684, § 3. The student may petition to have this status changed to that of lawful permanent resident at the end of the six year period upon demonstration that either (1) the student has completed, in good standing, at least two years at an institution of higher education, or (2) the student served in the Armed Forces for at least two years, unless honorably discharged. S. 1545, § 5(d)(1)(D). The DREAM Act also provides for limited financial aid assistance and the ability to participate in federal work-study programs. S. 1545, § 12.

The Student Adjustment Act does not contain the interim step of conditional permanent resident status, as in the DREAM Act. To be eligible under the Student Adjustment Act, a student must: (1) have earned a high school degree or demonstrate that he or she will graduate; (2) be between twelve and twenty-one years of age on the date the application is processed, with an exception for twenty-one to twenty-four year-olds if they are currently enrolled in college or have graduated with a degree; (3) have been physically present in the United States for a period of five years immediately preceding the enactment of the Act; and (4) demonstrate "good moral character." S. 1545, § 4; H.R. 1684, § 3.

This legislation is significant because only the Federal Government has the power to adjust immigration status, which is necessary to obtain work authorization, qualify for federal financial aid, and allay fears of possible deportation from the country. Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393, 406-07 (2002). See generally Jennifer Galassi, Note, *Dare to Dream? A Review of the Development, Relief, and Education for Alien Minors (DREAM) Act*, 24 CHICANO-LATINO L. REV. 79, 85 (2003) (arguing that the passage of a federal law would remove doubts as to whether extending in-state tuition to undocumented students is constitutional); Beth Peters & Marshall Fritz, *To Repeal or Not to Repeal: The Federal Prohibition on In-State Tuition for Undocumented Immigrants Revisited*, IMMIGRATION DAILY, Oct. 4, 2002, available at <http://www.ilw.com/lawyers/articles/2002,1004-peters.shtm#bio> (discussing alternatives to a simple repeal of Section 505 of IIRIRA, including making postsecondary awards for undocumented students a matter of state discretion and mandating that states ignore immigration status in determining eligibility for in-state tuition).

20. See Timothy W. Hagedorn, Note, *Illegal Immigration and the State Predicament: Has the Federal Government Commandeered State Legislative Processes?*, 8 MD. J. CONTEMP. LEGAL ISSUES 271, 292 (1997) (discussing the dilemma states with high populations of undocumented immigrants face, including the overwhelming costs of providing services such as health, safety, and education). Yet, the effects of denying these services could jeopardize the health and safety of the states' citizens. *Id.*

21. See *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (distinguishing the federal immigration power from a state's ability to regulate employment through its police power). See *infra* note 141 and accompanying text (discussing immigration as a plenary power of Congress).

22. Hagedorn, *supra* note 20, at 292.

23. See JEFFREY S. PASSEL & WENDY ZIMMERMAN, URBAN INST., ARE IMMIGRANTS LEAVING CALIFORNIA? SETTLEMENT PATTERNS OF IMMIGRANTS IN THE LATE 1990S 4 (2001) (noting that the six states with the largest immigrant populations are California, New York, Florida, Texas, New Jersey, and Illinois), available at

heavily immigrant-populated states has lead to such extreme measures as unsuccessful lawsuits against the Federal Government seeking reimbursement for the costs of providing for undocumented immigrants.²⁴

The in-state tuition initiatives represent a marked shift in some states' treatment of undocumented individuals.²⁵ Historically, states have aimed to restrict benefits in areas such as health care, employment, and secondary education to the undocumented populations living within their borders.²⁶ Ironically, many states may soon face a legal challenge of a different nature—that their efforts to assist the undocumented violate federal law.²⁷

<http://www.urban.org/url.cfm?ID=410287>. See Hagedorn, *supra* note 20 (discussing the types of costs states with high undocumented immigrant populations incur).

24. During the nineties, the six states with the largest immigrant populations unsuccessfully sued the Federal Government seeking monetary reimbursement for the high costs associated with providing for illegal aliens as a result of the failure of federal immigration policy. See, e.g., *California v. United States*, 104 F.3d 1086, 1089 (9th Cir. 1997) (affirming the district court's decision to dismiss California's constitutional and statutory claims against the United States, which were based on the financial burden federal immigration policy placed on California); *Arizona v. United States*, 104 F.3d 1095, 1096 (9th Cir. 1997) (affirming the district court's decision to dismiss Arizona's immigration claims against the United States for the reasons set out in *California v. United States*); *New Jersey v. United States*, 91 F.3d 463, 466 (3d Cir. 1996) (affirming the district court's holding that New Jersey's action seeking compensation for educating and incarcerating illegal aliens was non-justiciable); *Padavan v. United States*, 82 F.3d 23, 30 (2d Cir. 1996) (dismissing the suit seven New York senators and two New York counties brought against the United States for reimbursement of the costs associated with illegal aliens for failure to state a claim); *Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir. 1995) (holding that Florida officials' claim that the United States failed to enforce immigration policies presented a non-justiciable political question). See generally Hagedorn, *supra* note 20, at 272-73 (arguing that although the state suits did not achieve the desired result, they may have lead to IIRIRA's alleviation of the states' duty to provide public benefits); PASSEL & ZIMMERMAN, *supra* note 23 (demonstrating the substantial overlap between the states that filed suit—Arizona, California, Florida, New Jersey, New York, and Texas—and those with the highest immigrant populations—California, Florida, Illinois, New Jersey, New York, and Texas); *infra* Part I.B (showing that the majority of states with the largest immigrant populations—California, Illinois, New York, and Texas—now have laws that extend in-state tuition to undocumented students).

25. See, e.g., 1994 Cal. Legis. Serv. Prop. 187 (West) (excluding undocumented individuals from nearly all social services, restricting the access of undocumented children to a public K-12 education, and requiring local officials to inquire about immigration status and to report undocumented individuals to the Immigration and Naturalization Service).

26. See *infra* Part I.A (discussing state laws that the courts struck down because they discriminated on the basis of alienage).

27. See *The Connection: Tuition Tug of War* (WBUR Boston and National Public Radio broadcast, Apr. 25, 2003) [hereinafter *Tuition Tug of War*], at http://www.theconnection.org/shows/2003/04/20030425_a_main.asp (on file with the American University Law Review) (reporting that such a challenge is likely, according to Rosemary Jenks of Numbers USA, an immigration restriction group).

Both state-sponsored in-state tuition laws and proposed federal legislation to assist undocumented students face sharp criticism.²⁸ Opponents contend that such policies punish nonresident citizens, who would pay higher rates than qualified individuals who are in the United States unlawfully.²⁹ Critics also argue that these efforts counter the Federal Government's attempt to combat illegal immigration³⁰ and spend limited educational resources on individuals who will be unable to legally work after completing their postsecondary education.³¹

Whether a state law that grants in-state tuition to undocumented students would survive a legal challenge remains an open question of law.³² Accordingly, this Comment will examine the two most likely questions to arise during such a challenge: (1) whether the state laws violate the "on the basis of residence" provision of Section 505 of IIRIRA; and (2) whether the state laws are preempted altogether under the federal power over immigration.

Section I provides an overview of the challenges undocumented students face with regard to higher education, surveys recent state efforts to legislate in the area of postsecondary education, and analyzes state-level statutory wording in the context of IIRIRA. Section II examines the tension between the congressional power to regulate immigration and the right of states to set tuition rates and determine residency.

This Comment concludes that states can likely avoid a conflict with Section 505 of IIRIRA. Additionally, while courts afford tremendous deference to the federal immigration power, administration of education and determination of residency are traditional functions of

28. See FEDERATION FOR AMERICAN IMMIGRATION REFORM, *BREAKING THE PIGGY BANK: HOW ILLEGAL IMMIGRATION IS SENDING SCHOOLS INTO THE RED* 4-5 (2003) [hereinafter *BREAKING THE PIGGY BANK*] (contending that increasing the access of undocumented students to public universities deprives citizens and legal residents of educational opportunities and increases the cost to state taxpayers), available at <http://www.fairus.org/news/NewsPrint.cfm?ID=16318c=55>.

29. See, e.g., Ward Connerly, *Subsidizing Illegal Residents*, TOWNHALL.COM, Feb. 5, 2002, at <http://www.townhall.com/columnists/wardconnerly/printwc20020205.shtml> (on file with the American University Law Review) (arguing that giving aliens preferential treatment over citizens violates fundamental notions of fairness).

30. See FEDERATION FOR AMERICAN IMMIGRATION REFORM, *ISSUE BRIEF: TAXPAYERS SHOULD NOT HAVE TO SUBSIDIZE COLLEGE FOR ILLEGAL ALIENS* (2003) [hereinafter *FAIR ISSUE BRIEF*] (asserting that states that extend in-state tuition rates to undocumented students expose themselves "to substantial costs and criminal liability"), available at <http://www.fairus.org/html/04182108.htm> (last visited Nov. 15, 2003).

31. See, e.g., Melanie Scarborough, *Siding Against the Law-Abiding*, WASH. POST, May 25, 2003, at B8 (criticizing states for investing in the education of individuals who are "unemployable").

32. *Tuition Tug of War*, *supra* note 27.

the state police power. From a policy standpoint, because states bear the substantial cost of providing for their undocumented populations, they should have greater power to pass laws when they seek to impart, rather than deny, opportunities to undocumented students. In sum, carefully drafted state-sponsored efforts to extend in-state tuition to undocumented students should survive a legal challenge.

I. HIGHER EDUCATION FOR UNDOCUMENTED STUDENTS AND THE STATES

A. Background

The 1982 Supreme Court decision *Plyler v. Doe*³³ guides undocumented students' access to elementary and secondary education.³⁴ Under *Plyler*, a state cannot deny undocumented children a free public K-12 education.³⁵ Writing for the Court, Justice Brennan noted that it was the parents of undocumented children, not the children, who chose to come to the United States.³⁶ The majority emphasized that the denial of a basic education and the stigma of illiteracy "impose[d] a lifetime hardship on a discrete class of children not accountable for their disabling status."³⁷

Applying a standard of review resembling intermediate scrutiny,³⁸ the Court found that reserving a state's limited resources to educate its lawful residents did not further a substantial state interest.³⁹ The narrow 5-4 majority also acknowledged the existence of millions of undocumented immigrants living within the United States as a source

33. 457 U.S. 202 (1982).

34. *Id.* at 205.

35. *See id.* at 229-30 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.").

36. *See id.* at 220 (emphasizing that punishing a child for the parent's misconduct did not "comport with fundamental conceptions of justice").

37. *Id.* at 223.

38. *See id.* at 218 n.16 (noting that the court employs the "technique" of "intermediate" scrutiny "only when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases"). *See generally* Craig v. Boren, 429 U.S. 190, 197 (1976) (defining the language of intermediate scrutiny as "substantially relat[ing]" to an "important governmental objective."); Marisa Ann Tostado, Note, *Alienation: Congressional Authorization of State Discrimination Against Immigrants*, 31 LOY. L.A. L. REV. 1033, 1050-51 n.155 (1998) (citing Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 784-85 (1987)) (noting that the Supreme Court's attempt to "put more teeth into the rational basis test without approaching intermediate scrutiny," as in *Plyler*, has also been called "rational basis plus" and "rational basis plus with bite").

39. *Plyler*, 457 U.S. at 228-30.

of largely cheap labor and the inherent inequity in contributing labor to the country but being unable to enjoy the advantages afforded citizens and lawful residents.⁴⁰

In the more than twenty years since *Plyler*, the Court's ruling has prevented states and localities from restricting undocumented children's access to public school.⁴¹ Its effects on school-age children are enormous, as immigration has been a major contributor to the national increase in public school enrollment since *Plyler*.⁴²

But the holding in *Plyler* is also limited in its application.⁴³ The Court carefully maintained that while education is of paramount importance in American society,⁴⁴ there is no fundamental right to education.⁴⁵ Furthermore, the Court rejected the notion that undocumented aliens are a "suspect class,"⁴⁶ which would subject all laws based on such classification to strict judicial scrutiny.⁴⁷

Thus, while *Plyler* has safeguarded educational rights for undocumented children, its holding does little to protect the same children upon reaching college age.⁴⁸ The Urban Institute estimates that each year, approximately 65,000 undocumented students living

40. *Id.* at 218-19.

41. *See, e.g.,* League of United Latin American Citizens v. Wilson, 997 F. Supp. 1244, 1255-56 (C.D. Cal. 1997) (noting that the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") of 1996, 8 U.S.C. § 1643, defers expressly to *Plyler* in not denying public elementary and secondary education to undocumented children, even though the act heavily restricts undocumented aliens' access to other benefits); League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 785-86 (C.D. Cal. 1995) (invalidating the provision of California's Proposition 187 that excluded undocumented aliens from public elementary and secondary education because of the Supreme Court's holding in *Plyer*).

42. *See* U.S. CENSUS BUREAU, CENSUS BUREAU REPORTS, CHILDREN OF 'BABY BOOMERS' AND IMMIGRANTS BOOST SCHOOL ENROLLMENT TO EQUAL ALL-TIME HIGH (2001), at <http://www.census.gov/Press-Release/www/releases/archives/education/000322.html> (on file with the American University Law Review) (finding that the children of new immigrants played an influential role in the rise in the number of students enrolled in U.S. elementary and high schools).

43. *See Plyler*, 457 U.S. at 244-45 (Burger, J., dissenting) (noting that *Plyer*'s narrow holding determines the level of scrutiny that applies only in similar situations where states deny undocumented children a public education, but the holding does not require that states provide other benefits, such as welfare, to undocumented individuals).

44. *See id.* at 221 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)).

45. *See id.* (reinforcing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)).

46. *Id.* at 219 n.19.

47. *See Curran, supra* note 5, at 103 (observing the *Plyler* court's recognition of the unlawful nature of the entry by the undocumented in to the United States).

48. *See* Stanley Mailman & Stephen Yale-Loehr, *College For Undocumented Students After All?*, N.Y.L.J., June 25, 2001, at 3 (noting that even though *Plyler*'s central pillar stresses the importance of education, the decision "doesn't necessarily govern postsecondary education").

in the United States for at least five years graduate from high school.⁴⁹ However, the inaccessibility of postsecondary education is a likely contributor to excessive dropout rates among high school age undocumented youth.⁵⁰ This leads to poverty and unemployment, limits avenues to regulate their immigration status,⁵¹ and increases overall costs to the states.⁵² A study of Chicago's college-age immigrant youth found that, like their documented counterparts, undocumented students want to attend college, but are much more restricted in terms of financing their education.⁵³ In addition to being restricted from access to most state and federal scholarships, grants, and loans, undocumented youth typically come from

49. See JEFFREY PASSEL, URBAN INST., FURTHER DEMOGRAPHIC INFORMATION RELATING TO THE DREAM ACT 2 (2003) (noting that this figure is at the upper end of previous estimates of between 50,000 and 65,000 undocumented children to graduate from high school each year, and that the estimate does not include an additional 15,000 undocumented children to reach age eighteen, who have been in the United States for five years or longer, who failed to complete high school); CONG. BUDGET OFFICE, COST ESTIMATE, S. 1291, DEVELOPMENT, RELIEF, AND EDUCATION FOR ALIEN MINORS ACT 3 (2002) (estimating that, in 2000, there were 64,000 undocumented students under age twenty-one, who had been in the United States for at least five years, who were enrolled in college).

50. See Jason Song, *Raising Hope for Better Life, Citizenship*, BALT. SUN, May 13, 2003, at 6A (recounting the experiences of high school teacher Kelly Flores, whose "students have dropped out after they realize they could not go to college").

51. The most common routes to legal permanent residency status are through family sponsorship and employment, which is divided into five categories. Immigration and Nationality Act ("I.N.A.") § 203(a)-(b), 8 U.S.C. § 1153(a)-(b) (2003). Of the three largest employment-based preferences, 28.6% of the total allocations are reserved for "priority" workers, which encompasses immigrants with "extraordinary ability in the sciences, arts, education, business or athletics," renowned professors and researchers, and "multinational executives and managers." *Id.* § 203(b)(1). An additional 28.6% are reserved for professionals with "exceptional" abilities who hold advanced degrees. *Id.* § 203(b)(2). The third preference, which comprises another 28.6% of employment-based visas plus the unused portions from the first two categories, includes skilled workers, professionals with baccalaureate degrees, and other workers who can demonstrate the need for their labor in the United States. *Id.* § 203(b)(3). This allocation of employment-based visas demonstrates that most employment-based legal permanent residency petitions go to advanced postsecondary degree holders.

52. H. Research Org., *Bill Analysis*, H.B. 1403, 77th Leg., Reg. Sess., at 4 (Tex. 2001) [hereinafter *Texas Bill Analysis*] (correlating high drop-out rates with "a growing unskilled, undereducated workforce, accompanied by increased spending on social programs, higher rates of crime, and decreased opportunities for a higher quality of life"), available at <http://www.capitol.state.tx.us/hrofr/frame2.htm>. The Intercultural Development Research Association reported that in 1986, 86,000 student dropouts from Texas public schools cost the state \$17.12 billion. *Id.* By 1998, the number of dropouts had increased to more than 1.2 million and cost the state nearly \$319 billion. *Id.*

53. See CHIRAG MEHTA & ASMA ALI, CTR. FOR URBAN ECON. DEV., UNIVERSITY OF ILLINOIS AT CHICAGO, EDUCATION FOR ALL: CHICAGO'S UNDOCUMENTED IMMIGRANTS AND THEIR ACCESS TO HIGHER EDUCATION 7 (2003) (analyzing the likely effects of the passage of Illinois House Bill 60, an in-state tuition bill for undocumented students, on youth in Chicago), available at <http://www.uic.edu/cuppa/uicued/Publications/RECENT/undocumentedImmigrants.pdf>.

households where income is significantly lower than that of their counterparts.⁵⁴

From an economic standpoint, investment in the higher education of undocumented students reduces public spending on social and health benefits and increases tax revenue.⁵⁵ The Comptroller of Texas found that every dollar the state invested into higher education yielded more than five dollars for the Texas economy in the long run.⁵⁶

Economic findings such as those in Texas, combined with the fact that the states with the highest immigrant populations will bear the bulk of the price of either providing an education or paying the resulting social costs,⁵⁷ have lead some states to conclude that it is worthwhile to educate their undocumented students.⁵⁸ Almost every

54. See *id.* at 8 (finding that twenty-nine percent of immigrant students with lawful immigration status in Chicago, compared to only ten percent of undocumented students, lived in households with an annual income of more than \$40,000).

55. See GEORGES VERNEZ & LEE MIZELL, RAND EDUC. CTR. FOR RESEARCH ON IMMIGR. POL'Y, GOAL: TO DOUBLE THE RATE OF HISPANICS EARNING A BACHELOR'S DEGREE ix (2001) (estimating the combined lifetime revenue generated from doubling the number of Hispanics graduating from college in 2010 to be \$13 billion, including "\$5.4 billion from reduced public spending for social and health programs and \$7.6 billion in increased tax contributions"), available at <http://www.rand.org/publications/DB/DB350/DB350.pdf>.

56. See *Texas Bill Analysis*, *supra* note 52, at 4 (outlining arguments in support of the legislation such as the benefits to the Texas economy and an increase in tuition revenues).

57. See VERNEZ & MIZELL, *supra* note 55, at viii (finding that five states—California, Texas, New York, Florida, and Illinois—will have the task of educating the overwhelming majority of Hispanics aged twenty-four and younger). Hispanic youth in this age group largely reside in California (more than 33%), Texas (20%), and New York, Florida, and Illinois (25% in those three states combined). *Id.* Statistics regarding Hispanic youth are relevant because Hispanics account for nearly three-fourths of the unauthorized population living in the United States. See U.S. CITIZENSHIP & IMMIGRATION SERVS., OFFICE OF IMMIGRATION STATISTICS, ILLEGAL ALIEN RESIDENT POPULATION tbl. 1 (2001) (listing the country of origin and population size of the United States' undocumented immigrant population), available at <http://uscis.gov/graphics/shared/aboutus/statistics/illegalalien/index.htm>. A little more than 73% of foreign-born Hispanics who entered the United States before 1970 are U.S. citizens, compared to only 7.3% who entered the United States between 1990-2002. See U.S. CENSUS BUREAU, ANNUAL DEMOGRAPHIC SUPPLEMENT TO THE MARCH 2002 CURRENT POPULATION SURVEY (2003) (analyzing the percentage of foreign born Hispanics who obtained U.S. citizenship), available at <http://www.census.gov/prod/2003pubs/p20-545.pdf>. Much of this discrepancy is likely due to the immigration amnesty in 1986 created by the Immigration Reform and Control Act of 1986. Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 5, 1986). An estimated 2.7 million people acquired legal permanent resident status through IRCA's different legalization programs. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 608 (3d ed. 2002).

58. See, e.g., *Texas Bill Analysis*, *supra* note 52, at 3 (noting that the Texas law "would provide an opportunity for young people who have been living in Texas for some time and who plan to live, work, and raise their families in Texas to achieve their full potential and contribute more to the economy and society").

heavily immigrant-populated state grants qualified undocumented students eligibility for resident tuition rates.⁵⁹ Recent studies also indicate that immigrant populations in states traditionally unaffected by immigration increased dramatically during the nineties.⁶⁰ As immigrant populations continue to grow throughout the country, postsecondary education for undocumented students will be increasingly relevant to a larger number of states.

B. "On the Basis of Residence" and In-State Tuition Laws

1. "Residency" defined

Courts have consistently recognized the power of states to charge tuition differentials at the university level.⁶¹ This policy is based on the notion that taxpayers in a state should have access to the state's universities at a lower cost than individuals who do not pay taxes in that state.⁶² In addition, the state has a "legitimate interest" in seeing

59. See TEX. EDUC. CODE ANN. § 54.052 (Vernon 2003) (extending the in-state tuition rate to undocumented students who meet eligibility criteria); CAL. EDUC. CODE § 68130.5 (West 2003) (allowing qualified undocumented students to attend the California State University and California Community Colleges at the resident tuition rate); H.B. 60, 93d Leg., Reg. Sess. (Ill. 2003) (codified in scattered sections of 110 ILL. COMP. STAT. ANN. (2003)) (enabling eligible undocumented students in Illinois to attend the state's public universities at the in-state rate).

60. See PASSEL & ZIMMERMAN, *supra* note 23, at 7 (explaining that in the 1990s, immigrant populations in the thirty-seven "nontraditional immigrant states" increased by 71%, while they grew only 23% in the six largest immigrant states). In particular, the Hispanic population grew by 28% in the "five core states" of California, Texas, New York, Florida, and Illinois and increased by 94% in the rest of the nation during the same decade. See VERNEZ & MIZELL, *supra* note 55, at 5 (analyzing the geographic location of the Hispanic population within the United States).

61. See, e.g., *Sturgis v. Washington*, 368 F. Supp. 38, 42 (W.D. Wash. 1973) (finding a one-year residency requirement for in-state tuition constitutionally valid); *Ariz. Bd. of Regents v. Harper*, 495 P.2d 453, 457 (Ariz. 1972) (holding that a state may classify an individual as a resident for tuition purposes in a different manner than for other purposes); *Bryan v. Regents of the Univ. of Cal.*, 205 P. 1071, 1072 (Cal. 1922) (upholding tuition differentials based on residency); *Weitzel v. State*, 306 So. 2d 188, 192-93 (Fl. App. 1974) (upholding ability of Board of Regents to determine tuition policies); *Schmidt v. Regents of the Univ. of Mich.*, 233 N.W.2d 855, 856 (Mich. Ct. App. 1975) (affirming University of Michigan's ability to define residency for tuition purposes as within its power to establish tuition); *Thompson v. Bd. of Regents*, 188 N.W.2d 840, 843-44 (Neb. 1971) (noting that "cost equalization between those who have, and those who have not, recently contributed to the state's economy through employment, tax payments, and expenditures within the state" was a "reasonable justification for the discrimination in tuition") (internal quotations omitted).

62. Michael A. Olivas, *Administering Intentions: Law, Theory, and Practice of Postsecondary Residency Requirements*, 59 J. HIGHER EDUC. 263, 264 (1988) (explaining that the higher tuition rate for nonresidents "equalize[s]" the tax burden on residents and encourages states to develop strong postsecondary educational systems).

that its bona fide residents, who are more invested in the state, have a greater opportunity to attend the state's universities.⁶³ Although public opinion tends to assume otherwise, a substantial portion of undocumented individuals who work in the United States pay both state⁶⁴ and federal taxes,⁶⁵ thus countering the argument that they should not be eligible to attend a public university at the preferential rate because they do not help subsidize it.⁶⁶

States also have the ability to set residency classifications.⁶⁷ In practice, the process of determining who is a resident is fraught with intricacies and inconsistencies.⁶⁸ States consider a variety of factors, including tax returns, voter registration, driver's licenses, proof of housing, and payroll stubs; in essence there is no set formula.⁶⁹ In addition to these factors, states frequently make exceptions and allow individuals who do not satisfy traditional criteria to attend their universities at the resident tuition rate.⁷⁰

63. See *Vlandis v. Kline*, 412 U.S. 441, 452-53 (1973) (holding that due process requires that an individual be able to present evidence that he or she is a bona fide resident for tuition purposes).

64. See MEHTA & ALI, *supra* note 53, at iii (noting that undocumented immigrants contributed more than \$69 million in income tax revenues to Illinois' 2002 budget); JEFFREY S. PASSEL & REBECCA L. CLARK, URBAN INSTITUTE, IMMIGRANTS IN NEW YORK: THEIR LEGAL STATUS, INCOMES, AND TAXES 24 (1998) (finding that while undocumented immigrants in New York paid less in taxes than the legal foreign-born, their 1994 contributions to the state totaled more than \$1.1 billion).

65. See CONGRESSIONAL RESPONSE REPORT, OFFICE OF THE INSPECTOR GENERAL, SOCIAL SECURITY ADMINISTRATION, A-03-03-23038, STATUS OF THE SOCIAL SECURITY ADMINISTRATION'S EARNINGS SUSPENSE FILE 2-3 (2002) (describing the Earnings Suspense File ("ESF"), which receives money retained in social security taxes when the name of the employee does not match the social security number indicated in the employer's wage report). As of July 2002, the ESF contained approximately 236 million wage items totaling about \$374 billion, of which \$49 billion was paid into the ESF during fiscal year 2000. *Id.* at 1. The Social Security Administration admitted that, "the intentional misuse of SSNs by noncitizens not authorized to work is a major contributor to the ESF's growth." *Id.* at 3. Although many undocumented immigrants pay substantial amounts of taxes, they are unlikely to reap the benefits of the system to which they pay. Curran, *supra* note 5, at 76-77 n.49.

66. See, e.g., BREAKING THE PIGGY BANK, *supra* note 28, at 2 (arguing that "illegal immigrants" consume more in public services than they contribute through taxes).

67. Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019, 1027 (1995); Kathleen Winchell, Note, *Disparate Treatment of Students in a Similar Class: The Constitutionality of Kentucky's Method of Determining Residency Status for Admission and Tuition Assessment Purposes*, 40 BRANDEIS L.J. 1037, 1037-38 (2002).

68. See Olivas, *supra* note 67, at 1027-39 (detailing the extent to which residency determination is unnecessarily confusing).

69. *Id.* at 1037 tbl. 2.

70. See, e.g., FLA. STAT. ANN. § 1009.21(10) (West 2003) (classifying students as residents for tuition purposes in categories including the following: U.S. citizens living on the Isthmus of Panama, students from Latin American and the Caribbean who receive scholarships from the state or federal government, McKnight Doctoral Fellows and Finalists who are United States citizens, and U.S. citizens living outside the United States who are teaching at a Department of Defense Dependent School

Inserting alienage classifications into the residency debate adds another element of historical legal controversy, stemming from the complexities of determining one's domicile.⁷¹ Adding further to the confusion, in a series of decisions throughout the eighties and nineties, courts in California grappled extensively with whether an undocumented student could establish the requisite intent to remain in the state so as to receive in-state tuition.⁷² As a result, states currently enacting legislation to make undocumented students eligible for in-state tuition frame the issue differently. Instead of declaring that an undocumented student can be a resident, the laws create new bases, such as high school completion in the state, for awarding the in-state tuition rate.⁷³ Whether these criteria are actually "residence" in disguise remains to be determined.

or in an American International School and who enroll in a graduate level education program which leads to a Florida teaching certificate).

71. See generally Olivas, *supra* note 67, at 1030 (noting that much of this debate has centered around the concept of domicile, which includes the intent to remain permanently a resident in a particular state); *Elkins v. Moreno*, 435 U.S. 647, 668 (1978) (certifying the question of whether G-4 aliens could be domiciliaries of Maryland as a matter of state law); *Toll v. Moreno*, 458 U.S. 1, 17 (1982) (holding that a state could not prohibit G-4 aliens from establishing domicile in a state for tuition purposes if such preclusion conflicted with federal policy). *Toll* established that, for legal aliens, even in the case of a strict domiciliary requirement, if a state's classification of an alien as a nonresident conflicts with federal policy, then the Supremacy Clause will preempt the classification. *Id.*

72. See *Ass'n of Am. Women ("AAW") v. Bd. of Trustees*, 38 Cal. Rptr. 2d 15 (Cal. App. 2d Dist. 1995) (discussing *Leticia "A" v. Board of Regents*, No. 588982-5 (Cal. Super. Ct., Alameda Cty., Apr. 3, 1985), which enjoined the California State University system from applying the domicile standard used for U.S. citizens to undocumented students in determining residency status for tuition purposes, and thus enabled undocumented students to qualify for in-state tuition); *Regents of the Univ. of Cal. v. Superior Court ("Bradford II")*, 276 Cal. Rptr. 197, 200-07 (Cal. App. 2d Dist. 1990) (requiring, at the behest of a University of California employee who refused to enforce the ruling of *Leticia "A"*, that the University of California system comply with Attorney General John Van de Kamp's opinion that "the Legislature did not intend to . . . permit undocumented aliens to establish residence for tuition purposes in California's public institutions of higher education"). Compliance with the Attorney General's opinion thereby denied classification of undocumented students as residents because their presence in the state was unlawful. *Id.* at 203. See also *AAW*, 38 Cal. Rptr. 2d at 706-07 (resolving the discrepancy between the University of California and California State University policies after *Leticia "A"* and *Bradford II* by holding that undocumented alien students did not qualify as California residents for tuition purposes); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 774, 787 (C.D. Cal. 1995) (upholding Section 8 of Proposition 187, which prohibited postsecondary access by undocumented students, because it was severable from other, unconstitutional provisions and not preempted by federal law), *rev'd*, 997 F. Supp. 1244, 1256, 1261 (1997) (invalidating Section 8 of Proposition 187, after passage of the federal PRWORA and IIRIRA, on the grounds that the federal law preempted California law).

73. See, e.g., CAL. EDUC. CODE § 68130.5(a)(2) (West 2003) (requiring graduation or the equivalent from a California high school to be eligible for an exemption to nonresident tuition); TEX. EDUC. CODE ANN. § 54.052(j)(1) (Vernon 2003) (requiring graduation or the equivalent from a Texas high school to be considered a resident

2. *A legislative overview*

Seven states—beginning with Texas and California—have passed laws that enable most home state high school graduates, including undocumented students, to qualify for in-state tuition.⁷⁴ Paying close attention to the wording of IIRIRA, they have attempted to circumvent the “basis of residence” provision altogether by granting in-state tuition on criteria other than residence.⁷⁵

In 2001, Texas became the first state to pass legislation granting in-state tuition to undocumented students.⁷⁶ The legislation marked a philosophical shift, as Texas had previously sought to deny public elementary and secondary education to its undocumented students.⁷⁷ Later that same year, California became the second state to grant in-state tuition to undocumented students.⁷⁸ As in Texas, California Governor Gray Davis had earlier vetoed similar legislation⁷⁹ on the

for tuition purposes).

74. See TEX. EDUC. CODE ANN. § 54.052; CAL. EDUC. CODE § 68130.5 (enabling students in the California State University and California Community College systems, but not the University of California system, to qualify for in-state tuition). In 2002, the University of California Board of Regents passed a similar law enabling undocumented students to get in-state tuition. See Tanya Schevitz, *Tuition Cut For Immigrants: Undocumented Students in State Treated As Residents*, S.F. CHRON., Jan. 18, 2002, at A25.

75. See Sara Hebel, *States Take Diverging Approaches on Tuition Rates for Illegal Immigrants*, CHRON. HIGHER EDUC., Nov. 30, 2001, at 22-23 (noting that when Texas and California passed their in-state tuition laws for undocumented students, they believed that their careful wording “sidestep[ped]” IIRIRA by avoiding references to state residency).

76. See *Law Opens College Doors to Undocumented Youth*, HOUSTON CHRON., July 1, 2001, at A38 (noting that the legislation would potentially affect 3,000 undocumented students who would be eligible to pay in-state tuition rather than the much higher out-of-state fees).

77. See, e.g., *Martinez v. Bynum*, 461 U.S. 321, 332-33 (1983) (upholding a Texas law that permitted school districts to deny a free K-12 education to alien children who lived apart from their parents principally to attend the state’s public schools); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (invalidating a Texas law that both withheld state education funds from local schools for children who were in the United States unlawfully, and permitted schools to refuse to enroll them).

78. See Tanya Schevitz, *Tuition Cut For Immigrants: Undocumented Students in State Treated as Residents*, S.F. CHRON., Jan. 18, 2002, at A25 (reporting that the University of California Board of Regents voted to adopt a new policy for the University of California system that would allow some undocumented students to pay in-state tuition).

79. Act of Aug. 31, 2000, A.B. 1197, 1999-2000 Leg., Reg. Sess. (Cal. 2000).

grounds that it conflicted with IIRIRA.⁸⁰ The enacted legislation in California differed in that it did not mention the word “residency.”⁸¹

In many respects, both Texas’s and California’s legislative efforts are similar. The Texas law considers a student who meets the following criteria a Texas resident for tuition purposes: (1) graduation or the equivalent from a Texas high school; (2) residence in the state for at least three years as of the date of high school graduation or receipt of the equivalent of a high school diploma; (3) registration no earlier than the fall of 2001 as a student in a postsecondary institution; and (4) the signing of an affidavit stating the intent to file an application to become a permanent resident at the earliest possible opportunity.⁸²

The California law differs slightly. Instead of classifying a qualified individual as a resident for tuition purposes, it exempts the student from paying nonresident tuition.⁸³ Additionally, instead of requiring three years of actual residency in California prior to applying to college, an individual must only have attended high school in the state for three years to qualify.⁸⁴ The remaining provisions—high school graduation or the equivalent in the state, registration at a state university, and the filing of an affidavit stating the intent to legalize immigration status at the earliest opportunity—are largely the same.⁸⁵

Since the enactment of the Texas and California legislation, Utah,⁸⁶ New York,⁸⁷ Washington,⁸⁸ Oklahoma,⁸⁹ and Illinois⁹⁰ have passed

80. See Letter from Gray Davis, Governor of California, to Members of the California Assembly (Sept. 29, 2000), at http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1151-1200/ab_1197_vt_20000929.html (on file with the American University Law Review) (“In order for undocumented students to be exempt from paying non-resident tuition charges as called for in this legislation, IIRIRA would require that all out-of-state legal residents be eligible for this same benefit.”).

81. See Hebel, *supra* note 75 (observing that California lawmakers felt that the elimination of the word “residency” generated confidence that the bill avoided a conflict with IIRIRA).

82. TEX. EDUC. CODE ANN. § 54.052(j) (Vernon 2003).

83. CAL. EDUC. CODE § 68130.5(a) (West 2003).

84. *Id.* § 68130.5(a)(1). The distinction between the Texas and California laws is that while Texas requires both residency *and* high school attendance for three years in the state, California explicitly requires only three years of high school in the state.

85. *Id.* § 68130.5(a)(2)-(4).

86. UTAH CODE ANN. § 53B-8-106 (2003).

87. N.Y. EDUC. LAW § 6206 (2003). See generally Sara Hebel, *N.Y. Will Cut Tuition For Illegal Immigrants*, CHRON. HIGHER EDUC., July 5, 2002, at A23 (noting that the City University’s concern about a potential conflict with Section 505 of IIRIRA caused it to revoke its policy of allowing undocumented students to pay in-state tuition, and that the passage of Senate Bill 7784 would enable the City University of New York to once again offer in-state rates to undocumented students).

88. H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003) (enacted).

89. S.B. 596, 49th Leg., 1st Sess. (Okla. 2003) (to be codified at OKLA. STAT. tit. 70, § 3242).

90. H.B. 60, 93d Leg., Reg. Sess. (Ill. 2003) (to be codified in scattered sections

similar laws. During the 2003-2004 legislative term, Maryland,⁹¹ Colorado,⁹² and Arizona⁹³ rejected similar bills. Additionally, comparable legislation has been or will be introduced in Florida, Georgia, Hawaii, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, and Wisconsin.⁹⁴ In contrast, three states—Alaska,⁹⁵ Virginia,⁹⁶

of 110 ILL. COMP. STAT. ANN.). See MEHTA & ALI, *supra* note 53, at iii (predicting that the law would impact approximately 2,226 of the 3,500 undocumented students to graduate from a Chicago high school in 2003).

91. H.B. 253, 417th Leg., Reg. Sess. (Md. 2003). See Jason Song, *For Salvadoran Grad, an Uncertain Future; Immigrant: A 17-year-old's Dreams of Attending the University of Maryland Ended With the Veto of the In-State Tuition Bill*, BALT. SUN, June 3, 2003, at 1A (describing the frustration of graduating high school senior Edith Flores, who had hoped to attend the University of Maryland, where tuition is \$9,000 more per year for nonresidents). Flores said, "I keep telling myself to be happy because I worked so hard. But I just can't. I'm not going to a university." *Id.*

92. H.B. 1178, 64th Leg., 1st Reg. Sess. (Colo. 2003). Although the Colorado law did not pass, many undocumented students in Colorado may receive in-state tuition anyway because its state-funded universities do not require proof of a student's citizenship or immigration status. Michael Riley, *Illegal Immigrants Get Tuition Break: Colleges Rarely Check Evidence of Citizenship When Students Apply*, DENV. POST, Sept. 25, 2002, at 1A. On the application for admission for 2004-2005 to the University of Colorado at Boulder, the Admission Committee notes that providing a social security number is "voluntary" and "used for identification and record-keeping purposes only." The application notes that potential students are instructed that they will receive a separate "student identification number" upon enrollment. UNIV. OF COLO. AT BOULDER, UNDERGRADUATE APPLICATION FOR ADMISSION 9 (2003).

93. H.B. 2518, 46th Leg., 1st Reg. Sess. (Ariz. 2003). See Daniel Gonzalez, *State Resists Trend on Migrant Tuition*, ARIZ. REPUBLIC, May 21, 2003, at B9 (noting that "the state's three universities—Arizona State University, University of Arizona, and Northern Arizona University—follow a 'don't ask, don't tell' policy when it comes to the children of undocumented immigrants," which enables students who have lived in the state for a year or more to be eligible for in-state tuition).

94. See JAMES A. FERG-CADIMA, MEXICAN-AM. LEGAL DEF. AND EDUC. FUND, SURVEY OF RECENT STATE LAW AND LEGISLATION DURING THE 2003-2004 LEGISLATIVE TERM AIMED AT FACILITATING UNDOCUMENTED STUDENT ACCESS TO STATE UNIVERSITIES (2003) (surveying proposed state laws regarding in-state tuition for undocumented students).

95. See H.B. 39, 23d Leg., 1st Sess. (Alaska 2003) (proposing that the Board of Regents "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 legal alien").

96. See H.B. 2339, 2003 Sess. (Va. 2003) (borrowing much of its language from IIRIRA and providing that "an alien who is unlawfully present in the United States, and therefore ineligible to establish domicile pursuant to Section 23-7.4, shall not be eligible on the basis of residency within Virginia for any postsecondary educational benefit, including in-state tuition, unless citizens or nationals of the United States are eligible for such benefits in no less an amount, duration, and scope without regard to whether such citizens or nationals are Virginia residents"). The office of Virginia Attorney General Jerry Kilgore also suggested that in addition to being ineligible for in-state tuition status in Virginia, undocumented students should not be able to attend Virginia colleges and universities. Executive Summary of Memorandum from Alison P. Landry, Assistant Attorney General, to Presidents, Chancellors, Rectors, Registrars, Admissions Directors, Domicile Officers and Foreign Student Advisors (INS Designated School Officials) and the Executive Director of the State Council for Higher Education in Virginia (Sept. 5, 2002), at <http://www.steinreport.com/>

and Mississippi⁹⁷—have taken steps to restrict undocumented students' access to institutions of higher learning.

3. *An analysis of the California and Texas laws in the context of IIRIRA*

The seven state laws granting in-state tuition to undocumented students fall into two categories: (1) laws modeled after Texas that classify qualified undocumented students as residents for tuition purposes,⁹⁸ and (2) laws modeled after California that create exemptions from resident tuition for qualified undocumented students.⁹⁹ This Section focuses primarily on the laws of Texas and California, the forerunners in this field, and ultimately argues that because the California laws are more likely to survive an IIRIRA challenge, states seeking to extend resident in-state tuition rates to undocumented students should look to California as a guide.

The first category consists of Texas,¹⁰⁰ Illinois,¹⁰¹ and Washington.¹⁰² Each state law contains slightly different wording; Texas and Illinois classify qualified undocumented students as residents for tuition purposes,¹⁰³ while Washington includes them within its definition of "resident student."¹⁰⁴ In addition to using the word "resident" in the

va_colleges_11152002.htm (on file with the American University Law Review). Governor Mark Warner, in his veto of the Virginia bill, referred to the existing provisions of IIRIRA and declared that the Virginia bill "would have done nothing at all, other than score a political victory against 'illegal aliens' and contribute to anti-immigrant sentiment in this country." Governor's Veto, H.B. 2339 (May 1, 2003).

97. See S.B. 2678, Reg. Sess. (Miss. 2003); S.B. 3141, Reg. Sess. (Miss. 2002) ("It is the intention of the Legislature that none of the funds provided herein to the Board of Trustees of State Institutions of Higher Learning shall be spent to defray tuition cost or subsidize in any way the direct cost of education, ordinarily paid by the student, of any nonresident alien enrolled in any state-supported institution of higher learning in the State of Mississippi.").

98. TEX. EDUC. CODE ANN. § 54.052 (Vernon 2003); H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003) (enacted); H.B. 60, 93d Leg., Reg. Sess. (Ill. 2003) (codified in scattered sections of 110 ILL. COMP. STAT. ANN. (2003)).

99. CAL. EDUC. CODE § 68130.5 (West 2003); UTAH CODE ANN. § 53B-8-106 (2003); N.Y. EDUC. LAW § 6206 (2003); S.B. 596, 49th Leg., 1st Sess. (Okla. 2003) (enacted).

100. TEX. EDUC. CODE ANN. § 54.052 (Vernon 2003).

101. H.B. 60, 93d Leg., Reg. Sess. (Ill. 2003) (codified in scattered sections of 110 ILL. COMP. STAT. ANN. (2003)).

102. H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003) (enacted).

103. See TEX. EDUC. CODE ANN. § 54.052(j); H.B. 60, 93d Leg., Reg. Sess. (Ill. 2003) (codified in scattered sections of 110 ILL. COMP. STAT. ANN. (2003)).

104. See H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003) (enacted) (including "any person" to complete high school and obtain a diploma in Washington or the equivalent, who has lived in Washington for three years immediately prior to the receipt of the diploma or equivalent and until being admitted to a public university in Washington, and who signs an affidavit demonstrating the willingness to become a "permanent resident at the earliest opportunity the individual is eligible to do so" in the same category, for tuition purposes, as other students deemed residents, including those who established their domicile in Washington at least one year prior

statutes, the Texas and Washington laws require that undocumented students actually live in the state for three years.¹⁰⁵ Similarly, the Illinois law requires that an undocumented student reside with a parent or guardian while attending the state's high school.¹⁰⁶ These requirements specify where, and with whom, a student must have actually lived to be eligible for in-state tuition. As such, they lend additional support to the notion that eligibility is based on residence in the state.

However, because each state determines residency differently, the phrase "on the basis of residence" in Section 505 of IIRIRA¹⁰⁷ must also be interpreted in light of each individual state's definition of residency.¹⁰⁸ Texas, for example, defines residence as "domicile,"¹⁰⁹ or "[t]he place where a person is physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere."¹¹⁰ However, Texas also relies on criteria other than domicile, such as high school graduation, to classify an undocumented student as a resident for tuition purposes.¹¹¹ Thus, Texas might argue that even though the language "resident for tuition purposes" appears in its law, the actual basis for awarding this status is not strictly based on domicile, the Texas Code's definition for residence.¹¹² Under this interpretation, the Texas law might survive a challenge that it conflicts with IIRIRA.

to the beginning of an academic period and those who are on active military duty in Washington).

105. See TEX. EDUC. CODE ANN. § 54.052(j)(2) (Vernon 2003) (requiring that an individual have "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"); H.B. 1079 § 1(2)(e), 58th Leg., 1st Reg. Sess. (Wash. 2003) (specifying that to qualify for in-state tuition, an individual must have "lived in Washington for at least three years immediately prior to receiving the diploma or its equivalent").

106. See, e.g., 110 ILL. COMP. STAT. ANN. 305/7e-5(a)(1) (2003) (requiring that "[t]he individual resided with his or her parent or guardian while attending a public or private high school in this State").

107. IIRIRA § 505, 8 U.S.C. § 1623 (2001).

108. See, e.g., *Elkins v. Moreno*, 435 U.S. 647, 668 (1978) (holding that the question of whether G-4 aliens could become domiciliaries of Maryland for in-state tuition purposes was purely a matter of state law).

109. TEX. EDUC. CODE ANN. § 54.052(a)(1) (Vernon 2003).

110. BLACK'S LAW DICTIONARY 218 (2d Pocket ed. 2001).

111. TEX. EDUC. CODE ANN. § 54.052(j) (Vernon 2003).

112. But cf. *Texas Bill Analysis*, *supra* note 52, at 3 (stating that supporters of the bill want to "provide an opportunity for young people who have been living in Texas for some time and who plan to live, work, and raise their families in Texas to achieve their full potential and contribute more to the economy and society," and acknowledging their long-term future presence in Texas).

Laws in the second category—California,¹¹³ Utah,¹¹⁴ New York,¹¹⁵ and Oklahoma¹¹⁶—are less susceptible to challenges premised on conflict with IIRIRA. Instead of classifying a qualified undocumented student as a resident for tuition purposes, these laws exempt them from paying nonresident tuition.¹¹⁷ Statutes in this category are generally stronger in light of IIRIRA because they refrain altogether from using the word “resident.”

Unlike the Texas law, to qualify for in-state tuition under the California law, a student need not have actually lived in the state.¹¹⁸ Instead, the law requires only that the individual attended and completed high school there.¹¹⁹ With a high school attendance requirement, rather than a durational residence requirement, it is conceivable that a student could qualify for in-state tuition under the California law without having actually lived in the state.¹²⁰ This possibility supports the argument that eligibility for in-state tuition is based on different criteria—high school attendance, graduation, and the signing of an affidavit to become a resident—than actual residency.¹²¹ Thus, laws modeled after California would likely pass judicial scrutiny in the face of a challenge that they violate Section 505 of IIRIRA.

Although in-state tuition laws like California’s do not include the word “residence,” an argument can be made that they are

113. CAL. EDUC. CODE § 68130.5 (West 2003).

114. UTAH CODE ANN. § 53B-8-106 (2003).

115. N.Y. EDUC. LAW § 6206 (2003).

116. S.B. 596, 49th Leg., 1st Sess. (Okla. 2003) (codified in OKLA STAT. tit. 70, § 3242 (2003)).

117. See CAL. EDUC. CODE § 68130.5(a) (West 2003); N.Y. EDUC. LAW § 6206(7)(a) (2003); S.B. 596 § 1, 49th Leg., 1st Sess. (Okla. 2003) (codified in OKLA STAT. tit. 70, § 3242 (2003)); UTAH CODE ANN. § 53B-8-106(1) (2003).

118. CAL. EDUC. CODE § 68130.5 (West 2003).

119. See *id.* § 68130.5(a)(1) (providing an exemption from the nonresident tuition rate to undocumented students upon satisfaction of criteria including high school attendance for three or more years).

120. See *Recent Legislation, California Extends In-State Tuition Benefits to Undocumented Aliens—Act Relating to Public Postsecondary Education*, 115 HARV. L. REV. 1548, 1552 (2002) [hereinafter *California Extends In-State Tuition*] (illustrating, through the following hypothetical, that the exemption created in California does not necessarily only apply to undocumented students: “if residents of Arizona, Nevada, or Oregon were to cross the border into California each school day, attend a public or private high school in California for three years, and graduate from a California high school, they would meet the requirements of Section 68130.5 and be eligible for in-state tuition.”). But see *Martinez v. Bynum*, 461 U.S. 321, 328-29 (1983) (affirming a state’s right to have a “bona fide residence requirement” to ensure that services intended for residents, such as public schools, are enjoyed solely by residents). The Court in *Martinez* held that a school district could deny a free K-12 public education to a student if the student resided in the district for the sole purpose of attending school there. *Id.* at 333.

121. *California Extends In-State Tuition*, *supra* note 120, at 1552.

nonetheless about residency.¹²² State statutes addressing in-state tuition for undocumented students routinely fall within the section of state codes that deal with residency.¹²³ Additionally, under the Supreme Court's decision in *Martinez v. Bynum*,¹²⁴ a school district can refuse to provide a free public K-12 education to an individual who resides in the district for the sole purpose of attending school there.¹²⁵ Under *Martinez*, states can have a "bona fide" residency requirement, meaning that a person must actually establish residency before demanding services, such as access to the state's public schools.¹²⁶ Therefore, to satisfy the three-year high school attendance and graduation requirement, an undocumented student might have to have been a "bona fide" resident of the state.

However, even if state laws that grant in-state tuition eligibility to undocumented students are indeed based on residency, they do not necessarily violate Section 505. Section 505 limits the eligibility of the undocumented for postsecondary benefits unless citizens and nationals of the United States are also eligible for such benefits.¹²⁷ Professor Michael Olivas¹²⁸ argues that the inclusion of the word "unless" in Section 505, as opposed to a flat bar, signifies that states may pass residency laws for undocumented students.¹²⁹ He observes that, "[t]he only way to read this convoluted language is: State A cannot give any more consideration to an undocumented student than to a nonresident student from [S]tate B."¹³⁰ Under this argument, the benefit is the right to be considered for residency status.¹³¹ The consideration is the amount of time a student must live

122. E-mail from Michael A. Olivas, William B. Bates Distinguished Chair in Law and Director, Institute for Higher Education Law and Governance, University of Houston Law Center, to Jessica Salsbury (Oct. 4, 2003, 13:02:50 EST) (on file with the American University Law Review) (arguing that the laws address residency, regardless of whether the word "residency" appears in the statutory language).

123. See, e.g., CAL. EDUC. CODE § 68130.5 (West 2003) (falling within Part 41 of the California Education Code, entitled "Uniform Student Residency Requirements"); UTAH CODE ANN. § 53B-8-106 (2003) (existing just four provisions away from UTAH CODE ANN. § 53B-8-102 (2003), entitled "Definition of Resident Student").

124. 461 U.S. 321 (1983).

125. *Id.* at 333.

126. *Id.* at 329.

127. IIRIRA § 505, 8 U.S.C. § 1623 (2001).

128. Professor Olivas is the William B. Bates Professor of Law at the University of Houston Law Center and founder and director of the University of Houston Law Center's Institute of Higher Education Law and Governance. He is also an expert in immigration. See the University of Houston Law Center website at <http://www.law.uh.edu/faculty/> for more information.

129. See Olivas, *supra* note 6, at 652-53 (arguing that if Congress intended Section 505 to prevent all undocumented students from being considered residents for tuition purposes, the provision would not include a modifier "unless").

130. *Id.* at 653.

131. *Id.*

in a state to qualify for the in-state rate. As long as a state law that extends in-state tuition to the undocumented requires a longer durational residency for the undocumented than for citizens and nationals, it arguably comports with Section 505.¹³²

In gathering support for Utah's House Bill 144,¹³³ Governor Mike Leavitt of Utah echoed this logic.¹³⁴ Leavitt noted that if a student from Idaho chose to attend a Utah university, he or she could qualify for in-state tuition after completing sixty credit hours, or roughly two years of coursework.¹³⁵ Undocumented students, on the other hand, would only be eligible if they attended high school in the state for at least three years.¹³⁶ Similarly, in California, out-of-state students are considered residents after only one year, but undocumented students must attend a California high school for three years to qualify for resident tuition rates.¹³⁷ Therefore, because undocumented students must satisfy longer durational residence requirement for treatment as residents than citizens or nationals of other states, state laws that consider undocumented students residents for tuition purposes arguably do not violate Section 505.

II. FEDERAL IMMIGRATION POWER VS. STATE POLICE POWER

A. Federal Power Over Immigration

Even if state-sponsored in-state tuition laws do not conflict with Section 505, they must nonetheless withstand the challenge that, as a result of the Supremacy Clause of the Constitution,¹³⁸ the federal immigration power preempts the states from legislating altogether in the area of postsecondary education for undocumented students.

132. *Id.*

133. UTAH CODE ANN. § 53B-8-106 (2003).

134. Dawn House, *Leavitt Seeks to Implement Tuition Break; Governor Wants to Aid Children of Immigrants Minus Federal Go-Ahead*, SALT LAKE TRIB., Sept. 6, 2002, at C2.

135. *See id.* (referring to UTAH CODE ANN. § 53B-8-102(2)(a) (2003), which spells out the residency requirements for students who come to Utah from another state to attend a university).

136. UTAH CODE ANN. § 53B-8-106(1)(a) (2003).

137. *Compare* CAL. EDUC. CODE § 68130.5(a) (West 2003) (requiring that undocumented students attend high school in California for three or more years and graduate from a California high school or the equivalent to be eligible for the resident tuition rate), *with* CAL. EDUC. CODE § 68017 (West 2003) (classifying a student as a "resident" after a year of residence in California).

138. *See* U.S. CONST. art. VI, cl. 2, which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

Although not specifically enumerated, the federal power over immigration has its roots in the Constitution, which vests in Congress the power "[t]o establish an uniform Rule of Naturalization."¹³⁹ Early Supreme Court holdings articulated this power while basing it upon the Commerce Clause¹⁴⁰ and on principles of international law that hold that sovereign nations have the right to regulate the entrance of foreigners within their boundaries.¹⁴¹ The Federal Government has a "preeminent role" in regulating aliens within the borders of the United States.¹⁴² As such, when Congress passes lawful standards for admission, naturalization, and residence in the United States, states "can neither add to nor take from the conditions."¹⁴³ Moreover, courts that evaluate federal laws affecting aliens afford tremendous deference to Congress and recognize that the federal government, more so than individual states, has no duty to afford the same privileges to noncitizens as it does to citizens.¹⁴⁴

139. *Id.* art. I, § 8, cl. 4.

140. *See, e.g.,* *Chy Lung v. Freeman*, 92 U.S. 275, 281 (1875) (invalidating a California statute that regulated passengers arriving from foreign ports).

141. *See* *Shaughnessey ex rel. Mezei*, 345 U.S. 206, 210 (1953) (acknowledging "the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (recognizing the power of deportation); *Ekiu v. United States*, 142 U.S. 651, 664 (1892) (affirming the power to exclude aliens from the United States); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) ("The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers . . .").

142. *See* *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (discussing the Court's historical recognition of the Federal Government's role with respect to immigration).

143. *See* *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (holding invalid a California statute that excluded aliens from fishing off its shores since it conflicted with congressional power to regulate immigration).

144. Two cases of the 1970s, *Mathews v. Diaz*, 426 U.S. 67 (1976), and *Graham v. Richardson*, 403 U.S. 365 (1971), illustrate this principle. In *Mathews*, the Supreme Court held that the Federal Social Security Act, 42 U.S.C. § 1395 (2000), which required aliens to fulfill a residency requirement in the United States to receive health benefits, did not violate due process under the Fifth Amendment. 426 U.S. at 70, 87. The Court explained that, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to [its] citizens." *Id.* at 79-80. On the other hand, in *Graham*, two state welfare laws that conditioned the receipt of benefits on citizenship and durational residency were struck down on Fourteenth Amendment Equal Protection grounds. 403 U.S. at 382-83. The Court rejected the argument that states had a "special public interest" in preferentially distributing limited resources to citizens over noncitizens. Thus, courts are more likely to find that the Federal Government acted appropriately in distinguishing between citizens and noncitizens. *See generally* Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 1010-13 (1995) (describing the complexity of the Supreme Court's treatment of alienage classifications and its use of preemption and plenary power to avoid a full equal protection analysis).

Because of Congress's power over immigration, federal laws or policies in the area of immigration usually preempt state laws that encroach upon the same general area.¹⁴⁵ For example, in *Hines v. Davidowitz*,¹⁴⁶ the Supreme Court invalidated the Pennsylvania Alien Registration Act, perceiving it as an obstacle to the fulfillment of congressional goals in the passage of a federal alien registration act.¹⁴⁷ Similarly, in *Elkins v. Moreno*,¹⁴⁸ the Court certified the question of whether the children of G-4 aliens¹⁴⁹ could constitute domiciliaries of Maryland, as a matter of state law, for tuition purposes.¹⁵⁰ However, because Maryland's subsequent determination that G-4 aliens could not fulfill residency requirements frustrated federal policy, the Court found that the Maryland policy violated the Supremacy Clause.¹⁵¹ Hence, when states pass legislation concerning aliens, they face the possibility of preemption when the state law conflicts with federal objectives.

*B. DeCanas v. Bica and the Permissible Use of State Police Power
Over Aliens*

In spite of the Federal Government's broad power over immigration, the Supreme Court has not always held that federal laws and policies preempt state statutes.¹⁵² In *DeCanas v. Bica*,¹⁵³ the Court upheld a California statute that prohibited the employment of undocumented workers "if such employment would have an adverse effect on lawful resident workers."¹⁵⁴ The Court found support for this assertion in *Graham v. Richardson*,¹⁵⁵ *Takahashi v. Fish & Game*

145. See *Hines v. Davidowitz*, 312 U.S. 52, 70 (1941) ("The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject.").

146. *Id.*

147. *Id.* at 68, 73-74 (concluding that a state's "power to restrict, limit, regulate, and register aliens" always must subordinate to the power of the Federal Government).

148. 435 U.S. 647 (1978).

149. See *id.* at 647 (describing a G-4 visa as "a nonimmigrant visa granted to officers or employees of international treaty organizations and members of their immediate families").

150. *Id.* at 668-69.

151. *Toll v. Moreno*, 458 U.S. 1, 17 (1982).

152. *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).

153. *Id.*

154. CAL. LAB. CODE § 2805 (2003) (repealed 1988); *DeCanas*, 424 U.S. at 351.

155. 403 U.S. 365, 376 (1971) (holding that a Pennsylvania statute that denied benefits to resident aliens who had not resided in the United States for a predetermined number of years violated the Equal Protection Clause).

Commission,¹⁵⁶ and *Hines*,¹⁵⁷ noting that, if all state statutes concerning aliens became automatically “*ipso facto* regulation of immigration,” the Court could have skipped its analysis of preemption in those cases altogether.¹⁵⁸ Significantly, the Court deferred to the police power of states in the regulation of intrastate employment, and pointed to the state’s ability to pass child labor laws, to enforce occupational health and safety standards, and to regulate wage laws.¹⁵⁹

In addition to establishing that some regulations concerning noncitizens might fall within a state’s police power, *DeCanas* established the prevailing three-part test for determining whether federal law preempts a state statute related to immigration.¹⁶⁰ First, preemption occurs if a state law purports to regulate immigration.¹⁶¹ Second, if Congress intended to “occupy the field” that the state statute attempts to regulate, federal law will preempt it.¹⁶² To meet this prong, the federal law’s “clear and manifest purpose”¹⁶³ must have intended a “complete ouster of state power.”¹⁶⁴ Finally, a federal law will preempt a state law if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” and renders compliance with both the state and federal law impossible.¹⁶⁵

1. *State laws that extend in-state tuition to undocumented students do not regulate immigration*

The purpose of a state law can help determine whether it is a “direct or indirect regulation of immigration.”¹⁶⁶ Laws formed with

156. 334 U.S. 410, 422 (1948) (striking down a California law that denied fishing licenses to those Japanese ineligible to become citizens).

157. 312 U.S. 52, 74 (1941) (invalidating a Pennsylvania alien registration law on the grounds that a federal alien registration law precluded its enforcement).

158. *DeCanas*, 424 U.S. at 355.

159. *See id.* at 356 (noting that “[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State”).

160. *See* *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1253 (C.D. Cal. 1997) (applying the three-part test to California’s Proposition 187).

161. *See DeCanas*, 424 U.S. at 355 (defining a regulation of immigration as “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain”).

162. *Id.* at 357 & n.5 (referring to the Court’s discussion in *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), regarding the constitutional tests that enable courts to determine the appropriateness of preemption).

163. *Id.* at 357 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963)).

164. *Id.* at 357.

165. *Id.* at 363 (1976) (quoting *Hines*, 312 U.S. at 67).

166. *See* *Manheim*, *supra* note 144, at 967 (emphasizing the need to characterize the purpose of the state law in question).

the intent to monitor the ability of noncitizens to enter and live within the state are “direct” regulations of immigration, whereas laws passed to serve legitimate local objectives, but incidentally affect noncitizens, are not.¹⁶⁷ Along these lines, in *DeCanas*, the majority recognized that employing undocumented workers on substandard terms deprived citizens and legal aliens of jobs, depressed wages, and inhibited the effectiveness of unions.¹⁶⁸ The Justices also found that the California legislature tailored the law to address specific local concerns.¹⁶⁹ Significantly, the California law at stake in *DeCanas* did not regulate the ability of noncitizens to move into or throughout the state, but rather their employment once present.¹⁷⁰ Thus, because the state law focused on employment and was within California’s power to enact, it was not an impermissible regulation of immigration.¹⁷¹

Similarly, state-sponsored in-state tuition laws do not regulate the influx of noncitizens to and from the state, but address their access to education once present.¹⁷² Like the employment statute in *DeCanas*, the in-state tuition laws focus on local concerns such as the costs to states associated with high dropout rates, crime, and unemployment.¹⁷³ The fact that laws granting in-state tuition to undocumented students exist overwhelmingly in states with high immigrant populations supports the notion that educating undocumented students has reduced the state’s health and social spending while increasing the income tax revenue of both the state and federal governments.¹⁷⁴

Affirmations of the Federal Government’s immigration power refer to the authority to determine who may enter the United States, and under what conditions they may remain.¹⁷⁵ On the other hand, the

167. *Id.* (noting that regulations involving “health and safety or conservation of state resources” often fall into this category).

168. *DeCanas*, 424 U.S. at 356-57.

169. *Id.* at 357.

170. *Id.* at 355-56.

171. *Id.* at 356-57.

172. *See, e.g., Texas Bill Analysis, supra* note 52, at 3 (noting that many undocumented Texans arrived in the state as children and spent the majority of their lives there).

173. *See supra* notes 22-23 and accompanying text (finding that states, not the Federal Government, largely bear the financial burden resulting from immigration to the state).

174. *See supra* notes 55, 64-65 and accompanying text; *supra* notes 59-60 (acknowledging an overlap between heavily immigrant-populated states and states that have made efforts to extend in-state tuition to undocumented students).

175. *See, e.g., Toll v. Moreno*, 458 U.S. 1 (1982) (discussing the federal immigration power in relation to granting G-4 visas to employees of international organizations); *Kleindeinst v. Mandel*, 408 U.S. 753 (1973) (affirming the right of Congress to deny the entry of an internationally renowned Communist journalist into the United States); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419

Tenth Amendment provides that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁷⁶ The states have a strong argument that postsecondary regulations such as residency determination and tuition administration fall within the state police power, and that administering tuition is a power distinct and apart from the regulation of who may enter the country.¹⁷⁷

The underlying rationale behind in-state tuition is that individuals who pay taxes in that particular state, and in whom the state invests more, should be entitled to the preferential rate, whereas those that do not pay state taxes should not.¹⁷⁸ Courts have long recognized the power of states to charge tuition differentials for residents and nonresidents and to determine the criteria for classifying individuals into these categories.¹⁷⁹ States establish their own durational requirements for residency, create different exemptions and exceptions to residency requirements, and vary in terms of whether an individual must be a domiciliary of the state to be a resident.¹⁸⁰ This tremendous state autonomy demonstrates that regulation of postsecondary residency requirements is entirely a state function.

States also differ in terms of how they administer tuition. At least fifteen states determine eligibility for in-state tuition on a campus-by-campus basis, whereas the other thirty-five do so on a state-wide level.¹⁸¹ The public university system in Pennsylvania demonstrates this distinction, as each university has a separate and distinct board.¹⁸²

(1948) (noting the Federal Government's broad power to determine "what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization"); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (holding that while Chinese laborers in the United States were subject to the protections of the Constitution, Congress retained power to determine the conditions under which they remained in the country).

176. U.S. CONST. amend. X.

177. See *Texas Bill Analysis*, *supra* note 52, at 4 (arguing that "the role of policing the nation's borders and enforcing U.S. immigration laws is a federal responsibility, not one for the state or the state's higher education institutions").

178. See *supra* note 62 and accompanying text (noting that the payment of nonresident tuition equalizes the tax burden on residents); *supra* note 65 and accompanying text (observing the degree to which the undocumented pay state and federal taxes).

179. See *Olivas*, *supra* note 67, at 1027 (discussing the historical roots of residency for postsecondary tuition purposes).

180. *Id.* See also *Elkins v. Moreno*, 435 U.S. 647, 663 n.16 (1978) (classifying domicile as "both intensely local and immensely important to a wide spectrum of state government activities").

181. See *FERG-CADIMA*, *supra* note 94, at 2 (noting that the seven states with laws extending in-state tuition to undocumented students handle tuition policies at the state level).

182. See PA. STAT. ANN. tit. 24, § 2510 (West 2004) (noting the existence and

In terms of the college admissions process, states further differ in their awareness of a potential student's immigration status. For example, while the Universities of Maryland, Oregon, and Virginia require social security numbers on their applications,¹⁸³ the Universities of Colorado and Arizona receive such information on a voluntary basis.¹⁸⁴

Finally, the states' regulation of postsecondary residency and tuition does not interfere with the Federal Government's ability to regulate and control traditional immigration functions.¹⁸⁵ In spite of the autonomy of the states with regard to education, the Federal Government retains the power to subject undocumented students to removal proceedings if it so chooses.¹⁸⁶ States assume the risk that a student whose education they have subsidized may be deported.¹⁸⁷ They do not, however, purport to usurp the federal power to regulate immigration. Hence, the fact that the Federal Government's traditional immigration functions remain intact further supports the contention that regulation of in-state tuition is not a regulation of immigration.

2. *Congress did not intend to occupy the field of postsecondary education of undocumented students*

The second prong of the *DeCanas* test, intent to occupy the field, may present a greater challenge for the states. The only court decision to interpret Section 505, *League of United Latin American*

autonomy of the boards of Temple University, Indiana University of Pennsylvania, University of Pittsburgh, Lincoln University, and Pennsylvania College of Technology).

183. UNIV. OF MD., APPLICATION FOR FRESHMAN ADMISSION Part I (2003); UNIV. OF OR., 2004-5 APPLICATIONS FOR UNDERGRADUATE ADMISSION AND SCHOLARSHIPS (2003); UNIV. OF VA., APPLICATION FOR UNDERGRADUATE ADMISSION (2003).

184. See UNIV. OF COLO. AT BOULDER, *supra* note 92; Gonzalez, *supra* note 93 (noting that these schools have "don't ask, don't tell" policies since the providing of a social security number is optional).

185. See *supra* note 175 and accompanying text (describing the federal immigration power's emphasis on determining the conditions under which noncitizens enter and remain in the United States).

186. See Hebel, *supra* note 75 (describing the INS's position on state-sponsored in-state tuition laws as having "'no reason' to issue regulations on whether someone who is in the country illegally could qualify for tuition benefits. The agency believes that person should be removed from the country").

187. See John Iwasaki, *Tuition Break Has Surprise Beneficiaries: Undocumented Students Often Unaware of Benefit*, SEATTLE POST-INTELLIGENCER, Oct. 30, 2003, at A1, A8 (acknowledging that the fear of disclosing their undocumented status likely accounts for the paucity of undocumented youth to actually take advantage of Washington's new law). Alma, the lone undocumented student to seek in-state tuition at the University of Washington, asked that her name not be published in the *Post-Intelligencer* article. *Id.*

Citizens (LULAC) v. Wilson,¹⁸⁸ applied the *DeCanas* test to justify striking down a provision of California’s Proposition 187¹⁸⁹ that would have barred undocumented students from attending public colleges and universities.¹⁹⁰ The District Court for the Central District of California argued that Section 1621 of the United States Code and Section 505 of IIRIRA—along with Section 401 of the Personal Responsibility and Work Opportunity Reconciliation Act (“PWRORA”),¹⁹¹ the 1996 welfare reform legislation—manifested Congress’s intent to occupy the field of postsecondary education for noncitizens and thus precluded states from legislating in the area.¹⁹² The reasoning of *LULAC* suggests that states are prohibited from addressing the higher education needs of undocumented students altogether.¹⁹³ Hence, the Federal Government’s broad power over immigration would likely preempt any state efforts to extend in-state tuition to undocumented students.

However, it is important to view *LULAC* within the context of Proposition 187. The decision, as a whole, aimed to safeguard the rights of California’s immigrants.¹⁹⁴ In arriving at this outcome, Judge Pfaltzner noted the existence of a field—postsecondary education for noncitizens—without considering or explaining the range of state functions that fall into this category. Proposition 187 regulated undocumented students’ access to public universities, while IIRIRA and PWRORA provisions deal only with “postsecondary education benefit[s].”¹⁹⁵ Linking the two different issues—the ability to be

188. 997 F. Supp. 1244 (C.D. Cal. 1997).

189. See 1994 Cal. Legis. Serv. Prop. 187 (West) (denying social services, health care, and education to undocumented aliens, and containing strict reporting requirements by state and local agencies to the Federal Government of individuals with questionable immigration status). See generally Peter J. Spiro, *Learning to Live With Immigration Federalism*, 29 CONN. L. REV. 1627 (1997) (arguing that Proposition 187 fueled the passage of the 1996 IIRIRA and proposing that greater state control over immigration would contain anti-immigrant sentiment in limited parts of the country).

190. See *LULAC*, 997 F. Supp. at 1256 (C.D. Cal. 1997) (explaining that Section 8 of Proposition 187 applied to anyone not a “citizen of the United States, an alien lawfully admitted as a permanent resident in the United States, or a person who is otherwise authorized under federal law to be present in the United States”).

191. See 8 U.S.C. § 1611 (2003) (denying federal postsecondary benefits to any alien that is not a “qualified” alien).

192. See *LULAC*, 997 F. Supp. at 1256.

193. See generally Manheim, *supra* note 144, at 969 (noting that *Hines v. Davidowitz* expanded the notion of field preemption, meaning a denial of “state authority whenever Congress has legislated in the area”).

194. See *California Extends In-State Tuition*, *supra* note 120, at 1553 n.31 (noting the irony that the arguments advanced by immigrants’ rights advocates in *LULAC* may now be used to prevent California from giving the undocumented postsecondary benefits).

195. See IIRIRA § 505, 8 U.S.C. § 1623 (2001); PWRORA, 8 U.S.C. § 1611 (2003).

admitted to a university and the ability to receive preferential tuition—is arguably tenuous. Thus, while the outcome in *LULAC* was proper in light of the circumstances surrounding it, the holding—that Congress alone occupies the field of postsecondary education for undocumented immigrants—is subject to question.

To preserve the intent of *LULAC* in future cases, the decision could very well have been justified on other grounds, such as the Equal Protection Clause of the Fourteenth Amendment.¹⁹⁶ Under an Equal Protection analysis, barring undocumented students from admission to a public college or university would likely be considered alienage discrimination,¹⁹⁷ which, under *Plyler*, receives a heightened or intermediate level of scrutiny.¹⁹⁸

To make this argument, Judge Pfaelzer might have extended the reasoning of *Plyler* and argued that while there is no fundamental right to education, a college education in today's increasingly technological world is equivalent to what a secondary education was when the Supreme Court decided *Plyler*.¹⁹⁹ Like the young children in *Plyler*, many students who would have been denied access to California universities by Proposition 187 came to the United States at a young age, "through no fault of their own."²⁰⁰

3. *State laws granting in-state tuition to qualified undocumented students do not hinder congressional objectives*

The argument that state laws that extend in-state tuition to undocumented students pose an obstacle to the fulfillment of congressional objectives is unpersuasive. Congress has not articulated why it included Section 505 in IIRIRA; neither

196. See Ellen Badger & Stephen Yale-Loehr, *They Can't Go Home Again: Undocumented Aliens and Access to U.S. Higher Education*, 5 BENDER'S IMMIGR. BULL. 413, 414-15 (2000) (considering, under equal protection grounds, whether a public college or university can legally bar an undocumented student's access to the school).

197. *Id.* at 415 (distinguishing alienage discrimination from national origin discrimination).

198. See *supra* note 38 (describing the level of scrutiny applied to undocumented school-age children in *Plyler*, which resembled intermediate scrutiny). The standard of scrutiny in *Plyler* was likely intermediate scrutiny due to the fact that the children were undocumented; alienage classifications for aliens who are lawfully present are "inherently suspect" and subject to strict scrutiny. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

199. See VERNEZ & MIZELL, *supra* note 55, at 1 (finding that due to changes in the American and global economies, a college degree is increasingly necessary to open opportunities and enable economic mobility); Badger & Yale-Loehr, *supra* note 196, at 421 (discussing *Plyler*'s application to the right of college-age children to attend public universities).

200. Badger & Yale-Loehr, *supra* note 196, at 421.

congressional reports nor federal regulations provide authoritative guidance as to the meaning of the provision.²⁰¹ As a whole, IIRIRA is a restrictive law toward immigrants, which intends to "remove the incentive for illegal immigration provided by the availability of public benefits."²⁰² Whether this goal could ever be accomplished through the passage of Section 505 is doubtful, as research suggests that the availability of postsecondary education has little, if anything, to do with immigrant settlement decisions.²⁰³

A plain reading of Section 505 further indicates that Congress did not intend to deny undocumented students eligibility for in-state tuition.²⁰⁴ If Congress had intended to prohibit states from awarding in-state tuition to undocumented students, it could have done so expressly.²⁰⁵

Rather, Section 505 prohibits states from rendering the undocumented eligible, "on the basis of residence within a State . . . for any postsecondary 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."²⁰⁶ The use of the modifier "unless" indicates that states are not precluded from awarding in-state tuition on the basis of residence.²⁰⁷ The precise wording of Section 505—particularly the phrase "in no less an amount, duration, and scope"²⁰⁸—suggests that Congress's intent was to ensure that undocumented students not be treated preferentially to citizens and legal residents.²⁰⁹ Under *Mathews v. Diaz*,²¹⁰ such an objective is likely constitutional because Congress may pass legislation that favors

201. *Contra id.* (referring to a conference report on an earlier version of IIRIRA, which "described the section as 'provid[ing] that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education'").

202. See *California Extends In-State Tuition*, *supra* note 120, at 1553 (quoting 8 U.S.C. § 1601(6) (2000)).

203. See PASSEL & ZIMMERMAN, *supra* note 23, at 16-19 (arguing that economic considerations, family, and housing, as opposed to the availability of welfare, are the largest factors for immigrants deciding where to move).

204. See, e.g., *Perrin v. United States*, 444 U.S. 37, 42 (1979) (noting that, in interpreting statutes for legislative intent, words should be given their "ordinary, contemporary, common meaning," unless otherwise indicated).

205. *Id.*

206. IIRIRA § 505, 8 U.S.C. § 1623 (2001).

207. See *supra* note 129.

208. IIRIRA § 505.

209. See *id.* (declaring that a state shall not make undocumented students eligible for postsecondary education benefits on the basis of residence "unless a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident").

210. 426 U.S. 67 (1976).

citizens over noncitizens.²¹¹ Since citizens receive the benefits of residency more quickly than undocumented students, the application arguably satisfies Congress's intent.²¹² Thus, because state-sponsored in-state tuition laws for undocumented students are consistent with congressional objectives, they should pass muster under the third prong of the *DeCanas* test.

CONCLUSION

State efforts to qualify undocumented students for in-state tuition are only a partial solution to a larger problem.²¹³ The removal of educational barriers for college-bound undocumented youth is not complete without financial aid, work authorization, and immigration relief.²¹⁴ Since these issues are largely federal, even states with the greatest intentions for their undocumented student populations can provide assistance only to a point.²¹⁵

In spite of these limitations, states must be empowered to support their undocumented youth to the fullest extent possible in areas of traditional state control, including public postsecondary education. States bear the bulk of the cost of providing for their undocumented students, who, once brought across U.S. borders, attend public schools, and settle in individual states. To ignore this reality hurts both states as well as individual students. Increasing access to higher education is the key to providing future opportunities, success, and stability to both undocumented students and the communities in which they live.

211. See *id.* at 78 (noting that the fact that aliens are entitled to Due Process protection does not entitle them to "all the advantages of citizenship").

212. See discussion *supra* Part I.B.3 (comparing the waiting times to be considered a resident in California and Utah between undocumented students and nonresident citizens or nationals). Generally, nonresident citizens or nationals obtain residency status within one to two years while undocumented students may wait up to three or more years. *Id.*

213. See Romero, *supra* note 19, at 406-07 (noting the limitations of state efforts, since only Congress can actually change an individual's immigration status).

214. *Id.* at 406.

215. *Id.* at 407.