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THE THREE R'S: READING, 'RITING, AND REWARDING ILLEGAL IMMIGRANTS: HOW HIGHER EDUCATION HAS ACQUIESCED IN THE ILLEGAL PRESENCE OF UNDOCUMENTED ALIENS IN THE UNITED STATES

Jennifer L. Maki*

INTRODUCTION

Illegal immigration into the United States from neighboring countries, mainly Mexico, has caused public universities and colleges to decide whether students illegally residing within their state borders should be treated as in-state residents for tuition purposes. Currently, undocumented aliens cannot be abridged of their right to attend primary and secondary schools.¹ However, after completing their education at these levels, federal policies limit their right to financial assistance and their right to qualify for state college and university benefits.²

In response to early increases in immigration, federal laws have established guidelines for admitting foreigners into the United States for business, social, and educational purposes.³ Several immigration statutes outline the entrance requirements for nonimmigrant workers and students.⁴ To regulate foreigners choosing to enter the United States through non-designated immigration channels,⁵ Congress

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¹ See *Plyler v. Doe*, 457 U.S. 202 (1982).

² See 8 U.S.C. § 1621 (2000) (defining aliens who are ineligible for state and local public benefits); *id.* § 1623 (limiting the eligibility of aliens for postsecondary education benefits on the basis of residency).

³ See Janice Alfred, Note, *Denial of the American Dream: The Plight of Undocumented High School Students Within the U.S. Educational System*, 19 N.Y.L. SCH. J. HUM. RTS. 615, 621 (2003) ("In 1965, in response to the social and economic changes brought about by the Civil Rights movement, President Lyndon Johnson signed into law the Immigration and Nationality Act Amendments.").

⁴ See, e.g., 8 U.S.C. § 1324(a)(3)(A) (2000) (stating that employment of illegal aliens is unlawful); Marcia Needleman & Laura L. Veal, *Basic Immigration Law: F, J, and M Nonimmigrants*, in *BASIC IMMIGRATION LAW 2003*, at 175, 193 (PLI Corp. Law & Practice Course, Handbook Series No. B-1384, 2003) (outlining different types of student visas).

⁵ See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 101(a)(15), 66 Stat. 163, 167-69 (codified as amended in 8 U.S.C. § 1101(a)(15)) (defining categories of foreigners attempting to enter the United States as both immigrants and nonimmigrants).

enacted two federal mandates: the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)⁶ and the Illegal Immigrant Reform and Immigration Responsibility Act (IIRIRA).⁷ This legislation limits the public benefits that may be afforded to illegal aliens.

The Supreme Court has already addressed the constitutionality of state policies affecting illegal aliens and education, striking down policies stripping illegal aliens of basic protections and needs.⁸ While present in the United States, illegal aliens receive protection of their fundamental rights, regardless of their legal status.⁹ The Supreme Court, however, has declined to classify education as a fundamental right¹⁰ or to label undocumented alien adults in the United States with a suspect classification.¹¹ Therefore, a person who chooses to enter this country illegally will only receive protection for their basic needs that are necessary to take part in our society.¹²

Because there is no explicit answer as to whether illegal alien adults are entitled to higher education, courts rely on current federal mandates and Supreme Court precedent to decipher the relationship between U.S. immigration policies and undocumented aliens' rights. The precedent clearly distinguishes between U.S. citizens, nonimmigrants, legal immigrants, and undocumented aliens in affording benefits and rights.¹³ Political pressure is mounting to change the process for illegal aliens attempting to receive financial assistance for higher education institutions.¹⁴ These

⁶ Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.).

⁷ Pub. L. No. 104-208, Div. C., 110 Stat. 3009 (1996) (codified in scattered sections of 8 U.S.C.).

⁸ See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens."); see also *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (finding that basic education to illegal alien children is necessary for their participation in society).

⁹ But see *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151–52 (2002) (conditioning fundamental rights on compliance with federal immigration policies); *Mathews v. Diaz*, 426 U.S. 67, 78 (1976) (stating that all persons are protected by due process, but not necessarily entitled to the same advantages).

¹⁰ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (finding that the Constitution neither implicitly nor explicitly guarantees the right to an education).

¹¹ *Plyler*, 457 U.S. at 223; see also *infra* note 49 (discussing the *Plyler* Court's decision during a suspect classification for illegal aliens).

¹² See *Mathews*, 426 U.S. at 78 (holding that Congress has no duty to provide all aliens with benefits provided to citizens).

¹³ See, e.g., Michael Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens from Becoming Public Charges*, 31 CREIGHTON L. REV. 741, 745–46 (1998) (explaining the PRWORA definition of a qualified alien who is eligible for public benefits).

¹⁴ See, e.g., Peggy Lowe, *Dueling Tuition Bills; House Debates Rates Illegal Immigrants Should Be Charged*, ROCKY MOUNTAIN NEWS (Colo.), Jan. 20, 2004, at 18A (reporting on the debate on tuition rates in the Colorado legislature), available at 2004 WL 58485612.

political forces are attempting to coerce Congress and the Court to disregard sound public policy initiatives and laws requiring the use of proper immigration channels.¹⁵ Some proposed initiatives have even suggested removing the federal government from determining the immigration status of aliens by awarding conditional residency to illegal aliens who are admitted to a public university.¹⁶

Several states differentiate between in-state and out-of-state residents for tuition purposes.¹⁷ In the current higher education system, the obstacles faced by undocumented aliens who have graduated from high school should be no different than those faced by legal residents who want to attend a college outside of the state where they have their residential status. In addition, foreign students who have legally obtained a visa generally pay a higher rate of tuition to attend a public college or university.¹⁸ This discrepancy gives illegal aliens an advantage over nonimmigrants who follow the legally prescribed guidelines to enter the United States.¹⁹

Many critics argue that tuition restrictions make it virtually impossible for undocumented aliens to attend higher education institutions,²⁰ but this is simply not the case.²¹ Most public state universities admit undocumented alien students, but some refrain from providing in-state tuition rates for these individuals based on their

¹⁵ See, e.g., Jay Bookman, *Immigration Reform Can Work*, TIMES UNION (Albany), Jan. 11, 2004, at E2 (arguing that undocumented aliens are not drawn to the United States for benefits and privileges or to put American citizens out of work), available at 2004 WL 59354804.

¹⁶ See, e.g., Development, Relief, and Education for Alien Minors (DREAM) Act of 2003, S. 1545, 108th Cong. § 7 (giving exclusive jurisdiction over deportation to the Secretary of Homeland Defense).

¹⁷ See, e.g., CAL. EDUC. CODE ANN. § 68130.5 (West 2003); TEX. EDUC. CODE ANN. § 54.052 (Vernon Supp. 2004–2005).

¹⁸ See, e.g., CAL. EDUC. CODE § 68130.5(a)(4) (West 2003); TEX. EDUC. CODE ANN. § 54.051(m) (Vernon Supp. 2004–2005) (denying in-state tuition benefits to nonimmigrant foreign students).

¹⁹ See William Raspberry, *Virginia's Illegal-Alien Policy Takes Long View*, DESERET MORNING NEWS (Salt Lake City), Oct. 28, 2003, at A15 (reporting that Virginia's policy to reserve special benefits for citizens makes sense), available at 2003 WL 65886308. But see Mercedes Olivera, *Message to Migrants: College Help Is Here*, DALLAS MORNING NEWS, Aug. 10, 2002, at 32A (reporting that "House Bill 1403, which went in effect Sept. 1, 2002, allows undocumented immigrant students . . . to be eligible for in-state tuition rates at Texas' public higher education institutions"), available at LEXIS, News Library.

²⁰ See Alfred, *supra* note 3, at 616; Jennifer Galassi, Comment, *Dare to Dream? A Review of the Development, Relief, and Education for Alien Minors (DREAM) Act*, 24 CHICANO-LATINO L. REV. 79, 81 (2003) (claiming that IIRIRA acts to "effectively bar access" to education for illegal aliens).

²¹ See Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C.J. INT'L L. & COM. REG. 393, 399 (2002) ("[T]his postsecondary education law protects U.S. citizens from discrimination by a state that might be inclined to grant in-state tuition to some but not others.").

understanding of IIRIRA.²² These students are not barred from attending a higher education institution; however, they must pay the same out-of-state tuition rate that nonresident students pay to attend these institutions.²³

Both Texas and California suffer from a heavy influx of illegal immigrants.²⁴ Although IIRIRA mandates that states cannot give a public benefit to an undocumented alien without affording the same opportunity to a U.S. citizen,²⁵ these states have enacted laws that allow illegal aliens to establish in-state residency.²⁶ These laws effectively ignore the IIRIRA mandate by giving the upper-hand to undocumented aliens in receiving a lower tuition rate, an act that is unfair to students who follow the legal guidelines to establish residency.²⁷

Congress's enactment of PRWORA and IIRIRA addresses two national policy concerns: encouragement of self-reliance, a basic principle of U.S. immigration law, and removal of any incentive for illegal immigration.²⁸ IIRIRA, enacted one month after PRWORA, does not deprive undocumented aliens of the opportunity to attend higher education institutions; however, even if these individuals are given in-state tuition rates, their illegal status bars any future employment in high-skilled labor positions.²⁹ In addition to prohibiting the employment of undocumented aliens, IIRIRA requires that employers report the status of employees to the U.S. Immigration and Customs Enforcement Agency (ICE).³⁰ IIRIRA and PRWORA codify

²² Galassi, *supra* note 20, at 82 (“Since the promulgation of [IIRIRA], the vast majority of states have come to believe that their public universities are wholly unable to offer in-state tuition rates to undocumented immigrants.”).

²³ See, e.g., Franco Ordonez, *Immigrant Students Find College Hard to Afford; Bill Would Allow State Tuition Rates*, BOSTON GLOBE, June 15, 2003, at 1 (reporting that “[a]s an undocumented alien, [the individual] cannot qualify for the lower tuition rates offered to state residents by state schools”), available at 2003 WL 3402027.

²⁴ Office of Policy & Planning, U.S. Immigration & Naturalization Serv., *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000* (Jan. 2003), at http://uscis.gov/graphics/shared/aboutus/statistics/ill_report_1211.pdf.

²⁵ 8 U.S.C. § 1623 (2000).

²⁶ CAL. EDUC. CODE § 68130.5 (West 2003); TEX. EDUC. CODE ANN. §§ 54.051(m), 54.052(j) (Vernon 1996 & Supp. 2004–2005).

²⁷ See Victor Davis Hanson, *El Norte*, WALL ST. J., Jan. 19, 2004, at A12 (reporting that there is a “growing furor over the present system of non-enforcement [because] the perception that many illegal residents actually receive preferential treatment over Americans”), available at 2004 WL-WSJ 56917397.

²⁸ See 8 U.S.C. § 1601 (2000) (enumerating statements of national policy concerning welfare and immigration).

²⁹ See *id.* § 1324(a)(3)(A) (making employment of illegal aliens unlawful).

³⁰ The ICE is the investigative division of the Department of Homeland Security. See U.S. Immigration & Customs Enforcement, *Fact Sheet*, at <http://www.ice.gov/graphics/about/index.htm>.

Congress's intent to prohibit any enticement of undocumented aliens remaining in the United States to ignore immigration laws.³¹

This Note argues that undocumented aliens should not receive the benefits of in-state tuition rates and federal financial aid for public colleges and universities without complying with the established guidelines to achieve such benefits. Part I analyzes the Supreme Court cases that have dealt with illegal aliens and education and the federal statutes establishing guidelines for higher education. Part II discusses the current status of immigration laws that pertain to the treatment of undocumented aliens, what powers the states should be allowed to retain in regulating tuition for higher education, and how states utilize these powers. This part also evaluates the initiatives in California and Texas, where state lawmakers have enacted legislation giving in-state tuition rates to illegal aliens. Several other states are debating whether to align their tuition policies with federal mandates regarding undocumented aliens or to follow the lead of California and Texas. Part III addresses the policy implications of allowing illegal immigrants to by-pass the residency requirements in federal immigration laws and to receive financial aid that is denied to nonresident U.S. citizens and foreign students, and rebuts the argument that in-state tuition should be extended to these undocumented students.

The extension of financial aid to undocumented aliens circumvents the United States's current immigration policies.³² Providing undocumented aliens with these privileges incorrectly rewards their illegal status as compared to the legal status held by nonimmigrant foreign students. Additionally, extension of these privileges to illegal alien students gives them an advantage over U.S. citizens who are nonresidents of a particular state and must go through the proper channels to benefit from a state institution's in-state tuition rates.³³ Undocumented aliens should be required to correct their illegal status before a state institution recognizes their right to receive benefits accorded to U.S. citizens and visa-holding students in the United States.

³¹ See *Romero*, *supra* note 21, at 399 (stating that IIRIRA's objective is to deter undocumented immigration).

³² See 8 U.S.C. § 1623 (2000).

³³ See *Ordonez*, *supra* note 23, at 1 ("It's really hard to justify giving a college seat . . . to a student who is not even legally in the country while denying it to a student who's done nothing but play by the rules their entire life."); *College Support for Illegal Immigrants' Kids Hurts Citizens*, USA TODAY, Jan. 17, 2003, at 10A ("Why are we undermining our own laws and our own children by helping illegals from other countries?"), available at 2003 WL 5303308.

I. BACKGROUND

A. *Primary and Secondary Education of Illegal Aliens*

In 1973, the Supreme Court decided *San Antonio Independent School District v. Rodriguez*,³⁴ a case involving a constitutional challenge to Texas's dual-approach for financing the state's public schools.³⁵ The taxable property disparities of Texas's school districts resulted in lower local expenditures for education in certain minority-dominated school districts.³⁶ The plaintiffs argued that "the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution."³⁷ The district court agreed with the plaintiffs, finding that the public school financing system violated the Equal Protection Clause,³⁸ because "these disparities, [were] largely attributable to differences in the amounts of money collected through local property taxation."³⁹

The Supreme Court, on direct appeal, disagreed with the lower court and concluded that the Constitution did not implicitly or explicitly protect the right to education.⁴⁰ Therefore, despite "the grave significance of education both to the individual and to our society,"⁴¹ the Court noted that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."⁴²

The Court also disagreed with the lower court's finding that Texas's financing system had resulted in wealth discrimination.⁴³ The Court noted that "where wealth is involved, the Equal Protection Clause does not require absolute equality or

³⁴ 411 U.S. 1 (1973).

³⁵ *Id.* at 9–10.

The State, supplying funds from its general revenues, finances approximately 80% of the Program, and the school districts are responsible — as a unit — for providing the remaining 20%. The districts' share, known as the Local Fund Assignment, is apportioned among the school districts under a formula designed to reflect each district's relative taxpaying ability.

Id.

³⁶ *See id.* at 8.

³⁷ *Id.* at 17.

³⁸ U.S. CONST. amend. XIV, § 1.

³⁹ *Rodriguez*, 411 U.S. at 16.

⁴⁰ *See id.* at 35.

⁴¹ *Id.* at 30 (quoting *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 283 (W.D. Tex. 1971)).

⁴² *Id.*

⁴³ *Id.* at 22.

precisely equal advantages.”⁴⁴ The Court found that in the Texas public school system, “no charge fairly could be made that the system fail[ed] to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.”⁴⁵

Eight years later, the Court reviewed the constitutionality of a bar on the admission of illegal alien children to primary and secondary schools. The case, *Plyler v. Doe*,⁴⁶ was filed as a class action on behalf of school-age children of Mexican origin unable to establish legal residency in Texas.⁴⁷ The Court reviewed a Texas statute limiting funding to public schools in certain local districts.⁴⁸ Two important questions answered in this decision are relevant to determining whether illegal aliens should be afforded financial assistance for higher education: (1) are illegal aliens “persons” who should be classified as a suspect class and guaranteed due process of law,⁴⁹ and (2) how does legislation differ with respect to illegal alien children and adults?⁵⁰

The State of Texas and several government entities argued first that illegal aliens should not be “persons” afforded constitutional guarantees.⁵¹ The Supreme Court disagreed and stated that “[a]liens, even aliens whose presence in this country

⁴⁴ *Id.* at 24.

⁴⁵ *Id.* at 37.

⁴⁶ 457 U.S. 202 (1982).

⁴⁷ *Id.* at 206.

⁴⁸ *See id.* at 205.

⁴⁹ *See infra* notes 52, 55–62 and accompanying text. The Court in *Plyler* examined both whether an undocumented alien should receive due process of law, *Plyler*, 457 U.S. at 210, and whether these individuals should be classified as a suspect class, *id.* at 219–20. The Court first considered whether undocumented aliens should receive protection under the Fourteenth Amendment which “provides that ‘[no] State shall . . . deprive any person of life, liberty, or property, without due process of law.’” *Id.* at 210 (citing U.S. CONST. amend. XIV). The Court decided to recognize the due process rights of undocumented aliens because these individuals are “persons” regardless of their “status under immigration laws.” *Id.* at 210.

Next, the Court considered whether these undocumented aliens must be treated as similarly situated residents of the United States. *Id.* at 216–20. The Court explained that “[t]he Equal Protection Clause directs that ‘all persons similarly circumstanced shall be treated alike,’” *id.* 216 (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)), and, as a result, any state action that enacts a classification to distinguish individuals must “bear[] some fair relationship to a legitimate public purpose,” *id.* The Court further explained that because “[s]ome classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective” any classification, such as those involving the undocumented alien children, must be carefully scrutinized. *Id.* at 217 n.14. The Court concluded that undocumented aliens are not a “suspect class” and that the classification of those who chose to illegally enter the United States as such is not “constitutional[ly] irrelevant.” *Id.* at 219.

⁵⁰ *See infra* notes 60–62 and accompanying text.

⁵¹ *See Plyler*, 457 U.S. at 210.

is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”⁵² Although the Court appeared sympathetic to the plight of illegal alien children, it explicitly denounced the unauthorized immigration of illegal alien adults.⁵³ The Court affirmed that “those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences.”⁵⁴

The Court also considered whether illegal alien children should be classified as a suspect class.⁵⁵ It reasoned that “entry into the class [of illegal immigrants] is itself a crime”⁵⁶ and that “undocumented status is not irrelevant to any proper legislative goal.”⁵⁷ The Court firmly rejected the classification that undocumented aliens are a suspect class⁵⁸ and stated that “[u]nlike 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.”⁵⁹ Although the Court concluded that states could withhold benefits from illegal aliens, the Court reasoned that arguments to support such action “do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants.”⁶⁰ Unlike their adult parents, illegal alien children did not make the choice to enter the United States illegally.⁶¹ Therefore, the Court treated undocumented alien children as a quasi-suspect class.⁶²

Although the Court’s decision in *Plyler* was limited to primary and secondary education, it provides important background for determining whether college-aged illegal aliens are entitled to residency classifications and the corresponding financial benefits at public institutions. In addition to reaffirming that education is not a fundamental right,⁶³ the Court distinguished undocumented alien children from illegal alien adults, questioning whether children have the ability to change their immigration status.⁶⁴ Undocumented aliens who apply to public higher education institutions fall in between these two categories of “minor children” and “parents [who] have the ability to conform their conduct to social norms.”⁶⁵ Although these illegal aliens came to the United States because of their parents’ actions, they are no

⁵² *Id.*

⁵³ *See id.* at 220.

⁵⁴ *See id.*

⁵⁵ *Id.* at 219.

⁵⁶ *Id.* at 219 n.19.

⁵⁷ *Id.* at 220.

⁵⁸ *Id.* at 219 n.19 (“We reject the claim that ‘illegal aliens’ are a ‘suspect class.’”).

⁵⁹ *Id.*

⁶⁰ *Id.* at 219–20.

⁶¹ *See id.* at 220.

⁶² *See id.* at 223–24.

⁶³ *Id.* at 221.

⁶⁴ *See id.* at 220.

⁶⁵ *Id.* (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

longer children who lack decision making capabilities.⁶⁶ Thus, the question is whether the U.S. immigration system should force them to become accountable and change their illegal status in order to qualify for the financial benefits in the higher education system that legal residency in a state affords.

B. Higher Education and Immigration

Although the Supreme Court has not directly addressed whether illegal aliens should be entitled to residency classifications to receive higher education benefits, several cases have explored the relationship between the U.S. immigration system and higher education. In 1978, in *Elkins v. Moreno*,⁶⁷ the Court reviewed the University of Maryland's denial of in-state tuition to alien students whose parents held a G-4 visa.⁶⁸ The Court explained that Congress had enacted guidelines to determine whether nonimmigrants could form the necessary intent to change their domicile to the state of Maryland. The Court concluded that these immigration statutes did not preclude G-4 visa holders and their children from changing their domicile.⁶⁹ The Court in *Elkins* disagreed with the University of Maryland's assertion that these students were precluded from forming the intent to change their domicile based on their immigration status.⁷⁰ The Court ruled that the plaintiffs' domicile had not been per se determined by their visa status. As a result, the State must decide if the G-4 visa holder had met the domicile intent requirement needed to receive in-state tuition.⁷¹

⁶⁶ Austin T. Fragomen, *Aliens and Equal Protection*, 3 IMMIGR. LAW & BUS. § 8:2 (2004) (stating that the intermediate level of scrutiny applied in *Plyler* would be lowered to a rational basis test absent "two crucial elements: (1) children who were not responsible for illegal status, and (2) education").

⁶⁷ 435 U.S. 647, 652 (1978).

⁶⁸ *Id.* at 666 (explaining that a G-4 visa is a nonimmigrant visa for officers or employees of international treaty organizations and members of their immediate family); see also 8 U.S.C. § 1101(a)(15)(G)(iv) (2000) (defining the characteristics of a G-4 class visa).

⁶⁹ See *Elkins*, 435 U.S. at 666. The Court stated that although some nonimmigrants were restricted from forming the intent to make their permanent home in the United States, G-4 visa holder were not restricted: "Congress' silence is therefore pregnant, and we read it to mean that Congress, while anticipating that permanent immigration would normally occur through immigrant channels, was willing to allow nonrestricted nonimmigrant aliens to adopt the United States as their domicile." *Id.*

⁷⁰ *Id.* at 658.

⁷¹ *Id.* at 666 (stating that Congress had not placed a restriction on a nonimmigrant, admitted under § 101(a)(15)(G)(iv), to develop the subjective intent to stay indefinitely in the United States).

Four years later, the Court in *Toll v. Moreno*⁷² was faced with plugging questions resulting from their decision in *Elkins*.⁷³ In *Toll*, a class action challenged the University of Maryland's policy to exclude domiciled dependents of G-4 aliens from consideration for in-state residency for tuition purposes.⁷⁴ The University of Maryland imposed a discriminatory tuition burden on nonimmigrants, arguing that the students should not receive in-state tuition because "the salaries their parents receive from the international banks for which they work are exempt from Maryland income tax."⁷⁵ The Court disagreed with the state's basis for denying in-state tuition benefits and reasoned that "the Federal Government has not merely admitted G-4 aliens into the country; it has also permitted them to establish domicile and afford significant tax exemptions on organizational salaries."⁷⁶ The Court again focused on the congressional intent behind the immigration laws that regulate immigrants and nonimmigrants attempting to establish residency.⁷⁷ The Court concluded that these immigration laws intended to allow G-4 immigrants to establish domicile in the United States. The Court also found that the university's policy violated the Supremacy Clause and frustrated immigration policies by not conforming to federal laws regarding G-4 visa holders.⁷⁸

C. Federal Enactments Regarding Illegal Aliens

Congress has also played an important role in shaping immigration policy by exercising its powers "[t]o establish an uniform Rule of Naturalization."⁷⁹ The Immigration and Nationality Act of 1952 addressed "all aspects of admissions of aliens to the United States."⁸⁰ Current federal law prohibits aliens from entering the United States without first applying for and receiving permission.⁸¹ Those individuals who illegally enter the United States are subject to arrest and deportation.⁸² Illegal aliens present in the United States are "subject to the full range of obligations

⁷² 458 U.S. 1 (1982).

⁷³ *Id.*

⁷⁴ *Id.* at 3.

⁷⁵ *Id.* at 16.

⁷⁶ *Id.* at 17.

⁷⁷ *See id.* at 12–13.

⁷⁸ *See id.* at 17 ("[W]e cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminatory tuition charges and fees solely on account of the federal immigration classification.").

⁷⁹ U.S. CONST. art. I, § 8, cl. 4; *see Toll*, 458 U.S. at 10 ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders.").

⁸⁰ *Elkins v. Moreno*, 435 U.S. 647, 648 (1978).

⁸¹ *See Regents of the Univ. of Cal. v. Superior Court*, 276 Cal. Rptr. 197 (Cal. Ct. App. 1990).

⁸² *See id.* at 200–01 (citing 8 U.S.C. §§ 1251, 1252, 1357).

imposed by the State's civil and criminal laws."⁸³ Additionally, until the illegal alien "leaves the jurisdiction . . . he is entitled to the equal protection of the laws that a State may choose to establish."⁸⁴

Because illegal immigration is prevalent in many border states, several reforms have been adopted in an attempt to define the treatment of undocumented aliens in the United States. During the Clinton Administration, two important immigration reforms were enacted to regulate employment, public benefits, and education for illegal aliens. First, in August 1996, Congress enacted PRWORA to restrict the eligibility of unqualified aliens to receive federally funded benefits.⁸⁵ PRWORA expressly denies certain public benefits to illegal aliens,⁸⁶ regulates the eligibility of immigrants for other benefits,⁸⁷ and establishes a systematic approach to verify the immigration status of individuals seeking to utilize these public benefits.⁸⁸ For example, PRWORA offers a statutory definition of a "qualified alien" and lists seven categories of immigration that allow an alien to acquire this status.⁸⁹ PRWORA explicitly states that "an alien who is not a qualified alien . . . is not eligible for any Federal public benefit."⁹⁰ PRWORA serves as a guideline to provide public benefits only to aliens who comply with the federal statutes and are deemed "qualified aliens."⁹¹

The second federal mandate enacted during the Clinton Administration was IIRIRA, which regulates the treatment of undocumented aliens regarding higher education benefits.⁹² The statute proclaims that an illegal immigrant is not eligible for any postsecondary education benefit on the basis of in-state residency unless any U.S. citizen or national is eligible for such a benefit without regard to whether the

⁸³ See *Plyler*, 457 U.S. at 215.

⁸⁴ *Id.*

⁸⁵ See 8 U.S.C. § 1611(a) (2000).

⁸⁶ See *id.* § 1601.

⁸⁷ See generally *id.* § 1611.

⁸⁸ See *id.* § 1642.

⁸⁹ See Sheridan, *supra* note 13, at 746; see also 8 U.S.C. § 1641(b) (2000) (defining a qualified alien as an alien (a) lawfully admitted for permanent residence under 8 U.S.C. § 1158, (b) granted asylum under 8 U.S.C. § 1158, (c) admitted as a refugee under 8 U.S.C. § 1157, (d) granted withholding of deportation under 8 U.S.C. § 1253(h), (e) granted conditional entry under 8 U.S.C. § 1153(a)(7), and (f) paroled in the United States for at least one year under 8 U.S.C. § 1182(d)(5)).

⁹⁰ Sheridan, *supra* note 13, at 746 (quoting 8 U.S.C. § 1611(a) (West Supp. 1997)). Nonqualified aliens are expressly excluded from receiving "retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit or any other similar benefit" appropriated by United States funds. 8 U.S.C. § 1611(c)(1)(B) (2000).

⁹¹ See 8 U.S.C. § 1641 (2000).

⁹² See *id.* § 1623(a); see also *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1256 (C.D. Cal. 1997) (interpreting the enactment of IIRIRA as proof of congressional intent to regulate immigration).

citizen or national is such a resident.⁹³ The House Conference Report accompanying this bill clarified Congress's intent in enacting IIRIRA by stating that "[t]his section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education."⁹⁴ After the enactment of IIRIRA, several states adjusted their tuition policies regarding illegal immigrants.⁹⁵ However, some states have attempted to avoid a conflict with IIRIRA by adjusting the wording of their education code's residency requirements.⁹⁶ To date, no court has decided whether these state policies are preempted by IIRIRA.

The enactment of IIRIRA and PRWORA within the same year is evidence of Congress's "long-stated policy that immigrants should not become public charges."⁹⁷ However, some state legislatures are departing from the congressional mandate delineated in PRWORA and IIRIRA.⁹⁸ Additionally, members of Congress have proposed initiatives that will revoke these immigration reforms.⁹⁹ What has resulted is an inconsistent state-by-state set of guidelines attempting to regulate immigration and an incongruent immigration policy that favors illegal immigrants over both nonimmigrants and visa holders who enter the United States through the proper legal channels.

II. THE CURRENT PARADOX IN THE TREATMENT OF UNDOCUMENTED ALIENS AND LEGAL VISA HOLDERS

Allowing undocumented aliens to receive tuition benefits at state colleges and universities creates a two-tier system. Illegal immigrants are easily funneling into colleges and universities,¹⁰⁰ while the path for foreign students is plagued with

⁹³ Romero, *supra* note 21, at 400 ("Congress wanted to ensure that undocumented immigrants would not be made better off than U.S. citizens by some states.").

⁹⁴ H.R. CONF. REP. NO. 104-828, at 240 (1996).

⁹⁵ See Justice Wetzel, *Matter of Paula R. v. Goldstein*, 227 N.Y.L.J. 20 (2002) ("A public institution's obligation to comply with applicable federal mandates cannot be trivialized as optional.").

⁹⁶ See, e.g., CAL. EDUC. CODE ANN. § 68130.5 historical notes (West 2003) ("This act, as enacted during the 2001-02 Regular Session, does not confer postsecondary education benefits on the basis of residence within the meaning of Section 1623 of Title 8 of the United States Code.").

⁹⁷ Sheridan, *supra* note 13, at 766.

⁹⁸ See Ann Morse, Nat'l Conference of States Legislatures, *Tuition and Unauthorized Immigrant Students* (Aug. 14, 2003), at <http://www.ncsl.org/programs/immig/tuition2003.htm> (reporting that California, Texas, Utah, New York, Washington, Oklahoma, and Illinois have enacted legislation allowing illegal aliens to receive in-state tuition).

⁹⁹ See, e.g., DREAM Act, *supra* note 16.

¹⁰⁰ See *infra* notes 166-80 (discussing the Texas Education Code); *Regents of the Univ. of Cal. v. Superior Court*, 276 Cal. Rptr. 197 (Cal. Ct. App. 1990).

staunch adherence to strict statutes that, if violated, result in immediate deportation.¹⁰¹ Illegal immigration is becoming an ever-increasing concern for the United States.¹⁰² In fact, current statistics illustrate that the estimates of illegal aliens entering the United States each year has resulted in a doubling of the unauthorized resident population since 1990.¹⁰³ While the ICE is responsible for enforcing immigration laws regulating those wishing to enter the United States for working, living, and studying purposes, illegal immigrants can avoid the federal mandates of IIRIRA and PRWORA.¹⁰⁴ In addition, the ICE visa provisions intend that the ICE carefully monitor foreign students who are admitted to the United States.¹⁰⁵ Lengthy requirements must be met before these students can enroll in a higher education institution.¹⁰⁶ These students must also abide by strict guidelines while present in the United States or face revocation of their visa.¹⁰⁷ Foreign students face these strict regulations despite being viewed as “well-educated foreigners [that] are an enormously significant source of talent in elite sectors of American society.”¹⁰⁸ Additionally, some critics and scholars argue that “it is the F-1, J-1, and H-1B foreigners, not the illegal migrants from south of the border, who are advancing research at universities and filling demand in companies for highly-educated talent.”¹⁰⁹ The following question must be answered: why is our current system plagued by inconsistency that favors the unlawful actions of illegal aliens who bypass the immigration channels over the actions of foreign students who have adhered to U.S. immigration regulations?¹¹⁰

¹⁰¹ See Needleman & Vea, *supra* note 4, at 198 (“[A]n F-1 student who fails to maintain a full course of study without the approval of the DSO or otherwise fails to maintain status is not eligible for an additional period for departure.”).

¹⁰² See generally Morse, *supra* note 98 (cataloging recent immigration statistics).

¹⁰³ *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, *supra* note 24.

¹⁰⁴ See Adrian Arroyo, Comment, *The USA PATRIOT Act and the Enhanced Border Security and Visa Entry Reform Act: Negatively Impacting Academic Institutions by Deterring Foreign Students from Studying in the United States*, 16 *TRANSNAT'L LAW* 411, 423 (2003) (describing the Student and Exchange Visitor Information Program (SEVIS) that monitors student compliance with the terms of a visa).

¹⁰⁵ See *id.* at 423 (noting that ICE has failed in its responsibilities of accurate record-keeping).

¹⁰⁶ See *id.* at 415–16 (explaining that foreign students must be accepted for enrollment at an institution, speak proficient English, and have sufficient funds for self-support in the United States).

¹⁰⁷ See Daniel Walfish, Note, *Student Visa and the Illogic of the Intent Requirement*, 17 *GEO. IMMIGR. L.J.* 473, 476 (2003).

¹⁰⁸ *Id.* at 474.

¹⁰⁹ *Id.* at 475.

¹¹⁰ See Romero, *supra* note 21, at 400 (arguing that Congress did not want states to make undocumented immigrants better off than U.S. citizens).

A. Congressional Mandates Regarding Immigration

There is an inevitable struggle between congressional guidelines, namely PRWORA and IIRIRA, and state laws enacted in reaction to these federal measures.¹¹¹ Congress has been careful in delegating power to the states for regulating public benefits concerning immigration.¹¹² A state may enact legislation that affects illegal aliens “only if 1) the power to regulate in this area is delegated to the states, 2) the law mirrors federal policy, and 3) the statute furthers a legitimate state goal.”¹¹³ While the decision to grant residency to illegal aliens remains within each state’s discretion, a state law must nonetheless align with federal mandates.¹¹⁴ This requirement has resulted in states and lower courts trying to adhere both to a state’s desire of extending public benefits to illegal aliens and to federal mandates that attempt to control benefits.

Answering the questions involving higher education and illegal aliens requires an interpretation of what Congress intended to achieve when enacting PRWORA and IIRIRA. Aside from the one-sided belief that these statutes are designed to promote anti-immigration sentiment,¹¹⁵ IIRIRA actually traces an important distinction drawn by the Court in both *Rodriguez* and *Plyler*.¹¹⁶ The Court held that although public education is not a protected “right,” a basic level of education is “required in the performance of our most basic public responsibilities.”¹¹⁷ Because primary education is necessary to become a functioning member of society, states provide primary and secondary public education for illegal aliens.¹¹⁸ However, the Court in *Plyler* distinguished illegal alien children from adults who could lawfully

¹¹¹ See, e.g., Sheridan, *supra* note 13, at 766 (stating that IIRIRA and PRWORA “provide[] stronger restrictions on the improper receipt of public assistance”); Romero, *supra* note 21, at 393. *But see* Alfred, *supra* note 3, at 639 (“[S]tates have the option of passing a law that would override [PRWORA].”).

¹¹² See 8 U.S.C. § 1621(d) (2000).

¹¹³ Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019, 1041 (1995).

¹¹⁴ See Wetzal, *supra* note 95. See generally *Toll v. Moreno*, 458 U.S. 1 (1982); *Elkins v. Moreno*, 435 U.S. 647, 652 (1978).

¹¹⁵ See Romero, *supra* note 21, at 400 (stating that Congress intended to keep undocumented aliens worse off as compared to U.S. citizens).

¹¹⁶ 8 U.S.C. § 1621(c) (2000) (declaring that illegal aliens should not receive “postsecondary education” benefits); *id.* at § 1623 (explaining the educational benefit limitations for undocumented aliens who are unlawfully present in this country); see IIRIRA, *supra* note 7.

¹¹⁷ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

¹¹⁸ *Plyler v. Doe*, 457 U.S. 202, 219 (1982); see also Raspberry, *supra* note 19, at A15 (“The reason we have free public education is that we think everybody needs at least a high school diploma in order to be productive.”).

change their immigration status.¹¹⁹ Congress's enactment of IIRIRA codifies this distinction. The Court did not articulate an extension of illegal aliens' education benefits beyond primary and secondary education.¹²⁰ Therefore, although a basic education is afforded to everyone, once illegal alien children reach the age of eighteen they must take responsibility for their illegal presence in the United States.

B. State Law Must Comply with IIRIRA's Immigration Guidelines

IIRIRA provides a stringent set of restrictions regarding the eligibility of public benefits for illegal aliens.¹²¹ Congress intended IIRIRA and PRWORA to encourage illegal aliens to change their illegal status once they enter this country.¹²² When states choose to remove the residency requirements for in-state tuition at their higher education institutions, they discourage illegal aliens from correcting their unlawful status.¹²³ For example, the Eastern District of Arkansas in *Hein v. Arkansas State University*¹²⁴ found that Arkansas State University correctly declined to grant in-state tuition to a nonimmigrant student.¹²⁵ The court held that the plaintiff should "not [be] eligible for in-state tuition status because she never attempted to change her immigration status from F-1."¹²⁶ The court went on to state that the "[p]laintiff could have sought an adjustment of her F-1 visa status at anytime before applying for in-state tuition status. However, she chose not to do this."¹²⁷ The same is true for undocumented aliens who graduate from high school and apply to public colleges and universities.¹²⁸ In some states, these students gain admission to state colleges based on a promise to change their illegal status¹²⁹ or under the presumption that they are currently eligible to apply as in-state residents.¹³⁰ These high school

¹¹⁹ See *supra* notes 57–61 and accompanying text.

¹²⁰ See Galassi, *supra* note 20, at 86 (stating that *Plyler* guarantees public education for illegal immigrants from kindergarten to the twelfth-grade).

¹²¹ See Sheridan, *supra* note 13, at 766.

¹²² See generally Romero, *supra* note 21, at 399 (finding that Congress intended to deter illegal immigration).

¹²³ See, e.g., Olivas, *supra* note 113, at 1053 (finding that several illegal alien students had become eligible for permanent resident status and were not subject to the alien deportation provisions).

¹²⁴ 972 F. Supp. 1175 (E.D. Ark. 1997).

¹²⁵ *Id.*

¹²⁶ *Id.* at 1177.

¹²⁷ *Id.* at 1186–87.

¹²⁸ See Fragomen, *supra* note 66.

¹²⁹ See Recent Legislation, *Immigration Law — Education — California Extends Instate Tuition Benefits to Undocumented Aliens*, 115 HARV. L. REV. 1548, at 1551 (reporting that the California Education Code requires an illegal alien "to file an affidavit stating that he has filed or will file an application for legal immigration status as soon as legally permitted").

¹³⁰ See TEX. EDUC. CODE ANN. § 54.052(j)(4) (Vernon Supp. 2004–2005).

graduates should be encouraged to correct their illegal status in this country before enrollment in a state college or university.

C. State Responses to IIRIRA

Following the enactment of IIRIRA, state colleges and universities began to question the validity of their residency requirements.¹³¹ Some states adopted laws prohibiting their public colleges and universities from granting in-state residency to undocumented students.¹³² Other states, notably California and Texas, found ways to circumvent the federal mandate to curtail in-state tuition benefits for illegal aliens.

1. California's Laws Attempt to Regulate Illegal Immigration

The state of California faces a constant stream of illegal aliens from Mexico.¹³³ As a result, California continuously advances initiatives to change their state education code to reflect the current sentiment regarding financial assistance and public benefits for illegal aliens.¹³⁴ Despite early attempts to combat illegal immigration by refusing educational benefits to undocumented aliens, California became one of the states to circumvent the IIRIRA mandate regarding in-state tuition.¹³⁵

Prior to the enactment of IIRIRA, the California courts attempted to define California's tuition policies.¹³⁶ For example, the Court of Appeals of California decided *Regents of the University of California v. Superior Court of Los Angeles County*,¹³⁷ which involved a state employee unwilling to classify undocumented alien students as nonresidents for tuition purposes.¹³⁸ The university argued that

¹³¹ See Alfred, *supra* note 3, at 636.

¹³² See, e.g., Wetzel, *supra* note 95. Prior to 1989, the City University of New York (CUNY) charged illegal aliens nonresident tuition rates. *Id.* This policy changed in 1989 and "allowed illegal aliens to pay the resident tuition rate if they have been living in New York State for twelve months or had attended a New York City high school for the previous two semesters." *Id.* After the enactment of IIRIRA, CUNY again changed their tuition policy to avoid conflict with IIRIRA. *Id.* However, in August 2002, Gov. George Pataki signed a law allowing undocumented aliens to pay the in-state tuition rates. *Law Lowers Tuition for Immigrants*, TIMES UNION (Albany), Aug. 10, 2002, at B4, available at 2002 WL 24158900. To ensure that the illegal alien intends to reside in the state after graduation "[t]he law includes specific criteria for eligibility that emphasize a student's ties to the state." *Id.*

¹³³ See Olivas, *supra* note 113, at 1023 (stating that California's location contributes to the disproportionate influx of undocumented aliens).

¹³⁴ See generally Recent Legislation, *supra* note 129, at 1550.

¹³⁵ See *infra* notes 150–55 and accompanying text.

¹³⁶ See, e.g., *infra* notes 137–42 and accompanying text (regarding the Court's decision in *Toll v. Moreno*, 458 U.S. 1 (1982), that struck down a statute denying in-state status to any nonimmigrant alien).

¹³⁷ 276 Cal. Rptr. 197 (Cal. Ct. App. 1990).

¹³⁸ *Id.* at 199.

Congress did not classify illegal aliens as nonimmigrants who must maintain a residence abroad and thus forfeit the ability to form the requisite intent for California residency.¹³⁹ The court found this argument “unpersuasive” and declined to classify illegal aliens as in-state residents because federal law forbids illegal aliens to enter the United States without applying for admission and authorizes the arrest and deportation of those who manage to enter the country illegally.¹⁴⁰ The court concluded that subsidized tuition is comparable to financial assistance and need-based programs; the federal government consistently limits the availability of these benefits for illegal aliens.¹⁴¹ The court also found that extending these benefits to illegal aliens was illogical because “California . . . denies this subsidy to citizens of neighboring states and to aliens holding student visa; yet the state has substantial and legitimate reason to favor both these groups over undocumented aliens, rather than the reverse.”¹⁴² This early decision was in line with the soon to be enacted IIRIRA.

In 1996, California voters approved Proposition 187 which addressed the state’s rising concern over the care for a growing illegal immigrant population.¹⁴³ This proposition resulted in the exclusion of undocumented aliens from primary and secondary school as well as colleges and universities.¹⁴⁴ Proposition 187 also forbid illegal aliens from being designated as in-state residents for tuition purposes.¹⁴⁵ The initiative’s provisions “required that California school districts verify the immigration status of children who were enrolled in its public schools” and “barred undocumented immigrants from ever attending California state colleges or universities.”¹⁴⁶ Immediately, action was brought to impede enforcement of Proposition 187. The District Court in *League of United Latin American Citizens v. Wilson*,¹⁴⁷ enjoined California from implementing Proposition 187.¹⁴⁸ The district court’s opinion relied on the Supremacy Clause and determined that parts of the statute were preempted by federal law.¹⁴⁹

¹³⁹ *Id.* at 200.

¹⁴⁰ *Id.*

¹⁴¹ *See id.* at 201–02 (“In comparison with these fundamental rights and privileges denied undocumented aliens by state and federal laws, the privilege withheld here — subsidized public university education — is considerably less significant.”).

¹⁴² *Id.* at 202.

¹⁴³ *See* 1994 Cal. Legis. Serv. Prop. 187 (West) (approval of Proposition 187).

¹⁴⁴ *See* Susan Knock Brennecke, *Pay Now or Pay Later? California’s Attempt to Legislate Undocumented Children Out of A Public Education*, 23 J. JUV. L. 41 (2002–2003).

¹⁴⁵ 1994 Cal. Legis. Serv. Prop. 187 (West).

¹⁴⁶ Alfred, *supra* note 3, at 625.

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

¹⁴⁸ *Id.*

¹⁴⁹ *Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995) (relying on the Court’s decision in *De Canas v. Bica*, 424 U.S. 351 (1976)).

On October 11, 2001, the California legislature again addressed in-state tuition rates for illegal aliens.¹⁵⁰ The result was Assembly Bill 540, codified as California Education Code section 68130.5.¹⁵¹ This bill diverged from both the precedent of California courts and voter initiatives by allowing higher education institutions to award in-state tuition to illegal immigrants.¹⁵² The California Education Code's new in-state tuition policy requires proof of "high school attendance in California for three or more years," "graduation from a California high school," and "the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so."¹⁵³ IIRIRA states that an illegal alien cannot receive postsecondary education benefits "on the basis of residence within a state . . . unless a citizen or national of the United States is eligible for such a benefit."¹⁵⁴ The State of California avoided federal preemption by conditioning the receipt of in-state tuition on these requirements rather than residency.¹⁵⁵

Interestingly, several court opinions cited the predecessor of section 68130.5, California Education Code section 68062, for the proposition that Congress only intended legally admitted aliens to become eligible for tuition benefits at a state university.¹⁵⁶ Clearly, the California legislature avoided a conflict with the federal mandate by not explicitly designating illegal aliens as "residents."¹⁵⁷ However, if in-state tuition is not conditioned on a residency requirement, the policy concerns addressed by California courts, Proposition 187, and Education Code section 68062

¹⁵⁰ See Recent Legislation, *supra* note 129, at 1550.

¹⁵¹ See *id.*

¹⁵² See *supra* notes 137–46. *But see* Regents of Univ. of Cal. v. Superior Court, 276 Cal. Rptr. 197 (Cal. Ct. App. 1990); Beth Peters & Marshall Fitz, *To Repeal or Not To Repeal: The Federal Prohibition on In-State Tuition for Undocumented Immigrants Revisited*, 168 EDUC. L. REP. 2, *565, *569 ("In an ironic political twist, California reversed the stance it had adopted in Proposition 187 and recently enacted a measure designed to navigate around the prohibition of Section 505 [of the IIRIRA].").

¹⁵³ CAL. EDUC. CODE § 68130.5 (West 2003) (listing requirements for exemption from nonresident tuition).

¹⁵⁴ 8 U.S.C. § 1623 (2000).

¹⁵⁵ See Recent Legislation, *supra* note 129, at 1552 (stating that in-state domicile required proof that an illegal alien attended a California high school for at least three years and subsequently received a diploma).

¹⁵⁶ See *Carlson v. Reed*, 249 F.3d 876 (2001) (finding that a California TN/TD visa holder could not establish California residence because her continued presence in this country would be illegal based on her immigration status); see also CAL. EDUC. CODE § 68062 (West 2003), Notes of Decisions (explaining that "Congress reserved no classification for such aliens, since in entering the country without applying for admission they have broken the law and are subject to arrest and deportation. *Ed. Code*, § 68062, subd. (h), was intended to permit only legally admitted alien students to qualify for tuition purposes").

¹⁵⁷ See Recent Legislation, *supra* note 129, at 1551–52. ("California does not permit an undocumented alien to establish official residency.").

fall on deaf ears.¹⁵⁸ Interestingly, the California Education Code states that “[a]n alien . . . may establish his or her residence, unless precluded by the Immigration and Nationality Act.”¹⁵⁹ Thus, the state code narrowly avoids classifying illegal aliens as “residents” by use of semantics to ensure that section 68130.5 does not conflict with IIRIRA.¹⁶⁰ Any action by a California state university to designate an illegal alien as an in-state student should conform with federal law and the precedent of California’s courts, voters and legislation.

2. Texas’s State Immigration Laws

Treatment of illegal aliens in Texas has developed along a similar pattern as treatment of these individuals who live in California.¹⁶¹ The state supreme court in *Richards v. League of United Latin American Citizens*,¹⁶² held that Article VII of the Texas Constitution provides for equal access to public education, but limited its reach to avoid inclusion of higher education.¹⁶³ The court in *Richards* distinguished public education as it applies to primary and secondary schools from its application to higher education institutions.¹⁶⁴ The court found that the Texas Constitution clearly segregates the management of primary and secondary schools from higher education institutions.¹⁶⁵

In 2001, the Texas House Bill 4103 amended the Texas Education Code.¹⁶⁶ Since the bill passed, the Texas Education Code’s in-state tuition requirement now states that “[b]efore an individual may register at an institution of higher education paying tuition at the rate provided for residents, the individual must affirm under oath, to the appropriate official at the institution, that the individual is entitled to be

¹⁵⁸ See 67 Op. Att’y Gen. Cal. 241 (1984). California Attorney General John K. Van De Kamp reviewed section 68062 and found that its legislative history “clearly tips the scales in favor of the conclusion that section 68062, subdivision (h), does not permit undocumented or illegal aliens to acquire residency for tuition purposes.” *Id.*

¹⁵⁹ CAL. EDUC. CODE § 68062(h) (West 2003).

¹⁶⁰ Recent Legislation, *supra* note 129, at 1551–52. The author notes that the “Section does not say that undocumented students cannot attend, or even that they are ineligible for in-state tuition. Rather, it says tuition benefits cannot be given on the basis of residence.” *Id.* at 1553.

¹⁶¹ See *supra* notes 150–53 and accompanying text (describing California’s adoption of legislation to allow illegal immigrants to qualify for tuition benefits).

¹⁶² 868 S.W.2d 306 (Tex. 1993).

¹⁶³ *Id.* at 317 (“[A]rticle VII establishes three separate types of educational institutions supported by separate constitutional funds. The ‘Public Free Schools’ addressed by sections 1 through 8 do not include institutions of higher education.”).

¹⁶⁴ *Id.* at 316–17.

¹⁶⁵ See *id.*

¹⁶⁶ See H.R. 4103 (Tex. 2001).

classified as a resident for purposes of tuition.”¹⁶⁷ However, despite the section 54.0521(a) requirement that a student be “entitled to a classification as a resident” when they register with the institution, Texas House Bill 1403 provides a loophole for illegal aliens living in this country.¹⁶⁸

First, section 54.051 of the Texas Education Code specifically addresses the residency requirement for in-state tuition and now provides that “[u]nless the student establishes residency as provided by Section 54.052(j) or 54.057, tuition for a student who is a citizen of any country other than the United States of America is the same as the tuition required of other nonresident students.”¹⁶⁹ Texas Education Code section 54.052(j) dictates that an individual is an in-state resident if he resided with a parent, guardian, or conservator while attending a Texas high school and

- (1) graduated from a public or private high school or received the equivalent of a high school diploma in this state;
- (2) resided in this state for at least three years as of the date the person graduated from high school or receive the equivalent of a high school diploma;
- (3) registers as an entering student in an institution of higher education not earlier than the 2001 fall semester; and
- (4) provides to the institution an affidavit stating that the individual will file an application to become a permanent resident at the earliest opportunity the individual is eligible to do so.¹⁷⁰

There is a clear distinction between promising to apply for residency, as required by section 54.052(j), and being entitled to such classification when a student applies to the institution, as required under section 54.0521(a).¹⁷¹ If the student is “entitled” to the residency classification at the time he registers with a state university, then the affidavit requirement, as stated in section 54.052(j)(4), is futile. The student, by signing the oath of residency, must be entitled to the classification of residency and thus should be required to apply for legal status *before* enrollment in the state university.

Second, the education code presents a clear advantage to those entering the United States through unlawful means.¹⁷² Legal nonimmigrant students who come

¹⁶⁷ 12 TEX. JUR. 3D. *Colleges and Universities* § 59 (2004) (citing TEX. EDUC. CODE ANN. § 54.0521(a)).

¹⁶⁸ See *infra* note 170 and accompanying text (explaining how a nonresident student may meet the requirements for in-state tuition benefits).

¹⁶⁹ TEX. EDUC. CODE ANN. § 54.051(m) (Vernon Supp. 2004–2005).

¹⁷⁰ *Id.* § 54.052(j).

¹⁷¹ See *generally id.* §§ 54.051(m), 54.052(j).

¹⁷² See *id.* § 54.051(m).

to Texas on a student visa are unable to gain the same immediate benefit that is given to undocumented aliens.¹⁷³ Texas Education Code section 54.052 outlines the general rules for establishing residency. Specifically, section 54.052(f) states that “[a]n individual who is 18 years of age or over who resides out of the state or who has come from outside Texas and who registers in an educational institution before having resided in Texas for a 12-month period shall be classified as a nonresident student.”¹⁷⁴ Texas Education Code section 54.057(a) specifically addresses student visa holders:

An alien who is living in this country under a visa permitting permanent residence or who has applied to or has a petition pending with the Immigration and Naturalization Service to attain lawful status under federal immigration law has the same privilege of qualifying for resident status for tuition and fee purposes under this subchapter as has a citizen of the United States.¹⁷⁵

Foreign students who enter the United States as nonimmigrants or with student visas are oftentimes never given the opportunity to establish in-state residency.¹⁷⁶ Educational visas are awarded for short durations of time,¹⁷⁷ allowing nonimmigrants to remain in the United States only during the requisite time period to receive their degree.¹⁷⁸ As a result, even if a nonimmigrant visa student could meet the residency requirements of the Texas Education Code after being present in the country for twelve months, section 54.052(f) bars him from receiving the in-state tuition rates during his first year of study.¹⁷⁹ The Texas Education Code thus perpetuates the

¹⁷³ See *id.* § 54.052. Section 54 allows illegal aliens to qualify for in-state tuition rates because the statutes requirements are met by the student’s illegal presence in the country. Legal nonimmigrants cannot, by the statutory definition, fulfill these requirements. Furthermore, fulfillment of these qualifications would designate them as illegal aliens.

¹⁷⁴ *Id.* § 54.052(f).

¹⁷⁵ *Id.* § 54.057.

¹⁷⁶ See Needleman & Vea, *supra* note 4, at 193.

¹⁷⁷ See *id.* at 197.

¹⁷⁸ See *id.*, which explains an F-1 visa student’s duration of stay.

An F-1 student is admitted to the United States for “duration of status,” which is defined as “the time during which an F-1 student is pursuing a full course of study at an educational institution approved by the Service . . . or engaging in authorized practical training following completion of studies, plus 60 days to prepare for departure from the U.S.”

Id. (quoting 8 C.F.R. § 214.2(f)(5)).

¹⁷⁹ See TEX. EDUC. CODE ANN. § 54.052(f) (Vernon Supp. 2004–2005).

discrimination against foreign students who have chosen to adhere to U.S. immigration laws.¹⁸⁰

Texas's education code does not reflect the congressional intent embodied in IIRIRA. Because Texas conditions the state's tuition rates on residency, the education code should not give any benefit to illegal aliens unless citizens and nationals are eligible for the same benefit in no less duration or amount.¹⁸¹ Section 54 of the education code offers illegal aliens a clear advantage in qualifying for in-state tuition.¹⁸² The code uses their previous unlawful activity — residing illegally in this country — to fulfill their residency requirement.¹⁸³ Comparatively, because of the statutory time constraints imposed on a visa student, such a student is automatically denied the benefit of in-state tuition for the first year of study.¹⁸⁴

D. The Proposed DREAM Act Attempts to Revoke IIRIRA

In the wake of uncertainty surrounding the classification of undocumented aliens for tuition purposes, Senator Orrin G. Hatch (R-Utah), has introduced legislation to repeal the federal provisions that bar states from providing postsecondary education benefits to undocumented aliens.¹⁸⁵ The DREAM Act would amend the IIRIRA and permit states to grant in-state tuition benefits to undocumented aliens.¹⁸⁶ This legislation proposes that undocumented aliens, upon their acceptance to an institution of higher learning, earn conditional residency if they "immigrated to the United States before the age of 16, have lived in this country at least five years

¹⁸⁰ See, e.g., Needleman & Veal, *supra* note 4, at 194 (stating that an F-1 visa student is required to have a residence abroad that he has no intention of abandoning). Nonimmigrants, such as F-1 students may be ineligible to qualify for in-state tuition because they are unable to present proof that they will be able to remain in this country after their student visa expires. See 8 U.S.C. § 1101(f)(i) (2000) (defining foreign visa students as aliens who do not intend to abandon their foreign residence); see also *Regents of Univ. of Cal. v. Superior Court*, 276 Cal. Rptr 197, 200 (Cal. Ct. App. 1990) ("Aliens who maintain a foreign residence they do not intend to abandon cannot also be residents of California, for a person can have only one residence.") (citing CAL. EDUC. CODE § 68062(a)).

¹⁸¹ See 8 U.S.C. § 1623(a) (2000).

¹⁸² See *supra* notes 175–80 and accompanying text (describing how the Texas Education Code abides by the federal immigration laws, in terms of a visa holder's ability to establish residency, and thus bars certain visa holders from being able to establish residency in the same amount of time as an illegal immigrant).

¹⁸³ See 8 U.S.C. § 1623(a) (2000) (warning that an illegal alien cannot receive postsecondary education benefits "on the basis of residence within a State . . . unless a citizen or national of the United States is eligible for such a benefit").

¹⁸⁴ See Arroyo, *supra* note 104, at 416.

¹⁸⁵ See DREAM Act, *supra* note 16; Mary Shaffrey, *Changes in the Cards; IRS Eyeing Taxpayer-ID Numbers to Stem Use by Illegal Immigrants*, WASH. TIMES, Sept. 7, 2003, at A01, available at 2003 WL 7718737.

¹⁸⁶ See DREAM Act, *supra* note 16. Additionally, the DREAM Act of 2003 proposes to amend or repeal IIRIRA. See *id.* § 4(a)(1).

and . . . are of 'good moral character.'"¹⁸⁷ States are then able to award illegal aliens with in-state tuition rates and effectively determine the immigration status of these aliens.¹⁸⁸

The enactment of the DREAM Act would have a significant impact on United States immigration policy and the illegal alien population. First, the act encourages illegal aliens to maintain their illegal status rather than pursue a corrective measure to become legally permitted to remain in the United States.¹⁸⁹ Second, the Act gives states the ability to award residency to illegal aliens and effectively removes Congress's ability to control naturalization.¹⁹⁰ Finally, the Act's policy would maintain a disparate impact on the treatment of legal nonimmigrants and illegal aliens.¹⁹¹

The DREAM Act discourages undocumented aliens from taking corrective measures to change their illegal status. Currently all illegal aliens "owe[] *obedience to the laws of the country in which he is domiciled.*"¹⁹² The DREAM Act overlooks the responsibilities of illegal immigrants to correct actively their residency status despite their illegal entry into the country.¹⁹³ Simply put, federal law requires that all aliens apply for permission to remain in the United States.¹⁹⁴ This requirement would be usurped by the DREAM Act. Additionally, Congress has enacted measures to control immigration, measures that would be circumvented by this legislation.¹⁹⁵ Currently, IIRIRA regulates the ability of all immigrants to receive federal and state benefits.¹⁹⁶ In addition, the Enhanced Border Security and Visa Entry Reform Act of 2002¹⁹⁷ requires intense monitoring of legal immigrant and nonimmigrant students present in this country.¹⁹⁸ It is not within a state's power to give illegal aliens a shortcut to evade federal immigration procedures.¹⁹⁹ Essentially, the DREAM Act

¹⁸⁷ Shaffrey, *supra* note 185, at A01.

¹⁸⁸ See Morse, *supra* note 98 (reporting that the DREAM Act "would allow certain minor immigrant children to gain legal status"). *But see* Romero, *supra* note 21, at 407 ("The power to change one's immigration status rests solely on Congress's shoulders.").

¹⁸⁹ See Olivas, *supra* note 113.

¹⁹⁰ See Alfred, *supra* note 3, at 629 (noting that the federal government has power over national sovereignty and immigration).

¹⁹¹ *Id.* ("[S]tates cannot freely enact legislation that facially discriminates against legal and undocumented immigrants.").

¹⁹² *Plyler v. Doe*, 457 U.S. 202, 212 n.11 (citing *Wong Wing v. United States*, 163 U.S. 228, 242-43 (1896)) (emphasis added).

¹⁹³ See, e.g., *id.* at 220 (stating that parents have the ability to conform to the State's jurisdiction); *supra* notes 123-26 and accompanying text (describing how illegal aliens may have the opportunity to correct their illegal status and choose not to do so).

¹⁹⁴ See 8 U.S.C. §§ 1101(a)(4), 1181(a) (2000).

¹⁹⁵ See Romero, *supra* note 21, at 396 (stating Congress's power over immigration extends into areas that are traditionally left to states).

¹⁹⁶ See generally Galassi, *supra* note 20, at 79.

¹⁹⁷ See 8 U.S.C. § 1701 (2000).

¹⁹⁸ See 8 U.S.C. § 1761 (2000); see also Arroyo, *supra* note 104, at 423.

¹⁹⁹ See Romero, *supra* note 21, at 407 (noting that Congress has the sole power to change

rewards illegal aliens for retaining their unlawful status and allows them to bypass the immigration channels for correcting their unlawful status.²⁰⁰

Congress holds the sole power “to establish an uniform Rule of Naturalization.”²⁰¹ Giving states the power to designate undocumented aliens as legal residents infringes on the congressional power to regulate immigration and naturalization.²⁰² One of the DREAM Act’s proposals is to enable illegal aliens “to earn permanent residency in the United States in conjunction with earning either a 4 or 2-year college degree.”²⁰³ This would allow states to grant residency to illegal aliens if they meet the Act’s stated conditions, which do not include correcting their illegal status through the designated immigration procedures.²⁰⁴ This proposal would interfere with Congress’s ability to maintain the rules governing naturalization.²⁰⁵ As explained by the Court in *Toll v. Moreno*:

The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such

a person’s immigration status).

²⁰⁰ See *Free Tuition for Illegal Aliens: ‘What Next—Free Room and Board?’*, SAN DIEGO UNION-TRIB., Sept. 17, 2003, at B9 (arguing that policies giving tuition breaks to illegal aliens are giving “an illegal immigrant . . . something a citizen has to work for”).

²⁰¹ Galassi, *supra* note 20, at 83 (quoting U.S. CONST. art. I, § 8, cl. 4).

²⁰² See Romero, *supra* note 21, at 407.

²⁰³ See S. 1291, 147 CONG. REC. S8579-01, S8581 (daily ed., Aug. 1, 2001) (statement of Sen. Hatch) (supporting the adoption of the DREAM Act to offer undocumented aliens the opportunity to earn permanent residency). If such a resolution were adopted, an illegal immigrant could establish legal residence in the United States quicker than some legal residents can establish in-state residency in a new state to acquire the same benefit of in-state tuition rates. Section 8 of the United States Code distinguishes between “aliens” who have applied or may apply for admission to the United States, 8 U.S.C. § 1101(a)(13), and “immigrants,” 8 U.S.C. § 1101(a)(15). Those individuals who are classified as “aliens” have the ability to apply for permanent admission to the United States. 8 U.S.C. § 1101(a)(13)(C). Individuals who are classified as “immigrants” are given this status based on their desire to work or study in this country, or because a treaty exists that allows them to temporarily reside in the United States. 8 U.S.C. § 1101(a)(15). The United States Code explicitly states that these individuals have a “residence” abroad, *id.*, and unless they choose to relinquish this residency they will not be able to qualify as a resident of this country. The result is that these individuals will not be eligible to meet the residency requirements that aliens are eligible for within the provisions of the United States Code.

²⁰⁴ Galassi, *supra* note 20, at 85.

²⁰⁵ See Fragomen, *supra* note 66 (“Since Congress has enacted a comprehensive plan for the regulation of immigration and naturalization, any state legislation which is inconsistent with the purpose of Congress is invalid.”).

powers; they can neither add to nor take from the conditions lawfully imposed by Congress²⁰⁶

Giving state universities the power to determine if students can attend their colleges and, as a result, become citizens of the United States creates a potentially devastating problem for regulating immigration.²⁰⁷

The DREAM Act also explicitly gives preferential treatment to illegal aliens,²⁰⁸ resulting in inconsistent treatment of legal nonimmigrants.²⁰⁹ For example, the Act states that an individual who is a student visa abuser, i.e., overstays the length of his visa permit, is not eligible for residency.²¹⁰ As a result, an individual who legally came into the United States through the proper channels receives worse treatment than the individual who has chosen never to use the correct immigration channels. Both individuals are illegally present in the country and both should receive the same treatment. This disparate treatment of alien students exemplifies the discrepancies that plague the Act.

State legislatures and members of Congress are attempting to delineate guidelines to regulate illegal aliens and higher education.²¹¹ Some states have extended in-state tuition benefits to undocumented aliens living in their borders.²¹² These states have followed California and Texas by “skirting the 1996 federal ban [on giving higher education benefits to illegal immigrants] by using criteria other than residency.”²¹³ Other states, including Virginia and Maryland, are currently debating legislation to eliminate illegal aliens entirely from higher education, or have already mandated payment of out-of-state tuition.²¹⁴ As the uncertainty surrounding the

²⁰⁶ *Toll v. Moreno*, 458 U.S. 1, 11 (1982) (citing *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948)); *see also Plyler v. Doe*, 457 U.S. 202, 219 (1982) (stating that the federal government has the plenary power to control access “to determine who has sufficiently manifested his allegiance to become a citizen of the Nation” and that “[n]o State may independently exercise a like power”).

²⁰⁷ *See supra* notes 123–26 and accompanying text.

²⁰⁸ *See Morse, supra* note 98 (stating that the DREAM Act “would allow certain minor immigrant children to gain legal status”). *But see* DREAM Act, *supra* note 16, § 4(a)(1)(C)(i).

²⁰⁹ *See Morse, supra* note 98.

²¹⁰ *See* DREAM Act, *supra* note 16, § 4(a)(1)(C)(i) (stating that one of the requirements for admission to permanent residence on a conditional basis is an alien cannot be inadmissible under paragraph (6)(G) of section 212(a)).

²¹¹ *See* Nat’l Immigration Law Ctr., *State Proposed or Enacted Legislation Regarding Immigrant Access to Higher Education*, available at http://www.nilc.org/immlawpolicy/DREAM/TABLE_State_Leg_Imm_Higher-Ed.PDF (last visited Feb. 7, 2005).

²¹² *See* Hanson, *supra* note 27.

²¹³ *See* Shaffrey, *supra* note 185, at A01.

²¹⁴ *See* Christina Bellantoni, *Bill Barring Illegals from College Expected to Pass*, WASH. TIMES, Feb. 5, 2004, at A01 (reporting a Virginia house bill prohibiting state-sponsored schools from enrolling illegal aliens).

treatment of illegal aliens in higher education continues, concrete guidelines are necessary to delineate whether illegal aliens should benefit from in-state tuition at state colleges and universities.

III. ANSWERS TO THE CURRENT IMMIGRATION DEBATE AND THE RESULTING POLICY IMPLICATIONS

The Supreme Court in *Plyler* remarked that a “shadow population” of undocumented aliens numbering in the millions was a concern that needed redress in defining the system of public benefits in the United States.²¹⁵ This growing population of undocumented citizens continues to bring new challenges to the practice of distributing public benefits.²¹⁶ This Part argues that allowing undocumented aliens to receive public benefits perpetuates their unlawful activities and thus weakens the public outlook of the law. Additionally, undocumented aliens should only receive in-state tuition once they comply with our federal immigration procedures; a task required of foreign nonimmigrant students and student visa holders. Finally, this Part describes the economic ramifications of allowing undocumented aliens to receive public benefits and the unfair financial burden this policy places on the American public.

The Supreme Court has already dispelled the myth of whether illegal immigration should be tolerated:

At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their “parents have the ability to conform their conduct to societal norms,” and presumably the ability to remove themselves from the State’s jurisdiction²¹⁷

The *Plyler* decision does not support a policy of active endorsement and acquiescence to unlawful immigration.²¹⁸ The Court’s only mandate was that illegal alien

²¹⁵ *Plyler v. Doe*, 457 U.S. 202, 218–19 (“Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial ‘shadow population’ of illegal migrants — numbering in the millions — within our borders.”).

²¹⁶ See 8 U.S.C. § 1611(a) (2000) (defining qualified aliens for federal financial assistance); Mark R. Kravitz & Daniel J. Klau, *Developments in the Second Circuit: 2000–2001*, 34 CONN. L. REV. 833, 862 (2002) (“Unqualified aliens . . . are not entitled to federally sponsored aid except in a few explicit circumstances.”).

²¹⁷ *Plyler*, 457 U.S. at 220 (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

²¹⁸ *Id.*

children should be allowed to attend primary and secondary public school to receive a basic education.²¹⁹ Additionally, the Court in *Plyler* supported limitations on public benefits that are available to illegal aliens because “[p]ersuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct.”²²⁰ Commentaries advocating for the extension of financial aid to illegal aliens overlook these arguments.²²¹ These policy recommendations would result in the continued acquiescence of illegal behavior.²²² This perpetuation of illegal activity has been ignored by the state institutions awarding in-state tuition benefits.²²³

Giving in-state tuition benefits to illegal aliens creates a mandate that illegal activity will not only be tolerated, but also embraced and rewarded *so long as it goes undetected*. At some point, the involuntariness of illegal alien children changes and their actions must be seen as the voluntary actions of an adult.²²⁴ The Court in *Plyler* found that undocumented children did not have control to change their illegal status and that a “basic education” was necessary to function in society.²²⁵ The Court distinguished between the undocumented child’s inability to exercise responsibility and the accountability that is required of illegal alien adults.²²⁶ States’ treatment of undocumented aliens in higher education should follow this distinction.²²⁷ Postsecondary education institutions that extend tuition benefits to illegal aliens are no longer ignoring the involuntary actions of a dependent *child* who cannot object to the unlawful actions of a parent.²²⁸ Instead, these institutions are acquiescing to the voluntary actions of those undocumented adults who elect to

²¹⁹ See Galassi, *supra* note 20.

²²⁰ *Plyler*, 457 U.S. at 219.

²²¹ See, e.g., Galassi, *supra* note 20; Olivas, *supra* note 113.

²²² See, e.g., Galassi, *supra* note 20; Olivas, *supra* note 113.

²²³ See Raspberry, *supra* note 19, at A15. Raspberry questions whether it is reasonable for a state’s citizens to foot the bill for illegal alien education by examining Virginia’s illegal alien policy. *Id.* Raspberry states that of the two views people express regarding the offering of illegal aliens in-state tuition, one is based on sympathy for the individuals, while the other is based on “the logic that illegality has meaning or it doesn’t. If it does, it certainly ought to require that we do not reward the lawlessness — if only because the rewards will undercut our efforts to reduce the lawlessness.” *Id.*

²²⁴ See Fragomen, *supra* note 66.

²²⁵ *Plyler*, 457 U.S. at 223; see, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”). In *Yoder*, the Court allowed Amish parents to withdraw their children from public school after completing the eighth grade. *Id.* at 219. Although the Court did not explicitly state that the requirements for a basic education are met by completion of the eighth grade, it is obvious that the Court believed that these Amish children had received the essentials of a basic education.

²²⁶ *Plyler*, 457 U.S. at 219–20.

²²⁷ *But see* Alfred, *supra* note 3.

²²⁸ See Raspberry, *supra* note 19, at A15.

avoid both correcting their unlawful status in the United States and having to return to their native country.²²⁹

The second major problem with extending in-state tuition to illegal aliens is that these individuals are not being denied anything; in fact, they are confronting the same obstacles that foreign students and out-of-state residents face when applying to a university. A notable distinction between the statutes at issue in *Rodriguez* and *Plyler* and those involving higher education tuition rates is that the latter do not result in a denial of education.²³⁰ Regardless of the enactment of IIRIRA, illegal aliens still have access to higher education. The result of IIRIRA and similar statutes is simple: while illegal aliens may prefer to attend a private institution or a prestigious state school, like other students, they may have to attend a school that is not their first choice because of financial difficulties that out-of-state tuition rates impose.²³¹ All students are competing for a place at state colleges or universities with a finite number of seats to fill in those institutions. IIRIRA does not prevent illegal immigrants from competing for these competitive seats. However, no student is guaranteed the ability to attend their first choice of college. This situation is distinctly different from *Plyler*, where the undocumented children faced a complete bar to education.²³² Here, the illegal alien faces a financially narrowed choice of options, the same limitation faced by many college-aged citizens.

IIRIRA is designed to ensure that illegal aliens cannot receive postsecondary education benefits that are withheld from nonresident students who are U.S. citizens or visa holders.²³³ The DREAM Act and California and Texas's education codes violate this mandate.²³⁴ These policies do not put the in-state tuition requirements for illegal aliens on equal footing with out-of-state students,²³⁵ but rather they favor

²²⁹ Romero, *supra* note 21, at 410 (stating that children cannot affect their status but “[t]heir ‘parents have the ability to conform their conduct to societal norms,’ and presumably the ability to remove themselves from the State’s jurisdiction” (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977))).

²³⁰ See, e.g., Associated Press, *Some Illegal Immigrants to Get a Tuition Break in California*, N.Y. TIMES, Jan. 18, 2002 (“America Yareli Hernandez, an 18-year-old student at Fresno State, told the regents that she wanted to transfer to a University of California campus but could not afford the tuition.”), available at WLNR 4024331.

²³¹ See, e.g., *id.*

²³² See generally *Plyler v. Doe*, 457 U.S. 202 (1982).

²³³ See 8 U.S.C. § 1623(a) (2000) (“[A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit.”).

²³⁴ *Id.* In addition, IIRIRA requires that the same benefit afforded to an illegal immigrant be given to a U.S. citizen in no less amount, duration, or scope. *Id.* The state statute requirements for tuition have codified the unlawful behavior of the illegal alien as a requirement. See, e.g., *supra* notes 153, 166–67, 187.

²³⁵ See Hanson, *supra* note 27.

immigrants who illegally enter the country, overstay their visas, or are nonimmigrants, as opposed to favoring those who enter the United States using legal measures.²³⁶ For example, the DREAM Act and some state education codes give in-state tuition to illegal aliens without requiring any action by these individuals to correct their status.²³⁷ Out-of-state students and legal nonimmigrants must take an *affirmative step* to qualify as an in-state student.²³⁸ A nonresident student must live in a particular state for a designated time period and follow the school's instructions for residency qualification.²³⁹ Only after taking these steps can he apply for in-state tuition. Illegal aliens, however, do not have to take any affirmative steps that mirror these guidelines.²⁴⁰ In Texas and California, illegal immigrants are required only "to provide affidavits that they will seek to pursue lawful immigration status as soon as they are able."²⁴¹ Texas and California also explicitly deny these same tuition benefits to nonimmigrant foreign students who have used legal immigration channels to enter the United States for educational purposes.²⁴² Congress warned against this inequality when it implemented IIRIRA.²⁴³ The affirmative acts required of citizens and legal nonimmigrants give the undocumented students an advantage in receiving in-state tuition.²⁴⁴

In pursuing higher education, the illegal alien has a clear advantage.²⁴⁵ By avoiding deportation while in primary and secondary school, illegal aliens benefit from a state's presumption that they are in-state students.²⁴⁶ However, out-of-state students are not afforded the same luxury. Qualification for in-state residency oftentimes requires converting an individuals' drivers license, vehicle registration

²³⁶ See, e.g., *supra* text accompanying notes 169–74.

²³⁷ See, e.g., TEX. EDUC. CODE ANN. § 54.052 (Vernon Supp. 2004–2005); CAL. EDUC. CODE § 68130.5 (West 2003).

²³⁸ See, e.g., Olivas, *supra* note 113, at 1029 (stating that forty states have complicated residency requirements for out-of-state students that require more than mere duration of stay).

²³⁹ See *supra* text accompanying notes 169–74.

²⁴⁰ See, e.g., *Munoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003) (approving the deportation of a twenty-four-year-old illegal alien who was smuggled into the country as a child).

²⁴¹ See *Romero*, *supra* note 21, at 405 (citing CAL. EDUC. CODE § 68139.5 (West 1989) and TEX. EDUC. CODE ANN. § 54 (Vernon 1996)).

²⁴² See *id.* (citing CAL. EDUC. CODE § 68139.5 (West 1989) and TEX. EDUC. CODE ANN. § 54 (Vernon 1996)).

²⁴³ See IIRIRA, *supra* note 7, § 505; *Romero*, *supra* note 21, at 400 ("Congress wanted to ensure that undocumented immigrants would not be made better off than U.S. citizens by some states.").

²⁴⁴ Cf. *Romero*, *supra* note 21, at 399 (stating that IIRIRA's objective is to deter illegal immigration).

²⁴⁵ See *infra* note 246 and accompanying text.

²⁴⁶ See *supra* note 236 (discussing how illegal aliens benefit from certain states' legislation regarding higher education tuition benefits).

and voter registration.²⁴⁷ Despite these affirmative requirements of nonresidents, illegal aliens are not required to acquire these licenses and registrations to prove that they intend to remain in the state, nor must they overcome similar administrative obstacles to prove allegiance to a state.

Aside from the discord that results between illegal alien and nonresident treatment, nonimmigrants and educational visa holders face the same disparate treatment. Going through the proper channels for entrance into the United States is difficult for many nonimmigrants.²⁴⁸ Besides the domiciled intent requirements, there are limits on the length of the stay in the country and a nonimmigrant's ability to engage in work or education.²⁴⁹ States that allow illegal aliens to receive in-state tuition inevitably prejudice nonimmigrants who have chosen to go through legal channels.

For example, the Ninth Circuit Court of Appeals in *Carlson v. Reed* faced the issue of whether a TN/TD nonimmigrant student should be classified as a state resident.²⁵⁰ The circuit court determined that "aliens are eligible for classification as California residents only if they possess the legal capacity to establish 'domicile in the United States' under federal immigration law."²⁵¹ The court reasoned that Congress intended for federal mandates to guide a state's decisions regarding public benefits for immigrants.²⁵² In California, if Carlson had illegally entered the country, her ability to receive the in-state tuition rate would have substantially increased.²⁵³

This disparate treatment will only continue if Congress enacts the DREAM Act. The Act allows those entering the country illegally to bypass the immigration process and receive conditional residency as well as in-state tuition.²⁵⁴ The inherent

²⁴⁷ See Lawrence J. Conlan, *Durational Residency Requirements for In-State Tuition: Searching for Access to Affordable Higher Learning*, 53 HASTINGS L.J. 1389, 1392 (2002). To combat illegal immigration, some states bar illegal aliens from obtaining proof of residency. See Pia Orrenius & Madeline Zavodny, *Immigration Policy: What are the Consequences of an Amnesty for Undocumented Immigrants?*, 9 GEO. PUBLIC POL'Y REV. 21, 23–24 (2004) (explaining that several states bar undocumented aliens from getting drivers' licenses, governmental assistance, bank accounts, or even library cards).

²⁴⁸ See, e.g., Walfish, *supra* note 107 (discussing the immigration pipeline).

²⁴⁹ See, e.g., *supra* text accompanying notes 177–78.

²⁵⁰ *Carlson v. Reed*, 249 F.3d 876, 880 (9th Cir. 2001) ("The 'TN' visa category was created pursuant to Section D of Annex 1603 of NAFTA, which provides that '[e]ach party shall grant temporary entry'). Based on the temporary entry status, the immigration laws prohibited the student from establishing the domicile requirement. *Id.*

²⁵¹ *Id.* at 878; see also CAL. EDUC. CODE § 68062(h) (West 2003) ("An alien, including an unmarried minor alien, may establish his or her residence, unless precluded by the Immigration and Nationality Act (8 U.S.C. § 1101) from establishing domicile in the United States.").

²⁵² See *Carlson*, 249 F.3d at 879.

²⁵³ See *supra* text accompanying note 153 (outlining the requirements for a student to establish California residency).

²⁵⁴ See DREAM Act, *supra* note 16.

unfairness in awarding such privileges to illegal aliens is palpable. Foreign students who enter the country legally may be dissuaded in their efforts by the benefits given to illegal immigrants. Because these individuals are allowed to enter the United States only for a finite amount of time, they may choose illegal channels to ensure their ability to stay in the country. This discord could lead to those who wish to enter the country for educational purposes to choose illegal immigration as opposed to the current immigration system. All college-bound immigrants should pay out-of-state tuition rates unless they follow the established immigration guidelines and, in turn, qualify for in-state tuition rates.

The final argument against extending in-state tuition to illegal immigrants is an economic one: without changing their illegal status, these individuals are not eligible for several positions in the workforce and are still subject to deportation.²⁵⁵ It is necessary to consider what illegal immigrants are entitled to after graduation from a postsecondary educational institution. Several advocates who support in-state tuition for illegal immigrants maintain that illegal immigrants who lack a college degree are not eligible for competitive postgraduate job positions.²⁵⁶ However, these same advocates recognize that employers cannot *lawfully* offer illegal immigrants employment.²⁵⁷ Before illegal aliens can effectively participate in the workplace, they must change their status.²⁵⁸ Therefore, requiring individuals to perfect their status before receiving the financial benefits of in-state tuition is not an unduly burdensome step in their accession to the workplace.

One persistent argument in support of in-state tuition at the postsecondary education level is that because states and taxpayers have already invested substantial sums of money in the education of illegal alien children, continued outpourings of tax dollars should be spent to extend those benefits to illegal aliens in postsecondary education.²⁵⁹ One commentator noted that "primary and secondary public education constituted the 'largest direct public assistance outlays for all illegal immigrants . . . ' totaling \$6 to \$8.1 billion."²⁶⁰ However, logic does not dictate that because a state

²⁵⁵ See Romero, *supra* note 21; *infra* notes 256–57 and accompanying text (explaining the employment pitfalls that illegal aliens face based on federal laws).

²⁵⁶ See 8 U.S.C. § 1324(a) (2000) (forbidding employers from knowingly hiring illegal aliens).

²⁵⁷ Romero, *supra* note 21, at 395 ("While colleges and universities are not barred from admitting them, undocumented immigrants cannot effectively compete for post-graduation jobs for which they have been trained because employers can be sanctioned for knowingly hiring such persons.").

²⁵⁸ *Id.*

²⁵⁹ Galassi, *supra* note 20, at 87 (Illegal aliens should continue to receive financial assistance because "[a] substantial investment in the education of these children has been made.").

²⁶⁰ *Id.* (citing *Impact of Illegal Immigration on Public Benefit Programs and the American Labor Force: Hearings Before the Subcommittee on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 25–26 (1996) (statement of Donald L. Huddle, Professor Emeritus of Economics, Rice University)).

supports the preservation of a child's basic educational needs, that the state must also provide support for higher education. The Congressional Budget Office's Cost Estimate from enactment of the DREAM Act determined that this extension of in-state tuition to illegal immigrants would cost approximately \$362 million between 2003–2006.²⁶¹ This would result in a further drain on states' already inadequate budgets.²⁶² Therefore, this influx of illegal aliens and their desire to attend higher education institutions at in-state tuition rates needs immediate redress.²⁶³

CONCLUSION

Current U.S. immigration laws bar the residency of those individuals who unlawfully enter the United States.²⁶⁴ The laws subject these individuals to deportation if their violation is discovered.²⁶⁵ A lack of federal funding dedicated to carry out this initiative, however, does not mean that Congress intends to allow these individuals to reside in the United States without taking action to correct their status.²⁶⁶ Additionally, the current legislative initiatives that support giving undocumented aliens increased public benefits overlook the problems of supporting their continued illegal presence.²⁶⁷

The burden of caring for illegal immigrants and providing for their basic needs already falls on the states.²⁶⁸ While the Supreme Court has held that illegal alien children should be afforded a basic level of education, this initiative has not been extended to the postsecondary level.²⁶⁹ Currently, most states have established policies that allow for admission of illegal aliens to their institutions.²⁷⁰ Some states, however, explicitly forbid the extension of in-state tuition to these illegal aliens.²⁷¹ Other states have wrestled with getting around residency requirements for tuition

²⁶¹ *Breaking the Piggy Bank: How Illegal Immigration Is Sending Schools into the Red*, Fed'n for Am. Immigration Reform [hereinafter *Piggy Bank*] (citing CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE FOR S. 1291 DEVELOPMENT, RELIEF, AND EDUCATION FOR ALIEN MINORS ACT (July 26, 2002)), at <http://www.fairus.org> (last visited Feb. 24, 2005).

²⁶² *Id.*

²⁶³ *Id.* (stating that the federal government needs to take some decisive actions and restore the integrity of this country's immigration laws).

²⁶⁴ 8 U.S.C. §§ 1101(a)(4), 1181(a) (2000).

²⁶⁵ *Id.* §§ 1251, 1252, 1357.

²⁶⁶ *See supra* note 31.

²⁶⁷ *See supra* note 28 and accompanying text; Fragomen, *supra* note 66.

²⁶⁸ *See Piggy Bank*, *supra* note 261 (arguing that states are already straining under the under-funded budgets for education).

²⁶⁹ *See Olivas*, *supra* note 113, at 1022 (noting that the Supreme Court has yet to rule directory on postsecondary education residency classifications involving alienage).

²⁷⁰ *See generally Galassi*, *supra* note 20.

²⁷¹ *See, e.g., Raspberry*, *supra* note 19, at A15.

benefits.²⁷² These states walk a fine line by extending these benefits to illegal aliens in violation of the congressional mandate.

Problems surrounding illegal immigration are not disappearing. These problems are realities for states forced to cope with their ballooning undocumented population. Proponents for illegal immigrant in-state tuition want equal opportunity for these individuals. However, the necessity of correcting their status will plague these individuals throughout their life. Barriers for in-state tuition, employment, and federal benefits, will present obstacles for those individuals who are illegally present in the United States.

Illegal aliens' presence in the United States violates federal law.²⁷³ It has yet to be determined whether states, such as California and Texas who extend tuition benefits to these individuals, run afoul of IIRIRA.²⁷⁴ Despite this debate regarding in-state tuition, these individuals will complete their four-year degree and face employment obstacles because of their illegal status.²⁷⁵ It is inevitable that these individuals will have to apply for legal residency to receive the equal opportunity their supporters' desire.²⁷⁶ Illegal aliens should not receive the benefits of in-state tuition rates until they comply with the established guidelines to become legal citizens. Although this requires action by the illegal alien, it assures her ability to receive in-state tuition benefits, to gain employment following graduation, to receive other public benefits, and to truly dispel her membership in a "shadow population."

²⁷² See Alfred, *supra* note 3, at 644 (stating that some colleges and universities unilaterally decide to give in-state tuition to undocumented aliens if they prove they are residing in the state).

²⁷³ 8 U.S.C. § 1101 (2000).

²⁷⁴ *Id.* § 1623.

²⁷⁵ *Id.* § 1324(a).

²⁷⁶ *Id.* § 1181 (explaining the admission criteria for immigrants wishing to enter the United States); see also *Regents of Univ. of Cal. v. Superior Court*, 276 Cal. Rptr 197, 200 (Cal. Ct. App. 1990) (explaining that an illegal alien is subject to arrest and deportation if they attempt to "enter the United States without applying for admission").