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# Reduced Tuition Benefits for Undocumented Immigrant Students: The Implications of a Piecemeal Approach to Policymaking

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# REDUCED TUITION BENEFITS FOR UNDOCUMENTED IMMIGRANT STUDENTS: THE IMPLICATIONS OF A PIECEMEAL APPROACH TO POLICYMAKING

**Stephen L. Nelson,\* Kara Hetrick Glaubitz,\*\* and  
Jennifer L. Robinson\*\*\***

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## INTRODUCTION

Within the past year, state legislative chambers have been the home to energetic debates on the topic of immigration. During the 2011 legislative season, state legislators introduced more than 1600 bills and resolutions relating to undocumented immigrants, representing a fourteen percent increase over the previous year.<sup>1</sup> This significant increase in proposed state legislation may be in response to inaction at the federal level.<sup>2</sup> Among the many immigration debates, access to education has emerged as a significant issue, and the states have addressed it in various ways. In 2011, Maryland and Connecticut joined eleven other states in passing legislation allowing undocumented students to be eligible for in-state tuition rates at public colleges and universities.<sup>3</sup> Conditions for eligibility are based on a

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1. See *2011 Immigration-Related Laws and Resolutions in the States (Jan. 1–Dec. 7, 2011)*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/immig/state-immigration-legislation-report-dec-2011.aspx> (last visited Apr. 17, 2013). Of the 1607 bills that were considered in all fifty states and Puerto Rico, as of December 7, 2011, a total of 306 were enacted. *Id.* Several states failed to pass immigration related laws, these states are: Alaska, Wyoming, Minnesota, Wisconsin, Ohio, Kentucky, New Hampshire, and Delaware. See *id.* (looking at the color-coded map of the United States).

2. See Julie Bykowicz, *Amid Federal Inaction, Md. Among States to Take Up Immigration Issue*, THE BALTIMORE SUN, Jan. 17, 2011, [http://articles.baltimoresun.com/2011-01-17/news/bs-md-immigrations-state-policy-20110117\\_1\\_illegal-immigrants-immigration-status-federal-immigration-authorities](http://articles.baltimoresun.com/2011-01-17/news/bs-md-immigrations-state-policy-20110117_1_illegal-immigrants-immigration-status-federal-immigration-authorities).

3. See *infra* Table 1. The thirteen states that have laws allowing undocumented students to be eligible for in-state tuition are: California, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Mexico, New York,

number of factors, some of which are: the student's attendance of high school within the state, graduation from high school or equivalent, acceptance into a state institution of higher education, and the submission of a signed affidavit stating that they will pursue legal immigration status as soon as possible.<sup>4</sup> Additionally, although no legislation has passed in Rhode Island regarding this issue, the State's Board of Governors of Higher Education approved a measure in September 2011 granting reduced tuition for undocumented students.<sup>5</sup> While the number of states allowing in-state tuition for undocumented students has increased, four states<sup>6</sup> have taken the opposite position, enacting legislation that specifically prohibits these students from receiving in-state tuition benefits. Two states—South Carolina<sup>7</sup> and Alabama<sup>8</sup>—have gone a step further, altogether barring undocumented students from enrolling in public colleges and universities.

This Article examines and informs on the policy intersection of education and immigration through the lens of in-state tuition benefits for undocumented immigrant students. The purpose of this Article is not to advocate or otherwise further a particular position in this policy arena, but rather to identify, describe, and discuss the implications of the current piecemeal approach to policymaking across the United States with respect to this particular issue. Section I of this Article examines the history of undocumented legal access to primary and secondary education. Section II of this Article describes federal legislation addressing the issue of in-state tuition for undocumented immigrant students. Section III of this Article identifies and discusses legislation

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Oklahoma, Texas, Utah, Washington, and Wisconsin. *See id.* In addition, Rhode Island's Board of Governors of Higher Education allows undocumented students to be eligible for in-state tuition. *See id.*

4. *See infra* Table 1 for statutes that require some or all of the listed requirements.

5. R.I. BD. OF GOVERNORS OF HIGHER EDUC., POLICY MANUAL, RESIDENCY POLICY S-5.0, effective 9/26/2012; *see also*, Al Rosenberg, *U.S. Education Secretary Praises R.I. Push to Help Undocumented Students*, PROVIDENCE J., Nov. 7, 2011, <http://news.providencejournal.com/breaking-news/2011/11/us-education-se-3.html#.T3S55Xrspe4>.

6. The states that prohibit undocumented students from receiving in-state tuition benefits are: Arizona, Colorado, Georgia, and Indiana. *See infra* Table 2.

7. S.C. CODE ANN. § 59-101-430 (2012).

8. ALA. CODE § 31-13-8 (2012).

addressing the issue of in-state tuition for undocumented students at the state level. Section IV of this Article describes the history of litigation in state and federal courts over the issue of legislation relating to in-state tuition for undocumented students. Section V of this Article details the current state of public opinion on this issue. Finally, Section VI of this Article explores the piecemeal approach to policymaking identified within this Article and discusses several implications of this approach to policymaking.

### I. LEGAL ACCESS TO EDUCATION FOR UNDOCUMENTED IMMIGRANT STUDENTS

The United States Supreme Court has never directly considered the issue of in-state tuition for undocumented students.<sup>9</sup> The Court, however, addressed a similar question, specifically related to accessibility of primary and secondary education for undocumented immigrant children, in *Plyler v. Doe*.<sup>10</sup> In *Plyler*, the Court heard a challenge to a Texas statute that allowed schools to bar from enrollment any students not legally admitted to the United States.<sup>11</sup> The

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9. The right to education is not a fundamental right under the Constitution. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court held that “[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). In *Rodriguez*, a group of minority parents on behalf of their children attending schools in a low-income school district in San Antonio, Texas, challenged the state’s method of funding public education through revenue generated from local property taxes. *Id.* at 3–5, 9–17. The *Rodriguez* Court did, however, note the “vital role of education in a free society” and that the Court’s holding should not “in any way detract[] from [its] historic dedication to public education.” *Id.* at 30.

10. *Plyler v. Doe*, 457 U.S. 202 (1982), *superseded by statute*, Personal Responsibility and Work Opportunity Act of 1996, Pub. L. 104-193, 110 Stat. 2105, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546, *as recognized in* *Day v. Sebelius*, 376 F. Supp. 2d 1022 (D. Kan. 2005).

11. *See id.* at 205. *Plyler* represents the culmination of several lawsuits brought against local school boards that eventually reached the Supreme Court as a consolidated class action case. *Id.* at 206, 210. The statute at issue in *Plyler* was section 21.031 of the Texas Education Code. At the time the plaintiffs challenged the statute, which stated:

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

affected school districts interpreted and applied the statute at issue in *Plyler* in various ways: some took no action to revise district policies to include undocumented students, some completely excluded undocumented students from attending school, and others charged tuition to undocumented students who wanted to attend school.<sup>12</sup>

The statute at issue in *Plyler* was challenged under the Equal Protection Clause of the Fourteenth Amendment for denying equal protection of the laws to undocumented students. The Supreme Court began its analysis in *Plyler* by considering whether undocumented immigrants were persons within the meaning of the Fourteenth Amendment.<sup>13</sup> The State of Texas argued that “undocumented aliens, because of their immigration status, are not ‘persons within the jurisdiction’ of the State of Texas, and that they therefore have no right to the equal protection of Texas law.”<sup>14</sup> The Court ultimately concluded that “[w]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term.”<sup>15</sup> Further, the Court noted that “[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”<sup>16</sup>

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(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

*Id.* at 205 n.1 (quoting TEX. EDUC. CODE ANN. § 21.031 (1975)).

12. *See generally id.* at 206 n.2.

13. *Id.* at 210.

14. *Id.*

15. *Id.*

16. *Id.* The *Plyler* Court also specifically noted that “[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens.” *Id.* at 212 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

The State of Texas defended the statute at issue in *Plyler* with two distinct arguments. First, Texas argued that “[t]he undocumented status of these children *vel non* establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents.”<sup>17</sup> Second, Texas argued that it was furthering a legitimate interest in the “preservation of the state’s limited resources for the education of its lawful residents”<sup>18</sup> by excluding undocumented students from its schools. Specifically, Texas argued: (1) that it was entitled to “seek to protect itself from an influx of illegal immigrants;”<sup>19</sup> (2) that undocumented children imposed burdens on the State’s efforts to provide “high-quality public education” to its citizens;<sup>20</sup> and (3) that undocumented students were not likely to be able to “put their education to productive social or political use within the State.”<sup>21</sup>

The Court ultimately invalidated the Texas statute, noting that while education is not a fundamental right, “the importance of education in maintaining our basic institutions and the lasting impact of its deprivation on the life of the child” make it unique among government benefits.<sup>22</sup> The Court also held that the Texas statute “impose[d] a lifetime hardship on a discrete class of children not accountable for their disabling status” and “foreclose[d] any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”<sup>23</sup> Further, the Court concluded, Texas could not “deny a discrete group of innocent children the free public education that it offers to other children residing within its borders” without a showing that the denial “furthers some substantial state interest.”<sup>24</sup> The Court also rejected Texas’s claim that its statute furthered its interest in curtailing illegal immigration by noting that “[t]he dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country . . . in order to avail themselves of a free

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17. *Id.* at 224.

18. *Id.* at 227.

19. *Id.* at 228.

20. *Id.* at 229.

21. *Id.* at 229–30.

22. *Id.* at 221.

23. *Id.* at 223.

24. *Id.* at 230.

education.”<sup>25</sup>

Just weeks after the Court announced its decision in *Plyler*, the Court struck down a Maryland student residency requirement, which disqualified nonimmigrant residents from establishing state residency, in *Toll v. Moreno*.<sup>26</sup> The nonimmigrants challenging the policy in *Toll* were children of officers of international organizations, such as the World Bank, who held G-4 visas and were living in Maryland.<sup>27</sup> The university policy at issue in *Toll* initially denied nonimmigrant students in-state tuition because they were not domiciled in the state, but later was revised to deny in-state tuition even if a nonimmigrant could establish domicile in Maryland.<sup>28</sup> The Court’s holding in *Toll*, that federal immigration law authorized the classification of nonimmigrant aliens to establish domicile in the United States, prohibited the University of Maryland from refusing to recognize them as residents for purposes of assessing tuition.<sup>29</sup>

Important to note is that because the *Toll* Court invalidated the University of Maryland’s policy under the Supremacy Clause, the Court “ha[d] no occasion to consider whether the policy violated the Due Process or Equal Protection Clauses.”<sup>30</sup> The Court’s analysis in *Toll* suggests that the constitutionality of state laws directed at non-citizens should only be examined under the Due Process and Equal Protection Clauses if the law does not violate the Supremacy Clause. Moreover, the *Toll* Court acknowledged the conflict inherent in litigation matters involving immigration. Specifically, the Court noted: “when Congress has done nothing more than permit” entrance in the United States “the proper application of the principle is likely to be a matter of some dispute.”<sup>31</sup>

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25. *Id.* at 228.

26. *Toll v. Moreno*, 458 U.S. 1 (1982), *superseded by statute*, Personal Responsibility and Work Opportunity Act of 1996, Pub. L. 104-193, 110 Stat. 2105, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546, *as recognized in* *Day v. Sebelius*, 376 F. Supp. 2d 1022 (D. Kan. 2005).

27. *Id.* at 4 & n.1.

28. *Id.* at 3-9.

29. *Id.* at 11, 17.

30. *Id.* at 10.

31. *Id.* at 13.

Few federal cases specifically address the issue of admission for undocumented students into higher education institutions. In *League of United Latin American Citizens v. Wilson*, the U.S. District Court for the Central District of California invalidated Proposition 187, which denied college and university admission to aliens not lawfully present in the United States.<sup>32</sup> Relying on federal preemption, the Court held that “states have no power to effectuate a scheme parallel to that specified in [federal law], even if the parallel scheme does not conflict with [federal law]” because Congress has expressed its intent to regulate this particular subfield of public policy.<sup>33</sup>

## II. FEDERAL LEGISLATION

Because the United States Constitution grants Congress the power “[t]o establish an uniform Rule of Naturalization,”<sup>34</sup> and because the Supremacy Clause of the United States Constitution bars states from passing legislation that would be preempted by a valid federal law,<sup>35</sup> the federal government is the ultimate authority for regulating immigration in the United States. In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)<sup>36</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>37</sup> These two laws, which are described in more detail below, limit the eligibility of aliens<sup>38</sup> to receive public benefits at the state and local

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32. *United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997).

33. *Id.* at 1255 (citing 8 U.S.C. § 1642 (2012)) (the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 are discussed in significant detail *infra* Section II.A–B).

34. U.S. CONST. art. I, § 8, cl. 4.

35. *Id.* at art. VI, cl. 2 (“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, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

36. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996).

37. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

38. The following definition for permanent resident alien is provided by the U.S. Citizenship and Immigration Services:

An alien admitted to the United States as a lawful permanent resident.

level, including public postsecondary education benefits.

A. *PRWORA and IIRIRA*

Signed into law by President Clinton on August 22, 1996, PRWORA establishes a means for determining whether aliens are eligible for public benefits administered by local, state, and federal governments.<sup>39</sup> These benefits include postsecondary education.<sup>40</sup> PRWORA specifically restricts eligibility for public benefits to only “qualified alien[s].”<sup>41</sup> Under PRWORA, qualified alien does not include undocumented immigrants who are unlawfully in the United States.<sup>42</sup> PRWORA, thus, restricts access to postsecondary benefits for undocumented students.

Enacted shortly after PRWORA, on September 30, 1996, IIRIRA expressly restricts access to postsecondary education benefits for undocumented immigrants in the United States.<sup>43</sup> Under Section 505 of IIRIRA,

an 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 education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a

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Permanent residents are also commonly referred to as immigrants; however, the Immigration and Nationality Act (INA) broadly defines an immigrant as any alien in the United States, except one legally admitted under specific nonimmigrant categories (INA section 101(a)(15)). An illegal alien who entered the United States without inspection, for example, would be strictly defined as an immigrant under the INA but is not a permanent resident alien. Lawful permanent residents are legally accorded the privilege of residing permanently in the United States. They may be issued immigrant visas by the Department of State overseas or adjusted to permanent resident status by U.S. Citizenship and Immigration Services in the United States.

*Permanent Resident Alien*, U.S. CITIZENSHIP AND IMMIGRATION SERV., <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=9a1f95c4f635f010VgnVCM1000000ecd190aRCRD> (last visited Apr. 18, 2013).

39. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996).

40. 8 U.S.C. § 1621(c)(1)(B) (2012).

41. *Id.* § 1621(a)(1).

42. *Id.* § 1621(c)(2)(B).

43. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

resident.<sup>44</sup>

Under IIRIRA, undocumented immigrant students may not receive postsecondary education benefits on the basis of their residency within a state, unless all U.S. citizens are eligible for the same benefits regardless of their residency status.<sup>45</sup>

### B. *The DREAM Act*

The Development, Relief, and Education for Alien Minors Act, popularly known as the DREAM Act, was first introduced in the Senate by Orrin Hatch (R-UT) and Richard Durbin (D-IL) in 2001.<sup>46</sup> The proposed bill would have amended Section 505 of IIRIRA to “permit States to determine residency for higher education purposes and to authorize the cancellation of removal and adjustment of status of certain alien college-bound students who are long-term United States residents.”<sup>47</sup> Additionally, the DREAM Act would create a process called “cancellation of removal”

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44. 8 U.S.C. § 1623(a).

45. *Id.*

46. Originally introduced in 2001 and then reintroduced in 2003, the Student Adjustment Act is the companion bill to the Dream Act in the House of Representatives. Student Adjustment Act of 2001 (SAA) H.R. 1918, 107th Cong. (2001) (reintroduced as Student Adjustment Act of 2003, on April 10, 2003). In both its 2001 and 2003 versions, the SAA contained proposals similar to those found in the Dream Act. Specifically, the SAA would repeal section 505 of IIRIRA and:

[A]djust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

(i) the alien has not, at the time of application, attained the age of 21,  
(ii) the alien was physically present in the United States on the date of the enactment of the Student Adjustment Act of 2001 and has been physically present in the United States for a continuous period of not less than five years immediately preceding the date of such application,  
(iii) the alien has been a person of good moral character during such period, and  
(iv) the alien, at the time of application, is enrolled at or above the 7th grade level in a school in the United States or is enrolled in or actively pursuing admission to an institution of higher education in the United States . . . .

*Id.* Additionally, an individual must not have a criminal history to be eligible for benefits under the SAA and the SAA would have only applied to students already living within the United States at the time of the SAA’s enactment. *Id.*; see 8 U.S.C. §§ 1182(a)(2)(A), 1227(a)(2)(A) (detailing which criminal convictions can make an alien ineligible for visas or admission).

47. Development, Relief, and Education for Alien Minors Act (DREAM Act of 2001), S. 1291, 107th Cong. (2001).

through which alien students could secure lawful immigration status in the United States and therefore become legally employed and eligible for educational benefits, such as state and federal financial aid.<sup>48</sup>

The DREAM Act proposes several requirements which, if met by an undocumented immigrant, would allow that individual to receive conditional resident status and, at a later point, to become a lawful permanent resident.<sup>49</sup> As proposed, to be eligible for benefits under the DREAM Act, an alien student must not have reached the age of twenty-one by the time of application, must be attending an institution of higher education in the United States, must be physically present in the United States when the DREAM act is enacted, be physically present within the United States for no less than five years before the Act's enactment, and must be of good moral character.<sup>50</sup> A report accompanying the DREAM Act, submitted by Senator Hatch, described the DREAM Act as “represent[ing] a common-sense approach to our immigration policy” and an effort to “not only directly improve the quality of life of its beneficiaries, but . . . also benefit the overall United States economy.”<sup>51</sup>

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48. *Id.* § 3.

49. *Id.* § 3(a)(1).

50. *Id.* § 3(a)(1)(B). Additionally, the Act requires that the alien student not be deportable pursuant to a number of provisions of the Immigration and Nationality Act, as, for example, a national security threat. *Id.* § 3(a)(1)(F) (referring to Immigration and Nationality Act § 237(a)(2) (8 U.S.C. §§ 1182(a)(3), 1227(a)(4) (2012)) as the statutes which may make an alien inadmissible or deportable). To be eligible for conditional permanent resident status, under the Act, the undocumented immigrant student must demonstrate one of the following: (1) he or she earned a degree at an institution of higher education or has been working towards a bachelor's degree or higher degree for at least two years; (2) he or she served honorably, for at least two years, in the United States Armed Forces; or (3) he or she performed at a minimum 910 hours of volunteer community service on behalf of an approved organization. Development, Relief, and Education for Alien Minors Act of 2003 (DREAM Act of 2003), S. 1545, 108th Cong. § 5(d)(1)(D) (2003).

51. S. REP. NO. 108-224, at 2, 3 (2004). The full text of the “Purpose and Need” section of this report reads as follows:

The United States should vigilantly protect its borders and enforce its immigration laws. The consequence of illegal entry or overstaying a visa should be deportation. Illegal immigrants who have eluded authorities should not be rewarded with blanket amnesty. At the same time, America's immigration policy must also be sufficiently flexible so that our firm stance against illegal immigration does not undermine our other national interests. The Development, Relief, and Education for Alien Minors (DREAM) Act represents a common-sense approach to

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our immigration policy.

Thousands of children of undocumented immigrants have graduated from our high schools. Most came to America as children, playing no part in the decision to enter the United States, and may not even know they are here illegally. A great many grow up to become honest and hardworking young adults who are loyal to our country and who strive for academic and professional excellence. It is a mistake to lump these children together with adults who knowingly crossed our borders illegally. Instead, the better policy is to view them as the valuable resource that they are for our nation's future.

The DREAM Act does not guarantee any illegal immigrant the right to remain in the United States, and does not grant automatic or blanket amnesty to its potential beneficiaries. However, it does give some who have been acculturated in the United States the privilege of earning the right to remain. The bill provides a six-year conditional residence period for those who entered the United States prior to attaining sixteen years of age, have been here continuously for at least five years, stayed away from crime, and either earned at least a high school degree or gained acceptance to college.

During that six-year period, these individuals can earn the right to stay permanently by serving in our military, obtaining an associate's degree or trade school diploma, or completing two years in a bachelor's or graduate program. Because of the residency and age requirements described in Section V of this report, there is no incentive to enter the United States illegally in the future, as anyone who entered the United States after the age of sixteen or who has been in the United States less than five years at the time of enactment will not be able to benefit from this legislation. In other words, the act grants absolutely no benefit to anyone who plans to illegally enter the United States in the future. Moreover, these rigorous standards result not in citizenship, but only in permanent residency status that may one day result in eligibility to apply for citizenship.

Our society benefits greatly from educating our immigrant population. For example, in its 'policy recommendations for the 108th Congress,' the Cato Institute states that '[i]mmigration gives America an economic edge in the global economy.' The same report also found that 'the typical immigrant and his or her offspring will pay a net \$80,000 more in taxes during their lifetimes than they collect in government services.' Further, in testimony before the Senate Immigration subcommittee, a senior economics fellow with the Cato Institute estimated that immigrant households paid approximately \$133 billion in direct taxes to federal, state and local governments in 1998. He further estimated that the total net benefit (taxes paid over benefits received) to the Social Security system from continuing current levels of immigration is nearly \$500 billion from 1998–2022 and nearly \$2.0 trillion through 2072.

Moreover, the RAND Corporation published a study showing that higher levels of education are associated with public savings in the form of lower expenditures for public income transfer and health programs, and higher tax contributions. The same study also found that larger savings in public social programs would be realized if the educational levels of the total population, which includes both native born and immigrant segments, were increased. As such, the DREAM

The DREAM Act failed to pass in 2001 during the 107th Congress and sponsors reintroduced it with only minor variations during the 108th and 109th Congresses.<sup>52</sup> Through these years, the DREAM Act never reached a full vote in either chamber. In 2007, during the 110th Congress, S. 2205—a revised DREAM Act—fell only eight votes short of bypassing a filibuster.<sup>53</sup> This new version of the DREAM Act eliminated the amendment to the IIRIRA that would have granted states the right to determine residency for undocumented students.<sup>54</sup> Though the DREAM Act has yet to pass Congress, this omission seemed to increase the bill's legislative advancement when the change was first made. In 2009, the DREAM Act enjoyed sponsorship across the partisan divide, with forty cosponsors of the Senate bill. Despite support in both chambers, the bill failed to make it out of committee.<sup>55</sup> In December 2010, H.R. 6497, a new iteration of the DREAM Act, passed in the U.S. House of

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Act will not only directly improve the quality of life of its beneficiaries, but will also benefit the overall United States economy.

America's national interests must shape our immigration policy. We must protect our borders and remove those who do not have permission to remain within them. At the same time, with the DREAM Act, we can extend a welcoming hand, guided by specific and rigorous standards, to those who have already been integrated as part of our society and whose continued presence will benefit our country.

Finally, it must be emphasized that the DREAM Act does not require states to give undocumented alien children in-state tuition. Quite to the contrary and consistent with the principle of federalism, the DREAM Act returns to the states their prerogative to determine how to allocate their own resources.

*Id.* at 2–3 (citations omitted).

52. See *Bill Summary & Status 107th Congress (2001–2002) S.1291*, THE LIBRARY OF CONGRESS, <http://hdl.loc.gov/loc.uscongress/legislation.107s1291> (last visited Feb. 24, 2013); *Bill Summary & Status 108th Congress (2003–2004) S.1525*, THE LIBRARY OF CONGRESS, <http://hdl.loc.gov/loc.uscongress/legislation.108s1525> (last visited Feb. 24, 2013); see *Bill Summary & Status 109th Congress (2004–2005) S.2075*, THE LIBRARY OF CONGRESS, <http://hdl.loc.gov/loc.uscongress/legislation.109s2075> (last visited Feb. 24, 2013).

53. See *Bill Summary & Status 110th Congress (2007–2008)*, THE LIBRARY OF CONG., <http://hdl.loc.gov/loc.uscongress/legislation.110s2205> (last visited Feb. 24, 2013).

54. See Development, Relief, and Education for Alien Minors Act of 2007 (DREAM Act 2007), S. 2205, 110th Cong. (2007).

55. See *Bill Summary & Status 111th Congress (2009–2010) S.729*, THE LIBRARY OF CONGRESS, <http://hdl.loc.gov/loc.uscongress/legislation.111s729> (last visited Feb. 24, 2013); *Bill Summary & Status 111th Congress (2009–2010) H.R.1751*, THE LIBRARY OF CONGRESS, <http://hdl.loc.gov/loc.uscongress/legislation.111hr1751> (last visited Feb. 24, 2013).

Representatives, but was blocked from consideration in the Senate after a motion to end a filibuster was rejected.<sup>56</sup>

On May 11, 2011, the current version of the DREAM Act was introduced in both chambers of Congress, respectively as S. 952 and H.R. 1842.<sup>57</sup> The current DREAM Act again includes a repeal of section 505 of the IIRIRA, specifying that the legislation is intended to restore the option for states to determine residency for the purpose of higher education benefits.<sup>58</sup> As of October 2012, thirty-five cosponsors have joined Senator Durbin (D-IL) in the Senate, while Congressman Berman (D-CA) has lined up 115 cosponsors in the House.<sup>59</sup> The DREAM Act continues to be a highly contentious piece of legislation with passionate advocates and opponents. Despite years of debate around the DREAM Act, at present no federal legislation has passed that would change access to higher education for undocumented students on a national level.

### III. STATE LEGISLATIVE ACTIVITY

The absence of guidelines for implementing and enforcing section 505 of IIRIRA has been cited for contributing to a “confusing triangle” of tuition policies at institutions of higher education across the United States.<sup>60</sup> Specifically, the states have taken up the issue of in-state tuition for undocumented students in a variety of ways. Since 2001, when Texas passed the nation’s first law granting in-state tuition for undocumented students,<sup>61</sup> thirteen states have passed

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56. *Updates Archive*, NAT’L IMMIGRATION FORUM, <http://www.immigrationforum.org/blog/archives/2010/12>.

57. *See, e.g., Bill Summary & Status 112th Congress (2011–2012) S.952* THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:S.952>: (last visited Apr. 18, 2013).

58. *See, e.g., Bill Text 112th Congress (2011–2012) S.952.IS*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/query/z?c112:S.952>: (last visited Apr. 18, 2013).

59. *Bill Summary & Status 112th Congress (2011–2012) S.952*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:S952:@@P> (last visited Feb. 19, 2013); *Bill Summary & Status 111th Congress (2009–2010) H.R.1842*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR1842:@@P> (last visited Feb. 19, 2013).

60. DAVID W. STEWART, IMMIGRATION AND EDUCATION: THE CRISIS AND THE OPPORTUNITIES 198 (1993).

61. H.R. 1403, 77th Leg., Reg. Sess. (Tex. 2001).

legislation or policies allowing undocumented students to receive the tuition benefit. The states currently allowing in-state tuition include: California, Connecticut, Illinois, Kansas, Nebraska, New Mexico, New York, Rhode Island, Texas, Utah, Washington, and Oklahoma.<sup>62</sup> Wisconsin enacted legislation granting the tuition benefit to undocumented students in 2009,<sup>63</sup> but Wisconsin's Governor Scott Walker revoked the law in 2011,<sup>64</sup> eliminating it from the state budget. Maryland passed a bill allowing in-state tuition for undocumented students in 2011,<sup>65</sup> but this policy is yet to be implemented, as the legislation has been blocked through referendum. The decision of whether to allow in-state tuition for undocumented students in Maryland also appeared as a 2012 ballot initiative<sup>66</sup> and was passed by voters on November 6, 2012.<sup>67</sup>

Both Oklahoma and Rhode Island allow in-state tuition,<sup>68</sup> but these states have taken a more nuanced approach to arrive at this policy. In 2003, Oklahoma passed legislation granting the in-state benefit; however, in 2008, the state legislature removed language specifically allowing in-state tuition, instead leaving the decision to the Oklahoma Board of Regents.<sup>69</sup> At present, the Board of Regents continues to allow in-state tuition for undocumented students, but this practice is no longer specified in state code. While Oklahoma's legislation has changed, there has been no substantive change to the state's practice as it relates to undocumented students and in-state tuition. No legislation

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62. *See infra* Table 1.

63. WIS. STAT. § 36.27(2) (2009) (repealed 2011).

64. LEGISLATIVE FISCAL BUREAU JOINT COMM. ON FIN., Paper #750 in NONRESIDENT TUITION EXEMPTIONS FOR CERTAIN UNDOCUMENTED PERSONS (UW SYSTEM AND WTCS) 1 (June 2, 2011), available at <http://legis.wisconsin.gov/lfb/publications/budget/2011-13-Budget/documents/Budget%20Papers/750.pdf>.

65. S. 167, 2011 Leg., Reg. Sess. (Md. 2011); *see* MD. GEN. ASSEMBLY, *Senate Bill 167*, <http://mgaleg.maryland.gov/webmgafirmMain.aspx?tab=subject3&ys=2011rs/billfile/sb0167.htm> (last visited Feb. 19, 2012).

66. Julie Bykowicz, *Immigrant Tuition Referendum Officially Makes Ballot*, THE BALTIMORE SUN, July 22, 2011, [http://weblogs.baltimoresun.com/news/local/politics/2011/07/immigrant\\_tuition\\_referendum\\_o.html](http://weblogs.baltimoresun.com/news/local/politics/2011/07/immigrant_tuition_referendum_o.html).

67. Andrea Noble, *Dream Act to Allow In-State Tuition to Illegals Passes*, THE WASH. TIMES, Nov. 6, 2012, <http://www.washingtontimes.com/news/2012/nov/6/dream-act-awakens-voters-passion-on-election-day/?page=all>.

68. *See infra* Table 1.

69. H.R. 1804, 51st Leg., Reg. Sess. § 13 (Okla. 2007).

has yet passed on the issue in Rhode Island, though it has been proposed several times. In September 2011, however, the Rhode Island Board of Governors of Higher Education unanimously passed an amendment to the state's residency policy, specifically allowing in-state tuition for undocumented students.<sup>70</sup> Thus far, Rhode Island is the only state to altogether bypass the legislature and instead address this issue through the executive branch.<sup>71</sup>

Over the years, a number of other states have considered legislation making undocumented students eligible for in-state tuition. Several states have considered such legislation, but have failed to pass it. These states include Arizona,<sup>72</sup> Colorado,<sup>73</sup> Florida,<sup>74</sup> Hawaii,<sup>75</sup> Massachusetts,<sup>76</sup> Michigan,<sup>77</sup> New Jersey,<sup>78</sup> and Oregon.<sup>79</sup> Four states currently bar undocumented students from in-state tuition benefits by statute: Arizona,<sup>80</sup> Colorado,<sup>81</sup> Georgia,<sup>82</sup> and Indiana.<sup>83</sup> Three states, Alaska,<sup>84</sup> Mississippi,<sup>85</sup> and Virginia,<sup>86</sup> have

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70. Erica Niedowski, *R.I. Education Board Ok's In-State Tuition for Undocumented Students*, THE ASSOCIATED PRESS, Sept. 27, 2011, [http://www.boston.com/news/local/rhode\\_island/articles/2011/09/27/ri\\_education\\_board\\_oks\\_in\\_state\\_tuition\\_for\\_undocumented\\_students/](http://www.boston.com/news/local/rhode_island/articles/2011/09/27/ri_education_board_oks_in_state_tuition_for_undocumented_students/).

71. See Alan Rosenber, *U.S. Education Secretary Praises R.I. Push to Help Undocumented Students*, PROVIDENCE J., November 7, 2011, <http://news.providencejournal.com/breaking-news/2011/11/us-education-se-3.html#.T3sjEHrsqCg> (noting that U.S. Secretary of Education Arne Duncan praised Rhode Island for a novel approach to addressing the needs of undocumented students in higher education).

72. H.R. 2518, 46th Leg., 1st Reg. Sess. (Ariz. 2003).

73. H.R. 03-1178, 64th Gen. Assemb., 1st Reg. Sess. § 1 (Colo. 2003); see also S. 13-033, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013) (seeking to expand in-state student classification to students without a lawful immigration status).

74. H.R. 27, 64th Leg. 1st Reg. Sess. (Fla. 2003).

75. H.R. 873, 22d Leg., 2003 Sess. (Haw. 2003).

76. S. 237, 183d Leg., Reg. Sess. (Mass. 2003).

77. S. 196, 92d Leg., 1st Reg. Sess. § 2 (Mich. 2003).

78. Assemb. 2633, 210th Leg., 2002–2003 Sess. (N.J. 2002).

79. S. 10, 72d Leg., 2003 Reg. Sess. § 2 (Or. 2003).

80. ARIZ. REV. STAT. ANN. § 15-1803(B) (2012).

81. COLO. REV. STAT. § 23-7-110(1) (2012) (specifying U.S. citizens as the only ones eligible for in-state tuition).

82. GA. CODE ANN. § 20-3-66(d) (2012).

83. IND. CODE § 21-14-11-1 (2012).

84. See H.R. 39, 23d Leg., 1st Sess. (Alaska 2003) (under this legislative proposal, the Alaska Board of Regents would “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.”).

85. See S. 2678, 2003 Leg., Reg. Sess. § 41 (Miss. 2003); see also S. 3141, 2003 Leg., Reg. Sess. § 27 (Miss. 2002) (pursuant to these proposals “none of the

considered legislation barring undocumented students from eligibility for in-state tuition, but have failed to pass it.

Legislation granting in-state tuition to undocumented students primarily falls into two categories: the Texas Model and the California Model.<sup>87</sup> Under the Texas Model, the law classifies qualified undocumented students as residents for tuition purposes, using the same, or very similar, criteria to that used for U.S. citizens. For example, Texas law considers an undocumented student a resident if they meet the following criteria:

- 1) graduat[ed] or the equivalent from a Texas high school;
- 2) [has a] 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) regist[ered] no earlier than the fall of 2001 as a student in a postsecondary institution; and 4) . . . sign[ed] an affidavit stating the intent to file an application to become a permanent resident at the earliest possible opportunity.<sup>88</sup>

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funds herein appropriated [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.”)

86. See H.D. 2339, 2003 Gen. Assemb., 2003 Sess. § 1 (Va. 2003) (providing that “[a]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within Virginia for any post-secondary educational benefit, including in-state tuition, unless citizens 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.”).

87. Texas and California were the first two states to grant in-state tuition to undocumented students, but they “differ[] slightly” from one another. Jessica Salsbury, Comment, *Evading “Residence”: Undocumented Students, Higher Education, and the States*, 53 AM. U. L. REV. 459, 474 (2003). Referring to them as models in the context of comparing the laws to the IIRIRA, Salsbury notes that the primary difference between the two approaches is that the Texas law classifies qualified undocumented individuals as residents for tuition purposes and the California law exempts undocumented individuals from residency, and only requires that undocumented individuals attend and graduate from high school in California, register at a state university, and execute an affidavit acknowledging intent to legalize immigration status at the earliest opportunity. See *id.* Given that legislative efforts on this issue in other states generally conform to the precepts of either the Texas or California laws, this Article refers to the Texas and California laws as models.

88. *Id.* (citing an older version of TEX. EDUC. CODE ANN. § 54.052(j) (West 2003), amended by TEX. EDUC. CODE ANN. § 54.052(a)(3) (2012)). The four requirements for residency have been replaced with the following requirements:

- (A) graduated from a public or private high school in this state or received the equivalent of a high school diploma in this state; and

All students—whether U.S. citizens or undocumented—must meet the first three criteria in order to meet residency requirements.<sup>89</sup> Undocumented students are additionally required to sign an affidavit.<sup>90</sup> Other states that fall under this first category include Connecticut,<sup>91</sup> Illinois,<sup>92</sup> Kansas,<sup>93</sup> Nebraska,<sup>94</sup> Rhode Island,<sup>95</sup> and Washington.<sup>96</sup>

Laws under the California Model create exemptions from non-resident tuition for qualified undocumented students, without considering the student as a resident. The requirements for this exemption are similar to those for the Texas model, however the distinction between the two is that in California, undocumented students are not classified as residents;<sup>97</sup> instead, these laws exempt students from paying nonresident tuition. In addition to California, laws in Maryland,<sup>98</sup> New Mexico,<sup>99</sup> New York,<sup>100</sup> Oklahoma,<sup>101</sup> and Utah<sup>102</sup> fit into this category.

Going beyond the issue of whether to offer in-state tuition to undocumented students, several states have passed legislation further increasing or decreasing access to higher

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(B) maintained a residence continuously in this state for:

(i) the three years preceding the date of graduation or receipt of the diploma equivalent, as applicable; and

(ii) the year preceding the census date of the academic term in which the person is enrolled in an institution of higher education.

TEX. EDUC. CODE ANN. § 54.052(a)(3) (West 2012); *see* S. 1528, 79th Leg., Reg. Sess. § 3 (Tex. 2005) (amending the 2003 version of TEX. EDUC. CODE ANN. § 54.052(j)).

89. *See* Salsbury, *supra* note 87, at 474.

90. TEX. EDUC. CODE ANN. § 54.053(3)(B) (West 2012).

91. CONN. GEN. STAT. § 10a-29(9) (2012).

92. 110 ILL. COMP. STAT. 305/7e-5(a) (2012).

93. KAN. STAT. ANN. § 76-731a(2) (2012).

94. NEB. REV. STAT. § 85-502(8) (2012).

95. R.I. BD. OF GOVERNORS OF HIGHER EDUC., *supra* note 5.

96. WASH. REV. CODE § 28B.15.012(2)(e) (2012).

97. CAL. EDUC. CODE § 68130.5 (West 2012).

98. MD. CODE ANN. EDUC. § 15-106.8 (LexisNexis 2012).

99. N.M. STAT. ANN. § 21-1-4.6(B) (2012) (“Any tuition rate or state-funded financial aid that is granted to residents of New Mexico shall also be granted on the same terms to all persons, regardless of immigration status, who have attended a secondary educational institution in New Mexico for at least one year and who have either graduated from a New Mexico high school or received a general educational development certificate in New Mexico.”).

100. N.Y. EDUC. LAW § 355(2)(h)(8) (Consol. 2012).

101. OKLA. STAT. tit. 70 §§ 3242–2 (2012) (OKLA. STAT. 70 § 3242(A)(1)–(2) *invalidated by* Thomas v. Henry, 260 P.3d 1251 (Sup. Ct. Okla. 2011)).

102. UTAH CODE ANN. § 53B-8-106 (LexisNexis 2012).

education. California<sup>103</sup> and Illinois<sup>104</sup> have passed legislation allowing undocumented students to qualify for financial aid to help pay for higher education. South Carolina<sup>105</sup> and Alabama,<sup>106</sup> on the other hand, have enacted laws explicitly prohibiting undocumented students not only from receiving the in-state tuition benefit, but also from attending public colleges altogether. Table 1 below summarizes policies in states that have taken action to increase access to higher education for undocumented students, and Table 2 below summarizes policies for those states that have restricted access to date.

**Table 1: State Policies Increasing Access to Higher Education for Undocumented Students**

State	Code	
California	CAL. EDUC. CODE § 68130.5 (West 2012)	Allows in-state tuition for undocumented students.
	CAL. EDUC. CODE § 66021.6–.7 (West 2012)	Allows undocumented students to access private financial aid.
	CAL. EDUC. CODE § 69508.5 (West 2012)	Allows undocumented students to access public financial aid.
Connecticut	CONN. GEN. STAT. § 10a-29(9) (2012)	Allows in-state tuition for undocumented students.
Illinois	110 ILL. COMP. STAT. 305/7e-5	Allows in-state tuition for undocumented students.

103. See CAL. EDUC. CODE § 66021.6–.7 (granting undocumented students access to private financial aid); see also *Id.* § 69508.5 (granting undocumented students access to public financial aid).

104. See 15 ILL. COMP. STAT. 505/16.5 (2012) (establishing private scholarship fund for undocumented students).

105. S.C. CODE ANN. § 59-101-430 (2012).

106. ALA. CODE § 31-13-8 (2012).

	15 ILCS 505/16.5	Establishes private scholarship fund for undocumented students.
Kansas	KAN. STAT. ANN. § 76- 731a(2) (2012)	Allows in-state tuition for undocumented students.
Maryland	MD. CODE ANN. EDUC. § 15-106.8 (LexisNexis 2012)	Allows in-state tuition for undocumented students, with the requirement that they earn an Associates degree at a community college before continuing to a four-year school. Passed by referendum in November 2012.
Nebraska	NEB. REV. STAT. § 85- 502(8) (2012)	Allows in-state tuition for undocumented students.
New Mexico	N.M. STAT. ANN. § 21-1- 4.6(B) (2012)	Allows in-state tuition for undocumented students. Allows undocumented students to access public financial aid.
New York	N.Y. EDUC. LAW § 355(2)(h)(8) (Consol. 2012)	Allows in-state tuition for undocumented students.
Oklahoma	OKLA. STAT. 70 § 3242 (2012)	Decision of whether to allow in-state tuition for undocumented students is given to Oklahoma Board of Regents.
	OKLA. STAT. 70 § 3242.2 (2012)	Allows in-state tuition for undocumented students.
Rhode Island	Board of Governors of Higher Education Student Residency Policy (S-5.0)	Board of Governors for Higher Education approved a policy that allows undocumented students to pay in-state tuition.

Texas	TEX. EDUC. CODE § 54.052 (2012)	Allows in-state tuition for undocumented students.
Utah	UTAH CODE ANN. § 53B-8-106 (LexisNexis 2012)	Allows in-state tuition for undocumented students.
Washington	WASH. REV. CODE § 28B.15.012 (2012)	Allows in-state tuition for undocumented students.
Wisconsin	Wis. Stat. § 36.27	Allowed in-state tuition for undocumented students. Law revoked by Governor Scott Walker in 2011.

**Table 2: State Policies Decreasing Access to Higher Education for Undocumented Students**

Alabama	ALA. CODE § 31-13-8 (2012)	Prohibits undocumented students from admission to public colleges.
Arizona	ARIZ. REV. STAT. ANN. § 15-1803 (2012)	Prohibits undocumented students from receiving in-state tuition and any financial aid.
Colorado	COLO. REV. STAT. § 23-7-110 (2012)	Prohibits undocumented students from receiving in-state tuition.
Georgia	GA. CODE ANN. § 20-3-66(d) (2012)	Prohibits undocumented students from receiving in-state tuition.
Indiana	IND. CODE § 21-14-11-1 (2012)	Prohibits undocumented students from receiving in-state tuition.

Montana	H.R. 638, 62d Leg., 2011 Sess. § 1 (Mont. 2011)	Montana voters passed a referendum included on the 2012 ballot that denies state services to undocumented immigrants. <sup>107</sup>
South Carolina	S.C. CODE ANN. § 59-101-430 (2012)	Prohibits undocumented students from attending public colleges.

#### IV. LEGAL CHALLENGES TO STATE LAWS GRANTING IN-STATE TUITION TO UNDOCUMENTED STUDENTS

Several of the laws identified in Section III of this Article have been the subject of some type of legal challenge. The following section describes legal challenges to legislation granting undocumented students the opportunity to pay in-state tuition in state and federal courts.<sup>108</sup> This Article does

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107. H.R. 683, 62d Leg., 2011 Sess. § 1 (Mont. 2011); *see also* Heather Jurva, *Ballot Initiatives Pass by Wide Margin: Abortion, Illegal Immigrant Laws Change, Medical Marijuana Act Upheld*, THE MONT. KAIMIN, Nov. 7, 2012, [http://www.montana.kaimin.com/news/article\\_1c34125a-75ff-5248-8ae2-4aa7f978b77c.html](http://www.montana.kaimin.com/news/article_1c34125a-75ff-5248-8ae2-4aa7f978b77c.html).

108. It is important to note that not all challenges to state laws regarding in-state tuition and undocumented immigrant students are challenged in court. For example, in 2005, the Washington Legal Foundation, which describes itself as “a public interest law and policy center . . . [that] devotes a significant portion of its resources to protecting the constitutional and civil rights of American citizens and aliens lawfully present in this country,” filed a complaint and request for investigation with the Department of Homeland Security alleging that the Texas statute conferring residency status on undocumented immigrants violates federal law because it does not offer the same tuition rate to U.S. citizens who live outside of Texas. Vicky J. Salinas, Comment, *You Can Be Whatever You Want to Be When You Grow Up, Unless Your Parents Brought You to this Country Illegally: The Struggle to Grant In-State Tuition to Undocumented Immigrant Students*, 43 HOUS. L. REV. 847, 865 & n.119 (2006) (citing Formal Complaint Letter from Daniel J. Popeo, Chairman and Gen. Counsel, Wash. Legal Found., & Richard A. Samp, Chief Counsel, Wash. Legal Found., to Daniel Sutherland, Officer for Civil Rights and Civil Liberties, Dep’t of Homeland Sec. (Aug. 9, 2005), *available at* <http://www.wlf.org/upload/INSTATE.pdf>); *see also* *Texas’ Tuition Policy Challenged*, WASH. TIMES, Aug. 23, 2005, <http://www.washingtontimes.com/news/2005/aug/23/20050823-105220-1267r/?page=all#pagebreak> (describing the Washington Legal Foundation’s challenge to the Texas law regarding in-state tuition). In their complaint, the Washington Legal Foundation claimed that the conferral of residency status is a “post-secondary education benefit” under IIRIRA, and argued that the Texas law violated the civil rights of non-Texas residents by denying them in-state tuition. Letter from Daniel J. Popeo, &

not necessarily describe every judicial challenge in the United States to these laws, just those cases reported by LexisNexis, and therefore widely available to researchers.<sup>109</sup> The cases identified and discussed in this Section are summarized in Table 3 below.

#### A. League of United Latin American Citizens v. Wilson

The first case discussed in this section, *League of United Latin America Citizens v. Wilson*,<sup>110</sup> does not regard a state law passed in response to the confusing triangle of the IIRIRA, but rather regards a challenge to California's Proposition 187, which was approved in the November 8, 1994 general election.<sup>111</sup> The purpose of Proposition 187 was to "provide for cooperation between [the] agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California."<sup>112</sup> "Section 8 of Proposition 187 denies public

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Richard A. Samp to Daniel Sutherland, *supra*, at 1–7. Interestingly, the Washington Legal Foundation noted that it filed its complaint with the Department of Homeland Security, rather than initiating a lawsuit against the State of Texas, because recent litigation in Kansas suggested that a lawsuit may have a lower likelihood of success than a challenge brought directly to the Department of Homeland Security. *Id.* at 1–3.

109. With respect to the population of cases described in this Article (the term population refers to all of the observations in which a researcher is interested), the distinction between reported cases and published cases is important. Several different publishing outlets, for example West Publishing (which publishes the federal supplement series), publish written decisions of courts in the United States (including decisions of state and federal district—or trial-level—courts, state and federal appellate courts, and state and federal supreme courts). These publishing outlets, however, do not publish every decision made by these courts. Some decisions, or cases, are designated as unpublished or not for official publication by either the deciding judge or by the publishing outlet. Although these unpublished cases are not available in official hardbound volumes produced by publishing outlets, many of these cases are still available through online legal-research-oriented search engines, such as Westlaw and LexisNexis. For the purposes of this Article, the term reported refers to any case (whether published or unpublished) that is available to researchers through Westlaw and LexisNexis.

110. *League of Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997).

111. *Id.* at 1249.

112. *Id.* Specifically, the provisions of Proposition 187 required "public education personnel to (i) verify the immigration status of persons with whom they come in contact; (ii) notify certain defined categories of persons of their

postsecondary education 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.”<sup>113</sup>

The U.S. District Court for the Central District of California struck down Proposition 187 on the basis of federal preemption. The Court held that “states have no power to effectuate a scheme parallel to that specified in [PRWORA], even if the parallel scheme does not conflict with [PRWORA]” because Congress has made itself responsible for regulating the arena of public postsecondary education benefits.<sup>114</sup> Specifically, the Court reasoned that because section 505 of IIRIRA regulates the eligibility of undocumented students for post secondary education benefits, “it also manifests Congress’ intent to occupy this field.”<sup>115</sup> Federal law, thus, according to the Court preempted Proposition 187.<sup>116</sup> Interestingly, as noted above, California later reversed course on this policy issue and passed legislation granting in-state tuition to undocumented students.

#### B. Equal Access Education v. Merten

In *Equal Access Education v. Merten*, the U.S. District Court for the Eastern District of Virginia heard a challenge to a September 5, 2002 memorandum issued by the Virginia Attorney General, which advised all of Virginia’s public colleges and universities to deny admission to undocumented students.<sup>117</sup> Specifically, the memorandum stated that “the Attorney General is strongly of the view that illegal and undocumented aliens should not be admitted into our public colleges and universities at all.”<sup>118</sup> The plaintiffs in *Merten*

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immigration status; (iii) report those persons to state and federal officials; and (iv) deny those persons social services, health care and education.” *Id.*

113. *Id.* at 1256 (internal quotation marks omitted).

114. *Id.* at 1255 (citing Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 432, 110 Stat. 2105, 2274 (codified as 8 U.S.C. § 1642(a) in 1996)).

115. *Id.* at 1256.

116. *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997).

117. *Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 591 (E.D. Va. 2004).

118. *Id.* (citing Memorandum from the Commonwealth of Virginia Attorney General, Immigration Law Compliance Update 5 (Sept. 5, 2002)).

included Equal Access Education, a private immigrant advocacy organization, as well as two undocumented students seeking admission to Virginia's public universities.<sup>119</sup>

The *Merten* court first addressed the issue of whether Virginia's policy violated the Supremacy Clause. The plaintiffs argued that because the regulation of immigration is an enumerated federal power, Virginia was acting in an arena belonging exclusively to the federal government.<sup>120</sup> Noting that "not every state enactment or action 'which in any way deals with aliens is a regulation of immigration and thus per se preempted by [the Supremacy Clause],"<sup>121</sup> the *Merten* court held that Virginia did not violate the Supremacy Clause because its policy used federal standards to determine individual immigration status.<sup>122</sup>

The plaintiffs in *Merten* also argued that the Virginia policy violated the Due Process Clause of the Fourteenth Amendment. Specifically, the plaintiffs asserted that because they were denied admission to Virginia's institutions of higher education, they were denied "(1) a property interest in receiving a public education at Virginia community colleges . . . that have adopted open enrollment admissions policies; and (2) a property interest in receiving a fair and impartial admissions decision" under constitutionally acceptable criteria.<sup>123</sup> The *Merten* court also disagreed with this argument, noting that "illegal immigration status is not a constitutionally impermissible criterion on which to base an admissions decision and plaintiffs have no property interest in an admissions decision that does not take illegal immigration into account."<sup>124</sup>

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119. *Id.* at 592–93. The two prospective students came to the United States as small children, graduated from high school in the United States with excellent grades and scored well enough on college entrance examinations to qualify for admission to Virginia's public universities. *Id.*

120. *Id.* at 602.

121. *Id.* at 601 (quoting *De Canas v. Bica*, 424 U.S. 351 (1976), *superseded by statute* as stated in *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1974 (2011)).

122. *Id.* at 608.

123. *Id.* at 611.

124. *Id.*

### C. Day v. Sebelius

In *Day v. Sebelius*,<sup>125</sup> the U.S. District Court for the District of Kansas heard a challenge to Kansas House Bill Number 2145, which allowed undocumented immigrants to qualify for in-state tuition and became law on July 1, 2004.<sup>126</sup> As described above, the Kansas law at issue in *Day* is similar to the Texas statute in that it required undocumented students to attend an accredited Kansas high school for at least three years prior to graduation and to sign an affidavit agreeing to soon legalize their immigration status in order to qualify for in-state tuition.<sup>127</sup> The plaintiffs in *Day* were non-resident students (or their parents) of Kansas state institutions of higher education who paid out-of-state tuition, who alleged that the Kansas law violated Section 505 of IIRIRA and the Equal Protection Clause of the Constitution.<sup>128</sup> Many observers closely watched the outcome of this challenge, expecting the Day decision to have a significant impact on other state laws granting in-state tuition to undocumented students.<sup>129</sup>

The court never reached the merits of the plaintiffs' arguments, however, dismissing six of the seven claims asserted in the case, including the Equal Protection claim, for lack of standing. According to *Day*, the plaintiffs failed to establish standing because they could not establish that the Kansas statute actually applied to them since each plaintiff had paid out-of-state tuition both before and after the statute was enacted.<sup>130</sup> The *Day* court further noted that even if it

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125. *Day v. Sebelius*, 376 F. Supp. 2d 1022 (D. Kan. 2005)

126. *Id.* at 1025 (citing KAN. STAT. ANN. § 76-731a (2005)).

127. See discussion *supra* at Section III.

128. *Day*, 376 F. Supp. 2d at 1025.

129. See generally Salinas, *supra* note 108, at 867 (citing Rebecca Ness Rhymer, Note, *Taking Back the Power: Federal vs. State Regulation of Postsecondary Education Benefits for Illegal Immigrants*, 44 WASHBURN L.J. 603, 616 (2005)) (noting that “[m]any expected [*Day v. Sebelius*] to strike down in-state tuition for undocumented students”); see also *Financial Aid and Scholarships for Undocumented Students*, FINAID, <http://www.finaid.org/otheraid/undocumented.phtml> (last visited Feb. 21, 2013) (predicting that *Day v. Sebelius* would overturn state laws that provide in-state tuition to illegal immigrants); Juan Castillo, *Tuition Law for Illegal Immigrants Challenged*, AUSTIN AM.-STATESMAN, Feb. 1, 2005, at A1 (arguing that *Day v. Sebelius*, though the case was not named in the article, threatened similar legislation in Texas).

130. See *Day*, 376 F. Supp. 2d at 1033, 1039–40.

had found the plaintiffs to have suffered injury in fact, they still failed to demonstrate how such a finding would have addressed their injuries since the invalidation of the Kansas statute would have left them situated exactly as they were before the challenge: as students required to pay out-of-state tuition at Kansas institutions of higher education.<sup>131</sup> The Tenth Circuit Court of Appeals eventually affirmed the district court's dismissal of the plaintiffs' claim, and the Supreme Court declined to hear an appeal.<sup>132</sup>

*D. Washington Legal Foundation's Challenge to Texas and New York Statutes*

On August 9, 2005, the Washington Legal Foundation (WLF) filed a complaint letter to the U.S. Department of Homeland Security's Officer for Civil Rights and Civil Liberties against the State of Texas for violating the civil rights of WLF's members, in violation of federal law.<sup>133</sup> Specifically, the WLF alleged that Texas violated IIRIRA by "adopt[ing] a statute that permits illegal aliens living in Texas and who graduate from Texas high schools to be deemed 'residents' of Texas in order to qualify for discounted tuition rates, yet does not offer the same tuition rates to U.S. citizens and nationals who live outside of Texas."<sup>134</sup> In its letter, the WLF refers to the conferral of residency status for purposes of in-state tuition in Texas as a "post secondary benefit" and alleges that Texas has made it "exceedingly difficult for citizens and nationals living outside the State to qualify as a 'resident' of Texas."<sup>135</sup> WLF sent a similar letter to the Officer for Civil Rights and Civil Liberties on

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131. *Id.* at 1034. The *Day* court also found that the plaintiffs had no private right of action, or a right that authorizes an individual to sue in court, because administrative agencies (rather than private individuals) are the only party typically authorized to bring lawsuits against entities that violate the law, in a statutory context, unless the statute expressly or implicitly grants a private right of action to sue. *See id.* at 1036–37.

132. *See Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007).

133. Letter from Daniel J. Popeo & Richard A. Samp to Daniel Sutherland, *supra* note 108. In this letter the Washington Legal Foundation describes itself as "a public interest law and policy center based in Washington, D.C., with members and supporters in all 50 states[, and it] devotes a significant portion of its resources to protecting the constitutional and civil rights of American citizens and aliens lawfully present in [the United States]." *Id.* at 1–2.

134. *Id.* at 1.

135. *Id.* at 4.

September 7, 2005, containing similar allegations against the New York statute.<sup>136</sup>

In its complaint letters, the WLF indicates that it is petitioning the Officer for Civil Rights and Civil Liberties directly because “all other avenues for relief have been denied.”<sup>137</sup> In support of this argument, the WLF cited *Day v. Sebelius*, and specifically referenced the fact that the United States District Court for the District of Kansas dismissed similar complaints for lack of standing and lack of a private right of action.<sup>138</sup> The Department of Homeland Security has not filed any formal challenges in state or federal courts seeking to invalidate the Texas or New York statutes in response to the WLF’s complaint letters.

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

In *Martinez v. Regents of the University of California*,<sup>139</sup> a court for the first time directly considered whether a state statute granting in-state tuition to undocumented students violates Section 505 of IIRIRA. The plaintiffs in *Martinez* were students paying out-of-state tuition at California public colleges and universities who claimed that California’s statute granting in-state tuition to undocumented students violated federal law in that it conferred a benefit on undocumented individuals without granting out-of-state U.S. citizens the same benefit.<sup>140</sup> The California Supreme Court specifically heard the issues of whether the California statute violated IIRIRA, PRWORA, and the Privileges and Immunities Clause and whether “federal immigration laws preempt California’s policy of granting in-state tuition to nonresident high school graduates.”<sup>141</sup>

In its preemption analysis under IIRIRA, the *Martinez* court noted that “[IIRIRA’s] language compels us to conclude that it does not prohibit what the [California] Legislature did

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136. See Formal Complaint Letter from Daniel J. Popeo, Chairman and Gen. Counsel, Wash. Legal Found., & Richard A. Samp, Chief Counsel, Wash. Legal Found., to Daniel Sutherland, Officer for Civil Rights and Civil Liberties, Dep’t of Homeland Sec. (September 7, 2005), available at <http://www.wlf.org/Upload/INSTA-NY.pdf>.

137. *Id.* at 11.

138. See discussion *supra* at IV.C.

139. *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010).

140. *Id.* at 860.

141. *Id.* at 860–61.

in enacting [the California statute granting undocumented students in-state tuition].”<sup>142</sup> Specifically, the court noted that the California statute’s exemption from paying nonresident tuition is not based on residence, but rather

on *other* criteria, specifically, that persons possess a California high school degree or equivalent; that if they are unlawful aliens, they file an affidavit stating that they will try to legalize their immigration status; and, especially important here, that they have attended ‘[h]igh school . . . in California for three or more years.’<sup>143</sup>

The court also noted that

many unlawful aliens who would qualify as California residents but for their unlawful status, and thus would not have to pay out-of-state tuition, will not be eligible for [California’s statutory] exemption—only those who attended high school in California for at least three years and meet the other requirements are eligible

for in-state tuition under this law.<sup>144</sup>

The *Martinez* court also addressed the argument that PRWORA preempted the California law. Under this argument, “not only must the state law specify that illegal aliens are eligible [for in-state tuition], but the state Legislature must also expressly reference [PRWORA].”<sup>145</sup> The plaintiffs in *Martinez* further argued that in order to satisfy PRWORA, a state law “would have to use the federal statutory term ‘illegal alien’ in its legislation—a term that would clearly put the public on notice.”<sup>146</sup> The court rejected these arguments noting that PRWORA “requires no specific words” and that California’s statute “expressly state[s] that it applies to undocumented aliens, rather than conferring a benefit generally without specifying that its beneficiaries may

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142. *Id.* at 863.

143. *Id.* at 863 (citing CAL. EDUC. CODE § 68062 (West 2012); *Regents of Univ. of Cal. v. Superior Court*, 276 Cal. Rptr. 197, 201 (2d Dist. 1990)).

144. *Id.* at 863–64 (citing *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518, 544 (3d Dist. 2008)).

145. *Martinez v. Regents of Univ. of Cal.*, 241 P.3d 855, 868 (Cal. 2010). This conclusion was advanced at the appeals court level under the argument that, as contained in a conference committee report on PRWORA, “[o]nly the affirmative enactment of a law by a State legislature and signed by the Governor after the date of enactment of this Act, that references this provision, will meet the requirements of this section.” *Id.* at 867 (citing H.R. REP. No. 104-725, 2d Sess., at 383 (1996)).

146. *Id.* at 868 (internal quotation marks omitted).

include undocumented aliens.”<sup>147</sup> If Congress had a different intent, noted the *Martinez* court, “it would have said so clearly and would not have set a trap for unwary legislatures.”<sup>148</sup>

Finally, the *Martinez* court addressed the issue of whether the California law violated the Privileges and Immunities Clause of the U.S. Constitution. In their argument, the plaintiffs pursued the theory that

[b]y making illegal aliens who possess no lawful domicile in the state of California eligible for in-state tuition rates, while denying this benefit to U.S. citizens whose lawful domicile is outside California, the state of California has denigrated U.S. citizenship and placed U.S. citizen Plaintiffs in a legally disfavored position compared to that of illegal aliens.<sup>149</sup>

The *Martinez* court rejected this claim, noting that the U.S. Supreme Court rarely invokes the Privileges and Immunities Clause to strike down a state statute and gives only a narrow interpretation of the clause.<sup>150</sup> The court also clarified that even though the Privileges and Immunities Clause only applies to citizens, unlike other constitutional provisions “no authority suggests the clause prohibits states from ever giving resident aliens ([whether] lawful or unlawful) benefits they do not also give to all American citizens.”<sup>151</sup>

#### F. Immigration Reform Coalition of Texas v. Texas

In *Immigration Reform Coalition of Texas v. Texas*,<sup>152</sup> the Immigration Reform Coalition of Texas (IRCOT) challenged the removal of their lawsuit from the 281st Judicial District of Harris County, Texas to the United States District Court

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147. *Id.*

148. *Id.*

149. *Id.* at 869 (citations omitted).

150. *Id.* (citing *Saenz v. Roe*, 526 U.S. 489, 511 (1999) (Rehnquist, C.J., dissenting); *see also, e.g.*, *Slaughter-House Cases*, 83 U.S. 36 (1872)).

151. *Martinez*, 241 P.3d at 869. The court went on to note that “[t]he fact that the clause does not protect aliens does not logically lead to the conclusion that it also prohibits states from treating unlawful aliens more favorably than nonresident citizens.” *Id.*

152. *Immigration Reform Coal. of Tex. v. Tex.*, 706 F. Supp. 2d 760 (S.D. Tex. 2010).

for the Southern District of Texas.<sup>153</sup> Similar to the allegations in *Martinez*, IRCOT alleged that the Texas statute allowing for undocumented students to qualify for in-state tuition conflicted with, and should be preempted by, federal laws establishing that illegal aliens are not eligible for postsecondary education benefits at public colleges and universities.<sup>154</sup> The plaintiffs in *IRCOT* also sought

a declaration that ‘in Texas, an illegal alien is not eligible for discounted in-state tuition or any form of state student financial aid,’ and that ‘the provision of Texas law that allows an alien to qualify as a Texas resident for purposes of discounted in-state tuition and state financial aid are preempted, void, and of no effect.’<sup>155</sup>

IRCOT also sought “an order enjoining the [State of Texas] from making, or forwarding, monetary grants to illegal aliens under [Texas law].”<sup>156</sup>

Like the plaintiffs in *Day*, the *IRCOT* plaintiffs suffered from a standing problem. In rejecting IRCOT’s motion, the court noted that “the injuries of [IRCOT’s] members based solely on their status as taxpayers providing funds to the state treasury is too uncertain and remote to satisfy constitutional standing.”<sup>157</sup> The *IRCOT* court also declined to preempt the Texas statute because “IRCOT ha[d] alleged no injury which ha[d] resulted from enforcement of the Texas statutes defining residency.”<sup>158</sup> After finding that it lacked jurisdiction to hear the plaintiffs’ claims, the *IRCOT* court remanded the case back to the 281st District of Harris County to “make a determination a determination as to whether and in what manner the suit may proceed.”<sup>159</sup>

#### G. Hispanic Interest Coalition of Alabama v. Governor of Alabama

At least one state law denying undocumented students admission to state colleges and universities has been subject

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153. *Id.* at 762.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 765.

158. *Immigration Reform Coal. of Tex. v. Texas*, 706 F. Supp. 2d 760, 765 (S.D. Tex. 2010).

159. *Id.* at 765.

to a constitutional and preemption challenge in federal court. In *Hispanic Interest Coalition of Alabama v. Governor of Alabama*,<sup>160</sup> the plaintiffs, the Hispanic Interest Coalition of Alabama (HICA), challenged an Alabama statute providing that an undocumented alien “shall not be permitted to enroll in or attend any [Alabama] public postsecondary education institution.”<sup>161</sup> This section of Alabama law allowed officers of postsecondary education institutions in Alabama to “seek federal verification of an alien’s immigration status with the federal government,” but did not allow them to independently make a final determination about an individual’s immigration status.<sup>162</sup> Moreover, the law also deemed undocumented individuals ineligible for “any postsecondary education benefit, including, but not limited to, scholarships, grants, or financial aid.”<sup>163</sup>

As it was originally enacted, the Alabama law both prohibited enrollment of “[a]n alien who is not lawfully present in the United States,” and also expressly limited enrollment to aliens who “possess lawful permanent residence or an appropriate nonimmigrant visa under [federal law].”<sup>164</sup> The Federal District Court for the Northern District of Alabama “enjoined [this second portion of the law] in its entirety on the ground that it constituted an unconstitutional classification of aliens.”<sup>165</sup> After the district court’s ruling, the Alabama legislature amended the Alabama law to remove this second provision entirely “which was understood to define lawful presence as requiring lawful permanent residence or a nonimmigrant visa.”<sup>166</sup> Because this amendment removed the challenged feature of Alabama law, the Eleventh Circuit Court of Appeals “vacate[d] the district court’s injunction [of the challenged portion of Alabama’s law] as moot and remand[ed] for the dismissal of the challenge.”<sup>167</sup>

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160. *Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236 (11th Cir. 2012).

161. *Id.* at 1240 (citing ALA. CODE § 31-13-8 (2012)).

162. *Id.*

163. *Id.*

164. *Id.* at 1242.

165. *Id.*

166. *Id.*

167. *Id.* at 1243.

**Table 3: State and Federal Court Cases on In-State Tuition for Undocumented Students**

<b>Case Name</b>	<b>Cite</b>	<b>Court &amp; Year</b>	<b>State</b>	<b>Holding</b>
<i>League of United Latin American Citizens v. Wilson</i>	997 F. Supp. 1244	Central District of California (1997)	California	Proposition 187 preempted by PRWORA and IIRIRA
<i>Equal Access Education v. Merten</i>	305 F. Supp. 2d 585	Eastern District of Virginia (2004)	Virginia	Virginia law does not violate Supremacy Clause
<i>Day v. Sebelius</i>	376 F. Supp. 2d 1022	District of Kansas (2005)	Kansas	Dismissed for lack of standing
<i>Martinez v. Regents of the University of California</i>	241 P.3d 855	Supreme Court of California (2010)	California	In-state tuition law does not violate IIRIRA, PROWA, or any other federal law
<i>Immigration Reform Coalition of Texas v. Texas</i>	706 F. Supp. 2d 760	Southern District of Texas (2010)	Texas	Dismissed for lack of standing
<i>Hispanic Interest Coalition of Alabama, et al. v. Alabama</i>	691 F.3d 1236	Eleventh Circuit Court of Appeals (2012)	Alabama	Issue moot because Alabama legislature changed portion of law at issue in appeal

## V. PUBLIC OPINION

The wide variation in the states' approaches to immigration is not surprising in light of the divide in public opinion on the topic. While these policies impact only a small percentage of all college students, the issue has proven highly divisive, as have other topics related to immigration. Both advocates and opponents of offering in-state tuition to undocumented students argue that this is an issue of social justice and economics. The arguments of both proponents and opponents of this issue are described below.

### A. *Moral Arguments*

Those on both sides of the issue argue their positions based on justice and fairness, but reach different conclusions. Proponents of in-state tuition benefits for undocumented students argue that to deny students this benefit effectively punishes children for the wrongdoing of their parents, since these students were brought into the U.S. as minors, having no choice in their immigration status.<sup>168</sup> While compelling undocumented students to pay out-of-state tuition adds a barrier to attending college, proponents of in-state tuition argue that this is highly unlikely to encourage students who have spent the majority of their lives in the United States to leave the country. Instead, this creates a population whose opportunities are considerably limited throughout their lives in a country that many have known as home for years. Conversely, increasing educational opportunities for undocumented students develops human capital and prepares students to lead productive lives and avoid issues tied to poverty.<sup>169</sup> In addition to benefiting the students as individuals, society as a whole benefits from a more educated populace able to make informed, sound decisions and contribute to the country's productivity.<sup>170</sup>

In response to the argument that undocumented students should not be punished for the actions of their parents, opponents argue that while these students may have

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168. See Melissa Cook, *A High Stakes Game Texas Can't Afford to Lose: Interpreting Federal Immigration Law on In-State Tuition for Undocumented Students*, 11 TEX. TECH ADMIN.L.J. 225, 239 (2009).

169. *Educ. Comm. Hearing*, 101st Leg., 2d Sess., 4, 47 (Neb. 2010) (statement of Sen. Bill Avery and Marshall Hill).

170. *Id.* at 43 (statement of J.B. Milliken).

immigrated as minors with little say in the decision, once they are eighteen their immigration status becomes their own responsibility. Offering in-state tuition rates to undocumented students therefore rewards illegal behavior, and provides amnesty to individuals who are knowingly violating federal law.<sup>171</sup> Furthermore, offering this benefit to undocumented immigrants provides additional encouragement for individuals to enter the United States illegally.<sup>172</sup> In addition to incentivizing illegal behavior, opponents assert that allowing undocumented students to receive the in-state tuition benefit is unfair to citizen students from other states who are in the country legally and are not allowed to pay the reduced rate.<sup>173</sup> Finally, in response to the assertion that denying in-state tuition rates to undocumented students limits their opportunity, some opponents argue that offering the benefit provides false hope, since there is currently no path to legal employment once an undocumented student earns a degree.

### *B. Economic Arguments*

Proponents of granting in-state tuition benefits to undocumented students cite the benefits of higher education both for individuals and society. Earning potential is increased considerably with a college degree, which in turn increases income tax revenue and may decrease the likelihood that an individual will need to rely on public assistance.<sup>174</sup> Developing an educated workforce benefits the economy as a whole. Proponents assert that while in-state tuition may be subsidized, it is not free, and many of these students would be unable to pay the full rate and would then likely not attend at all, in which case institutions of higher education would receive no money from these students. Opponents assert that offering in-state tuition to undocumented students provides a financial benefit to immigrants in the country illegally at the

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171. Cook, *supra* note 168, at 238.

172. Kathleen A. Connolly, *In Search of the American Dream: An Examination of Undocumented Students, In-State Tuition, and the DREAM Act*, 55 CATH. U. LAW REV. 193, 213–14 (2005); *see also* Cook, *supra* note 168, at 238.

173. *Educ. Comm. Hearing*, *supra* note 169, at 16 (statement of Kris Kobach).

174. Alejandro Portes & Patricia Fernández-Kelly, *No Margin for Error: Educational and Occupational Achievement Among Disadvantaged Children of Immigrants*, 620 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 17 (2008).

cost of citizen taxpayers and that these students will not be able to contribute to the economy more productively with college degrees, since they will still be ineligible for legal employment.

### C. *The Divide*

The Pew Research Center for People and the Press survey, conducted in late 2011, indicates that the American public is divided on immigration related issues, including tuition benefits for undocumented individuals.<sup>175</sup> Nearly half of the public (forty-eight percent) believes that undocumented students, who meet certain criteria, should be eligible for in-state tuition, while forty-six percent disagree. There is a wider division on the issue between Republicans and Democrats.<sup>176</sup> Most Republicans (sixty-three percent) believe that undocumented immigrants should not be eligible for in-state tuition benefits compared to thirty-eight percent of Democrats.<sup>177</sup> Table 4 below illustrates these findings.

**Table 4: Public Opinion on In-State Tuition for Undocumented Students**

	<b>Should be Eligible</b>	<b>Should Not be Eligible</b>	<b>Don't Know/ Refused</b>
Republican	33%	63%	4%
Democrat	56%	38%	6%
Independent	51%	44%	5%
ALL	48%	46%	6%

N=2001

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175. *Illegal Immigration: Gaps Between and Within Parties*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, <http://www.people-press.org/2011/12/06/illegal-immigration-gaps-between-and-within-parties/?src=prc-headline> (last visited Feb. 21, 2013). The survey question stated “Do you think an illegal immigrant who went to high school in your state and is accepted to a public college should be eligible for the in-state tuition rate, or shouldn’t they?” PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, NOVEMBER 2011 RELIGION AND POLITICS SURVEY: FINAL TOPLINE 1 (Nov. 9–14, 2011), available at <http://www.people-press.org/files/legacy-questionnaires/Immigration%20topline%20for%20release.pdf>.

176. *Illegal Immigration: Gaps Between and Within Parties*, *supra* note 175.

177. *Id.*

Public opinion remains split on the issue of offering in-state tuition to undocumented students and the debate continues to be heated. In light of this divide, it is unclear which direction public policy on the issue is headed.

## VI. IMPLICATIONS

### *A. A Piecemeal Approach to Policymaking*

As described in this Article, in the absence of federal guidance, states have adopted a multitude of legislative approaches to the issue of in-state tuition for undocumented students.<sup>178</sup> This wide spectrum of policies at the state level, which range from outright bans of undocumented students from admission to public colleges and universities to allowing undocumented students to enroll in institutions of higher education and pay in-state tuition rates,<sup>179</sup> can be described as a piecemeal approach to policymaking. This piecemeal approach, in short, has led to significant policy differences across the United States. Undocumented immigrants living within the United States who desire to obtain a postsecondary education, thus, face different opportunities and obstacles, depending upon the laws of the state in which they live, along the path to obtaining a higher education.

### *B. The Development (and the Future) of the Piecemeal Approach in this Policy Area*

While several state legislatures have entered the policy fray of in-state tuition for undocumented students (which, as argued in this Article, has led to a piecemeal approach to policymaking), it is very difficult to explain the development of this piecemeal approach over time or to predict future policy developments in this area. Specifically, state policies governing in-state tuition and undocumented students do not necessarily reflect or conform to traditional notions and understandings of conservative or liberal policymaking. For example, the State of Utah, which is generally considered to be a more conservative state and is led by a Republican governor and has a legislature dominated by Republicans,

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178. See discussion *supra* Section III.

179. See discussion *supra* Section III.

allows undocumented students to enroll in its public colleges and universities, and, if the student meets basic legislative requirements, can pay tuition at the rate of other in-state students.<sup>180</sup> This policy is very similar to California and other states generally considered to be more liberal than Utah.<sup>181</sup> There seems to be no clear ideological or partisan reason why states choose one policy direction over another in this particular arena. Future state action as it relates to undocumented students and in-state tuition, thus, is difficult to generalize or predict.

*C. The Piecemeal Approach in this Policy Area is Likely to Continue*

The development of this piecemeal approach to policymaking with respect to the issue of in-state tuition for undocumented students is likely to continue. Two primary factors contribute to the observation that this piecemeal approach is not likely to change, assuming the federal legislative landscape with respect to this issue remains the same. First, as described above, state legislation on in-state tuition for undocumented students is not easy to challenge in court.<sup>182</sup> Procedural barriers, most notably, the requirement that a litigant have standing,<sup>183</sup> make bringing constitutional and preemption challenges against these state laws extremely difficult. Second, the split in public opinion over the issue of in-state tuition for undocumented students indicates that this piecemeal approach is likely to continue.<sup>184</sup> Studies of public opinion have found that there is a great deal of congruence between changes in policy and changes in public opinion. In other words, public policy often tends to move in the same direction as public opinion. The divisive nature of this particular policy issue in the American public, thus dictates that the piecemeal approach to policymaking within this policy arena is likely to continue.

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180. *See supra* Table 1.

181. *See supra* Table 1.

182. *See discussion supra* at Section IV.

183. *See discussion supra* Section IV.C.

184. *See discussion supra* Section V.

*D. Normative Implications for Congress*

This Article also has important normative implications for Congress. By not acting to revisit or amend IIRIRA or PRWORA, such as through the proposed DREAM Act, Congress has implicitly allowed the piecemeal approach described in this Article to develop over time.<sup>185</sup> Now that the piecemeal approach to policymaking in this particular policy arena has been identified, Congress has the opportunity to either alter its course and give direction and structure to the states as it relates to the development of this policy issue, or it can continue its current course of action and allow states to develop their own policy direction within their jurisdiction. Moreover, given the fact that litigants attempting to challenge state laws in this policy arena have difficulty establishing standing, judicial challenges to these laws are less likely to percolate through the levels of the federal appellate courts. Thus, if this policy direction is to be altered, it will most likely happen as a result of Congressional action as opposed to a successful appellate challenge in federal court. While this Article takes no position as to whether or not Congress should take steps to alter the current development of this policy arena, it is clear that in the absence of Congressional action, the piecemeal approach to this particular policy issue is likely to continue.

## CONCLUSION

Immigration policy has commanded considerable attention in the past decade throughout the United States. The accessibility of higher education for undocumented students is a contentious issue that, in the absence of federal action, has been taken up by the state legislatures. There is a wide spectrum of action on the issue among the states. On one side, Illinois and California have not only granted in-state tuition benefits to undocumented students, but have also taken the proactive step of increasing access to financial aid.<sup>186</sup> On the other hand, South Carolina was the first state to altogether bar undocumented students from enrolling in public colleges.<sup>187</sup>

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185. See discussion *supra* Section II.

186. See *supra* Table 1.

187. See *supra* Table 2.

In-state tuition laws for undocumented students have been challenged in state and federal courts primarily based primarily on the meaning and interpretation of the IIRIA and PRWOA. Though several lawsuits have emerged in different states, *Martinez v. Regents of University of California*, in California, is the most influential to date.<sup>188</sup> Other prospective litigants have found it difficult to challenge these laws for lack of standing.<sup>189</sup> Still other potential litigants have petitioned the Department of Homeland Security directly in order to challenge these state laws.<sup>190</sup>

While the states vary widely on the issue of access to higher education for undocumented students, the federal government continues to debate the possibility of increasing access through the DREAM Act.<sup>191</sup> Despite strong public support in recent years, this legislation has failed to pass.<sup>192</sup> In absence of federal legislation or federal appellate precedent, the availability of in-state tuition for undocumented students continues to be within the purview of the states. In addressing this policy arena, states have passed a number of different types of laws addressing in-state tuition for undocumented students. The evolution of this issue at the state level, thus, is reflective of a piecemeal approach to policymaking, the development of which is difficult to predict and likely to continue.

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188. See discussion *supra* Section IV.E.

189. See discussion *supra* Section IV.C.

190. See discussion *supra* Section IV.D.

191. See discussion *supra* Section II.B.

192. See discussion *supra* Section II.B.