

# Taking Back The Power: Federal vs. State Regulation on Postsecondary Education Benefits for Illegal Immigrants

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## I. INTRODUCTION

Federal law requires that state educators provide free public educational services to children through the twelfth grade, regardless of immigration status.<sup>1</sup> Postsecondary education, however, comes with a higher price tag.<sup>2</sup> To relieve the burden of the rising cost of postsecondary education, state legislatures across the country have implemented laws allowing resident students to pay lower “in-state” tuition rates for attendance at public universities within the state.<sup>3</sup> States initially designed such legislation to provide more opportunities for United States citizens. Several states, however, have re-worked their legislative residency requirements to extend the benefit to non-United States citizens, including immigrants unlawfully living in the United States.<sup>4</sup> Some argue that these laws contradict a 1996 federal law that

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1. See *Plyler v. Doe*, 457 U.S. 202 (1982). A 1996 study estimated that it costs \$5.85 billion per year to provide K-12 public education to illegal immigrant children. FEDERATION FOR AMERICAN IMMIGRATION REFORM, THE ESTIMATED COST OF ILLEGAL IMMIGRATION, at <http://www.fairus.org/ImmigrationIssueCenters/ImmigrationIssueCenters.cfm?ID=2382&c=13> (last modified Feb. 2004) [hereinafter ESTIMATED COST] (citing Donald Huddle, *The Net National Costs of Immigration: Fiscal Effects of Welfare Restorations to Legal Immigrants*, Rice University, 1997). A more recent study, performed in 2003, estimated costs to be \$7.4 billion annually. *Id.*

2. “In the United States, the average tuition with room and board at a four-year public college for in-state residents during the 1978-1979 academic year was \$1,994. By the 1996-1997 school year, the figure had reached \$7,331.” Colleges and Universities, *Tuition*, MICROSOFT ENCYCLOPEDIA (2004), at <http://encarta.msn.com/encnet/refpages/RefArt-Textonly.aspx?refid=761553412&print=50>. Since 1993-94, the average tuition and fees at four-year public colleges and universities has increased approximately 47%. THE CHRISTIAN SCI. MONITOR, COSTS SOAR AT PUBLIC UNIVERSITIES, <http://moneycentral.msn.com/content/ColegeandFamily/P57654.asp> (last visited Apr. 8, 2005).

3. See CAL. EDUC. CODE § 68130.5(a) (West 2003) (exempting illegal immigrants from paying resident tuition but not changing residency requirements to include illegal immigrants); 110 ILL. COMP. STAT. ANN. 305/7e-5 (West Supp. 2004); N.Y. EDUC. LAW § 6206(7)(a) (McKinney Supp. 2005); OKLA. STAT. ANN. tit. 70 § 3242 (West 2004); TEX. EDUC. CODE ANN. § 54.052(j) (Vernon Supp. 2004-05); UTAH CODE ANN. § 53B-8-106 (2004); 2004 Kan. Sess. Laws 172; WASH. REV. CODE ANN. § 28B.15.012 (West Supp. 2005). However, if a resident student from State A wants to attend a public university in State B, he or she must pay higher “out-of-state” tuition rates.

4. See TEX. EDUC. CODE ANN. § 54.052(j) (becoming the first state to enact this type of legislation in 2001); CAL. EDUC. CODE § 68130.5(a); 110 ILL. COMP. STAT. ANN. 305/7e-5; N.Y. EDUC. LAW § 6206(7)(a); OKLA. STAT. ANN. tit. 70 § 3242; UTAH CODE ANN. § 53B-8-106; 2004 Kan. Sess. Laws 172; WASH. REV. CODE ANN. § 28B.15.012 (West Supp. 2005). Immigrants

prohibits states from granting tuition breaks to illegal immigrants when those breaks are not available to all United States citizens.<sup>5</sup>

Proponents of such state legislation argue that it is against public policy to provide illegal immigrants with free public elementary and secondary school education, only to restrict access to postsecondary education.<sup>6</sup> Alternatively, opponents argue that giving incentives to this group of individuals encourages the continued pattern of unlawful behavior.<sup>7</sup> This debate remains heated not only among state legislatures, but also among the general public.<sup>8</sup> It is estimated that 50,000 to 65,000 immigrants unlawfully present in the United States are eligible to receive in-state tuition rates each year.<sup>9</sup> With competition for slots at state colleges and universities at an all-time high, presenting illegal immigrants with tuition breaks further curtails the ability of American students to receive those slots.<sup>10</sup>

This Note will explore the current conflict between federal and state law and will address the federal government's exclusive power to regulate postsecondary education for illegal immigrants. This power prevents states from taking it upon themselves to extend in-state tuition benefits to illegal immigrants. Moreover, this Note will consider

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present in the United States are classified under two different categories—those who are “qualified” and those who are not. 8 U.S.C. § 1641 (2000). A “qualified” immigrant is here with the permission of the federal government. *Id.* Unqualified immigrants are here illegally and are subject to deportation at any time. 8 U.S.C. § 1227 (2000).

5. Lori Montgomery, *Md. Approves Immigrants' Tuition Break; Ehrlich Says He'll Likely Veto Bill to Help Illegal Students*, WASH. POST, Mar. 23, 2003, at C6.

6. *Financial Aid and Scholarships for Undocumented Students*, at <http://www.college-aid.com/otheraid/undocumented.phtml> (last visited Apr. 8, 2005).

7. Peggy Lowe, *Dueling Tuition Bills; House Debates Rates Illegal Immigrants Should Be Charged*, ROCKY MTN. NEWS, Jan. 20, 2004, at 18A. “In Kansas, we encourage you to violate the law. If you actually get a valid visa to study here, we will penalize you by making you pay out-of-state tuition.” Kris W. Kobach, *Immigration Tuition Ignores Law*, KANSAS CITY STAR, June 16, 2004, <http://www.amren.com/news/news04/06/21/immigranttuition.html>.

8. Of 500 registered voters surveyed in Colorado, 57% did not believe that “illegal immigrants should be eligible for in-state tuition rates to attend state colleges and universities if they have lived in Colorado long enough and are academically qualified,” while only 31% were in support. Holly Yettick, *Poll Finds Little Support for Bending Tuition Rules; Only 31% of Coloradans Surveyed Say Illegal Aliens Should Pay In-State Rates*, ROCKY MTN. NEWS, Oct. 16, 2002, at 5A. 12% percent of voters remained neutral. *Id.*

9. Mary Beth Marklein, *Immigrants May Get Tuition Break*, USA TODAY, Aug. 12, 2002, at 6D. This estimate was formulated by the National Immigration Law Center. *Id.* The estimate equals two percent of graduating public high school seniors nationwide. *Id.* In Kansas, the law could affect an estimated 2,000 illegal immigrants. Kobach, *supra* note 7. “[I]f an estimated 2,000 illegal aliens took advantage of this subsidy, it could cost Kansas taxpayers more than \$15 million a year.” *Id.*

10. Phil Kent, *Bad Policy to Consider Breaks in Illegal Immigrants' Tuition*, ATLANTA JOURNAL-CONSTITUTION, May 28, 2003, at 13A.

For every illegal alien admitted into a state university system, another American citizen or legal student will be rejected. It's likely that illegal immigrants seeking in-state tuition at public universities aren't responsible for violating our laws, having been brought into this country illegally by their parents. But it's also true that American citizens and legal residents who'll be rejected when illegal aliens are added to the queue are being punished for the actions of illegal alien parents. To me, this is unconscionable.

Michael Scott, *Letters to the Times; Tuition Change Would Hurt U.S.-Born Students*, L.A. TIMES, May 1, 2003, at California Metro; Part 2, 14.

recent efforts to declare these state laws unconstitutional.<sup>11</sup> In sum, state decisions to grant in-state tuition to illegal immigrants are a clear departure from federal guidelines and objectives regarding the issue. To prevent a flood of further state legislation, the federal government should take a more active and vocal role in discouraging this type of legislative behavior.

## II. BACKGROUND

### A. *A General Survey of Illegal Immigration in the United States*

The number of illegal immigrants presently living in the United States is at an all-time high.<sup>12</sup> In 1996, studies projected that the illegal immigrant population was around five million.<sup>13</sup> However, current estimates reveal that eight to twelve million illegal immigrants presently live in the United States.<sup>14</sup> Although the federal government has enacted legislation declaring unsanctioned entry into the United States unlawful, the legislation has done little to deter those desperate to pursue the opportunities and freedom available in the United States.<sup>15</sup> The single deterrent for unsanctioned entry is the threat of deportation.<sup>16</sup> This threat, however, is minimal because an illegal immigrant may be deported only if and when his illegal status is uncovered.<sup>17</sup> Since illegal immigration enforcement is at a standstill,

11. Complaint for Injunctive and Declarative Relief, *Day v. Sebelius* (D. Kan. filed July 19, 2004) (No. 04-4085) [hereinafter *Day Complaint*]. On July 19, 2004, twenty-four students and parents, who were denied in-state tuition benefits at Kansas' public universities and colleges, filed suit with the United States District Court for the District of Kansas in Topeka, claiming a violation of their constitutional rights. *See id.* The lawsuit alleged that Kansas House Bill 2145, which took effect July 1, 2004, discriminates against non-Kansans by not providing them with the same tuition benefits given to immigrants unlawfully present in the United States who are deemed to be residents of Kansas. *Id.* at 2. More specifically, the lawsuit contained eight claims for relief, including violations of 8 U.S.C. §§ 1621 and 1623; preemption; creation of residence status contrary to federal law; infringement upon exclusive federal powers; violation of the Equal Protection Clause of the Constitution; and a claim for declaratory relief. *Id.* at 9-28.

12. ESTIMATED COST, *supra* note 1. It is estimated that between one and three million illegal immigrants crossed our borders in 2004 alone. Lou Dobbs, *Campaign Cowardice*, *US NEWS & WORLD REP.*, Sept. 27, 2004, at 58.

13. ESTIMATED COST, *supra* note 1.

14. Jerry Seper, *Immigration Plan Envisions 'Incentives' to Illegal Aliens*, *THE WASH. TIMES*, Aug. 10, 2004, <http://washingtontimes.com/national/20040810-123433-8727r.htm>; *see also* FEDERATION FOR AMERICAN IMMIGRATION REFORM, *WHAT'S WRONG WITH ILLEGAL IMMIGRATION?*, at <http://www.fairus.org/ImmigrationIssueCenters/ImmigrationIssueCenters.cfm?ID=1181&c=13> (last modified Mar. 2005) [hereinafter *WHAT'S WRONG*].

15. *See* 8 U.S.C. § 1325 (2000). An illegal immigrant who has lived in the United States for more than 180 days, and who is caught, must return to his home country and wait three years before he can apply for legal visitor or immigrant status. Seper, *supra* note 14. If an illegal immigrant has been in the United States for over one year, and is caught, he must return home and wait ten years before applying for legal visitor or immigrant status. *Id.*

16. *See* 8 U.S.C. § 1227 (2000).

17. Lou Dobbs, *Enforce the Immigration Laws We've Got* (July 16, 2004), at <http://www.cnn.com/2004/US/07/16/broken.borders/index.html>. Since funds for deportation are minimal, many illegal immigrants who are captured and awaiting deportation are released from jail on their own recognizance. *Id.* However, 70% to 90% never actually show up for their court date. *Id.* The Department of Homeland Security, Immigration and Customs Enforcement, estimates that approximately half a million illegal immigrants have been arrested and released and have

millions of illegal immigrants linger in the shadows and remain undiscovered each year.<sup>18</sup>

By some estimates, illegal immigration costs the United States \$45 billion a year.<sup>19</sup> Not only does society bear the financial costs of illegal immigration, but it is also burdened with the loss of jobs and a decrease in the average household income.<sup>20</sup> The labor market is more than willing to hire illegal immigrants under the table to avoid paying American workers a higher wage.<sup>21</sup> Many illegal immigrants, in turn, accept payment below the federal minimum wage.<sup>22</sup> Consequently, American workers are forced out of their jobs and are unable to locate jobs elsewhere because the only jobs they are qualified for are being taken by illegal immigrants.<sup>23</sup>

Americans also feel the financial burden of illegal immigration in other areas, such as social security, criminal justice programs, housing, public education, and health care.<sup>24</sup>

With illegal immigration posing a threat to workers and their families, it is understandable that two-thirds of Americans oppose measures designed to make it easier for illegal immigrants to cross the borders in hopes of securing United States citizenship.<sup>25</sup> In 1986, the federal government, intending to curb illegal immigration, implemented a program which granted amnesty to illegal immigrants already within United States borders and increased measures to block

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failed to show up for their scheduled court date. *Id.* In addition, there are approximately “80,000 criminal illegal aliens in the country, which are people who have committed crimes in the United States and are due for deportation but remain at large.” Lou Dobbs, *No Clear Consensus on Immigration Enforcement Bill* (Dec. 14, 2004), at <http://www.cnn.com/2004/US/12/13/immigration.bill/index.html>.

18. Seper, *supra* note 14.

19. Dobbs, *supra* note 12, at 58 (discussing estimates conducted by the Federation for American Immigration Reform).

20. *Id.* Over the past ten years, illegal immigrants have replaced millions of low-skilled United States workers. *Id.* The average American worker’s income has decreased approximately \$1,700 per year due to illegal immigration. *Id.*

21. *Cf.* ESTIMATED COST, *supra* note 1 (stating that many Americans lose their jobs to illegal immigrants who are willing to accept lower wages).

22. *See id.*

23. *Cf. id.* (stating that Americans are losing their jobs to illegal immigrants); WHAT’S WRONG, *supra* note 14 (estimating that in 1996 “illegal aliens were displacing roughly 730,000 American workers every year, at a cost of \$4.3 billion a year, and the supply of cheap labor they provide depresses the wages and working conditions of the working poor”). “We cannot ignore the obvious, that illegal immigration displaces legal workers and depresses wages, making it difficult for unskilled workers to get jobs and support their families.” *Illegal Aliens in the United States: Hearing on H.R. 59-872 Before the House Subcomm. on Immigration and Claims*, 106th Cong. (1999) (statement of Lamar Smith, Chairman, House Subcomm. on Immigration and Claims), [http://commdocs.house.gov/committees/judiciary/hju59872.000/hju59872\\_0.htm](http://commdocs.house.gov/committees/judiciary/hju59872.000/hju59872_0.htm).

24. *See* ESTIMATED COST, *supra* note 1. In fact, a 1996 study revealed the following costs of illegal immigration per year (in billions): Public Education K-12—\$5.85; Public Higher Education—\$0.71; Housing—\$0.61; Social Security—\$3.61; Medicaid—\$3.12; Medicare A and B—\$0.58; Criminal Justice and Corrections—\$0.76; Local Government—\$5.00; Other Programs—\$9.25. *Id.* Since illegal immigration rates have dramatically increased since 1996, it is safe to assume that these costs have also risen.

25. Dobbs, *supra* note 12, at 58.

further illegal entry.<sup>26</sup> The program sanctioned employers whose hiring of illegal immigrants spread the use of “forgery-proof” residency documents.<sup>27</sup> After 3.1 million illegal immigrants received amnesty, subsequent measures to enforce the program failed.<sup>28</sup> The result did little to curb illegal immigration rates.<sup>29</sup>

In January 2004, President George W. Bush proposed a “guest-worker” program to permit millions of illegal immigrants, already within our borders, to remain in the United States, on the condition that they have jobs and apply for guest worker permits.<sup>30</sup> The program will allow illegal immigrants the opportunity to renew their guest worker status every three years, with no restrictions on the number of times they may renew the status.<sup>31</sup> Critics of the proposal argue that it encourages more illegal immigrants to cross our borders because it eliminates the threat of deportation.<sup>32</sup> In addition, opponents suggest that the “guest-worker” program will allow illegal immigrants to sleep easier, knowing that they are “safe” from being captured and deported.<sup>33</sup> Others argue that the program will not work, since many illegal immigrants have already lived here for decades and have managed to go unnoticed.<sup>34</sup> It is unlikely that they would come out from under the radar and make themselves known, only to face the possible risk of deportation somewhere down the line.<sup>35</sup>

### B. *Impact of Plyler v. Doe*<sup>36</sup> on *Illegal Immigrants’ Rights*

In 1975, the Texas legislature enacted a statute which denied state funding for the education of children who were not “legally admitted” into the United States.<sup>37</sup> In addition, it denied illegal immigrant children the ability to enroll in public schools.<sup>38</sup> Legislators faced an overwhelming increase in the population of illegal immigrants and

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26. *Immigrants Come . . . States Wind up Paying for Illegal Flow*, SAN DIEGO UNION-TRIB., Feb. 4, 2003, at B-8.

27. *Id.* Illegal immigrants often use fraudulent credentials and information to obtain United States driver’s licenses and credit cards. Criminal Justice News, *Criminal Indictments Charge 36 Persons with Trafficking in Fraudulent New Jersey Driver’s Licenses and Identification Documents, Multi-Agency Investigation Targeted “Brokers” & Corrupt DMV Employees* (June 24, 2002), at <http://www.state.nj.us/lps/dcj/releases/2002/dmv0624.htm>. These fraudulent documents are used to obtain employment and purchase goods and services. *Id.*

28. *Immigrants Come . . . States Wind up Paying for Illegal Flow*, *supra* note 26. The government was unable to block further illegal entry into the United States. *Id.*

29. *Id.*

30. Seper, *supra* note 14.

31. *Id.*

32. *Id.* The program is designed to encourage the illegal immigrants to come forward. However, opponents argue that the program could turn into “a scheme to identify illegal aliens and deport them.” *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. 457 U.S. 202 (1982).

37. *Id.* at 205 (citing TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981)).

38. *Id.*

worked to prevent a drain on the state's limited educational resources.<sup>39</sup> In a class action suit filed on behalf of undocumented immigrant children, the petitioners alleged that these children were unfairly excluded from the public schools.<sup>40</sup> The United States Supreme Court, in a 5-4 decision, held that undocumented children were "persons" under the Equal Protection Clause of the Fourteenth Amendment and thus were entitled to the same educational benefits as all American children.<sup>41</sup>

The Court noted that illegal immigrants should not be treated as a suspect class, subject to strict judicial scrutiny, simply because of their unlawful presence in this country.<sup>42</sup> Instead, the Court applied an intermediate standard of review to examine whether the state's discrimination in denying education to illegal immigrant children was substantially related to an important government interest.<sup>43</sup> The Court found that the Texas statute imposed a lifelong hardship on this group of children despite the fact that they were not responsible for their illegal status.<sup>44</sup> The State failed to persuade the Court that denying free public education to this group of students furthered a substantial state interest.<sup>45</sup>

While the Court noted that education is perhaps one of the most important functions of our society, it clearly stated that the right to an education is not fundamental.<sup>46</sup> In addition, although the Court found that illegal immigrant children were entitled to a free public K-12 education, it also stated that "like all persons who have entered the United States unlawfully, these children are subject to deportation."<sup>47</sup>

Chief Justice Warren Burger, writing for the dissent in *Plyler*, agreed with the majority's ultimate conclusion that illegal immigrants are physically within the jurisdiction of a state for purposes of Fourteenth Amendment protection.<sup>48</sup> Nevertheless, Chief Justice Burger did not feel that the Equal Protection Clause automatically required "identical treatment of different categories of persons."<sup>49</sup> The dissent

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39. *Id.* at 207.

40. *Id.* at 206.

41. *Id.* at 210. "Aliens, 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." *Id.* (citing *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); and *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

42. *Id.* at 223. "Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action." *Id.* at 220 n.19.

43. *Id.* at 228-30.

44. *Id.* at 223.

45. *Id.* at 230.

46. *Id.* at 221-23.

47. *Id.* at 226, 230 (citing 8 U.S.C. §§ 1251, 1252 (1976 & Supp. IV)).

48. *Id.* at 243 (Burger, C.J., dissenting).

49. *Id.* (Burger, C.J., dissenting) (citing *Jefferson v. Hackey*, 406 U.S. 535, 549 (1972); *Reed v. Reed*, 404 U.S. 71, 75 (1971); and *Tigner v. Texas*, 310 U.S. 141, 147-48 (1940)).

rebutted the argument that illegal immigrant children are entitled to special protection under the intermediate standard of review simply because they have no control over their status.<sup>50</sup> The Chief Justice indicated that state legislatures may use an individual's lack of control as a factor in creating different classifications of persons under the Equal Protection Clause.<sup>51</sup> According to Chief Justice Burger, although the Drafters designed the Equal Protection Clause to preclude unreasonable classifications and discrimination arising from prejudice and opposition, "it is not an all-encompassing 'equalizer' designed to eradicate every distinction for which persons are not 'responsible.'" <sup>52</sup> The dissent believed that since illegal immigrants "are not a suspect class," and since "education is not a fundamental right," the majority should have applied a rational basis test instead of an intermediate standard of review.<sup>53</sup> The dissent noted that application of a rational basis test would more appropriately shift the focus to whether the Texas legislation requiring illegal immigrants to pay tuition for a K-12 public education is rationally related to the State's economic goals.<sup>54</sup> The dissent argued that if a rational basis test were applied, it would not be "irrational" for a state to deny benefits to persons unlawfully present in the country, while granting benefits to those lawfully present.<sup>55</sup>

Relying on a previous United States Supreme Court case, the dissent argued that since illegal immigrants are here unlawfully, a state may choose to deny them benefits, including the right to a free public school education.<sup>56</sup> There is no precedent requiring a state to provide any governmental services to illegal immigrants.<sup>57</sup> The dissent made a critical point, stating that the federal government has the ultimate power to regulate and enforce immigration laws.<sup>58</sup> Additionally, the dissent noted that the federal government failed to properly take an active leadership role in the wake of the country's increasing illegal immigration problem.<sup>59</sup> Thus, many assumed that the states had the

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50. *Id.* at 244 (Burger, C.J., dissenting).

51. *Id.* at 245 (Burger, C.J., dissenting).

52. *Id.* (Burger, C.J., dissenting).

53. *Id.* at 248 (Burger, C.J., dissenting).

54. *Id.* at 248-49 (Burger, C.J., dissenting). "While regulation of immigration is an exclusively federal function, a state may take steps, consistent with federal immigration policy, to protect its economy and ability to provide governmental services from the 'deleterious effects' of a massive influx of illegal immigrants." *Id.* at 249 n.10 (Burger, C.J., dissenting) (citing *De Canas v. Bica*, 424 U.S. 351 (1976)).

55. *Id.* at 250 (Burger, C.J., dissenting).

56. *Id.* (Burger, C.J., dissenting). "[A] State may protect its 'fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens.'" *Id.* (citing *De Canas*, 424 U.S. at 357).

57. *Id.* (Burger, C.J., dissenting).

58. *See id.* at 243 n.1 (Burger, C.J., dissenting).

59. *See id.* at 242-43, 243 n.1 (Burger, C.J., dissenting).

implicit power to regulate illegal immigration within their own jurisdictions.<sup>60</sup>

In his dissent, Chief Justice Burger boldly stated that

[a] state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive. If the Federal Government, properly chargeable with deporting illegal aliens, fails to do so, it should bear the burdens of their presence here. Surely if illegal alien children can be identified for purposes of this litigation, their parents can be identified for purposes of prompt deportation.<sup>61</sup>

In other words, the Federal Government is responsible for illegal immigration issues and the effects it imposes on our society. It is the Federal Government's job to capture and deport those who cross our borders illegally. It appears the dissent is arguing that if we are able to identify all those children in our public schools who are illegal immigrants, why are further efforts to locate and deport their parents—the true lawbreakers—not being made? By handing out a free public K-12 education to illegal alien children, are we conveying the notion that it is acceptable for all illegal immigrants to be secure in their status, even though they are living in violation of U.S. laws?

The outcome of *Plyler* does not extend the right to a free public education beyond K-12 students.<sup>62</sup> Although *Plyler* has served as the forerunning case with respect to illegal immigrants' rights over the past twenty years, "[s]ome commentators speculate that the [*Plyler*] decision is a 'fragile precedent' and it is unclear how the issue would be decided under the current Court."<sup>63</sup>

C. *The Personal Responsibility and Work Opportunity  
Reconciliation Act of 1996*<sup>64</sup> and the *Illegal Immigration Reform  
and Immigration Responsibility Act of 1996*<sup>65</sup>

*Plyler* is viewed as the cornerstone decision for illegal immigrants' rights in the United States.<sup>66</sup> Notwithstanding the decision in *Plyler*, Congress has attempted to limit illegal immigrants' access to

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60. *Id.* "It does not follow, however, that a state should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the Federal Government." *Id.* at 243 n.1 (Burger, C.J., dissenting).

61. *Id.* at 242 n.1 (Burger, C.J., dissenting).

62. *See Plyler*, 457 U.S. 202.

63. Andrea Kate Neumann, Note, *Education Under California's Proposition 187: Plyler v. Doe Revisited*, 3 SW. J. L. & TRADE AM. 223, 236 (1996) (citing Ronald J. Ostrow, *U.S. Justice Department Memo Assails Prop. 187; Election: Administration's Latest Broadside Compares the Measure to a Texas Law Declared Unconstitutional*, L.A. TIMES, Oct. 28, 1994, at A1.)

64. Pub. L. No. 104-193, 110 Stat. 2268 (1996) (codified as amended in various sections of 8 U.S.C.).

65. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in various sections of 8 U.S.C.).

66. *See* Robert S. Ryan, *Proposition 187: California's Stance Against Illegal Immigration*, 25 CAP. U. L. REV. 613, 629 (1996) ("*Plyler v. Doe*, probably represents the most expansive protection afforded to aliens.").

benefits through various pieces of legislation.<sup>67</sup> The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) and the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) imposed a number of restrictions on illegal immigrants' rights in the United States.<sup>68</sup> Specifically, Congress created this legislation to reduce the increasing availability of public benefits to illegal immigrants, which serve as incentives for keeping their illegal status.<sup>69</sup> Not only did the PRWORA and the IIRIRA restrict illegal immigrants' access to federal public benefits, such as social security and health care, but they also restricted access to state and local benefits, including the limitation on eligibility for preferential treatment for higher education purposes.<sup>70</sup> Title 8 of the United States Code, section 1623, provides that

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 resident.<sup>71</sup>

Although this legislation is still in effect today, there are measures pending before both the United States House of Representatives and the United States Senate that would result in dramatic changes to the IIRIRA.<sup>72</sup>

In the United States House of Representatives, legislators proposed the Student Adjustment Act of 2003 as an amendment to the IIRIRA, to allow states the ability to determine residency requirements for higher education purposes.<sup>73</sup> The Student Adjustment Act recommends that the IIRIRA adopt a more uniform approach to considering whether an illegal immigrant child may qualify for in-state

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67. 8 U.S.C. §§ 1601-1646 (2000 & Supps. I, II, 2001, 2002).

68. 8 U.S.C. §§ 1601-1646.

69. Pub. L. No. 104-193, 110 Stat. 2268 (1996) (codified as amended in various sections of 8 U.S.C.); 1611 Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in various sections of 8 U.S.C.).

70. 8 U.S.C §§ 1611, 1621 (2000). Aliens who are not "qualified" aliens are ineligible for federal public benefits. 8 U.S.C. § 1611. Aliens who are not "qualified" aliens are ineligible for state and local public benefits. 8 U.S.C. § 1621(a). A "qualified" alien is one who is lawfully admitted for permanent residence in the United States or meets one of the other conditions for legal entry. 8 U.S.C. § 1641(b) (2000). "Qualified" alien does not include illegal alien. *See* 8 U.S.C. § 1641. An alien who is not "qualified" may not receive federal or state and local benefits such as "retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family . . ." 8 U.S.C. §§ 1611(c)(1)(B), 1621(c)(1)(b) (2000). Aliens are prohibited from receiving postsecondary in-state tuition benefits pursuant to 8 U.S.C. § 1623.

71. 8 U.S.C. § 1623.

72. Student Adjustment Act of 2003, H.R. 1684, 108th Cong. (2003) (pending in House); Development, Relief, & Education for Alien Minors (DREAM) Act of 2003, S. 1545, 108th Cong. (2003) (pending in Senate).

73. H.R. 1684, 108th Cong. (2003).

tuition benefits.<sup>74</sup> Specifically, the bill suggests that the Secretary of Homeland Security remove the illegal immigrant status if the immigrant demonstrates the following: (1) the immigrant has not reached 21 years of age at the time of application; (2) the immigrant was physically present in the United States upon the enactment of the Student Adjustment Act of 2003, and has been continuously physically present in the United States for at least five years immediately preceding the date of application; (3) the immigrant is of good moral character; and (4) the immigrant, at the time of application, is enrolled in school at the seventh grade level or above or is enrolled in or is actively pursuing admission to an institution of higher education in the United States.<sup>75</sup> The Senate's counterpart to the Student Adjustment Act is the Development, Relief, and Education for Alien Minors (DREAM) Act.<sup>76</sup> The DREAM Act's ultimate goal is to give states the option of determining residency status for the purpose of higher education benefits.<sup>77</sup>

D. *Current Stance on Providing In-State Tuition Benefits to Illegal Immigrants—Conflict Between Federal and State Laws*

After the IIRIRA went into effect in 1996, it appeared to give the federal government complete control over whether illegal immigrants could qualify for postsecondary in-state tuition benefits.<sup>78</sup> However, the IIRIRA arguably left a loophole that permitted states to work around the federal government's affirmative position of denying state and local public benefits to illegal immigrants. Title 8 of the United States Code, section 1621(d), provides that a state may allow an illegal immigrant to qualify for a state or local public benefit through the enactment of a state law.<sup>79</sup> Through this loophole, several states created an express provision declaring that illegal immigrants may be treated as an in-state "resident" in order to qualify for postsecondary in-state tuition benefits or that an illegal immigrant may be exempt from paying nonresident/out-of-state tuition.<sup>80</sup>

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74. *See id.*

75. *Id.*

76. S. 1545, 108th Cong. (2003).

77. *Id.*

78. 8 U.S.C. § 1623 (2000).

79. 8 U.S.C. § 1621(d) (2000).

Only 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. The phrase 'affirmatively provides for such eligibility' means that the State law enacted must specify that illegal aliens are eligible for State or local benefits.

H.R. CONF. REP. NO. 104-725 (1996).

80. *See* CAL. EDUC. CODE § 68130.5(a) (West 2003); 110 ILL. COMP. STAT. ANN. 305/7e-5 (West Supp. 2004); N.Y. EDUC. LAW § 6206 (McKinney Supp. 2005); OKLA. STAT. ANN. tit. 70, § 3242 (West 2004); TEX. EDUC. CODE ANN. § 54.052(j) (Vernon Supp. 2004-05); UTAH CODE

Texas was the first state to re-work its residency requirements to allow illegal immigrants in-state tuition benefits.<sup>81</sup> The Texas statute, enacted in 2001, requires the following: (1) graduation from a Texas high school; (2) residence in the state for at least three years prior to high school graduation; and (3) an affidavit, signed by the student, stating the intent to file an application to become a permanent resident as soon as he or she is eligible to do so.<sup>82</sup> Shortly after the controversial Texas law went into effect, California adopted a similar law.<sup>83</sup> The California legislation sets forth the following requirements: (1) attendance at a high school in California for three or more years; (2) a California high school degree or general equivalency diploma; and (3) an affidavit to the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.<sup>84</sup> The California law does not, however, re-work its residency requirements to include illegal immigrants; instead, it simply exempts them from paying nonresident tuition.<sup>85</sup>

Currently, there are a total of eight states that have taken advantage of the loophole and enacted laws permitting illegal immigrants to qualify for in-state tuition benefits.<sup>86</sup> Following in the footsteps of Texas and California are New York, Utah, Illinois, Washington, Oklahoma, and most recently, Kansas.<sup>87</sup> There are, however, numer-

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ANN. § 53B-8-106 (Supp. 2004); 2004 Kan. Sess. Laws 172, WASH. REV. CODE ANN. § 28B.15.012 (West Supp. 2005).

81. TEX. EDUC. CODE ANN. § 54.052(j). However, several state universities in Texas, California, and New York had quietly been providing in-state tuition breaks to illegal immigrants during the 1990s. Phyllis Schlafly, *In-State College Tuition for Illegal Aliens?* (Mar. 19, 2003), at <http://www.eagleforum.org/column/2003/mar03/03-03-19.shtml>.

82. TEX. EDUC. CODE ANN. § 54.052(j). A person may also receive the equivalent to a high school diploma, such as a general equivalency diploma, in order to qualify under (1) above. *Id.*

83. CAL. EDUC. CODE § 68130.5(a). The original bill was vetoed by California Governor Gray Davis in 2000. See Schlafly, *supra* note 81. However, in 2001, section 68130.5 of the California Education Code was signed into law. CAL. EDUC. CODE § 68130.5(a).

84. CAL. EDUC. CODE § 68130.5(a).

85. *Id.* The California legislature decided to not grant illegal immigrants “residency” status for purposes of in-state tuition. See generally *id.* Instead, the California legislature simply created an exemption for them so that they may qualify for in-state tuition rates, without having to actually be a California resident. *Id.* Although the California legislature failed to include the word “residence,” many argue that the statute is nonetheless centered around residency. Jessica Salsbury, Comment, *Evading “Residence”: Undocumented Students, Higher Education, and the States*, 53 AM. U. L. REV. 459, 478-79 (2003).

86. CAL. EDUC. CODE § 68130.5(a); N.Y. EDUC. LAW § 6206(7)(a) (McKinney Supp. 2005); 110 ILL. COMP. STAT. ANN. 305/7e-5 (West Supp. 2004); OKLA. STAT. ANN. tit. 70, § 3242 (West 2004); TEX. EDUC. CODE ANN. § 54.052(j); UTAH CODE ANN. § 53B-8-106 (Supp. 2004); WASH. REV. CODE ANN. § 28B.15.012 (West Supp. 2005); 2004 Kan. Sess. Laws 172.

87. See N.Y. EDUC. LAW § 6206(7)(a). An illegal immigrant in the State of New York may qualify for in-state tuition benefits provided the student: (1) “attended an approved New York high school for two or more years, graduated from an approved New York high school and applied for attendance at an institution or educational unit of the city university within five years of receiving a high school diploma”; or (2) received a general equivalency diploma issued with the State of New York and applied to an institution or education unit of the city university within five years of receiving the general equivalency diploma; and (3) filed an affidavit with such an institution or education unit stating that the student has filed, or intends to file, an application to

ous states in opposition that have considered legislation that would prohibit extending their residency requirements to include illegal immigrants.<sup>88</sup> Although over half of the states have dealt with this issue, less than one-third have successfully implemented laws awarding post-secondary in-state tuition benefits to illegal immigrants.<sup>89</sup> There is growing concern over problems with illegal immigration, not only in border states, but across the country as well.<sup>90</sup> As a result, these laws

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legalize his or her immigration status. *Id.* In Utah, the legislature waived nonresident tuition rates for those students entering a Utah institution of higher education not earlier than the fall of 2002 who (1) attend a Utah high school for three or more years; (2) graduate from a Utah high school or receive a general equivalency diploma in Utah; and (3) file an affidavit stating that a student without lawful immigration status has filed, or intends to file, an application to legalize his or her immigration status. UTAH CODE ANN. § 53B-8-106. In 2003, Illinois changed its residency requirements to include illegal immigrants, provided the following conditions are met: (1) the individual resided with his or her parent while attending a Illinois high school; (2) the individual graduated from an Illinois high school or received a general equivalency diploma in the state; (3) the individual attended high school within the state for at least three years prior to graduation or received the general equivalency diploma; and (4) the individual filed an affidavit with the state university or college that he or she has, or intends to, file an application for permanent residence in the United States. 110 ILL. COMP. STAT. ANN. 305/7e-5. Washington reworked its residency requirements in 2003 to include illegal immigrants, if the following criteria are met: (1) the individual must have completed the full senior year of high school at a state school and obtained a high school diploma from that school or received the equivalent of a diploma; (2) the individual must have lived in the state for at least three years immediately preceding the receipt of the high school diploma or equivalent; (3) the individual must have continuously lived in the state after receiving the diploma or equivalent up until the time he or she is accepted at a university or college; and (4) the individual must submit an affidavit to the university or college which indicates that he or she will file an application to secure United States citizenship. WASH. REV. CODE ANN. § 28B.15.012. In 2003, Oklahoma enacted a law that allows an illegal immigrant to be eligible for in-state tuition if that person: (1) graduated from a state high school or received a general equivalency diploma in the state; (2) resided in the state with a parent or guardian for at least two years prior to receiving the high school diploma or equivalent; and (3) submitted an affidavit with the institution of higher education stating that the student has filed, or intends to file, an application to legalize the student's immigration status. OKLA. STAT. ANN. tit. 70, § 3242. In 2004, Kansas enacted a law which grants residency status for purposes of tuition and fees to a postsecondary institution to a person with illegal immigration status who has: (1) attended a Kansas high school for three or more years; (2) graduated from such high school or earned a general educational development (GED) certificate issued within Kansas; and (3) filed an affidavit with the postsecondary institution stating that the person has filed an application to legalize his or her immigration status, or the person will file such an application as soon as he or she is eligible to do so. 2004 Kan. Sess. Laws 172.

88. See Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 456 (2004); Andrew Stevenson, Note, *Dreaming of an Equal Future for Immigrant Children: Federal and State Initiatives to Improve Undocumented Students' Access to Postsecondary Education*, 46 ARIZ. L. REV. 551, 553-54 n.15 (2004). Mississippi is just one state that has denied in-state tuition benefits to illegal immigrant students. See S. 2678, 2003 Reg. Sess. (Miss. 2003) ("It is the intention of the Legislature that none of the funds provided herein to the Board of Trustees of State Institutions of Higher Learning shall be spent to defray tuition cost or subsidize in any way the direct cost of education, ordinarily paid by the student, of any nonresident alien enrolled in any state-supported institution of higher learning in the State of Mississippi.").

89. Only Texas, California, New York, Utah, Illinois, Washington, Oklahoma, and Kansas have implemented such laws. See CAL. EDUC. CODE § 68130.5(a); 110 ILL. COMP. STAT. ANN. 305/7e-5; N.Y. EDUC. LAW § 6206; OKLA. STAT. ANN. tit. 70, § 3242; TEX. EDUC. CODE ANN. § 54.052(j); UTAH CODE ANN. § 53B-8-106; WASH. REV. CODE ANN. § 28B.15.012; 2004 Kan. Sess. Laws 172.

90. See FAIR *Congratulates Arizonans for Decisive Victory for Immigration Enforcement: Arizona Vote Sends a Message to Washington and Is a Model for the Rest of the Country*, Nov. 4, 2004, at <http://www.fairus.org/Media/Media.cfm?ID=2558&c=34> (stating that citizens "all across the United States . . . are deeply concerned about the costs and security risks associated with a failed immigration policy").

are facing harsh criticism and are causing heated debates among the citizens of each state.<sup>91</sup>

In fact, shortly after Kansas Governor Kathleen Sebelius signed a bill into law authorizing Kansas public universities to provide in-state tuition rates to illegal immigrants, a group of twenty-four students and parents filed suit with the United States District Court for the District of Kansas in Topeka, Kansas.<sup>92</sup> This group, the members of which were denied in-state tuition benefits, claimed the law violated their constitutional rights.<sup>93</sup> They complained that the new law discriminates against non-Kansans by not providing them with the same tuition benefits given to illegal immigrants (under current law, out-of-state United States citizens are required to pay full out-of-state tuition, while in-state, non-United States citizens are granted in-state tuition rates).<sup>94</sup> The new Kansas law grants in-state tuition breaks to children who have entered the country illegally.<sup>95</sup>

To qualify for the in-state tuition break, an illegal immigrant must attend Kansas schools for at least three years, graduate from a Kansas high school, and provide a signed affidavit swearing that he or she is pursuing United States citizenship.<sup>96</sup> The lawsuit claimed that the State of Kansas exercised powers specifically reserved for Congress.<sup>97</sup> In addition, the plaintiffs argued that the Kansas law fails to properly work its way through the loophole of the IIRIRA because it does not specifically provide that “illegal aliens” are eligible for the in-state tuition benefits.<sup>98</sup> Commentators point out that the Kansas lawsuit is the

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91. See Montgomery, *supra* note 5.

92. See Day Complaint, *supra* note 11.

93. See *id.* On May 20, 2004, the Kansas governor signed Kansas H.B. 2145 into law. *Id.* at 7. This law took effect on July 1, 2004. 2004 Kan. Sess. Laws 172. The lawsuit was filed on July 19, 2004. See Day Complaint, *supra* note 11.

94. *Id.* at 2. “[I]f an estimated 2,000 illegal aliens took advantage of this subsidy, it could cost Kansas taxpayers more than \$15 million a year.” Kobach, *supra* note 7.

95. 2004 Kan. Sess. Laws 172.

96. *Id.*

97. Day Complaint, *supra* note 11, at 17-24.

98. *Id.* at 11. The lawsuit claims that Kansas HB 2145 fails to reference the provisions of 8 U.S.C. § 1621(d) even though Congress made clear that § 1621 must be referenced in order to be valid. *Id.*

No current State law, State constitutional provision, State executive order or decision of any State or Federal court shall provide a sufficient basis for a State to be relieved of the requirement to deny benefits to illegal aliens. Laws, ordinances, or executive orders passed by county, city or other local officials will not allow those entities to provide benefits to illegal aliens. Only 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. The phrase “affirmatively provides for such eligibility” means that the State law enacted must specify that illegal aliens are eligible for State or local benefits. Persons residing under color of law shall be considered to be aliens unlawfully present in the United States and are prohibited from receiving State or local benefits, as defined, regardless of the enactment of any State law.

*Id.* (citing H.R. CONF. REP. NO. 104-725, at 383 (1996)).

first of its kind across the nation.<sup>99</sup> It is expected to set a precedent that could potentially lead other concerned citizens and legal immigrants to challenge similar laws in other states.<sup>100</sup>

Although several states have taken it upon themselves to enact specific legislation with respect to postsecondary in-state tuition breaks for illegal immigrants, federal law provides that “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 resident.”<sup>101</sup> The federal government unmistakably contemplated whether it would be a good idea to provide such benefits to persons who are in the country illegally.<sup>102</sup> The federal government decided that illegal immigrants should not have this right.<sup>103</sup>

The United States Constitution, Article VI, Clause 2, provides that the laws imposed by the federal government are the supreme laws of the land.<sup>104</sup> It follows that a state should regulate only those areas of law that the federal government did not intend to occupy. There is no dispute that the federal government did intend to occupy and administer illegal immigration policies and laws within the United States.<sup>105</sup> Since Congress indicated that there is a significant public interest in enforcing illegal immigration laws, states should be preempted from legislating in this area.<sup>106</sup> On one hand, the federal government is trying to convey that illegal immigration will not be tolerated because it is illegal.<sup>107</sup> On the other, states are providing benefits, such as in-state tuition breaks, to those who are living in violation of federal law. Clearly, there is a direct conflict, and as such, federal law should trump state law.

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99. *Kansas Attorney General Agrees with FAIR on Tuition Benefits for Illegal Aliens*, July 22, 2004, at <http://www.fairus.org/Media/Media.cfm?ID=2472&c=34>.

100. *Id.*

101. 8 U.S.C. § 1623(a) (2000) (emphasis added).

102. *See id.*

103. *See id.*

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

105. *See De Canas v. Bica*, 424 U.S. 351, 354-55 (1976) (holding that the power to regulate immigration is exclusively federal).

106. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

107. 8 U.S.C. § 1601 (2000).

### III. ANALYSIS

#### A. *Federal Law Preempts States' Attempts to Enact Legislation Granting Postsecondary In-State Tuition to Illegal Immigrants*

It is unfortunate that the United States is playing a flip-flopping game with its stance on illegal immigration. The federal government enacted legislation “to remove the incentive for illegal immigration provided by the availability of public benefits.”<sup>108</sup> In addition, it declared that anyone who comes into the country illegally is subject to deportation.<sup>109</sup> With all of the federal laws in effect, one might think that illegal immigration is under control. However, it is not. Thousands of illegal immigrants flock to this country every year in hopes of obtaining a better paying job and a better way of life. Although the federal government is trying to discourage this problem by creating legislation restricting illegal immigrants’ access to public benefits, the federal government is not doing enough to enforce its own laws. Furthermore, to make matters worse, state governments are proposing legislation to increase illegal immigrants’ rights to access certain public benefits.

While states may have the power to control certain areas of law, the Supremacy Clause prohibits them from regulating any area in which Congress has explicit authority.<sup>110</sup> In order to maintain a balance between federal and state government, the Framers of the Constitution mandated that federal law be supreme over state law.<sup>111</sup> Typically, states may not regulate areas subject to federal regulation if a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>112</sup> The United States Supreme Court has noted three situations in which federal law preempts state law.<sup>113</sup> Most notably, preemption exists where Congress makes an express statement that federal law preempts state law.<sup>114</sup> However, if an express statement is lacking, there are two alternative bases for determining whether federal law preempts state law.<sup>115</sup> First, state law is preempted when Congress clearly intends to occupy a certain area of law.<sup>116</sup> Second, even if Congress has not oc-

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108. 8 U.S.C. § 1601(6).

109. 8 U.S.C. § 1227 (2000).

110. *See* U.S. CONST. art. VI, cl. 2.

111. *Id.*

112. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

113. *See* *California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989). Courts may also consider an additional three-pronged test to determine whether preemption exists by looking at: (1) the pervasiveness of the federal regulatory scheme; (2) the federal occupation of the field as necessitated by the need for national uniformity; and (3) the danger of conflict between state and federal laws. *Pennsylvania v. Nelson*, 350 U.S. 497, 502-05 (1956).

114. *ARC America Corp.*, 490 U.S. at 100.

115. *Id.*

116. *Id.*

cupied the field, federal law preempts state law to the extent that state law conflicts with federal law.<sup>117</sup> Although the federal government wavers with respect to the actual enforcement of illegal immigration laws, Congress covered all of its bases by articulating its desire and intent to regulate and control the area of immigration law.<sup>118</sup>

Congress identified the federal government's role in the regulation of immigration through a set of uniform national immigration laws.<sup>119</sup> In fact, the federal government's stance on immigration is expressly demonstrated in its statement of national policy:<sup>120</sup>

It continues to be the immigration policy of the United States that . . . aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and . . . the availability of public benefits not constitute an incentive for immigration to the United States.<sup>121</sup>

Through this language, Congress made its intent clear by specifying that the availability of public resources must be limited in order to remove the incentive for illegal immigration.

Furthermore, the federal government illustrated its intent to occupy this field by authorizing numerous laws that restrict illegal immigrants' rights, especially in the areas of federal, state, and local public benefits.<sup>122</sup> Specifically, Congress declared that illegal immigrants are not entitled the following state or local benefits: retirement benefits, welfare benefits, health benefits, disability benefits, public or assisted housing benefits, food assistance benefits, unemployment benefits, and postsecondary education benefits.<sup>123</sup> As such, states are preempted from enacting any legislation dealing with the regulation of illegal immigration.<sup>124</sup> More specifically, states are preempted from

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117. *Id.* at 100-01. A state law conflicts with federal law "when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (citations omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

118. 8 U.S.C. §§ 1601, 1611, 1621, 1623 (2000).

119. 8 U.S.C. § 1101-1777 (2000 & Supps. I, II, 2001, 2002). Congress has not only set forth limitations for providing public benefits, but it also sets the standards for the deportation and punishment of illegal immigrants. 8 U.S.C. §§ 1227, 1253, 1325 (2000).

120. 8 U.S.C. § 1601.

121. 8 U.S.C. § 1601(2)(A)-(B).

122. 8 U.S.C. §§ 1601, 1611, 1621, 1623. If an immigrant is classified as a "qualified alien," he or she may be eligible for some federal, state, or local public benefits. 8 U.S.C. §§ 1601, 1611, 1621. A "qualified alien" does not include an alien who is unlawfully present in the United States. *See* 8 U.S.C. § 1641 (2000). However, "a State that chooses to follow the federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with the national immigration policy." 8 U.S.C. § 1601(7).

123. 8 U.S.C. § 1621.

124. *See* U.S. CONST., art. VI, cl. 2; *De Canas v. Bica*, 424 U.S. 351, 354-55 (1976) ("[The] power to regulate immigration is unquestionably exclusively a federal power."). Although the federal government has exclusive control over this area of law, this authority does not automatically preempt every state law dealing with immigration. *Id.* Admittedly, the United States Su-

determining whether illegal immigrants may qualify for postsecondary in-state tuition breaks.

Federal law contains unambiguous language prohibiting illegal immigrants from qualifying for any postsecondary in-state tuition breaks.<sup>125</sup> Title 8 of the United States Code, section 1621(c)(1)(B), states that an illegal immigrant may not qualify for state or local benefits including “any . . . postsecondary education . . . or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.”<sup>126</sup> Title 8 of the United States Code, section 1623(a), further provides that “[n]otwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit . . . .”<sup>127</sup> Congress unmistakably attempted to restrict illegal immigrants’ access to postsecondary education benefits.

Nevertheless, Title 8 of the United States Code, section 1621(d), created a loophole through which states were given the authority to provide illegal immigrants the opportunity to receive state or local benefits.<sup>128</sup> This legislation went into effect on August 22, 1996, and allowed a state to

provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible . . . only through the enactment of a State law after the date of the enactment of this Act which affirmatively provides for such eligibility.<sup>129</sup>

On September 30, 1996, shortly following the enactment of Title 8 of the United States Code, section 1621, Congress created § 1623, which went into effect on July 1, 1998.<sup>130</sup> This statute specifically states that “notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit

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preme Court has upheld certain state discriminatory treatment of immigrants lawfully present within the United States. *Id.* (citing *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 415-22 (1948), and *Graham v. Richardson*, 403 U.S. 365, 372-73 (1971)). However, the Court has not extended this premise to state laws dealing with the regulation of illegal immigration. States only have authority to implement legislation with respect to illegal immigrants “where such action mirrors federal objectives and furthers a legitimate state goal.” *Plyler v. Doe*, 457 U.S. 202, 225 (1982).

125. *See* 8 U.S.C. §§ 1621(c)(1)(B), 1623(a).

126. 8 U.S.C. § 1621(c)(1)(B).

127. 8 U.S.C. § 1623(a).

128. 8 U.S.C. § 1621(d).

129. *Id.*

130. 8 U.S.C. § 1623.

...”<sup>131</sup> Upon enactment of this piece of legislation, Congress intentionally withdrew the authority it formerly bestowed upon the states in § 1621(d).<sup>132</sup> When two statutes are *in pari materia*<sup>133</sup> they should “be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.”<sup>134</sup> Accordingly, the specific language set forth in § 1623(a), which went into effect subsequent to § 1621(d), clarifies Congress’ objective, which is to prohibit states from awarding illegal immigrants in-state tuition breaks. The plain language of § 1623(a), when examined in conjunction with § 1621(d), illustrates Congress’ intent to close the loophole provided in § 1621(d). Congress further conveyed its explicit intent to remove the loophole and deny in-state tuition benefits to illegal immigrants when it declared, “This section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education.”<sup>135</sup> As a result, states are no longer eligible to rely on this loophole for purposes of enacting their own state-specific laws granting illegal immigrants postsecondary in-state tuition benefits.

Although inappropriate, states have relied on the loophole to implement and enforce in-state tuition laws for illegal immigrants. However, this is not the only way that states rationalize their decision to implement such legislation. In fact, states argue that their power to regulate education and residency requirements extends to areas of immigration.<sup>136</sup> This argument notwithstanding, state expansion into the area of immigration law interferes with the federal government’s distinct role over illegal immigration. Specifically, state laws that provide in-state tuition to illegal immigrants based on specific criteria hinder the federal government’s ability to regulate immigration functions. On one hand, the federal government represents that the national policy is to eliminate and reduce illegal immigration rates. On the other, states are telling illegal immigrants that they too can receive in-state tuition breaks so that they can be more beneficial in today’s society. It is not practical to encourage illegal immigrants to come forward for in-state tuition benefits at the state level, while the federal government is attempting to reduce illegal immigration.<sup>137</sup> Because the fed-

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131. 8 U.S.C. § 1623(a).

132. Compare 8 U.S.C § 1621(d) with § 1623(a).

133. *In pari materia* is defined as: “[o]n the same subject” or “relating to the same matter.” BLACK’S LAW DICTIONARY 794 (7th ed. 1999).

134. *Id.*

135. H.R. REP. NO. 104-828 (1996), at <http://usinfo.org/law/majorlaws/frillimm.html>.

136. Salsbury, *supra* note 85, at 485 (citing H. Research Org., Bill Analysis, H.B. 1403, 77th Leg., Reg. Sess., at 4 (Tex. 2001)).

137. *Id.*; see, e.g., Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). In *Plyler*, the majority granted free public K-12 education to illegal immigrant children because they were children and had no control over their illegal status. *Plyler v. Doe*, 457 U.S. 202, 223 (1982). That is not necessarily the case as to illegal immigrants who now want to attend college—they are not small children anymore.

eral government is the key player with respect to immigration law, it is impossible for postsecondary educational institutions to “define, determine, and adjudicate the application of immigration classifications and procedures that do not exist under federal law to alien applicants for admission.”<sup>138</sup>

Many states have taken it upon themselves to formulate immigration classifications and procedures that create a “residency” status for illegal immigrants.<sup>139</sup> Under normal circumstances, each state has authority to regulate the residency status of the people living within its borders.<sup>140</sup> However, it makes sense that only the federal government has the right to regulate the residence status of illegal immigrants, since it has the power to regulate immigration.<sup>141</sup> If an immigrant is unlawfully present in the United States, he is living here in violation of federal law.<sup>142</sup> Since federal law prohibits illegal immigrants from establishing residency within the United States, it likewise should prohibit illegal immigrants from establishing residency within a particular state.

There is little doubt that the federal government covered all of its bases by conveying its desire and intent to regulate and control the area of immigration law through its uniform set of immigration laws.<sup>143</sup> Because of the dramatic increase in illegal immigration rates, the federal and state governments should work together to alleviate a problem that overwhelms today’s society. Unfortunately, many states are currently working in opposition of the federal government’s anti-illegal immigration policies. By granting illegal immigrants public benefits, such as in-state tuition, the states “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in violation of the Supremacy Clause.<sup>144</sup>

### B. *Equal Protection Analysis*

The Fourteenth Amendment provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>145</sup> “Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due pro-

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138. Day Complaint, *supra* note 11, at 20.

139. See TEX. EDUC. CODE ANN. § 54.052(j) (Vernon Supp. 2004-05); 110 ILL. COMP. STAT. ANN. 305/7e-5 (West Supp. 2004); WASH. REV. CODE ANN. § 28B.15.012 (West Supp. 2005); 2004 Kan. Sess. Laws 172.

140. See generally *Martinez v. Bynum*, 461 U.S. 321, 333 (1983) (holding that a state may “restrict eligibility for tuition-free education to its bona fide residents”).

141. See *De Canas v. Bica*, 424 U.S. 351, 354-55 (1976).

142. See 8 U.S.C. §§ 1227, 1325 (2000).

143. 8 U.S.C. §§ 1101-1777 (2000 & Supps. I, II, 2001, 2002).

144. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

145. U.S. CONST. amend. XIV.

cess of law by the Fifth and Fourteenth Amendments.”<sup>146</sup> Historically, state laws which discriminate on the basis of alienage have been subject to the intermediate standard of review under the Equal Protection Clause.<sup>147</sup> In order to survive a constitutional challenge a state must show that the discrimination is substantially related to an important government interest.<sup>148</sup>

In *Plyler v. Doe*, the United States Supreme Court applied the intermediate standard of review when examining whether the state’s discrimination in denying education to illegal immigrant children was substantially related to an important government interest.<sup>149</sup> The majority placed a great deal of emphasis on the fact that the plaintiffs were minor children, who were “not accountable for their disabling status.”<sup>150</sup> The Court held that the State of Texas failed to justify that its decision to deny undocumented immigrant children a K-12 public education furthered some substantial state interest.<sup>151</sup> As the dissent in *Plyler* noted, however, a different standard should be applied when dealing with alienage in relation to education because education is not a fundamental right and because illegal immigrants are not a suspect class.<sup>152</sup> A rational basis test would more appropriately consider “whether the legislative classification at issue bears a rational relationship to a legitimate state purpose.”<sup>153</sup>

There are two possible Equal Protection challenges which could be made regarding postsecondary tuition laws and illegal immigrants—one at the state level and one at the federal level. The first Equal Protection claim could be brought by out-of-state residents challenging a state law awarding postsecondary in-state tuition benefits to illegal immigrants. The second Equal Protection claim could be brought by illegal immigrants challenging federal law, more specifically 8 U.S.C. § 1623, which prohibits illegal immigrants from receiving postsecondary in-state tuition benefits.

Under the first scenario, a state law that grants postsecondary in-state tuition rates to illegal immigrants would not likely withstand a properly applied rational basis test. The Equal Protection Clause

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146. *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (citing *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); and *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

147. *See id.* at 238 (Powell, J., concurring) (citing *Trimble v. Gordon*, 430 U.S. 762, 767 (1977), and *Craig v. Boren*, 429 U.S. 190 (1976)).

148. *See Craig*, 429 U.S. at 197.

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

150. *See id.* at 223.

151. *Id.* at 230.

152. *See id.* at 248-49 (Burger, C.J., dissenting).

153. *Id.* at 248 (Burger, C.J., dissenting). “The significant question here is whether the requirement of tuition from illegal aliens who attend the public schools—as well as from residents of other states, for example—is a rational and reasonable means of furthering the State’s legitimate fiscal ends.” *Id.* at 249 (Burger, C.J., dissenting).

does not specifically require “identical treatment of different categories of persons.”<sup>154</sup> In fact, a state may provide in-state tuition benefits to its own residents, but it is not required to provide the same benefits to out-of-state residents who attend school within its borders.<sup>155</sup> This sort of differential treatment has endured the rational basis test time after time.<sup>156</sup> “The underlying rationale behind in-state tuition is that individuals who pay taxes in that particular state, and in whom the state invests more, should be entitled to the preferential rate, whereas those that do not pay state taxes should not.”<sup>157</sup> Ultimately, a state has an interest in safeguarding its resources for the benefit of its own resident citizens.<sup>158</sup> When states provide easier access to higher educational institutions within the state, its citizens are likely to become more beneficial to the state following graduation.<sup>159</sup> As such, a state has a legitimate interest in treating in-state citizens differently from out-of-state citizens for in-state tuition purposes.

However, a state has no legitimate interest in granting preferential treatment to illegal immigrants over out-of-state citizens. Thus, state laws granting in-state tuition to illegal immigrants, but not to out-of-state United States citizens, would not survive application of a rational basis test.

[A]liens bear a relationship to this country which is in fact different from that of citizens. They have yet to establish a permanent commitment to this country and they retain the obligations and benefits of citizenship in another nation. Another nation continues to have a legitimate interest in their treatment by this government.<sup>160</sup>

States attempt to justify the decision to grant in-state tuition breaks to illegal immigrants, by stating that the illegal immigrants would be more beneficial in today’s American society.<sup>161</sup> However, a more appropriate question considers whether states are providing illegal immigrants with the means to be more successful in the United States or their home country. States justify denying out-of-state citizens in-

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154. *Id.* at 243 (Burger, C.J. dissenting).

155. *See Vlandis v. Kline*, 412 U.S. 441, 453-54 (1973). “So, after *Vlandis*, a state can establish reasonable criteria for in-state status to make certain that students who are not bona fide residents of the state do not receive the benefit of preferential tuition rates.” Lawrence J. Conlan, *Durational Residency Requirements for In-State Tuition: Searching for Access to Affordable Higher Learning*, 53 HASTINGS L.J. 1389, 1394 (2002).

156. *See Vlandis*, 412 U.S. 441 (stating that a state has a legitimate interest in awarding preferential in-state tuition rates to its bona fide residents).

157. Salsbury, *supra* note 85, at 485 (citing Michael A. Olivas, *Administering Intentions: Law, Theory, and Practice of Postsecondary Residency Requirements*, 59 J. HIGHER EDUC. 263, 264 (1988)).

158. *See id.* at 470-71 (citing *Vlandis*, 412 U.S. at 452-53). “[T]he state has a ‘legitimate interest’ in seeing that its bona fide residents, who are more invested in the state, have a greater opportunity to attend the state’s universities.” *Id.*

159. *See Plyler*, 457 U.S. at 223. “[Education] is the very foundation of good citizenship.” *Id.* (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

160. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 801 (6th ed. 2000).

161. Schlafly, *supra* note 81.

state tuition breaks because these same students are qualified for in-state tuition breaks at public universities in the state where they originally reside.<sup>162</sup> The same rationale should be applied to illegal immigrants. Illegal immigrants, as citizens of other countries, may still be eligible to receive benefits from their home country. Currently, states are allowing illegal immigrants to receive additional benefits in the United States. Persons who are in the United States illegally should not be entitled to receive benefits from two locations, while out-of-state citizens cannot. Furthermore, illegal immigrants should not be eligible to receive a lower tuition rate than United States citizens who happen to live out-of-state.<sup>163</sup> As such, the legislative classification that the states have created by permitting illegal immigrants to qualify for in-state tuition breaks, while prohibiting out-of-state citizens from doing the same, does not bear a rational relationship to a legitimate state purpose and would not survive a rational basis test.

The second challenge regarding the Equal Protection Clause would, however, withstand a properly applied rational basis test. This claim exists when an illegal immigrant brings suit at the federal level asserting that 8 U.S.C. § 1623 violates the Equal Protection Clause. As previously stated, § 1623 provides that “an alien who is not lawfully present in the United States shall not be eligible . . . for any postsecondary education benefit . . . .”<sup>164</sup> Illegal immigrants may argue that because they are recognized as “persons” under the Fourteenth Amendment, they are guaranteed equal protection of the laws and should be awarded the same benefits as the other “residents” of the state. However, illegal immigrants are prohibited from claiming a residency status pursuant to federal law.<sup>165</sup> The federal government has made clear that its policy is to reduce and eliminate the number of illegal immigrants present within the United States.<sup>166</sup> As such, it makes sense that illegal immigrants be treated differently from persons who are in fact resident citizens. Since a purpose of the federal government is to reduce the number of illegal immigrants, creating a distinction between them and actual United States citizens is rational.

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162. Cf. Dawn D. Schiller, *European Lessons in Higher Education*, 1992 U. CHI. LEGAL F. 539, 539 (1992) (“Traditionally, United States courts have upheld such practices, ruling that states may constitutionally charge nonresidents more than residents in order to equitably apportion public education costs between the two. Because resident students (or their parents) have already helped underwrite public university expenses by paying taxes, their states require them to pay less tuition to attend such universities.”).

163. Currently, an out-of-state citizen attending a public university in California is required to pay a higher tuition rate than an illegal immigrant attending the same school. Schlafly, *supra* note 81. In California, in-state resident students and illegal aliens pay \$1,839 at the state’s universities while out-of-state residents pay \$7,380. *Id.*

164. 8 U.S.C. § 1623(a) (2000).

165. See Day Complaint, *supra* note 11, at 21 (citing *Elkins v. Moreno*, 435 U.S. 647, 664-65 (1978)) (stating that illegal immigrants are in a class which prohibits them from establishing permanent residency status).

166. See 8 U.S.C. § 1601-1646 (2000 & Supps. I, II, 2001, 2002).

Therefore, a challenge by illegal immigrants against 8 U.S.C. § 1623 would likely withstand a rational basis test.

#### IV. CONCLUSION

Nearly two-thirds of Americans oppose making it easier for illegal immigrants to become United States citizens.<sup>167</sup> The federal government, itself, has done little to validate its stance on illegal immigration. On one hand, the government is encouraging illegal immigrants to flock to America by providing benefits, such as jobs, and the possibility of attaining United States citizenship, while on the other, restricting benefits to social welfare and encouraging closed borders. What makes matters worse is that both the federal and state governments are in direct conflict over many illegal immigration issues. The federal government is the key player in controlling and directing the course that illegal immigration should take. The states are not in a position to determine which benefits, if any, to grant to illegal immigrants. In particular, the states are not in a position to determine whether illegal immigrants qualify for any in-state tuition breaks.

It is mind-boggling to think that an undocumented illegal immigrant can qualify for in-state tuition benefits, while American citizens are denied the same.<sup>168</sup> Why should a state reward those who have not secured our national status? As this Note suggests, it is imperative that the federal government intensify and adopt a uniform approach to control legislation with respect to illegal immigration, and in doing so, should deny the states any opportunity to legislate regarding in-state tuition benefits for illegal immigrants.

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167. Dobbs, *supra* note 12, at 58.

168. For example, an American citizen who is a resident of Missouri but attends college in Kansas must pay the higher out-of-state tuition rates; however, an illegal immigrant who lives in Kansas, may qualify for in-state tuition breaks if he attends college in Kansas. Since this benefit is not available to *all* United States citizens, it makes little sense for it to be available to those who are unlawfully present in the United States.

