THE POLITICAL ECONOMY OF THE DREAM ACT AND THE LEGISLATIVE PROCESS: A CASE STUDY OF COMPREHENSIVE IMMIGRATION REFORM

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Many developments have kept the Development, Relief, and Education for Alien Minors (DREAM) Act and the issue of undocumented college students in the news and on federal and state legislative agendas.[1] Who would have thought that presidential candidates would be debating the issue, as they did in the Republican primaries of 2007 and 2008? Especially coming on the heels of a near-miss months earlier, when the bill almost passed in the Senate, the topic is one that has all the earmarks of an agenda-building subject, situated in the complex and treacherous context of twenty-first century U.S. domestic politics, especially those of comprehensive immigration reform. Inasmuch as this subset of much larger immigration, higher education, and tuition policies commands recurrent attention, DREAM Act politics are a useful bellwether for observers of these domains.

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1. The Development, Relief and Education for Alien Minors Act ("DREAM ACT") is known as such in the Senate. The DREAM Act of 2005, S. 2075, 109th Cong. (2005). In the House, the proposed legislation was known as the American Dream Act. The American Dream Act of 2006, H.R. 5131, 109th Cong. (2006).

This Article updates and amplifies several earlier studies of the DREAM Act, the general topic of undocumented college residency, and to a great extent, reveals the difficulty inherent in conducting research upon pending legislation, especially one that is so fluid and so imbedded in a larger, systemic regime. Part One includes the background for the DREAM Act, at the state and federal level. I review the extensive litigation and legal developments, as well as the several state DREAM Acts and other related issues concerning college residency and tuition. Part Two reviews the federal DREAM Act, and its failure to gain traction in its 2007 U.S. Senate vote. Part Three considers the politics of immigration reform that are the backdrop for these developments, and the Conclusion assesses the prospects for enactment of the legislation, either as a standalone statute or, more likely, as one of many components in the larger comprehensive immigration reform efforts. Considering how small this undocumented college student population is in the larger scheme of things (never more than 50,000 or 60,000 by any estimates),[2] this extensive state and national legislative history reveals a surprising degree of attention in the polity and within U.S. legislative arenas. Nonetheless, it has not stood on its own legs, and the odds have grown longer against its eventual enactment as a separate legislative program.

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2. A 2006 Migration Policy Institute (MPI) study estimated that approximately 50,000 undocumented college students were enrolled, either full-time and part-time, and would be eligible for permanent status under the DREAM Act. Jeanne Batalova & Michael Fix, New Estimates of Unauthorized Youth Eligible for Legal Status Under the DREAM Act, (Oct. 2006) *available at* http://www.migrationpolicy.org (accessed from homepage by selecting search and entering key words "backgrounder DREAM Act") (last visited Apr. 21, 2010). These data do not include persons who might be eligible for the Act's military options for legalization. For additional data, *see also* Elizabeth Redden, *Data on the Undocumented*, INSIDE HIGHER ED., Mar. 17, 2009, *available at* http://www.insidehighered.com/news/2009/03/17/undocumented (accessed from homepage by entering article title in search); Jeffrey S. Passel & D'Vera Cohn, PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES iv (2009), *available at* http://pewhispanic.org/files/reports/107.pdf (last visited Apr. 21, 2010) ("[A]mong unauthorized immigrants ages 18 to 24 who have graduated from high school, half (49%) are in college or have attended college. The comparable figure for U.S.-born residents is 71%."); Dawn Konet, *Migration Policy Institute, Unauthorized Youths and Higher Education: The Ongoing Debate*, Sept. 2007, http://www.migrationinformation.org/Feature/display.cfm?id=642 (last visited Apr. 21, 2010); Raphael Lewis, *In-state Tuition Not a Draw for Many Immigrants*, The BOSTON GLOBE, Nov. 9, 2005, at A1, *available at* http://www.boston.com (accessed from homepage by entering article title in search) (discussing individual state enrollments).

I. THE DREAM ACT

A. Litigation, Legal Developments

The first version of what is known now as the DREAM Act was introduced in Congress in 2001, and many observers thought it would be easily enacted into law. But it did not enter the world naked. Prior to its proposed enactment, several news stories were written about successful college students whose parents had brought them to the United States as children, who either entered without inspection or entered legally and then overstayed a visa, or did one of the many things that can render a family out of status.[3] These children stayed in school by virtue of *Plyler v. Doe*, the 1982 Supreme Court case that struck down restrictive Texas laws that would have allowed school districts to charge tuition or to ban unauthorized students outright from the public schools.[4] Over the many years since *Plyler*, school districts have accommodated the children, who, against all odds, are graduating and applying to colleges and universities.[5]

When their numbers began to grow and attracted attention, some public higher education institutions and states began to impose residency restrictions. Such restrictions precluded undocumented students from achieving domiciliary-based residency tuition, effectively creating a reprise of *Plyler* in post-secondary guise, or charged them tuition rates as if they were international students without visas.[6] Other states and

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3. *See* Michael A. Olivas, *Immigration Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27 (2007) (discussing preemption in the context of immigration); Amy Thompson, *A Child Alone & Without Papers*, Ctr. for Pub. Policy Priorities, (2008), *available at* http://www.cppp.org/repatriation (last visited Apr. 21, 2010) (discussing removal from the United States of unaccompanied, undocumented minors); MARIA PABON LOPEZ & GERARDO R. LOPEZ, PERSISTENT INEQUALITY: CONTEMPORARY REALITIES *in* THE EDUCATION OF UNDOCUMENTED LATINA/O STUDENTS 55-89 (2010).

4. Plyler v. Doe, 457 U.S. 202, 230 (1982). *See* Michael A. Olivas, Plyler v. Doe*: The Education of Undocumented Children, and the Polity*, *in* IMMIGRATION STORIES 197 (David Martin & Peter Schuck eds., 2005); *see also* María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond* Plyler v. Doe, 35 SETON HALL L. REV. 1373 (2005); Jaclyn Brickman, Note, *Educating Undocumented Children in the United States: Codification of* Plyler v. Doe *Through Federal Legislation*, 20 GEO. IMMIGR. L.J. 385 (2006). Historically, Texas is widely considered to have been the most restrictive and nativist towards its Mexican-origin population. *See, e.g.*, CYNTHIA E. OROZCO, NO MEXICANS, WOMEN, OR DOGS ALLOWED: THE RISE OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT (2009).

5. *See generally* BATALOVA & FIX, *supra* note 1.

6. *See, e.g.*, Paula R. v. Goldstein, No. M-2161, 2002 WL 2025999 (N.Y. App. Div. Sept. 5, 2002). In a series of articles, I have tracked these developments through 2004.

institutions allowed the students to establish residency and to pay the lower, in-state tuition; private institutions, which traditionally do not charge tuition based upon state residency criteria, either allowed them to enroll or held that they could not do so, often on the grounds that to do so would implicate their standing to issue I-20 visa documents, such as those employed by traditional F-1 or M-1 international students.[7] Given their many educational disadvantages, their ineligibility to receive most state aid and any federal financial assistance, and their inability to work while in school, only a small number of undocumented students were

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See generally Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HAST. CONST. L.Q. 1019 (1995) [hereinafter Olivas, *Storytelling Out of School*]; Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004) (hereinafter, Olivas, *IIRIRA*). I have continued to analyze these developments and have detailed regular changes on the website www.law.uh.edu/ihelg (last visited Apr. 21, 2010). *See also* Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99 (2008); Stella M. Flores, *State Dream Acts: The Effect of In-State Resident Tuition Policies and Undocumented Latino Students*, 33 REV. HIGHER EDUC. 239, 239 (2009) ("*Plyer v. Doe* . . . addressed only the educational and secondary schools . . . and did not address state or federal actions regarding the post secondary opportunities of undocumented students . . . ."). For an example of the issue in comparative context, see Marie-Theresa Hernandez, *The French Banlieue Riots of 2005 and Their Impact on U.S. Immigration Policy: A Transatlantic Study*, 7 ATLANTIC STUD. 79 (2010).

7. Michael A. Olivas, *The Political Economy of Immigration, Intellectual Property, and Racial Harassment: Case Studies of the Implementation of Legal Change on Campus*, 63 J. HIGHER EDUC. 570, 573–77 (1992); Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393 (2002); Victor C. Romero, *Noncitizen Students and Immigration Policy Post-9/11*, 17 GEO. IMMIGR. L.J. 357 (2003); CARL KRUEGER, EDUC. COMM'N OF THE STATES, IN-STATE TUITION FOR UNDOCUMENTED IMMIGRANTS (2005) *available at* http://www.ecs.org/html/issue.asp?issueID=199 (last visited Apr. 28, 2010); AIMEE CHIN & CHINHUI JUHN, BAKER INST. FOR PUB. POLICY, DOES REDUCING COLLEGE COSTS IMPROVE EDUCATIONAL OUTCOMES FOR UNDOCUMENTED IMMIGRANTS?: EVIDENCE FROM STATE LAWS PERMITTING UNDOCUMENTED IMMIGRANTS TO PAY IN-STATE TUITION AT STATE COLLEGES AND UNIVERSITIES, (2007), *available at* http://bakerinstitute.org/publications/Educational_Outcomes-5.pdf (last visited Apr. 28, 2010); Neeraj Kaushal, *In-State Tuition for the Undocumented: Education Effects on Mexican Young Adults*, 27 J. POL'Y ANALYSIS & MGMT. 771 (2008). *See generally* Karen Engle, *The Political Economy of State and Local Immigration Regulation: Comments on Olivas and Hollifield, Hunt & Tichenor*, 61 SMU L. REV. 159 (2008); S. KARTHICK RAMAKRISHNAN & TOM (TAK) WONG, IMMIGRATION POLICIES GO LOCAL: THE VARYING RESPONSES OF LOCAL GOVERNMENTS TO UNDOCUMENTED IMMIGRATION 22 (2007), *available* at http://www.law.berkeley.edu/files/RamakrishnanWongpaperfinal(1).pdf (accessed from homepage by entering paper title in search) (last visited Apr. 28, 2010); LOPEZ & LOPEZ, *supra* note 3, at 55-89 (2009) (providing a critical analysis of undocumented college applicants and students).

actually affected by state and post-secondary educational institutions' reactions to *Pyler*.[8]

Then, lightning struck with the passage of Proposition 187, California's 1994 ballot initiative designed to eliminate virtually all state benefits to undocumented immigrants.[9] This draconian measure, passed overwhelmingly by the state's electorate, would have stripped undocumented aliens of all but the most essential health and emergency medical services, would have overruled *Plyler* and denied educational benefits to these children, and would have required public officials to report undocumented aliens' status to police and security authorities.[10] Almost immediately, declaratory and injunctive relief was granted by federal courts, and ultimately, almost all of Proposition 187's provisions were struck down. The bar on postsecondary residency, however, was

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8. BATALOVA & FIX, *supra* note 1.

9. *See* League of United Latin Am. Citizens (LULAC II) v. Wilson, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997) (striking down virtually all of Proposition 187). *See generally* Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 634 (1995); Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 120-22 (1995).

10. The full text of Proposition 187 appears in *League of United Latin American Citizens (LULAC II) v. Wilson*, 908 F. Supp. 755, 787-91 (C.D. Cal. 1995). There is extensive literature on the events leading to, and following from, this ballot initiative. *See generally* Evangeline G. Abriel, *Rethinking Preemption for Purposes of Aliens and Public Benefits*, 42 UCLA L. REV. 1597 (1995); Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555 (1996); Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475 (1995); Lolita K. Buckner Inniss, *California's Proposition 187—Does It Mean What It Says? Does It Say What It Means? A Textual and Constitutional Analysis*, 10 GEO. IMMIGR. L.J. 577 (1996); Johnson, *supra* note 9; Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995); Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453 (1995); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201 (1994); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425 (1995); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217 (1994); Peter L. Reich, *Environmental Metaphor in the Alien Benefits Debate*, 42 UCLA L. REV. 1577 (1995); Peter H. Schuck, *The Message of Proposition 187*, 26 PAC. L.J. 989 (1995). Some of the fuller studies include, e.g., VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA 73-82 (2007); ROBIN DALE JACOBSON, THE NEW NATIVISM: PROPOSITION 187 AND THE DEBATE OVER IMMIGRATION (2008); Frederick J. Boehmke, *The Initiative Process and the Dynamics of State Interest Group Populations*, 8 STATE POLITICS & POLICY QUARTERLY 362 (2008).

upheld.[11] By the mid-1990s, a number of states had also challenged what they considered failed federal immigration enforcement policy, seeking additional federal resources.[12] Six of the major receiver states brought such suits; all were eventually unsuccessful.[13]

At the same time, California Congressman Elton Gallegly (R-Cal.) introduced federal legislation to overturn *Plyler*, and while the "Gallegly Amendment" was unsuccessful,[14] the newly Republican-controlled Congress in 1995 resulted in two major 1996 laws restricting immigration and the status of immigrants: the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

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11. *LULAC I*, 908 F. Supp. 755; *LULAC II*, 997 F. Supp. 1244. For a review of the residency issues leading up to this time, and the result of *LULAC*, see Olivas, *Storytelling Out of School*, *supra* note 6; Gary Libman, *Losing Out on a Dream? Education: Tuition Changes Cloud Future for Illegal Immigrants Who had Hopes of Attending UC Schools, Other State Colleges*, L.A. TIMES, Jan. 23, 1992, at E3 ("The [*Bradford*] decision will affect only about 100 UC students but about 14,000 at state community colleges, officials estimate."); Larry Gordon, *Immigrants Face Cal State Fee Hike*, L.A. TIMES, Sept. 9, 1992, at A3 ("[The Bradford] decision could affect 800 of the 361,000 Cal State students"). At the time, California public college students totaled nearly 2 million, including over 1.36 million in the community colleges. Sacramento: California Postsecondary Education Commission, Student Profiles, 1994, at Table 1-5, *available at* http://www.cpec.ca.gov/CompleteReports/1994Reports/94-20.pdf (last visited Apr. 21, 2010).

12. Chiles v. United States, 69 F.3d 1094 (11th Cir. 1995); Padavan v. United States, 82 F.3d 23 (2d Cir. 1966); New Jersey v. United States, 91 F.3d 463 (3d Cir. 1996); Arizona v. United States, 104 F.3d 1095 (9th Cir. 1997); Texas v. United States, 106 F.3d 661 (5th Cir. 1997).

13. *Chiles*, 69 F.3d 1094; *Padavan*, 82 F.3d 23; *New Jersey*, 91 F.3d 463; *Arizona*, 104 F.3d 1095; *California*, 104 F.3d 1086; *Texas*, 106 F.3d 661. Notwithstanding these cases, which all the states lost, it was a complex issue. For example, in 1993, Texas did not even spend all of its federal dollars allocated for immigrant program support and returned $90 million unspent to the government. *See* James Cullen, Editorial, *Blame the Newcomers*, TEX. OBSERVER, Aug. 19, 1994, at 2-3.

14. Olivas, Plyler v. Doe, *the Education of Undocumented Children, and the Polity*, *supra* note 3, at 212-13. For an authoritative review of the 1996 legislative histories and restrictionist efforts leading to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and Illegal Immigration Reform and Immigrant Responsibility Act of 1996, written by an observer-participant, see PHILIP G. SCHRAG, A WELL-FOUNDED FEAR; THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 141-44, 178-82, 244-45 (2000). While *Plyler* provided constitutional protection to the undocumented children from state laws, the case did not apply in similar fashion to congressional legislation. For other thoughtful studies of *Plyler* and the issues of federal preemption, see generally Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000).

(IIRIRA).[15] These omnibus laws dramatically changed the landscape, affecting federal benefits in many areas of health and welfare, including the requirement that if a state wished to accord resident tuition to the undocumented, it must do so "only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility."[16] The enactment of these federal statutes led the judge in the challenge to Proposition 187[17] to determine that the federal government preempted similar state actions expressing the "intention of Congress to occupy the field of regulation of government benefits to aliens."[18] When the state of California appealed this decision, the newly-elected governor, Gray Davis, invoked the Ninth Circuit's special arbitration and mediation provision, which resulted in a July 1999 settlement.[19]

In 2001, Texas passed the first statute to accord the state resident tuition allowed by IRRIRRA and PRWORA, affirmatively providing resident status to immigrant students.[20] The same year, on September 11, the world fundamentally changed, and any immediate hopes for immigration reform were dashed by the onset of overwhelming national security concerns.[21] Even so, federal legislation was introduced in 2001, giving the DREAM Act its acronym.[22]

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15. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 2, 5, 7, 8, 10, 11, 13, 15, 20, 21, 25, 26, 28, 29, 31, 42 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8, 18 U.S.C.).

16. 8 U.S.C.A. § 1621 (West 2010); *see* 8 U.S.C.A. § 1623 (West 2010).

17. League of United Latin Am. Citizens v. Wilson (LULAC II), 997 F.Supp. 1244 (C.D. Cal. 1997) (finding the majority of Proposition 187 preempted by previously enacted federal legislation).

18. *LULAC II*, 997 F.Supp. at 1253.

19. Patrick J. McDonnell, *Davis Won't Appeal Prop. 187 Ruling, Ending Court Battles*, L.A. TIMES, July 29, 1999, at A1, *available at* http://articles.latimes/com/1999/jul/29/news/mn-60700; Patrick J. McDonnell, *Prop. 187 Talks Offered Davis Few Choices*, L.A. TIMES, July 30, 1999, at A3, *available at* http://articles.latimes.com/1999/jul/30/news/mn-061022.

20. TEX. EDUC. CODE ANN. § 54.052 (Vernon 2005). *See* Sara Hebel, *States Take Diverging Approaches on Tuition Rates for Illegal Immigrants*, CHRON. OF HIGHER EDUC., Nov. 30, 2001, at A22.

21. *See* Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 852-65 (2003); Olivas, *IIRIRA*, *supra* note 6, at 457-63; Michael A. Olivas, *What the 'War on Terror' Has Meant For U.S. Colleges and Universities*, *in* DOCTORAL EDUCATION AND THE FACULTY OF THE FUTURE 249-58 (Ronald G. Ehrenberg & Charlotte V. Kuh eds., 2009). For a study of the larger issue of terrorism, see LOUIS FISHER, THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA'S FREEDOMS (2008).

22. *See, e.g.*, María Pabón López, *supra* note 3, at 1400-07.

Other states followed Texas' lead and through 2010, ten states allowed undocumented students to establish residency and pay in-state tuition:[23] one state (Oklahoma) had granted this status and then rescinded it;[24] South Carolina voted to ban the undocumented from attending its public colleges. The other states allowed them to enroll, but charged them non-resident tuition.[25] Given undocumented students' ineligibility to secure lawful employment, these students do not qualify for jobs in college or after graduation.[26] They may not be licensed or gain authorization for skilled professions such as teaching, law, or the medical professions.[27] As is evident from the narratives that follow, this is highly contested terrain, surprisingly so, especially considering how few such students exist in the context of over eighteen million college students. No estimates exceed 50,000 to 60,000 students nationally,[28] which would constitute the entire enrollment at the main Columbus campus of The Ohio State University.[29] In order to clear up the confusion on the issue, and to provide a path to legalization for the affected students after their graduation, the DREAM Act was introduced in 2001, in essentially its present form.

Table One: State Legislation Allowing Undocumented College Students to Establish Residency (by Statute)

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23. *See* Olivas, *IIRIRA*, *supra* note 6, at 456.

24. *Id*.

25. S.C. CODE ANN. § 59-103-5 (West 2009). *See Strong Illegal Immigration Bill Biggest Legislative Achievement*, POST & COURIER (Charleston, S.C.), June 7, 2008, at A10, *available at* http://www.postandcourier.com/news/2008/jun/07/strong_illegal-_immigration_bill_biggest_43802/; South Carolina General Assembly, 117th Session (2007-2008), *available at* http://www.law.uh.edu/ihelg/documentsSouthCarolina-Bill440.pdf (last visited Apr. 21, 2010) (detailing the state's regulatory interpretation of the law).

26. *See, e.g.*, J. Austin Smithson, Comment, *Educate Then Exile: Creating a Double Standard for Plyler Student Who Wants to Sit for the Bar Exam*, 11 SCHOLAR 87 (2008).

27. *See, e.g.*, Smithson, *supra* note 26; Susan Carroll, *Immigrant Spends Life Looking over Her Shoulder*, HOUSTON CHRON., Nov. 28, 2009, at B1 (describing an undocumented school teacher who fears deportation after spending most of her life in the United States). This is also an issue with immigrants throughout the regime of legal immigration. *See, e.g.*, Jeanne Batalova & B. Lindsay Lowell, *Immigrant Professionals in the United States*, 44 SOC'Y 26 (2007).

28. BATALOVA & FIX, *supra* note 1. The total college enrollment in the U.S. in 2007 was over 18 million students. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUC. STATISTICS (2008), *available at* http://nces.ed.gov/-fastFacts/display.asp?id=98 (last visited Apr. 21, 2010).

29. The Ohio State University, http://www.osu.edu.

Texas, H.B. 1403, 77th Leg., Reg. Sess. (Tex. 2001) [amended by S.B. 1528, 79th Leg., Reg. Sess. (Tex. 2005)]; TEX. EDUC. CODE ANN. § 54.052

California, A.B. 540, 2001-02 Cal. Sess. (Cal. 2001); CAL. EDUC. CODE §68130.5

Utah, H.B. 144, 54th Leg., Gen. Sess. (Utah 2002); UTAH CODE ANN. § 53B-8-106

New York, S. B. 7784, 225th Leg., 2001 NY Sess. (NY 2002); N.Y. EDUC. LAW §355(2)(h)(8)

Washington, H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003); WASH. REV. CODE ANN § 28B. 15.012

Oklahoma, S.B. 596, 49th Leg., 1st Reg. Sess. (OK 2003) [rescinded, Oklahoma Taxpayer and Citizen Protection Act of 2007 (H.B. 1804)]; OKLA. STAT.ANN.TIT. 70, § 3242

Illinois, H.B. 60, 93rd Gen. Assemb., Reg. Sess. (Ill. 2003); 110 ILL. COMP.STAT. ANN.

Kansas, H.B. 2145, 2003-2004 Leg., Reg Sess. (KS 2004); K.S.A. §76-731a

New Mexico, S.B. 582, 47th Leg. Reg. Sess. (2005); N.M.STAT. ANN. §21-1-1.2

Nebraska, L.B. 239, 99th Leg. 1st Sess. (Neb. 2006); NEB REV. STAT. ANN. § 85-502

Wisconsin, 2009 Assembly Bill 75 (2009 WISCONSIN ACT 28); WIS. STAT. § 36.27

In 2005, the Washington Legal Foundation (hereinafter WLF) filed a complaint with the Department of Homeland Security (hereinafter DHS) to challenge the Texas and New York statutes regarding undocumented students, although it is not entirely clear why this agency would have jurisdiction over these sections of IRRIRA.[30] As of Spring, 2010, no

30. Letter from Daniel J. Popeo, Chairman and General Counsel, Washington Legal Foundation & Richard A. Samp, Chief Counsel, Washington Legal Foundation, to Daniel

action had been taken on this matter by DHS, and discussions with attorneys and officials involved indicated that there would be no action forthcoming.[31] Indeed, the answer was issued in a response to a different question, one posed by North Carolina officials about their own admissions policies.[32] In July 2008, the Department of Homeland Security wrote that any determinations of tuition residency or admissions policy by states were state matters, not in the federal domain:

> the individual states must decide for themselves whether or not to admit illegal aliens into their public post-secondary institutions. States may bar or admit illegal aliens from enrolling in public post-secondary institutions either as a matter of public policy or through legislation. Please note, however, that any state policy or legislation on this issue must use federal immigration status standards to identify which applicants are illegal aliens. In the absence of any state policy or legislation addressing this issue, it is up to the schools to decide whether or not to enroll illegal aliens, and the schools must similarly use federal immigration status standards to identify illegal alien applicants.[33]

This would be the appropriate response to the 2005 WLF complaint to the DHS as well, for state tuition and admissions policies have always been state issues, and it is surprising that a state entity would pose such a question, implicitly suggesting that the determination of a state status might turn on a federal determination; one wonders what the North Carolina response would have been, had the federal Department responded that the federal government actually would assert jurisdiction over the matter. The DHS response to the North Carolina query occurred during the final stages of the appellate decision being rendered, but the court did not take notice of the letter.

Sutherland, Officer for Civil Rights and Civil Liberties, Dep't of Homeland Sec. (Aug. 9, 2005), *available at* http://www.wlf.org/upload/INSTATE.pdf (last visited Apr. 21, 2010).

31. JODY FEDER, CONGRESSIONAL RESEARCH SERVICE, UNAUTHORIZED ALIEN STUDENTS, HIGHER EDUCATION, AND IN-STATE TUITION RATES: A LEGAL ANALYSIS 6 (2008), *available at* http://www.digitalcommons.ilr.cornell.edu/key_workplace/550/ (last visited Apr. 21, 2010) (accessed from homepage by entering article title in search).

32. Letter from Jim Pendergraph, Executive Director, Office of State and Local Coordination, U.S. Immigration & Customs Enforcement, to Thomas J. Ziko, Special Deputy Attorney General, N.C. Dep't of Justice (July 9, 2008), *available at* http://www.nacua.org/documents/AdmissionUndocAlien072008.pdf.

33. *Id*.

In *Day v. Sibelius*, lawyers challenged the Kansas statute allowing undocumented college students to establish residency status for tuition.[34] The judge ruled for the state, finding that the plaintiffs did not have standing to bring suit.[35] The Federation for American Immigration Reform (FAIR) filed an appeal to the Court of Appeals and on August 30, 2007, the Tenth Circuit affirmed the trial court decision in the case.[36] The United State Supreme Court denied the petition for certiorari, ultimately upholding the statute.[37]

In December 2005, the same groups that filed the Kansas matter filed in California state court challenging AB 540,[38] the California residency statute, on a parallel track, hoping to knock the practice out at both the federal and state levels.[39] In October of 2006, FAIR's attempt to bring a case similar to the Kansas federal case in California state court lost when the trial judge ruled against them.[40] However, in the Fall of 2008, an appellate court overturned the decision, ordered the matter back to trial, and found against the state.[41] The University of California announced that it would be appealing the AB 540 appellate court ruling to the state supreme court and, just as important for students in the short term, would

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34. Day v. Sebelius, 376 F. Supp. 2d 1022, 1039-40 (D. Kan. 2005) (denying standing to challengers, upholding residency requirement allowing undocumented aliens to establish residency). *See also* Gary Reich & Alvar Ayala Mendoza, *'Educating Kids' Versus 'Coddling Criminals': Framing the Debate over In-State Tuition for Undocumented Students in Kansas*, 8 STATE POLITICS & POLICY QUARTERLY 177 (2008).

35. *Day*, 376 F. Supp. 2d 1022. There was also an unsuccessful attempt in 2006 to repeal the statute. Chris Moon, *Immigrant Tuition Vote Typifies Fragile Statehouse Ties*, TOPEKA CAPITAL-JOURNAL, Feb. 17, 2006, at A1, *available at* http://cjonline.com (accessed from homepage by entering article title in search).

36. Day v. Bond, 500 F.3d 1127, 1136-40 (10th Cir. 2007). Because the trial judge removed the governor as a defendant, the case at the Tenth Circuit was styled as *Day v. Bond*.

37. Day v. Bond, 500 F.3d 1127 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008).

38. CAL. EDUC. CODE § 68130.5 (West 2002). The California Assembly Bill became California Education Code Section 68130.5. Ralph W. Kasarda, *Affirmative Action Gone Haywire: Why States Granting College Tuition Preferences to Illegal Aliens are Preempted by Federalism*, 2009 BYU EDUC. & L.J. 197, 210 (2009).

39. Martinez v. Regents of the Univ. of Cal., No. CV 05-2064, 2006 WL 2974303 (Cal. App. Dep't Super Ct. 2006) (orders on demurrers, motion to strike, and motions by proposed interveners).

40. Cal. App. Dep't. Super. Ct. 2006 (dismissing challenge to state residency statute), *rev'd*, 83 Cal. Rptr. 3d 518 (Cal. App. 3d 2008), *superseded by* 198 P.3d 1 (Cal. 2008) (granting respondents' petition for review); *see* Kasarda, *supra* note 38; KRISTEN MILLER & CELINA MORENO, MARTINEZ V. REGENTS: MIS-STEP OR WAVE OF THE FUTURE, *available at* http://www.law.uh.edu/ihelg/monograph/08-07.pdf (last visited Apr. 21, 2010).

41. *Martinez*, 198 P.3d 1.

continue to award AB 540 tuition exemptions during the appeal process, still pending as of this writing in the spring of 2010.[42] In other words, the appellate ruling has not changed the university's tuition exemption program for the present, but the entire program is clouded by the possibility that the California Supreme Court could uphold the plaintiffs and render the program a violation of federal law.[43]

In another higher education immigration/residency case that occurred in California during this time period, a number of immigrant organizations filed suit in November of 2006 to challenge California's postsecondary residency and financial aid provisions[44] in *Student Advocates for Higher Education et al v Trustees, California State University et al.*[45] Citizen students with undocumented parents were being prevented from receiving the tuition and financial aid benefits due to them, at least in part because the California statute was not precisely drawn (or was being imperfectly administered). The challenge highlights several overlapping policies: immigration, financial aid independence/dependence upon parents, and the age of majority/domicile.[46] The state agreed to discontinue the practice, and

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42. *Id.* ("[p]etition for review filed by respondents . . . is granted.").

43. *Id.*

44. CAL. EDUC. CODE § 68040 (West 2010).

45. Student Advocates for Higher Educ. v. Trustees, Cal. State Univ., No. CPF-06-506755 (Cal. App. Dep't Super Ct. Feb. 26, 2007). The State agreed to discontinue the practice, and entered into a consent decree, so the matter was resolved in favor of the plaintiffs. *See* CAL. EDUC. CODE § 68040 (West 2010); CAL. CODE REGS. tit. V, § 41904 (2010). The above mentioned case challenged CAL. EDUC. CODE § 68040, CAL. CODE REGS. tit. V, § 41904, and the state constitution. Full disclosure: I am a member of the Board of the Mexican American Legal Defense and Educational Fund, which was a party to this challenge, and participated in the litigation and settlement discussions.

46. There is a growing technical and policy literature on the issue of the taxation and financial services for undocumented persons, including college students. *See, e.g.*, Paula N. Singer & Linda Dodd-Major, *Identification Numbers and U.S. Government Compliance Initiatives*, 104 TAX NOTES 1429 (2004); STAFF OF JOINT COMM'N ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO INDIVIDUAL TAXPAYER IDENTIFICATION NUMBERS ("ITINS") 3 (2004) ("[T]he [Internal Revenue Code] does not contain special rules regarding the treatment of illegal aliens, or the tax identification number requirements with respect to illegal aliens . . . ."); Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1 (2006); Cynthia Blum, *Rethinking Tax Compliance of Unauthorized Workers After Immigration Reform*, 21 GEO. IMMIGR. L.J. 595 (2007); John Coyle, *The Legality of Banking the Undocumented*, 22 GEO. IMMIGR. L.J. 21 (2007); Michael A. Olivas, *Undocumented College Students, Taxation, and Financial Aid: A Technical Note*, 32 REVIEW OF HIGHER EDUC. 407 (2009). A detailed 2009 U.S. Government Accountability Office study noted the complexity of the federal process, but did not address the related immigration issues. GOV'T ACCOUNTABILITY OFFICE, FED. STUDENT AID: HIGHLIGHTS OF A STUDY GROUP ON SIMPLIFYING THE FREE APPLICATION

entered into a consent decree, resolving the matter in the plaintiffs' favor.[47] The order overturned CSU's odd take on undocumented college student residency—that a citizen, majority-age college student with undocumented parents, was not able to take advantage of the California statute according the undocumented in-state residence, even if the student was otherwise eligible.[48] In a similar fashion, the Virginia attorney general and the Colorado attorney general[49] also ruled that U.S. citizen children could establish tuition residency status on a case-by-case basis, even if their parents were undocumented.[50] These rulings made a virtue of necessity, inasmuch as citizen children who reach the age of majority by operation of law establish their own domicile, so that their parents' undocumented status is irrelevant to the ability of the children to establish residency.

B. State Legislative Developments: New State Legislation Introduced, Passed and Defeated

In 2005, the State of Texas enacted several modifications to its postsecondary residency statutes (Senate Bill 1528) and the implementing Texas Coordinating Board regulations, some of which affected undocumented students.[51] These revisions made it slightly easier

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FOR FED. STUDENT AID (2009), *available at* http://www.gao.gov/new.items/d1029.pdf (last visited Apr. 21, 2010).

47. Student Advocates for Higher Educ., No. CPF-06-506755.

48. *Id*.

49. Op. Colo. Att'y Gen. No. 07-03 (2007); Allison Sherry, *Tuition Tussle Takes Shape*, Denver Post, Aug. 15, 2007, at A1, *available at* http://www.denverpost.com (accessed from homepage by entering article title in search).

50. Memorandum from Ronald C. Forehand, Senior Assistant Att'y General, Chief, Education Section to Lee Andes, State Council of Higher Educ. for Va. (March 6, 2008). In Virginia, citizen applicants of undocumented parents were the subject of an AG memo; the memo advised its client colleges to deal with these students on a case-by-case basis for residency tuition purposes. *See also* Susan Kinzie, *The University of Uncertainty: Va. Children of Illegal Immigrants Lack In-State Status*, WASH. POST, Mar. 14, 2008, at B1, *available at* http://www.washingtonost.com (accessed from homepage by entering article title in search) (last visited Feb. 5, 2010); Susan Kinzie, *U-VA Accepts Residency Claim*, WASH. POST, Mar. 24, 2008, at B5. *See generally* Allison Sherry, *Tuition Tussle Takes Shape*, DENVER POST, Aug. 15, 2007, at A1.

51. Tex. Educ. Code Ann. § 54.053 (Vernon 2009) (enacted by S.B. 1528). The full text of S.B. 1528 is *available at* http://www.statutes.legis.state.tx.us-/Docs/ED/htm/ED.54.htm (last visited June 11, 2010). *See also* Juan Castillo, *After Delay, Bill Challenging In-state Tuition Law All But Dead*, AUSTIN A.M.-STATESMAN, May 10, 2007, at B1, *available at* http://www.statesman.com (accessed from homepage by entering title in search). In 2001, Gov. Rick Perry had signed the original legislation that established H.B. 1403: http://www.uh.edu/ednews-/2007/hc/200701/2007012tuition.html (last visited Apr. 21, 2010) *See* TEX. EDUC. CODE §

for students to avail themselves of in-state tuition, and ended the anomalous situation where international students (required to maintain foreign domiciles in F-1 visa status) took advantage of the original statute and regulations. In an interesting twist, following the California appellate decision, a restrictionist Texas state legislator requested an Attorney General Opinion, seeking to apply the intermediate appellate decision in the California *Martinez* case.[52] In response, on July 23, 2009, the Texas attorney general waffled, concluding that the Texas tuition law would "not likely" violate the Equal Protection Clause of the Fourteenth, but refused to issue an opinion on whether the in-state tuition law was preempted by federal law.[53] Texas Gov. Perry, who in 2001 had signed the original legislation establishing House Bill 1403, said he would not accept or sign any changes to the state law.[54]

In a related development, the same Texas attorney general issued an opinion saying the state Hazlewood Act (a military scholarship program) phrase "citizen of Texas" should be interpreted as a person who lives in the state and is a U.S. citizen.[55] Prior to this AGO, Texas public colleges and universities gave the Hazlewood benefit to all qualifying military veterans, regardless of whether they were U.S. citizens or legal permanent residents when they entered the military. In 2007, two

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54.053 (Vernon 2005) (enacted by S.B. 1528), *available at* www.law.uh.edu/ihelg (last visited Apr. 21, 2010) (downloadable).

52. Op. Tex. Att'y Gen. No. GA-0732 (2009), *available at* http://www.oag.state.tx.us/opinions/50abbott/op/htm/ga-0732.htm (last visited Apr. 21, 2010).

53. *Id*. Susan Carroll, *Texas Lawmaker Challenges In-state Tuition Law*, HOUSTON CHRON., Oct. 30, 2008, at B1, *available at* http://www.chron.com (accessed from homepage by entering article title in search) (last visited Feb. 5, 2010); *Texas Attorney General Considers Payment of In-State Tuition by Undocumented Immigrants*, 86 INTERPRETER RELEASES 2029 (2009); Melissa B. Taboada, *Should Illegal Immigrants Receive In-State Tuition?*, AUSTIN AM.-STATESMAN, July 25, 2009, at B1, *available at* http://www.statesman.com (accessed from homepage by entering article title in search).

54. H.B. 1403 was signed into law by Gov. Rick Perry the Republican who succeeded Gov. George W. Bush's term and was then elected to his own term. Clay Robison, *Budget Hits Include Judges' Pay Hike*, HOUSTON CHRON., June 18, 2001, at 1A (describing the 2001 legislative session review of tuition revenue and the expected economic impact of the statute). In January 2007, Governor Perry (then re-elected to his second full term) indicated that he would not support any bills that overturned this legislation, including the revised version, S.B. 1528. Matthew Tresaugue & R.G. Radcliffe, *The Legislature: Illegal Immigrants May See Tuition Hike*, HOUSTON CHRON., Jan. 11, 2007, at B1; Clay Robison & R.G. Ratcliffe, *Perry to Stick By Law Giving Tuition Breaks to Illegal Immigrants*, HOUSTON CHRON., Jan. 12, 2007, at B4.

55. Op. Tex. Att'y Gen. No. GA-0347 (2005); Op. Tex. Att'y Gen. No. GA-0445 (2006). *See* Rosanna Ruiz, *Veterans Fight for Tuition Money From State*, HOUSTON CHRON., June 30, 2007, at B7; Associated Press, *Immigrant Veterans Sue for Waivers on Tuition*, HOUSTON CHRON., June 29, 2007, at B4.

Mexican American permanent resident veterans were rendered ineligible under this revised criterion, and they brought suit, which was resolved in 2008, when the state's attorney general reversed his position.[56]

Following the lead of Texas, the first state to enact residency tuition for the undocumented who graduated from the state's high schools and met the other residency requirements, in January 2005, New Mexico extended resident tuition to the undocumented, and altered its residency statutes for some American Indians and for Texans from border counties.[57] In doing so, it became among the most generous, extending financial aid and lottery scholarship eligibility as well as resident tuition.

Many state level developments took place in 2006. In January, 2006, the Utah attorney general issued an opinion, determining that the Utah statute granting tuition status to the state's undocumented college students was constitutional.[58] Although the state enacted considerably tighter legislation in 2008, barring the undocumented from many benefits, the move to repeal this tuition provision failed.[59] A safe harbor was created, and the state's senior U.S. senator, widely regarded as a

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56. In 2008, following the suit filed by MALDEF, *Dominguez v. State of Texas*, the State's Attorney General Greg Abbott reversed his position. Dominguez case materials, 2008, *available at* http://maldef.org/immigration/litigation/dominguez_v_texas-/index.html (last visited Apr. 21, 2010). *See* Hernan Rozemberg, *Texas Vets Get Tuition Back*, SAN ANTONIO EXPRESS-NEWS, Jan. 16, 2008, at 1B, *available at* http://www.mysanantonio.com (accessed from homepage by entering article title in search) (last visited Apr. 21, 2010); Lisa Falkenberg, *This Just In: AG Finds the Constitution*, HOUSTON CHRON., Jan. 16, 2008, at B1.

57. N.M. STAT. § 21-1-1.2 (West 2009). I consulted with the state senator introducing this bill and legislative counsel involved in drafting the statute. I also testified before the Senate committee holding hearings on the legislation and was involved in discussions with the governor who signed it into law and his staff. *See* Press Release, Governor Bill Richardson, Gov. Richardson Signs Bill Prohibiting Discrimination in Admission and Tuition Policy of New Mexico Post Secondary Educational Institutions Based on Student's Immigration Status (Apr. 8, 2005), *available at* http://www.governor.state.nm.us/press/2005/april/040805_4.pdf (last visited Feb. 5, 2010). Only a handful of New Mexico students participated in the program. *Lewis*, *supra* note 2.

58. Validity of Tuition Statute, UTAH CODE ANN. § 53B-8-106 (2006), *available at* www.law.uh.edu/ihelg (Downloadable: Utah AG Tuition Letter, Jan. 31, 2006). *See* Deborah Bulkeley, *A Law Granting In-State Tuition to Undocumented Students is Legally Sound*, DESERET NEWS, Feb. 2, 2006, at A1; Deborah Bulkeley, *Measure to Repeal Tuition Break for Illegals Is Back*, DESERET MORNING NEWS, Feb. 9, 2007, at B4.

59. UTAH CODE ANN. § 53B-8-106 (West 2009) (remained unaffected by 2008 reconstructionist law, S.B. 81); S.B. 110th Utah Cong. (2008), *available at* http://le.utah.gov/~2008/bills/sbillenr/sb0081.pdf (last visited Apr. 21, 2010). *See* Deborah Bulkeley, *Efforts to Repeal Immigrant Tuition Law Hit Speed Bump*, DESERET MORNING NEWS, Feb. 7, 2008, at A1; Bulkeley, *Utah Measure to Repeal Tuition Break*, *supra* note 58; Deborah Bulkeley & Lisa Riley Roche, *Immigrant Tuition Repeal Removed from Bill*, DESERET MORNING NEWS, Feb. 13, 2008, at B7.

conservative legislator, has continued his advocacy for passing federal immigration legislation that would grant legalization to college students.[60]

Also in January of 2006, the Massachusetts legislature voted down a measure that would have accorded in-state tuition to the undocumented.[61] In 2007, the governor proposed to abolish tuition at the state's community colleges, but the proposal did not gain traction, due to financial difficulties.[62] In 2008, another false start occurred, when the Governor decided not to pursue extending resident tuition to the students in any public college sector, citing the economic downturn.[63]

Early in 2007, Minnesota legislation was introduced,[64] both to broaden residency and to restrict it. At the end of a complicated session, on May 30, 2007, Minnesota Governor Tim Pawlenty signed into law an interesting partial victory for in-state/residency tuition advocates.[65] Under the Minnesota bill, a number of the state college system

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60. In 2007, Senator Hatch was then the co-sponsor of the DREAM Act. It is likely that his not being a co-sponsor of the 2005 version was due in part to having a primary opponent for re-election. He was re-elected to the Senate by a wide margin in 2006, but the FAIR website continues to label the DREAM Act as his bill, and characterized it (in 2007) as a giveaway to illegal aliens. For votes and statements of Sen. Orrin Hatch (R-Utah), see http://www.hatch.senate.gov (last visited Apr. 21, 2010); *see also* Press Release, Federation for American Immigration Reform, The 'DREAM Act': Hatch-ing Expensive New Amnesty for Illegal Aliens (Oct. 23, 2003), *available at* http://www.fairus.org/ (accessed from homepage by entering press release title in search) (last visited Apr. 21, 2010); Olivas, *Storytelling Out of School*, *supra* note 6, at 456-57 (in this 2004 article, I assumed that Hatch's co-sponsorship would likely hasten passage; like Rick in the movie *Casablanca*, "I was misinformed.").

61. Lewis, *supra* note 2; Yvonne Abraham, *Immigrant Tuition Bill Defeated*, BOSTON GLOBE, Jan. 12, 2006, at A1, *available at* http://www.boston.com (accessed from homepage by entering article title in search); Emelie Rutherford, *House Scraps Tuition Deal for Illegal Immigrants' Kids*, BOSTON HERALD, Jan. 12, 2006, at A15.

62. Matt Viser & Maria Sacchetti, *Patrick Mulls New Tack on Immigrant Tuition: May Try to Bypass Wary Legislature*, BOSTON GLOBE, Jan. 11, 2008, at B1; Elyse Ashburn, *Massachusetts Plan for Free Community Colleges Meets With Skepticism*, CHRON. OF HIGHER EDUC., June 15, 2007, at A22, *available at* http://www.chronicle.com (accessed from homepage by entering article title in search).

63. Maria Sacchetti, *Tuition Aid to Illegal Immigrants Falters: Patrick Declines to Act on Behalf of Graduates*, BOSTON GLOBE, May 22, 2008, at B1.

64. H.F. 1083, 85th Leg. Sess. (Minn. 2007), *available at* http://www.revisor.mn.gov (accessed from homepage by entering legislation title in search) (last visited Apr. 21, 2010).

65. Jean Hopfensperger, *Immigration Proposals Clash: The Governor and DFL Lawmakers Offered Differing Views on Issues Involving the State's Immigrants*, STAR TRIBUNE (Minneapolis), Feb. 15, 2007, at 5B (reviewing DREAM Act legislative proposals in Minnesota). For the text, see H.F. 1083, 85th Leg. Sess. (2007). The bill analysis can be found at http://www.leg.state.mn.us/hinfo/sessiondaily.asp?storyid=1098 (last visited Apr. 21, 2010).

institutions eliminated nonresident rates altogether, allowing anyone, apparently regardless of state of residence or immigration status, to qualify for the flat (formerly in-district) rate. The press coverage on this never fully sussed the entire legislation, which was complex and originally included a specific DREAM Act provision that was ultimately stripped.[66] While the legislation somewhat finesses the larger issue (and has a 2009 sunset), this approach has a cat's feet aspect to it, removing the immigration dimension.[67] It is an intriguing approach, as many DREAM Act students are likely to attend two year colleges.[68] In Texas, even before HB 1403 passed, several large community college districts had moved to this practice, led by the Houston and Dallas community college systems, which were the real precursors of this practice in Texas.[69] Many of these students enroll in transfer curricula; however, partly due to the rising costs, other administrative and paperwork requirements, and their inability to work for pay, these students rarely end up transferring to senior colleges.[70] Given the declining state appropriation support for higher education and the difficult economy, eliminating tuition seems an unlikely scenario for any college sector, especially the burgeoning two year universe, which has been inundated with overflow enrollments from strapped senior institutions.[71]

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66. H.F. 1083, 85th Leg. Sess. (Minn. 2007), *available at* http://www.revisor.mn.gov (last visited Apr. 21, 2010). For a good story on the legislation, but one that does not specifically mention this issue, see Megan Boldt, *2008-09 Minnesota Budget= Reluctant Governor OKs School Spending: Bill Adds $794 M Over 2 Years, Restores Aid for Special Education*, ST. PAUL PIONEER PRESS, May 31, 2007, at B1.

67. S.F. 1989, 85th Leg. Sess. (Min. 2007) (providing details on the bill actually passed).

68. ALEJANDRA RINCON, UNDOCUMENTED IMMIGRANTS AND HIGHER EDUCATION: SI SE PUEDE! 65-74 (2008).

69. RINCON, *supra* note 68 (reviewing city community college policies before the 2001 Texas statute, H.B. 1403). *See generally* Vicky J. Salinas, Comment, *You Can Be Whatever You Want to Be When You Grow Up, Unless Your Parents Brought You to This Country Illegally: The Struggle to Grant In-State Tuition to Undocumented Immigrant Students*, 43 HOUS. L. REV. 847 (2006).

70. RINCON, *supra* note 68, at 65-74.

71. Most states report flat or declining appropriations to their two year colleges, and substantially increased enrollments. *See, e.g.*, Jennifer Gonzalez, *State Directors of Community Colleges See Bleak Financial Times Ahead*, CHRON. OF HIGHER EDUC., Sept. 24, 2009, at A20, *available at* http://www.chronicle.com (accessed from homepage by entering article title in search). A community college in Boston became so overcrowded it started midnight classes for students who are workers on the swing shift. *Id.*; Abby Goodnough, *New Meaning for Night Class at 2-Year Colleges*, N.Y. TIMES, Oct. 27, 2009, at A1, *available at* http://www.nytimes.com (accessed from homepage by entering article title in search); Lisa W. Foderaro, *Two-Year Colleges, Swamped, No Longer Welcome All*, N.Y. TIMES, Nov. 11, 2009, at A17, *available at* http://www.nytimes.com (accessed from homepage by entering article title in search). For an analysis of state

On January 23, 2006, the Colorado attorney general issued an Attorney General Opinion on whether the state coordinating board had the authority to grant in-state residency status; he held that the Colorado Commission on Higher Education did not have such authority.[72] However, in 2007, he determined that state residency law did allow citizen students of undocumented parents to establish residency, if they otherwise met the durational requirements.[73] In this decision, he opined: "because it is the student, rather than the parents, who is the legal beneficiary of in-state tuition status, the fact that the parents may be in the country illegally is not a bar to the student's receipt of that benefit".[74] At the same time, Colorado newspapers reported on undocumented Colorado students who, through a reciprocal arrangement with New Mexico colleges, were allowed to attend New Mexico public colleges and to pay resident tuition.[75]

On April 14, 2006, Nebraska became the 10th state to provide in-state tuition to undocumented immigrant students who have attended and graduated from Nebraska high schools. It did so in dramatic fashion, overriding Governor Dave Heineman's veto. The bill passed by a 26-19 margin, but needed 30 votes for an override; supporters managed to change exactly 4 votes to get the necessary 30.[76]

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higher education funding and its decline, see Michael K. McLendon, James C. Hearn, & Christine G. Mokher, *Partisans, Professionals, and Power: The Role of Political Factors in State Higher Education Funding*, 80 J. HIGHER EDUC. 686 (2009) (documenting pattern declines in funding).

72. Colo. Att'y Gen. Op. No. 06-01/HE-HE-AGBBT (2006).

73. Colo. Att'y Gen. Op. No. 07-03/HE HE AGBCF (2007), *available at* http://www.coloradoattorneygeneral.gov (accessed from homepage by entering document title in search) (last visited Apr. 21, 2010).

74. *Id.* at 2; *see* Allison Sherry, *Tuition Tussle Takes Shape*, DENVER POST, Aug. 15, 2007, at A1.

75. Taylour Nelson, *PSD Says Program That Helps Undocumented Students Is Legal*, FORT COLLINS COLORADAN, Aug. 16, 2007, at 1A. *See, e.g.*, Perry Swanson, *Suthers: Kids of Illegal Immigrants Can Be Eligible for In-State Tuition*, COLO. SPRINGS GAZETTE, Aug. 15, 2007, *available at* http://www.gazette.com (accessed from homepage by entering article title in search).

76. L.B. 239, 99th Leg., 2d Sess. (Neb. 2005), *available at* http://www.nebraskalegislature.gov (accessed from homepage by selecting "search past legislation," then selecting "99th legislature" and entering keyword "LB239") (last visited Apr. 21, 2010) *See also* Martha Stoddard, *Legislators Split on Immigrant Tuition*, OMAHA WORLD-HERALD, Dec. 29, 2005, at A1; Ruth Marcus, *Immigration's Scrambled Politics*, WASH. POST, Apr. 4, 2006, at A23, *available at* http://www.washingtonpost.com (accessed from homepage by entering article title in search). In 2010, Kris Kobach filed suit in Nebraska state court to overturn the legislation (*Mannschreck v. University of Nebraska*), and a bill (LB 1001, 2010) was introduced to repeal the statute. *See* Margery A. Beck, *Kris Kobach, Kansas Secretary of State Candidate, Sues Nebraska Over*

During this period in the spring of 2006, very large crowds of immigrants and their supporters held widely-publicized rallies, drawing substantial attention in the media.[77] By one estimate, more than half a million persons marched in Los Angeles alone, even risking apprehension by police and immigration authorities.[78] These were the first national, substantial public displays of support on behalf of immigrants, and they energized supporters and opponents alike.[79]

On September 30, 2006, California Governor Arnold Schwarzenegger declined to sign S.B. 160, vetoing a bill would have allowed undocumented students in California, already eligible for in-state tuition, to participate in the state's financial aid grant programs.[80] The state's budget crisis was beginning to become evident, and higher education suffered a large cut in support, including closing programs, limiting enrollments in many institutions, and even furloughing faculty and staff.[81]

Several other states enacted legislation affecting international students, though these did not implicate in-state tuition status for the undocumented students who remained ineligible. Virginia extended tuition status to political refugees,[82] while Wyoming enacted state

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Immigrant Tuition Law, KANS. CITY STAR, Jan. 26, 2010; Barb Shelly, Kris Kobach's War On Undocumented College Students, KANS. CITY STAR, Jan. 26, 2010.

77. *Fight for Rights: Tens of Thousands March for Immigration Reform*, CHI. TRIBUNE, Mar. 13, 2006, at 8.

78. James Sterngold, *500,000 Throng L.A. to Protest Immigrant Legislation*, S.F. CHRON., Mar. 26, 2006, at A1.

79. *See Fight for Rights*, CHI. TRIBUNE, Mar. 13, 2006, at 8; Sterngold, *supra* note 73. *See generally* Bill Ong Hing & Kevin R. Johnson, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99 (2007); Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the 'Gigante' (Giant) Wake Up or Does it Still Sleep Tonight?*, 7 NEV. L.J. 780 (2007); Raquel E. Aldana, *Silent Victims No More?: Moral Indignation and the Potential for Latino Political Mobilization in Defense of Immigrants*, 45 HOUS. L. REV. 73, 92-97 (2008).

80. S.B. 160, Leg. Sess. (Cal. 2005-2006).

81. The enrolled version of the proposed legislation (S.B. 160) is available at http://www.leginfo.ca.gov (accessed from homepage by selecting "Bill Information," then "2005-2006 Session" and entering keyword "SB 160") (last visited Apr. 21, 2010). The veto message is available at http://gov.ca.gov/pdf/press/sb_160_veto.pdf (last visited Apr. 21, 2010); *see also* Scott Jaschik, *Post-DREAM Strategies*, INSIDEHIGHERED.COM, Oct. 29, 2007. *See* Carla Rivera, *Budget Cuts Hit Broad Swath of Cal State*, L.A. TIMES, Nov. 29, 2009, at A1.

82. During the same time as the discussions about undocumented Virginians and citizen children with undocumented parents were occurring, the Virginia Legislature established in-state tuition eligibility for those holding an immigration visa or those classified as political refugees in the same manner as any other resident student. Under these new provisions, students with temporary or student visa status are ineligible for

scholarship programs available only to residents who are lawful permanent residents (LPR) or citizens.[83] During 2006, additional states considered but did not enact resident tuition statutes.[84]

The pace did not slow in 2007. The Oklahoma Taxpayer and Citizen Protection Act of 2007 repealed the 2003 provision which accorded residency tuition and grants to eligible undocumented students, although the actual language of the bill, signed into law in May of 2007, grandfathered in those students already eligible and enrolled.[85] In January of 2008, Oklahoma's Board of Regents issued a memo outlining the new policies.[86] Even so, restrictionists prevailed in the repeal action,

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Virginia resident status and thus, also ineligible for in-state tuition. Va. Code Ann. § 23-7.4 (West 2009).

83. *See* Ben Neary, *Governor Signs Key Bills*, CASPER STAR-TRIBUNE, Mar. 11, 2006.

84. *See, e.g.*, Stephen Majors, *Immigrant Tuition Bill Fails Again*, BRADENTON HERALD (Florida), Apr. 21, 2006, at A1. Florida remains the only state among the major receiver states that has never accorded residency tuition status to the undocumented. The State's Sec. 529 Plans are also open only to U.S. citizens or "resident aliens" as purchasers or as beneficiaries, *see* http://www.myfloridaprepaid.com/Plans-/FAQ/index.asp (last visited Apr. 21, 2010); *see also* Dana Boone, *Her College Dream is Slipping Away*, DES MOINES REGISTER, Apr. 11, 2006, at 1A; Jennifer Jacobs, *Iowans Learn to Deal with Immigration*, DES MOINES REGISTER, Dec. 7, 2006, at 1A. *See also* Martha Stoddard, *Legislators Split on Immigrant Tuition*, OMAHA WORLD-HERALD, Dec. 29, 2005, at A1.

85. Oklahoma Taxpayer and Citizen Protection Act of 2007 (H.B. 1804), *available at* http://www.law.uh.edu/ihelg/undocumented/2008-1-2-guidancetoinstitutions.pdf (last visited Apr. 21, 2010). In January 2008, the state's Board of Regents issued a memo and regulations outlining the new policies, which are available at http://www.law.uh.edu/ihelg/undocumented/memo.pdf (last visited Apr. 21, 2010). *See* Valerie Jobe, *Immigration Reform Would Affect OCCC*, OKLA. CITY COMM. COLL. PIONEER, Apr. 2, 2007, at 1, *available at* http://www.okc.cc.ok.us-/pioneer/Archives/April_2_2007/news1.html (last visited Apr. 21, 2010).

86. *See* Susan Simpson & Michael McNutt, *New Immigration Law is Raising Questions for Many*, THE DAILY OKLAHOMAN, May 10, 2007, at A1. For an excellent summary of the various back-stories on the enactment and repeal of the Oklahoma statute, see Elizabeth McCormick, *The Oklahoma Taxpayer and Citizenship Protection Act: Blowing Off Steam or Setting Wild-Fires?*, 23 GEO. IMMIGR. L.J. 293 (2009). Mississippi also provides an interesting but not unique example of how the complexities of immigration and college residency law intersect imperfectly. In 1974, a 1972 Mississippi State statute, § 37-103-23, which held "[a]ll aliens are classified as nonresidents," was declared unconstitutional, but was never re-promulgated in accordance with the court ruling. Jagnadan v. Giles, 379 F. Supp. 1178, 1182 (D.C. Miss. 1974), *affirmed in part on other grounds*, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977). Therefore, as of 2010, there is no Mississippi statute that specifically addresses how various immigrants are to be treated for tuition. The state did promulgate a residency statute in 2006, but it did not address the immigration anomaly. MISS. CODE ANN. § 37-103-7 (West 2009). In 2007, two Attorney General Opinions were issued, filling in some the long-time gaps, especially following the federal provisions of 1621 and 1623, and the undocumented were determined not to be eligible for the resident

making Oklahoma the only state to have extended this status and then to have rescinded the in-state tuition eligibility.

In the spring of 2007, Connecticut's legislature passed and sent a bill to Governor Jodi Rell for her signature, which would have granted alien students who graduated from the State's high schools the opportunity to qualify for resident tuition.[87] She vetoed the bill on June 26, 2007, and wrote: "I understand these students are not responsible for their undocumented status, having come to the United States with their parents. The fact remains, however, that these students and their parents are here illegally and neither sympathy nor good intentions can ameliorate that fact."[88]

In the fall of 2007, uncertainties arose over what the more restrictionist state statutes from Georgia and Arizona would mean for this issue, and things were in flux in these two states. Georgia held public hearings in April of 2007, to get public input as to how it should proceed, but the behind-the-scenes waiver system which allowed each public college to use for waivers up to two percent of their headcount changed.[89] The statute took effect on July 1, 2007.[90] At the start of the spring, 2007 semester, Arizona officials were confused about what they

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tuition, barring any change in the state statute. Op. Att'y Gen. Miss. No. 2007-00416 (Sept. 7, 2007); Op. Att'y Gen. Miss. No. 2007-00416 (Aug. 13, 2007).

87. Press Release, State of Connecticut, Governor Rell Vetoes Bill to Provide In-State Tuition to Illegal Aliens (June 26, 2007), *available at* http://www.ct.gov-/governorrell/cwp/view.asp?A=2791&Q=385102 (accessed from homepage by entering article title in search) (last visited Apr. 21, 2010).

88. Press Release, *supra* note 87. Dirk Perrefort, *Filibuster Blocks Tuition Bill*, NEWS-TIMES (Danbury, Conn.), Mar. 16, 2007, at A1. Stacey Stowe, *Bill Giving Illegal Residents Connecticut Tuition Rates is Vetoed by the Governor*, N.Y. TIMES, June 27, 2007, at C14.

89. Brian Feagons, *Valedictorian in a Paradox*, ATLANTA JOURNAL-CONSTITUTION, May 30, 2007, at B1.

90. S.B. 529, Leg. Sess. (Ga. 2007). For additional discussion of the legislation in Georgia, see Brian Feagans, *Illegals to Lose In-state Tuition*, ATLANTA JOURNAL-CONSTITUTION, Dec. 16, 2006, at A1; Brian Feagans, *Valedictorian in a Paradox*, ATLANTA JOURNAL-CONSTITUTION, May 30, 2007, at B1; Brian Feagans, Mary Lou Pickel & Anna Varela, *A Fierce Divide: Georgia's New Law on Illegal Immigrants Looks Strict, But Is It a Real Crackdown?*, ATLANTA JOURNAL-CONSTITUTION, June 30, 2007, at A1; Andrea Jones & James Salzer, *Student Residency Mistakes Cost State*, ATLANTA JOURNAL-CONSTITUTION, Dec. 14, 2007, at E1; Brian Feagans, *'I Can't Do What I Really Want to Do,'* ATLANTA JOURNAL-CONSTITUTION, Dec. 16, 2007, at D7. *See generally* Kristina M. Campbell, *Local Illegal Immigration Reform Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041, 1059-60 (2007) (discussing the enjoining of Georgia's aanti-immigrant statute, which is impacted by pending litigation).

were to do with the statute's new requirements.[91] However, they decided that they would not enroll these students any longer, and by the summer of 2007, reported that nearly 5000 students had been removed from the state's institutions and adult basic education classes. In response, Arizona State University awarded students private money to help with financial aid needs.[92] The funds (contested by the same political opponents who enacted the restrictionist legislation) ran out in spring of 2008, and the overall fiscal crisis in the state has continued, causing furloughs of regular faculty and severe cutbacks in college services.[93]

Following the lead of Missouri, which in 2007 saw the introduction of a "death-penalty provision" that would have banned undocumented students from enrolling in any fashion in its public colleges, Virginia legislators introduced a similar bill in the Legislature in August 2007.[94]

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91. Yvonne Wingett, *Arizona's Colleges Struggle to Enforce New Tuition Statute*, ARIZ. REPUBLIC, Jan. 3, 2007, at A1; Yvonne Wingett & Matthew Benson, *Migrant Law Blocks Benefits to Thousands*, ARIZ. REPUBLIC, Aug. 2, 2007, at A1; Yvonne Wingett & Richard Ruelas, *ASU Helps Migrants Find Tuition*, ARIZ. REPUBLIC, Sept. 8, 2007, at A1; Mariana Alvarado Avalos, *Law Shuts Out Some Students*, ARIZ. DAILY STAR, Aug. 10, 2008, at B1; Renee Schafer Horton, *119 UA Students Reclassified as Out-of-State*, TUCSON CITIZEN, Jan. 1, 2008, at A1. *See generally*, Campbell, *supra* note 60; Kristina M. Campbell, *Historic Police Powers or State-Sanctioned Vigilantism? How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America* (forthcoming 2010), abstract *available at* http://ssrn.com/abstract=1472232 (last visited Apr. 21, 2010). Quite apart from the issues of immigration in Arizona, the state has been in deep financial trouble, especially at the public postsecondary institutions. *See, e.g.*, Anne Ryman & Lesley Wright, *ASU Plans to Lay Off Faculty to Save Cash*, ARIZ. REPUBLIC, Oct. 28, 2008, at A1; Eric Kelderman, *At the U. of Arizona, Goals Collide With Reality*, CHRON. OF HIGHER EDUC., Mar. 27, 2009, at A1.

92. Wingett & Ruelas, *supra* note 86.

93. John Faherty & Maxine Park, *ASU Ends Scholarships for Illegal Immigrants*, ARIZ. REPUBLIC, Feb. 16, 2008, at A1; Sara Hebel, *Arizona's Colleges Are in the Crosshairs of Efforts to Curb Illegal Immigration*, CHRON. OF HIGHER EDUC., Nov. 2, 2007, at A15; Katherine Mangan, *Arizona State U. Reclassifies 207 Students as Out of State*, CHRON. OF HIGHER EDUC., Jan. 8, 2008; Katherine Mangan, *Thousands of Arizona College Students Denied In-State Tuition*, CHRON. OF HIGHER EDUC., Jan. 9, 2008; Schafer Horton, *supra* note 91; Mariana Alvarado Avalos, *supra* note 91; Jesse McKinley, *Arizona Law Takes a Toll on Nonresident Students*, N.Y. TIMES, Jan. 27, 2008, at A13. In 2008-09, there was a mid-year cutback of eighteen percent in the Arizona State University budget. For a discussion of this, see Jonathan J. Cooper, *Undocumented Immigrants Spend Millions Extra on Tuition*, DIVERSEEDUCATION.COM, Aug. 10, 2009, *available at* http://diverseeducation.com/artman/publish-/article_12876.shtml (last visited Apr. 21, 2010).

94. H.B. 269, 94th General Assembly, 1st Sess. (Mo. 2007) ("[H.B. 269 would] prohibit the admission of unlawfully present aliens to public institutions of higher education . . . ."). Tim Craig, *Va. House Approves Bill on Illegal Immigration: Aim Is to Block Access To State, Local Funds*, WASH. POST, Jan. 31, 2007, at A1; Tim Craig, *Va.*

The Missouri Senate Committee on Pensions, Veterans' Affairs and General Laws heard testimony on March 14, 2007 on five proposed bills, including the "Missouri Omnibus Immigration Act" and a bill to ban undocumented students from enrolling in public institutions.[95] The Missouri legislation was not enacted in 2007.[96]

In 2008, the Missouri Legislature considered two separate bills addressing the undocumented college student tuition issue, one in the state House and one in the state Senate: HB 1463 would have prohibited state institutions of higher education from admitting undocumented individuals. It was not enacted, as the legislature ran out of time in May 2008.[97] However, House Bill 1549 was enacted into law, and incorporated by reference the federal provisions of Sections 1621 and 1623; Missouri public and private colleges have acted as if the legislation prohibits them from enrolling students without legal status after January 1, 2009.[98] By restating the 1621 and 1623 provisions, the Missouri statutory scheme parses federal law ("public benefits") in a fashion not dictated by the language. The ongoing *Martinez*[99] state court litigation in

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Republican Bill Would Bar Illegal Immigrants From College, WASH. POST, Aug. 30, 2007, at A1. For a review of the general history of this issue in Virginia, see Kerry Brian Melear, *Undocumented Immigrant Access to Public Higher Education: The Virginia Response*, 194 WEST EDUC. L. REPORTER 27 (2005). Virginia is interesting for a number of reasons, including its history as the one post-IIRIRA state challenged by the undocumented for the right of a state to *withhold* this benefit (the converse of the Kansas federal case and the California state case). Virginia's law denying the benefit was upheld. Doe v. Merten, 219 F.R.D. 387, 396 (E.D. Va. 2004) (holding that Virginia concerning undocumented students cannot be styled anonymously); Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 603, 614 (E.D. Va. 2004) (holding that state could enact laws denying resident tuition), *dismissed by* 325 F. Supp. 2d 655, 660, 673 (E.D. Va. 2004) (granting defendants' motion for summary judgment, finding that students do not have standing absent evidence that they were denied admission due to immigration status); *see also* Nathan G. Cortez, *The Local Dilemma: Preemption and the Role of Federal Standards in State and Local Immigration Laws*, 61 SMU L. REV. 47 (2008).

95. S.B. 1230 Gen. Assem. (Mo. 2008).

96. H.B. 1463, 94th Gen. Assem. (Mo. 2007). H.B. 1463 would "prohibit the admission of unlawfully present aliens to public institutions of higher education." *See also* Eugene McCormack, *Missouri*, CHRON. HIGHER EDUC., Aug. 31, 2007, at 68 (Almanac issue).

97. *Id.*; S.B. 1230 Gen. Assem. (Mo. 2008), *available at* http://www.senate.mo.gov (accessed from homepage by selecting "Session Information," then "Past Sessions" then "2008" then "S.B. 1230) (last visited Apr. 21, 2010); *see also* David A. Lieb, *Missouri Lawmakers Have Big Issues Left on Last Day*, JEFFERSON CITY NEWS-TRIBUNE, May 16, 2008; Chris Blank, *Missouri Lawmakers Approve Crackdown on Illegal Immigrants*, JEFFERSON CITY NEWS-TRIBUNE, May 16, 2008. Didi Tang, *Colleges to Start Checking Legal Residency*, SPRINGFIELD NEWS-LEADER, Nov. 3, 2008, at 1A (discussing developments in Missouri).

98. Tang, *supra* note 97.

99. Martinez v. Regents of the Univ. of Cal., No. CV 05-2064, 2006 WL 2974303.

California also turns on this crucial statutory construction, already construed by the federal decisions in *Merten*[100] and *Sibelius*.[101] If the legislative language simply incorporated the federal language, there was no need for the Missouri statute to have been enacted, especially if the IIRIRA and PWORA provisions require a state to take a formal action before according resident tuition to these students. If they are ineligible for the tuition status, as they were prior to the enactment, then no legislative action was required for determining or altering college resident status. This confusing set of events, especially in light of the clear July of 2008 DHS apportionment of state authority to establish state policy, is most likely explained as a punitive measure to stake out political ground and to force immigrant supporters to go on record, so that the vote—even on an unnecessary and superfluous matter—can be used in future elections as a signal of conservative political correctness.

The year 2008 started out with a bang, including ongoing national electoral politics over tuition benefits. In Virginia, citizen applicants of undocumented parents were the subject of an AG memo; the memo advised its client colleges to deal with these students on a case-by-case basis for residency tuition purposes.[102] In Utah, although a comprehensive restrictionist state law was enacted in 2008, it exempted undocumented college students from its coverage, so they remained eligible for resident tuition.[103]

In North Carolina, an odd and twisted scenario occurred in 2008. Early in the year, the state's community colleges indicated that they

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100. *Merten*, 217 F.R.D. 387 (E.D. Va. 2004).

101. Day v. Sibelius, 376 F.Supp. 2d 1022 (D. Kan. 2005).

102. *See* Kinzie, *supra* note 50. In Virginia, an AG memo does not have the binding force that an AG Opinion carries, but is considered advisory to the requestor and to other state officials who encounter similar situations. Several Virginia colleges in the past appeared to have allowed undocumented students to enroll and establish in-state residency tuition, prompting different legislative proposals in both 2008 and in 2009. The Legislature considered strengthening the current statute to ban the practice, but also considered legislation to permit a sub-group of undocumented students who met a heightened standard to receive in-state tuition. The legislation died in 2009, with no changes enacted. For additional discussion on the issue in Virginia, see Olympia Meola, *Colleges' Admittance of Illegals Opposed*, RICHMOND TIMES-DISPATCH, Jan. 18, 2008, at A1; *Kinzie*, *supra* note 50; Jim Nolan, *Va. Senate Backs Bill to Restrict Tuition Benefits for Illegal Immigrants*, RICHMOND TIMES-DISPATCH, Jan. 27, 2009, *available at* http://www2.timesdispatch.com/rtd/news/local/article/IMMIGATER27_20090127-145018/190169/; *What's Happening at the Legislature?*, RICHMOND TIMES-DISPATCH, Jan. 28, 2009, at A6; State Council for Higher Educ. for Va.; Martha Stoddard, *A tougher proposal on immigration; Gov. Dave Heineman and a State Senator Want State and Local Law Enforcement Agencies to Aid Homeland Security*, OMAHA WORLD-HERALD, Jan. 22, 2008, at A1.

103. Bulkeley, *supra* note 58; Bulkeley & Roche, *supra* note 59.

would enroll undocumented students and charge them in-district tuition.[104] In May, the Attorney General's Office issued a letter (which is less binding than an Attorney General Opinion), indicating that the state's colleges were not allowed even to enroll the undocumented, much less accord them resident tuition, citing DHS policy.[105] When the state officials sought actual guidance from DHS, the Department indicated that, to the contrary, states were able to determine their own policy, in accord with Sections 1621 and 1623.[106] After receiving this guidance, state college officials indicated that they would not enroll the students at in-state tuition rates.[107]

A similarly confused reading of federal law occurred in Arkansas, where schools had silently enrolled students, until it became publicly known, and the state higher education agency and governor ended the practice; an Arkansas AGO ruled that Arkansas law allowed the undocumented to attend state institutions, although not at resident tuition rates. [108] In September of 2008, Alabama's two-year college board also moved to ban their attendance.[109] In 2008 and 2009, resident tuition

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104. Mark Binker, *Illegal Immigrants' Tuition Pays Way*, NEWS & RECORD (Greensboro, N.C.), Mar. 20, 2009, at B1.

105. *See* Kristin Collins, *Feds: College: OK for Illegal Immigrants*, NEWS & OBSERVER (Raleigh, N.C.), May 10, 2008, at A1; Kristin Collins, *Illegals May Enjoy a Brief College Life*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 15, 2008, at B3; Scott Jaschik, *New Twist on Immigrant Students in NC*, INSIDEHIGHERED.COM, July 28, 2008, *available at* http://insidehighered.com/news/2008/07/28/qt (last visited Feb. 6, 2010) (discussing the May 2008 action by North Carolina Community College System to ban students who could not document legal immigration status from enrolling).

106. Letter from Jim Pendergraph, *supra* note 32.

107. Jennifer Gonzalez, *North Carolina Community Colleges to Resume Enrolling Illegal Immigrants*, CHRON. OF HIGHER EDUC., Sept. 18, 2009; Katherine Mangan, *Community Colleges in North Carolina Close Doors to Illegal Immigrants*, CHRON. HIGHER EDUC., Aug. 18, 2008; Kristin Collins, *Colleges Profit from Illegal Immigrants*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 25, 2009, at B3.

108. *See also* Ark. Att'y Gen. Op. No. 2008-109 (2008) (explaining that higher education admission in AR is open to undocumented aliens); *Arkansas Att. Gen. Opines that Undocumented Individuals May Enroll in States, Public Colleges and Universities*, 85 INTERPRETER RELEASES 2519 (Sept. 22, 2008); Doug Thompson, *Bill for In-State Tuition for Undocumented Students Falters in Committee*, MORNING NEWS (Little Rock, Ark.), Mar. 23, 2009 (explaining that immigrant tuition bill died in the Senate committee); John Brummett, *Beebe Rallies, Falls Short on Tuition*, ARK. NEWS, Mar. 28, 2009. Soon after AG Beebe became Governor Beebe, he upped the ante by outing the colleges. Laura Kellams, *State's Colleges Warned About In-State Tuition*, ARK. DEMOCRAT GAZETTE, May 23, 2008, at A1; John Brummett, *Shame, Shame*, ARK. NEWS, Mar. 26, 2009, at A13.

109. Desiree Hunter, *Board Bars Illegal Immigrants from Junior Colleges*, PRESS-REGISTER, Sept. 26, 2008, at B2; Katherine Mangan, *Alabama Board Bars Illegal Immigrants From State's 2-Year Colleges*, CHRON. OF HIGHER EDUC., Sept. 25, 2008.

legislation was considered but not enacted in Maryland, Colorado, Virginia, Nebraska, Ohio, and New Jersey.[110]

In June 2008, South Carolina became the first state to enact state legislation that banned undocumented students from even attending public colleges, signed into law in June, 2008.[111] Charging non-resident

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110. Ovetta Wiggins, *Immigrant Tuition Bill Falters in Md. Senate*, WASH. POST, Apr. 7, 2007, at B1; John Wagner, *Session Winds Up, Bringing Benefits For Working Class*, WASH. POST, Apr. 12, 2007, at GZ-1. As an example, Maryland Senate Bill 41 was introduced, but was not enacted into law:

> To qualify for an exemption from paying nonresident tuition, an individual must have attended a secondary school in the State for at least two years; have graduated from a high school in the State or received the equivalent of a high school diploma in the State; register as an entering student at a public institution of higher education in Maryland no earlier than the fall 2008 semester; provide documentation that the individual or the individual's parent or guardian has had Maryland income tax withheld during the year prior to high school graduation; and make application to attend the institution within three years of high school graduation. An individual who qualifies for the exemption and is not a permanent resident must also provide an affidavit stating that the individual will file an application to become a permanent resident within 30 days after becoming eligible to do so.

Fiscal and Policy Note, Senator Harrington, *available at* http://www.mlis.state.-md.us/2009rs/fnotes/bil_0001/sb0041.pdf (last visited Apr. 21, 2010). For discussion regarding the issue in Colorado, see Hank Lacey, *Legal Experts Dispute King's, GOP Certainty that Immigrant Bill Violates Federal Law*, DENVER STATEHOUSE EXAMINER, Mar. 12, 2009 (news report concerning Colorado tuition bill) (accessed from homepage by entering article title in search); Jeffery Wolf, *Colo. Senate Rejects Illegal Immigrant Tuition*, DENV. POST, Mar. 4, 2009, at B10 (editorial endorsing Colorado DREAM Act); Elise A. Keaton, CENTER FOR POLICY & ENTRE., Tuition Equity Legislation: Investing in Colorado High School Graduates Through Equal Opportunity to Postsecondary Education (2008). Several Virginia colleges in the past appeared to allow undocumented students to enroll and establish in-state residency tuition, prompting different legislative proposals in both 2008 and in 2009. The Legislature considered strengthening the current statute to ban the practice, but also considered legislation to permit a sub-group of undocumented students who met a heightened standard to receive in-state tuition. The legislation died in 2009, without implementing any changes. *See supra*, note 67; Meola, *supra* note 67; What's Happening, *supra* note 67; Kinzie, *supra* note 50; Nate Jenkins, *Activists Blast Governor's Immigration Bill as Bigoted*, JOURNAL STAR (Lincoln, Neb.), Jan. 23, 2008, at B; *see also* H.B. No. 308, 127th Gen. Assem. (Ohio 2007-08); Kirk Semple, *In New Jersey, Bills Offering In-State Tuition to Illegal Immigrants Face a Fight*, N.Y. TIMES, Apr. 20, 2009, at A20; State of New Jersey, Dep't of the Public Advocate, N.J. State DREAM Act.

111. S.C. CODE ANN. § 59-103-430, 2009. *See* Yvonne Wenger, *Sanford Signs Broad Illegal Immigration Law*, POST & COURIER (Charleston, S.C.), June 5, 2008, at A1. The S.C. Commission on Higher Education, in a memorandum dated January 16, 2009, determined that 2008 Act 280 (S.C. Illegal Immigration Reform Act) did not prohibit the "issuance of transcripts to non-verified students," inasmuch as they are not a "benefit." Memorandum from S.C. Comm'n on Higher Educ., Issuance of Transcripts to Non-Verified Students (Jan. 16, 2009) at 2.

tuition in the other states has allowed few such students to enroll; the prohibitions on federal financial assistance make it virtually impossible for undocumented students to attend colleges and pay non-resident rates.[112] Even in Texas, the first state to enact a law broadening its tuition status, and the state with the longest border adjoining Mexico, official figures for 2007 revealed there to be only 9062 undocumented enrollees out of the total public college enrollment of 1,102,572 full-time students, or eight-tenths of one percent.[113] In Washington, of the 427 students applying for and receiving "WA 1079" status in 2007-08, only 314 were presumed to be undocumented.[114] California's data were not widely-

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112. *See generally* Konet, *supra* note 1; Chin & Juhn, *supra* note 5; Jaschik, *supra* note 53 (review of state and federal developments after defeat of DREAM Act); Feder, *supra* note 31; Eddy Ramírez, *Should Colleges Enroll Illegal Immigrants?*, U.S. NEWS & WORLD REP., Aug. 17, 2008, at 46; Mary Beth Marklein, *Illegal Immigrants Face Threat of No College*, USA TODAY, July 6, 2008, at A1; Elizabeth Redden, *For the Undocumented: To Admit or Not to Admit*, INSIDEHIGHERED, Aug. 18, 2008, *available at* http://www.insidehighered.com/news/2008/08/18/immigrants; Kathleen Mangan, *Most Colleges Knowingly Admit Illegal Immigrants as Students, Survey Finds*, CHRON. HIGHER EDUC., Mar. 17, 2009; Jeffrey S. Passel & D'Vera Cohn, *surpa* note 1; Redden, *supra* note 1; Megan Eckstein, *In-State Tuition for Undocumented Students: Not Quite Yet*, CHRON. OF HIGHER EDUC., May 8, 2009, at A19; WILLIAM PEREZ, WE ARE AMERICANS: UNDOCUMENTED STUDENTS PURSUING THE AMERICAN DREAM (2009).

113. Patrick McGee, *Colleges See Rise in Illegal Aliens*, FORT WORTH STAR-TELEGRAM, July 21, 2005, at B1 ("More than 5,400 students benefited from the tuition law last spring [2006], up from 393 in 2001, according to the Texas Higher Education Coordinating Board."); Tresaugue & Radcliffe, *supra* note 54. *See also* Ashley Eldridge, *Array of Students Pay In-State Costs Under 2001 Bill*, DAILY TEXAN, Jul. 31, 2005, at 1. The Texas Coordinating Board, responsible for maintaining the data, reported in 2007:

> How many students has this affected? The number of students qualifying under these provisions is relatively small. The full population of students reported as residents under the residency provisions of TEC 54.052(a)(3) totaled 9,062 students in fall 2007. The state's public institution total enrollment that term was 1,102,572. Therefore, the TEC 54.052(a)(3) students represented slightly more than eight tenths of one percent of the public institution enrollment.

Tex. Higher Educ. Coordinating Bd., Residency and In-State Tuition, Statistical Report (2007), *available at* http://www.thecb.state.tx.us/Reports/doc-fetch.cfm?DocID=1528 (last visited Apr. 21, 2010). My own regular discussions with the Coordinating Board staff have suggested that nearly 10,000 different students have employed this provision in the approximately ten years since it was enacted, including citizens and permanent residents who graduated from the State's high schools and met the durational residency criterion. *See also* Chris Vogel, *The DREAM Act Might Be Dead, But These Kids' Hopes Are Not*, HOUSTON PRESS, June 17, 2008; Elizabeth Redden, *Success Obscured by Controversy*, INSIDEHIGHERED, Apr. 24, 2009, *available at* http://www.insidehighered.-com/news/2009/04/24/immigrants (last visited Apr. 21, 2010).

114. *See generally Washington Extends Resident Student Tuition Rate to Certain Nonimmigrants*, 86 INTERPRETER RELEASES 1786 (2009); *Undocumented Students Face Barriers to Higher Education*, PHYSORG.COM, Apr. 21, 2009; Kate Riley, *Harvesting a DREAM*, SEATTLE TIMES, June 5, 2009, at A12; Coll. Success Found., College Prep

available, but reports revealed that nearly two-thirds of the beneficiaries of AB 540 were citizens who had either moved away from the state or who were able to claim the in-state status because of the statutory language that grandfathered in former high school graduates as "residents."[115] In June 2009, Wisconsin became the eleventh state to offer the tuition provision, whittled down to ten due to Oklahoma's rescission.[116] As recently as 2010, action was underway in New Jersey and Rhode Island to enact law extending resident tuition status to the undocumented, while in Texas and Nebraska, efforts were undertaken to rescind earlier statutes, both by litigation and legislation.[117]

Resources. In addition, as has happened a number of times, a very sympathetic undocumented college student surfaced, bringing risky attention to himself. Lornet Turnbull, *Scramble to Help UW Graduate Who's an Illegal Immigrant*, SEATTLE TIMES, Sept. 30, 2009, at B1. For a few of the many examples, see, for example, Press Release, Sen. Chris Dodd, Dodd to Sponsor Rare Private Bill Preventing Haitian Girl's Deportation (July 16, 2004) (discussing Senator Dodd's sponsorship of a 2004 private relief bill for undocumented Haitian college student and urging passage of DREAM Act) (accessed from homepage by entering article title in search); *see also* Julia Preston, *In Increments, Senate Revisits Immigrant Bill*, N.Y. TIMES, Aug. 3, 2007, at A1; Marklein, *supra* note 112; Paul Basken, Kelly Field, & Sara Hebel, *Bush's Legacy in Higher Education: A Matter of Debate*, CHRON. OF HIGHER EDUC., Dec. 19, 2008, at A14; Eckstein, *supra* note 112.

115. Editorial, *In-State Tuition; Don't Kick Around Children of Immigrants*, SACRAMENTO BEE, Dec. 26, 2005, at B4 (reporting that, in 2005, of the total 208,000 UC students, 1,339 received the AB 540 exemption, including 407 undocumented immigrants); Josh Keller, *State Legislatures Debate Tuition for Illegal Immigrants*, CHRON. HIGHER EDUC., Apr. 13, 2007, at A28; Josh Keller, *U.S. Citizens Reap Unintended Benefit From California's Immigrant-Tuition Law*, CHRON. HIGHER EDUC., Dec. 6, 2009, at A1.

116. WIS. STAT. ANN. § 36.27 (West 2009). *See* Georgia Pabst, *Some Illegal Immigrants Will Be Able to Get In-state Tuition*, JOURNAL SENTINEL (Milwaukee, Wis.), June 30, 2009, at B3.

117. *See* http://www.njleg.state.nj.us/2008/Bills/S1500/1036_R1.PDF (NJ bill, 2010); RI HB 7172 (Rhode Island 2010 In State Tuition Bill); *see also* Adrienne Lu, *N.J. Bill on in-state tuition for illegal immigrants advances*, PHIL. INQUIRER, Jan. 5, 2010, at A1; Lisa Fleisher & Trish G. Graber, *Right to In-State Tuition for Illegals Advances*, STAR LEDGER, Jan. 5, 2010, at News-22; Jeff Diamant, *In-State Tuition for Illegal ImmigrantsFfizzles*, STAR LEDGER, Jan. 12, 2010, at NJ-16; Jonathan Tamari, *N.J. Legislature Denies In-State Tuition for Illegal Immigrants*, PHIL. INQUIRER, Jan.12, 2010, at B1; ANASTASIA R. MANN, GARDEN STATE DREAMS: IN-STATE TUITION FOR UNDOCUMENTED KIDS (New Jersey Policy Perspective report, 2010) *available at* http://www.njpp.org/rpt_tuition.html (last visited Apr. 9, 2010). Susan Carroll, *In-State Rates for Illegal Immigrants Attacked; Group Says Texas Violating Federal Law by Allowing Such Tuition Breaks; LAWSUIT: Texas Led the Way*, HOUS. CHRON., Dec. 16, 2009, at B1; Margery A. Beck, *Lawsuit Targets Nebraska's Immigrant-Tuition Law*, LINCOLN JOURNAL-STAR, Jan. 25, 2010, *available at* http://www.journalstar.com/news/state-and-regional/nebraska/article_c6ed17f0-09e5-11df-b231-001cc4c002e0.html; Barb Shelly, Kris Kobach's War on Undocumented

II. THE DREAM ACT IN CONGRESS AND FEDERAL DEVELOPMENTS

Of course, against the backdrop of considerable state activity, the federal stage was also active, following the introduction of the DREAM Act in 2001.[118] In both 2003 and in 2005, the DREAM Act was reintroduced in Congress, even with 2004 Senate Judicial Committee hearings,[119] but it languished there until comprehensive immigration reform efforts failed in the Summer of 2007. In July 2007, the Senate tried a different legislative approach by developing plans to attach the legislation to the Department of Defense (DoD) authorization bill.[120] Sen. Harry Reid pulled it from the floor when an Iraq timetable amendment failed; as a result, the Senate never got to the DREAM vote.[121] The DoD

College Students, KANS. CITY STAR, Jan. 26, 2010, *available at* http://voices.kansascity.com/node/7353; Martha Stoddard, *In-State Tuition Repeal Unlikely*, OMAHA WORLD-HERALD, Feb. 2, 2010, *available at* http://www.omaha.com/article/20100202/NEWS01/702029941; JoAnne Young, *Senators Hear Arguments on Repealing Nebraska Dream Act*, LINCOLN JOURNAL STAR, Feb. 2, 2010.

118. 147 CONG. REC. 8581 (2001) (statement of Sen. Orrin Hatch). S. 1291, 107th Cong. (2001) (as introduced in the Senate); S. 1291, 107th Cong. (2001) (as reported in the Senate); Student Adjustment Act of 2001, H.R. 1918, 107th Cong. (2001) (as introduced in House).

119. DREAM Act of 2003, S. 1545, 108th Cong. (2003) (as introduced in the Senate); DREAM Act of 2003, S. 1545, 108th Cong. (2003) (as reported in the Senate); Student Adjustment Act of 2003, H.R. 1684, 108th Cong. (2003) (as introduced in the House); S. REP. NO. 108-224 (2004) (as reported by S. Comm. on the Judiciary) (regarding the proposed amendment of the Illegal Immigration Reform Act of 1996); DREAM Act of 2005, S. 2075, 109th Cong. (2005) (as introduced in the Senate); American Dream Act of 2006, H.R. 5131, 109th Cong. (2006) (as introduced in the House); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006) (as placed on calendar in the Senate).

120. Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007).

121. *Id.*; DREAM Act of 2007, S. 774, 110th Cong. (2007) (A bill "[t]o amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to permit States to determine State residency for higher education purposes and to authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children, and for other purposes"); Educ. Access for Rightful Noncitizens (EARN) Act, H.R. 1221, 110th Cong. (2007) (as introduced in the House) ("[t]o provide for cancellation of removal and adjustment of status for certain long-term residents who entered the United States as children."); Am. Dream Act, H.R. 1275, 110th Cong. (2007) (as introduced in the House) ("[t]o amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to permit States to determine State residency for higher education purposes and to authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children, and for other purposes"); DREAM Act, S. 2205, 110th Cong. (2007) (as placed on calendar in the Senate) (A bill "[t]o authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as

authorization bill was scheduled to return to the Senate floor in September, 2007, but in late fall 2007, there had been no additional movement on the proposal. The House Judiciary Committee held a DREAM Act hearing on May 18, 2007.[122] On September 6, 2007, the House held subcommittee hearings on the STRIVE Act, the comprehensive House immigration legislation that contained, among other provisions, postsecondary tuition and the other features of the DREAM Act.[123] In one last attempt to enact legislation to address the status of the college students, on October 24, 2007, the Senate considered and voted down the standalone DREAM Act, 44-52, on the Cloture Motion.[124]

Additionally, there were developments in other immigration categories, such as college developments for victims of human trafficking (T nonimmigrant visas).[125] And, as noted, in 2008, the DHS in 2008 acted to situate the responsibility for state status as a state decision.[126] Even as the DREAM Act languished in Congress, dozens of national news stories, several books on the subject, and many national studies drew attention to the issue, including reports by the Heritage Foundation, in support of Kris Kobach's California state court litigation on in-state tuition residency.[127] The Congressional Research Service

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children, and for other purposes."). A motion not to proceed was voted on October 24, 2007. The bill terminated with a vote of 52-44. *Id.*

122. *See The Future of Undocumented Immigrant Students: Hearing on Comprehensive Immigration Reform Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Security & Int'l Law*, 110th Cong. (2007), transcript, votes, and committee transcript excerpts, *available at* http://judiciary.house.gov-/hearings/May2007/hear_051807.html (last visited Apr. 21, 2010).

123. Security Through Regularized Immigration and a Vibrant Economy (STRIVE) Act of 2007, H.R. 1645, 110th Cong. (2007); 2007 STRIVE hearing, *available at* http://judiciary.house.gov/hearings/printers/110th/37603.PDF (last visited Apr. 21, 2010).

124. DREAM Act, S. 2205, 110th Cong. (2007) (including details of the vote).

125. Eligibility for Title IV Program Assistance for Victims of Human Trafficking, Information for Financial Aid Professionals (May 11, 2006), *available at* http://ifap.ed.gov/dpcletters/GEN0609.html (last visited Apr. 21, 2010).

126. Letter from Jim Pendergraph, Executive Director, Office of State and Local Coordination, U.S. Immigration & Customs Enforcement, to Thomas J. Ziko, Special Deputy Attorney General, N.C. Dep't of Justice (July 28, 2008), *available at* http://www.nacua.org/documents/AdmissionUndocAlien072008.pdf (last visited Apr. 21, 2010).

127. *See, e.g.*, Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 473, 477, 517, 521 (2006-07). *But see* Olivas, *supra* note 6 at 99-132; *see also* Kris W. Kobach, *The Heritage Found., The Senate Immigration Bill Rewards Lawbreaking: Why the DREAM Act is a Nightmare*, BACKGROUNDER NO. 1960 (2006) [hereinafter Kobach, *Lawbreaking]* (last visited Apr. 21, 2010). Professor Kobach apparently suffers from recurring dreams—he also characterized the 2007 comprehensive immigration reform proposals as

published studies on the subject.[128] National professional associations, such as the National Association of College Admissions Counselors, have been drawn to this issue, making the DREAM Act an organizational priority.[129] The College Board also made this a priority, and in 2009 the Board released a comprehensive report, drawing press attention.[130] Moreover, the national and trade press regularly covered the subject.[131]

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a "nightmare." Kris W. Kobach, *The Heritage Found., The Senate Immigration Bill: A National Security Nightmare*, WEBMEMO NO. 1513 (2007), *available at* http://www.heritage.org/Research/Immigration/wm1513.cfm [hereinafter Kobach, Nightmare] (last visited Apr. 21, 2010). In 2010, he filed suit in Nebraska state court to overturn the legislation (*Mannschreck v. University of Nebraska*). *See* Margery A. Beck, *Kris Kobach, Kansas Secretary of State Candidate, Sues Nebraska Over Immigrant Tuition Law*, KANS. CITY STAR, Jan. 26, 2010; Barb Shelly, *Kris Kobach's War on Undocumented College Students*, KANS. CITY STAR, Jan. 26, 2010; Julia Preston, *A Professor Fights Illegal Immigration One Court at a Time*, N.Y. TIMES, July 21, 2009, at A10. In 2010, Kobach filed suit in Nebraska state court to overturn the legislation (*Mannschreck v. University of Nebraska*). *See* Margery A. Beck, *Lawsuit Targets Nebraska's Immigrant-Tuition Law*, LINCOLN JOURNAL-STAR Jan. 25, 2010, *available at* http://www.journalstar.com-/news/state-and-regional/nebraska-/article_c6ed17f0-09e5-11df-b231-001cc4c002e0.html; Martha Stoddard, *In-State Tuition Repeal Unlikely*, OMAHA WORLD-HERALD, Feb. 2, 2010, *available at* http://www.omaha.com/article-/20100202/NEWS01/702029941; JoAnne Young, *Senators Hear Arguments on Repealing Nebraska Dream Act*, LINCOLN JOURNAL STAR, Feb. 2, 2010.

128. ANDORRA BRUNO, CONG. RESEARCH SERV., UNAUTHORIZED ALIEN STUDENTS: ISSUES AND "DREAM ACT" LEGISLATION, Report RL33863, (2008), *available at* http://trac.syr.edu/immigration/library/P1606.pdf (last visited Apr. 21, 2010); FEDER, *supra* note 31.

129. *See* Elizabeth Redden, *A Message to Prospective Undocumented Students*, INSIDEHIGHERED., Oct. 16, 2008, *available at* http://www.insidehighered.com-/news/2008/10/16/vassar (last visited Apr. 21, 2010) (reporting that Vassar is open to undocumented students); AACRAO, UNDOCUMENTED STUDENTS IN THE U.S.: ADMISSION AND VERIFICATION (2009), *available at* http://www.aacrao.org/pro_development-/surveys/undocumented_results.pdf (last visited Apr. 21, 2010); BATALOVA & FIX, *supra* note 1; NAT'L IMMIGRATION LAW CTR., BASIC FACTS ABOUT IN-STATE TUITION FOR UNDOCUMENTED IMMIGRANT STUDENTS (2009).

130. ROBERTO GONZALEZ, COLL. BD., YOUNG LIVES ON HOLD: THE COLLEGE DREAMS OF UNDOCUMENTED STUDENTS (2009); Megan Eckstein, *College Board Announces Support for Immigration Bill*, CHRON. OF HIGHER EDUC., Apr. 22, 2009; Megan Eckstein, *In-State Tuition for Undocumented Students: Not Quite Yet*, CHRON. HIGHER EDUC., May 8, 2009, at A19; ANASTASIA R. MANN, GARDEN STATE DREAMS: IN-STATE TUITION FOR UNDOCUMENTED KIDS (New Jersey Policy Perspective report, 2010), *available at* http://www.njpp.org/rpt_tuition.html (last visited Apr. 21, 2010).

131. For several careful studies of the various legislative developments, see generally Maria Arhancet, *Developments in the Legislative Branch: Platforms of Presidential Candidates Regarding Immigration Reform*, 21 GEO. IMMIGR. L.J. 507 (2007) (outlining Republican and Democratic presidential candidates' positions on immigration); Keun Dong Kim, *Current Development in the Legislative Branch: Comprehensive Immigration Reform Nixed*, 21 GEO. IMMIGR. L.J. 685 (2007) (reporting on a failed immigration bill); Jeffrey N. Poulin, *Development in the Legislative Branch: The Piecemeal Approach Falls*

Another national barometer of interest in this larger issue is the scorecard of how many legislatures have considered legislation on immigration-related issues.[132] The National Conference of State Legislatures (NCSL) issued a report detailing the state-level immigration legislation in the first six months of 2009: more than 1400 bills were considered in all 50 states.[133] No fewer than "144 laws and 115 resolutions [had] been enacted in 44 states, with bills sent to governors in two additional states. A total of 285 bills and resolutions [had] passed legislatures; 23 of these bills [were] pending Governor's approval and three bills were vetoed."[134] Only four states did not enact a single immigration law during this period: Alaska, Massachusetts, Michigan, and Ohio.[135]

Short of Achieving the DREAM of Immigration Reform, 22 GEO. IMMIGR. L.J. 353 (2008) (reporting on the failure of the DREAM Act in 2007). The national press has kept up a substantial drumbeat, much of it remarkably positive. *See, e.g.*, Miriam Jordan, *Illegal at Princeton*, WALL ST. J., Apr. 15, 2006, at A1; Joseph Berger, *Debates Persist Over Subsidies for Immigrant College Students*, N.Y. TIMES, Dec. 12, 2007, at B8; Michael Luo, *Romney's Words Testify to Threat From Huckabee*, N.Y. TIMES, Dec. 2, 2007, at YT 29; FEDER, *supra* note 31; Ramírez, *supra* note 20; Marklein, *supra* note 112; Redden, *supra* note 112; Mangan, *supra* note 112; AACRAO, *supra* note 91; Martin Ricard, *Students Stage Mock Graduation To Advocate for Undocumented*, WASH. POST, June 24, 2009, at B2.

132. The National Conference of State Legislatures compiles legislative data on a variety of subjects, including state-level enactments of immigration laws, which showed in the first six months of 2009 that all but four states passed such laws, most restrictionist. *See* IMMIGRANT POL'Y PROJECT, STATE LAWS RELATED TO IMMIGRANTS AND IMMIGRATION (2009), *available at* http://www.ncsl.org-/default.aspx?tabid=18030 (last visited Apr. 9, 2010).

133. *Id. See* Jorge M. Chavez & Doris Marie Provine, *Race and the Response of State Legislatures to Unauthorized Immigrants*, 63 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 78 (2009), *available at* http://ann.sagepub.com/cgi-/content/abstract/623/1/78 (analyzing NCSL data) (last visited Apr. 21, 2010). Perhaps by definition, state legislators and their organizations are very conservative, as evident by the extraordinary data evident in the regular NCSL tabulations. But in an interesting eclipse with liberal and progressive observers, the NCSL has taken the official position that federal law preempts state and local law immigration enforcement efforts:

> NCSL holds firmly that states do not have 'inherent authority' to enforce federal civil immigration law. We also oppose efforts to perpetuate this myth of 'inherent authority' indirectly by shifting federal responsibility of immigration enforcement to state and local law officers through the criminalization of any violation of federal immigration law.

Nat'l Conference of State Legislatures, Immigration Reform—Official Policy, (2009), http://www.ncsl.org/default.aspx?tabid=18094 (last visited Apr. 21, 2010) (NCSL policy on preemption). For example, compare Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121 (1994) with Olivas, *supra* note 7.

134. NCLS, IMMIGRANT POL'Y PROJECT, *supra* note 131.

135. *Id.*

III. THE POLITICS OF IMMIGRATION REFORM

Political scientists Benjamin Marquez and John Witte have written an exceptionally useful paper that maps out what they consider the varying and kaleidoscopic legislative strategies in recent immigration reform efforts.[136] They grapple with the key issue in negotiating the complex and interlocking facets: whether to enact piecemeal statutes in the hope that varying coalitions wIll have different alignments in any complex regime, or to attempt a comprehensive solution that has many moving parts.[137] They perceptively set out the basic tradeoffs inherent in comprehensive immigration reform efforts in their conclusion:

> A paper that sets out to discuss legislative strategies should in the end have some definitive recommendations, but we do not. That may be a function of the policy subject – immigration – or it may be because, when faced with complex policy issues, the road ahead depends on trying different strategies. And that is what we see for immigration policy. It is clear that, whatever occurs, moving down that road will be very difficult, as it has been in the past. For some issues such as amnesty, there seems to be strong support across a range of interest groups, yet no issue divides Congress more decisively. If that issue needs to be resolved, and the demand is pressing, it may be best to separate the issue and try to reach compromises with the backing of the interest groups. To include it instead in a large package of reforms is likely to sink the package along with amnesty.
>
> On the other hand, other issues have formed natural combinations and compromises. Such has been the case on legal visa levels and in negotiations over types of visas. The Irish were even able to increase their numbers through a clever and indirect route as "diversity visas." In other contexts, diversity for Northern Europeans may well have been hard to sell. What we believe is essential is to keep the prospect of dealing with discrete and separable issues on the table. There is in Congress the

136. Benjamin Marquez & John F. Witte, *Immigration Reform: Strategies for Legislative Action*, 7 THE FORUM 1 (2009); *see also* Ryan Lizza, *Return of the Nativist*, NEW YORKER, Dec. 17, 2007, at 46 (reviewing political views on immigration).

137. Marquez & White, *supra* note 135.

> powerful tendency to solve all the problems at one time in a huge complex bill that covers broad ranges of issues.
>
> This tendency has several possible failings. First, it may often produce nothing – as has been the case with immigration policy in the current century. Second, the results of large sets of compromises may make the resolution of individual issues less optimal than if they were handled in discrete legislation. We trust the skills and wisdom of leaders who work for years in a policy area to realize when one of these outcomes looms. At that point, it might be better simply to ask: "Can we make positive progress on issue x, always remembering that issue y can be dealt with on another day." Indeed, we also suspect that similar analyses on other issues, such as healthcare reform, would benefit from the same advice.[138]

My reading of this work agrees in large part, but the most interesting facet of their analysis is that it omits the DREAM Act from its consideration. This dog-that-does-not-bark dimension is interesting because it would have been the best test of their thesis—that incremental and severable legislative approaches to complex problems are preferable and, especially in immigration reform, likely the most efficacious political strategy. For example, they identify theoretical positions on "Major Policy Issues on Immigration": Higher Immigration Totals, Higher Family Unification, Higher Specialized Employment, Amnesty – Path to Citizenship, Guest Worker Program, Social Services for Illegals [sic], Employer Sanctions/IDs, and Border Security.[139] In these core areas, they chart interest group salience, probe the resistance each position triggers, and indicate the extent to which there are possibilities for compromise.[140] They also helpfully measure the additional partisan and ideological implications of particular salience to analyses of immigration, and highlight two: "the effects on members of both parties of representing districts in southwestern border states, and, independently, districts with high levels of foreign-born constituents."[141]

Although they do not focus upon the DREAM Act or the area of undocumented postsecondary students, they might profitably have done

138. *Id*. at 24-25.
139. *Id*. at 5-8.
140. *Id*.
141. *Id*. at 8.

so, as there has been substantial sub-federal legislative activity in the field, there is evident a tug-of-war among advocates and restrictionists, there is a large body of literature and public focus on the subject, there is the categorical precedent of related U.S. Supreme Court decisions with bearing upon the issue, there is a growing litigation record in other federal and state courts, and, more to their point, the issue is severable (what they characterize as "discrete and separable") and has already been contested in the Congress. Thus, it would have been the perfect test case for their thesis, and a useful case study proxy for contesting the efficacy of comprehensive immigration reform.

Table 2: DREAM Act Congressional Legislative History

(107th Congress) 2001-02:

S. 1291, DREAM Act of 2001

H.R. 1918, Student Adjustment Act of 2001

(108th Congress) 2003-04:

S. 1545, DREAM Act of 2003

H.R. 1684, Student Adjustment Act of 2003

(109th Congress) 2005-06:

S. 2075, DREAM Act of 2005

H.R. 5131, American Dream Act of 2006

S. 2611, Comprehensive Immigration Reform Act of 2006

(110th Congress) 2007-8:

S. 1348, Comprehensive Immigration Reform Act of 2007

S. 774, A bill to amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to permit States to determine State residency for higher education purposes and to authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children, and for other purposes.

H.R. 1221, To provide for cancellation of removal and adjustment of status for certain long-term residents who entered the United States as children

H.R.1275, To amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to permit States to determine State residency for higher education purposes and to authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children, and for other purposes.

S. 2205, A bill to authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children, and for other purposes. [voted on, 44-52 (October 24, 2007)]

S. 2919, Department of Defense Authorization Bill* (originated in House)

H.R. 4986, DoD Authorization Bill

(111th Congress), 2009-2010

S. 729, DREAM Act of 2009

H.R. 1751, DREAM Act of 2009

Parts One and Two have documented the extensive previous legislative activity, the *dramatis personae* of contestants, and the considerable research and policy literature and media attention paid to the issue. The holding of *Plyler v. Doe*, that allowed undocumented school children to enroll freely in elementary and secondary schools, has been challenged but has remained good law nearly thirty years after the 1982 decision.[142] Indeed, except for a mid-1990's dustup that threatened congressional action to overturn the holding, *Plyler* has become accepted and accommodated by a substantial majority of school districts and policymakers, making a virtue of necessity and holding the innocent

142. *Plyler*, 457 U.S. 202; Olivas, *supra* note 6; Olivas, *supra* note 7; MARIA PABON LOPEZ & GERARDO R. LOPEZ, PERSISTENT INEQUALITY: CONTEMPORARY REALITIES IN THE EDUCATION OF UNDOCUMENTED LATINA/O STUDENTS (2010).

children harmless for what may have been the transgressions of their undocumented parents. However, *Plyler* does not extend to high school graduates and their admission to college or other post-compulsory schooling, and a number of cases have arisen, including an important one winding its way through California courts at the present time.[143]

This Part details the final two facets of undocumented college students as a component of comprehensive immigration reform: the severability of the issue and the legislative history of the DREAM Act in Congress. The near-miss of the 2007 legislation, its unusual provenance, and its likely recurrence all make this issue a bellwether for the likelihood of a more omnibus legislative strategy. Recalling Marquez and Witte's framing question, ("At that point, it might be better simply to ask: 'Can we make positive progress on issue x, always remembering that issue y can be dealt with on another day?'")[144] one might usefully ask: Can the DREAM Act pass as a standalone bill, if at all, or must it be a part of a larger legislative strategy?

Here, it is useful to recall in more detail the original status and introduction of the DREAM Act. As noted in Table Two, it was first introduced on August 1, 2001, by Senator Orrin Hatch (R-Utah); the bill had broad, bipartisan support, with Senator Hatch being among the most conservative members of the Senate, and Senator Richard Durbin (D-Ill.) being among the most liberal.[145] Despite some traction on the issue, formal hearings, and even a positive vote out of the Senate committee in November, 2003, the DREAM Act in its various versions languished there until comprehensive immigration reform efforts failed in Summer, 2007.[146] In July, 2007, the Senate tried a different legislative approach, and developed plans to attach the legislation to the Department of

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143. Martinez v. Regents of the Univ. of Cal., CV-05-2064, 2006 WL 2974303 (Cal. Super. Ct. Oct. 4, 2006) (dismissing challenge to state residency statute), *rev'd*, 83 Cal. Rptr. 3d 518, *superseded by* 198 P.3d 1 (Cal. 2008) (granting respondents' petition for review).

144. Marquez & Witte, *supra* note 135, at 25.

145. Table Two details the various permutations of the bills introduced. *See generally* Olivas, *IIRIRA*, *supra* note 6, at 461-62; BRUNO, *supra* note 127; RUTH ELLEN WASEM, CONG. RESEARCH SERV., IMMIGRATION REFORM: BRIEF SYNTHESIS OF ISSUE, Report RS2257 (2007); Laurence M. Krutchik, Comment, *Down But Not Out: A Comparison of Previous Attempts at Immigration Reform and the Resulting Implemented Changes*, 32 NOVA L. REV. 455, 468-81 (2008).

146. *See supra* notes 117-20 and accompanying text. *See generally* AM. ASS'N OF STATE COLLS. & UNIVS., ACCESS FOR ALL? DEBATING IN-STATE TUITION FOR UNDOCUMENTED ALIEN STUDENTS (2005), *available at*: www.aascu.org/policy-/special_report/access_for_all.htm (last visited Apr. 21, 2010) (reviewing federal and state immigration law history); NAT'L IMMIGRATION LAW CTR., DREAM ACT: BASIC INFORMATION (2005).

Defense authorization bill, but Sen. Harry Reid (D-Nev.)pulled it from the floor when an Iraq timetable amendment failed; as a result, the Senate never got to the DREAM vote in this guise.[147]

Nonetheless, the tactic to use the DoD bill as a vehicle was quite clever and germane because of provisions in the legislation that would have facilitated the legalization of undocumented members of the U.S. military. The DoD Authorization bill was scheduled to return to the Senate floor in September, 2007, but by late fall 2007, there had been no additional movement on the proposal.[148] By now, the growing unpopularity of the war in Iraq made the issue a political tar baby, too-divisive to provide the groundcover that might have been available had the tactic been used sooner after 2001's "war on terror" or in the early stages of the Iraq or Afghanistan military actions. The House Judiciary Committee held a DREAM Act hearing on May 18, 2007; on September 6, 2007, the House held Subcommittee hearings on the STRIVE Act, the comprehensive House legislation that contained, among other provisions, the DREAM Act.[149] In one last attempt to enact the postsecondary education legislation, on October 24, 2007, the Senate voted down the standalone DREAM Act, 44-52, on the cloture motion.[150] The one possible aperture closed and its moment passed.

The actors in this 2007 vote were an odd array. In a situation where sixty votes were needed and every vote counted, four voters who were on record as supporting the legislation did not vote.[151] Senator John McCain (R-Ariz.), who had been instrumental in the failed Kennedy-McCain effort at comprehensive immigration reform, did not vote, as he was in the midst of his unsuccessful presidential campaign.[152] Senator Edward

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147. *See supra* note 120 and accompanying text. *See generally* Margaret D. Stock, *The DREAM Act: Tapping an Overlooked Pool of Home-Grown Talent to Meet Military Enlistment Needs*, 6 ENGAGE 99, 99-103 (2005), *available at* http://hq.democracyinaction.org/dia/organizations/NILC/images/Stock_on_DREAM_Act.pdf (last visited Apr. 21, 2010); Julia Preston, *U.S. Military Will Offer Path to Citizenship*, N.Y. TIMES, Feb. 15, 2009, at A1. MARGARET D. STOCK & KRISTAN K. EXNER, IMMIGR. ISSUES RELATING TO MILITARY SERVICE: PRACTICAL PROBLEMS AND SOLUTIONS, IN IMMIGRATION & NAT'LITY L. HANDBOOK, 2009-10, at 921 (Rizwan Hassan ed., 2009); Susan E. Timmons & Margaret D. Stock, *Immigration Issues Faced by U.S. Servicemembers: Challenges and Solutions*, 43 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y, 270-76 (Sept.-Oct. 2009). Francine J. Lipman, *Saving Private Ryan's Tax Refund: Poverty Relief for ALL Working Poor Military Families*, ABA SECT. OF TAX. NEWS Q. 9 (Winter 2010).

148. *Supra* note 119-20 and accompanying text.

149. *Supra* notes 117-20.

150. *Supra* note 122.

151. *See* Details of the vote, *supra* note 123.

152. McCain's absence was widely regarded as strategic, as he was in the thick of a Republican primary fight. *See, e.g.*, Stephen Dinan, *McCain Caters to GOP Voters*,

Kennedy (D-Mass.) was unavailable for the vote, as his health had taken a turn for the worse.[153] Senator Barbara Boxer (D-Cal.) was unavailable, as extensive fires had broken out in her state, and she was attending to business there. Senator Christopher Dodd (D-Conn.), an early DREAM Act supporter, was also unavailable and did not vote.[154]

Most unusual and remarkable was the action of Senator Arlen Specter (R-Pa.), who had been a supporter of the DREAM Act and who was considered among the most liberal Republicans in the Senate. He voted against the bill, on the credulity-straining grounds that if it were enacted, it would impede the larger goal of comprehensive immigration reform.[155] On the Senate floor on October 24, 2007, he read the following remarks:

> Mr. President, I believe that the DREAM Act is a good act, and I believe that its purposes are beneficial. I think it ought to be enacted. But I have grave reservations about seeing a part of comprehensive immigration reform go forward because it weakens our position to get a comprehensive bill.
>
> Right now, we are witnessing a national disaster, a governmental disaster, as States and counties and cities and townships and boroughs and municipalities—every level of government—are legislating on immigration because the Congress of the United States is derelict in its duty to proceed.
>
> We passed an immigration bill out of both Houses last year. It was not conferenced. It was a disgrace that we couldn't get the people's business done. We were unsuccessful in June in trying to pass an immigration bill. I think we ought to be going back to it. I have discussed it with my colleagues.

WASH. TIMES, Oct. 31, 2007, at A1 (stating that "Sen. John McCain has quietly been piling up flip-flops," citing previous DREAM Act support).

153. Senator Kennedy, recovering from surgery at the time of the cloture vote, died from a brain tumor on August 25, 2009, at the age of 77. *Edward M. Kennedy*, N.Y. TIMES, Sept. 3, 2009.

154. *See, e.g.*, Press Release, Sen. Dodd, *supra* note 114; Julia Preston, *Measure Would Offer Legal Status to Illegal Immigrant Students*, N.Y. TIMES, Sept. 20, 2007, at A1 (Sen. Dodd securing private relief legislation for undocumented college student).

155. DREAM Act of 2007: Hearing on S. 2205, 110th Cong. S13305 (2007) (excerpt from Sen. Arlen Specter's Statement on the Senate Floor Regarding the DREAM Act).

> I had proposed a modification to the bill defeated in June, which, much as I dislike it, would not have granted citizenship as part of the bill, but would have removed fugitive status only. That means someone could not be arrested if the only violation was being in the country illegally. That would eliminate the opportunity for unscrupulous employers to blackmail employees with squalid living conditions and low wages, and it would enable people to come out of the shadows, to register within a year.
>
> We cannot support 12 to 20 million undocumented immigrants, but we could deport the criminal element if we could segregate those who would be granted amnesty only.
>
> I believe we ought to proceed with hearings in the Judiciary Committee. We ought to set up legislation. If we cannot act this year because of the appropriations logjam, we will have time in late January. But as reluctant as I am to oppose this excellent idea of the Senator from Illinois, I do not think we ought to cherry-pick. It would take the pressure off of comprehensive immigration reform, which is the responsibility of the Federal Government. We ought to act on it, and we ought to act on it now.[156]

This defection of a previously-supportive senior Republican Senator, combined with the White House's efforts to defeat passage, essentially on the same grounds, were the kiss of death to the bill. The White House issued a press release just prior to the DREAM Act Senate vote, suggesting the need for overall immigration reform and suggesting that the current legislation was too generous:

> The Administration continues to believe that the Nation's broken immigration system requires comprehensive reform. This reform should include strong border and interior enforcement, a temporary worker program, a program to bring the millions of undocumented aliens out of the shadows without amnesty and without animosity, and assistance that helps newcomers assimilate into American society. Unless it provides additional authorities in all of these areas,

156. *Id.*

> Congress will do little more than perpetuate the unfortunate status quo.
>
> The Administration is sympathetic to the position of young people who were brought here illegally as children and have come to know the United States as home. Any resolution of their status, however, must be careful not to provide incentives for recurrence of the illegal conduct that has brought the Nation to this point.[157]

Senator Specter was widely considered a safe vote on the issue, and his politics had evolved to the point where he would even switch parties in 2008 and become a Democrat.[158] Senator Kay Bailey Hutchison (R-Tex.), who anticipated running for Governor of Texas against the incumbent Republican Rick Perry (who had signed into law the first state legislation to grant in-state tuition to the undocumented), voted for the DREAM Act, and thereby reduced the risk of alienating Latino voters in her home state who would now have to choose in the primary between two candidates who had both supported the issue. [159] Observers, including Senate staff, noted that there had been several other possible votes that would have been available for the legislation if the required 60 votes were within shouting distance; these senators were only willing to risk the wrath of critical voters if the game were worth the candle and their votes would actually count.[160] The absence of Senators McCain and

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157. OFFICE OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATIVE POLICY: S. 2205 – DEVELOPMENT, RELIEF, AND EDUCATION FOR ALIEN MINORS ACT OF 2007 (2007), *available at* http://www.whitehouse.gov/omb/legislative/sap/110-1/s2205sap-s.pdf (last visited Apr. 21, 2010).

158. Carl Hulse & Adam Nagourney, *Specter Switches Parties*, N.Y. TIMES, Apr. 28, 2009, at A1. Of course, these political alliances are fleeting and malleable. *See, e.g.*, Carl Hulse, *Democrats Gain as Stevens Loses His Senate Race*, N.Y. TIMES, Nov. 19, 2008, at A1 (politics of Sen. Joe Lieberman's switch from Democrat to Independent); Katharine Q. Seelye, *Specter Feels Squeeze From New Friends and Old*, N.Y. TIMES, Jan. 27, 2010, at A12.

159. James C. McKinley, Jr., *Governor's Race Exposes Republican Rift in Texas*, N.Y. TIMES, Aug. 14, 2009, at A11 (discussing differences between Perry and Hutchison); Robert Draper, *It's Just a Texas-Governor Thing*, N.Y. TIMES MAG., Dec. 6, 2009, 30-35; James C. McKinley Jr., *Texas Senator Now a Challenger Lagging in Polls*, N.Y. TIMES, Feb. 21, 2010, at A14. In March, she lost the Republican primary race to Perry. James C. McKinley Jr. and Clifford Krauss, *'Yes' for Texas Governor Is 'No' to Washington* **,** N.Y. TIMES, Mar. 3, 2010, at A1 (Perry defeated Hutchison in primary without a runoff).

160. Discussions with Staff Attorneys, National Immigration Law Center, Mexican American Legal Defense and Educational Fund (Sept. 27, 2007) (on file with author). *See also* Julia Preston, *Measure on Legal Status for Immigrant Students Blocked*, N.Y. TIMES,

Kennedy, both champions of immigration reform generally, the absences of Senators Dodd and Boxer, the defection of Specter, and the White House withholding support clearly doomed the star-crossed bill at the very last stages of maneuvering. There was evidence that Republicans, all of whom except McCain voted, also had not wanted to give what would likely be viewed as a legislative "victory" to the Democrats, or to appear to do so, with the national presidential elections coming soon afterwards.[161] Given that the DREAM Act had bipartisan sponsorship, there were signals that its enactment would be able to garner the 60 votes necessary to avoid the filibuster, under the structural and operating rules of Congress. On this point, political scientist Barbara Sinclair has noted of this complex institutional ecosystem, especially the role of the filibuster and other procedural tactics:

> The minority party – and quite a few independent observers – argues that rules barring any germane amendments are undemocratic, but such rules are often necessary to prevent carefully constructed compromises from coming unraveled on the floor. If allowed to offer any and all germane amendments, the minority may well come up with ones that repeatedly place some of the majority in the politically perilous position of choosing between "the popular" and "the responsible" vote. Forcing the most vulnerable members of the majority to take such votes is often the minority's aim. An important facet of the job of the congressional party leadership – one that a strong party leadership has a much better chance of carrying out – is protecting and enhancing the party's reputation. This means bringing a broader perspective to bear, and restrictive rules can be a valuable leadership tool for making it easier for members to take a broader perspective. In thinking about reform, we need to remember both that a geographically-based electoral system builds in a certain parochialism – also known as responsiveness and accountability to the constituency – and that how the legislature is organized internally can either accentuate or attenuate that parochialism.[162]

Sept. 28, 2007, at A1; Elizabeth Redden, *DREAM Act Vote on Tap*, INSIDEHIGHERED, Oct. 24, 2007.

161. *Id. See also* Preston, *supra* note 146; Julia Preston, *Bill for Immigrant Students Fails Test Vote in Senate*, N.Y. TIMES, Oct. 25, 2007, at A16.

162. Barbara Sinclair, *Question: What's Wrong with Congress? Answer: It's a Democratic Legislature*, 89 B. U. L. REV. 387, 396 (2009) (citations omitted). *See*

This was the final nail in the coffin, especially when the Republican presidential candidates began in earnest to accuse each other of weakness on immigration and of favoring an amnesty to the affected students.[163] By this time, FAIR, the Heritage Foundation, and restrictionist lawyers had also added to the thermodynamics, making it impossible for supporters to bring up the issue.[164] The fleeting, best opportunity for enacting the DREAM Act had passed, caught in the ironic pincers of being too much (for conservative legislators who feared being tarred as supporting an "amnesty") and too little (enacting it would torpedo the larger strategy of reforming overall immigration problems). In this scenario, the initiative died both by fire and by ice, and even was too-little/too-late, being tarnished by the increasingly-unpopular Iraq War association. Had the strategy been attempted either immediately after September 11, 2001 or soon after, when support for the Afghan and Iraq war efforts was greater, it is more likely it would have passed. Ironically, several of the terrorists involved in the deadly attacks were themselves college students out of status, and the predictable reaction to the acts of terrorism also entangled the issue.[165] It is all the more remarkable that the various state DREAM acts were all undertaken after 2001, save the

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generally Barbara Sinclair, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING (2006). *See also* Julia Preston, *Measure Would Offer Legal Status to Illegal Immigrant Students*, N.Y. TIMES, Sept. 20, 2007, at A1; Julia Preston, *Bill for Immigrant Students Fails Test Vote in Senate*, N.Y. TIMES, Oct. 25, 2007, at A1; Posting of Michael Luo to The Caucus: The Politics and Government Blog of the Times, http://thecaucus.blogs.nytimes.com (May 22, 2008, 15:51 EST) (accessed by typing "McCain Says Immigration Reform Should Be Top Priority" into search box).

163. Sara Hebel, *Candidates Grapple With How to Expand Access to College*, CHRON. OF HIGHER EDUC., Sept. 14, 2007, at A17; Berger, *supra* note 181.

164. *See* MATTHEW SPALDING, HERITAGE FOUND., GETTING REFORM RIGHT: THE WHITE HOUSE'S IMMIGRATION INITIATIVE, WEB MEMO (2007). Preston, *Bill for Immigrant Students Fails Test Vote in Senate*, *supra* note 160; Kobach, *supra* note 126; Kasarda, *supra* note 38. I do not suggest that all conservative views are of one accord, on this topic or any other. Some of the more libertarian views, for example, advocate for more open borders, legalization, and increased immigration for both higher-end and lower-skill jobs. *See, e.g.*, DANIEL GRISWOLD, CATO INST., CTR. FOR TRADE POL'Y STUD., COMPREHENSIVE IMMIGRATION REFORM: FINALLY GETTING IT RIGHT, FREE TRADE BULLETIN NO. 29, at 1 (2007).

165. Olivas, *IIRIRA*, *supra* note 6, at 436. *See also* Leonard M. Baynes, *Racial Profiling, September 11, and the Media: A Critical Race Theory Analysis*, 2 VA. SPORTS & ENT. L.J. 1, 17-21 (2002) (detailing accounts of several hijackers). The student visas of two of the hijackers were actually approved exactly six months after they took over the planes. *See generally* Laura Khatcheressian, *FERPA and the Immigration and Naturalization Service: A Guide for University Counsel on Federal Rules for Collecting, Maintaining and Releasing Information About Foreign Students*, 29 J.C. & U.L. 457, 466-67 (2003).

original statute, signed into Texas state law before September 11 by Governor Bush's successor.

After President Barack Obama, an early co-sponsor of the bill when he was in the U.S. Senate, was elected to the presidency and assumed office in January 2009, his first major legislative initiatives were dealing with the economic meltdown that began to surface politically in the late summer and fall of 2008,[166] and then with comprehensive health care and insurance reform,[167] which was brought forward in the omnibus fashion that Marquez and Witte had suggested was less likely to succeed. Senator Reid, the Senate majority leader, indicated that he would not proceed with the next two major legislative subjects in piecemeal fashion, forcing climate change and immigration reform to evolve as omnibus projects.[168] There was also a substantial wait until the Obama administration made its own immigration reform design clear. It was not until mid-November 2009 that DHS Secretary Janet Napolitano made her first address on the subject of comprehensive immigration reform, and while she stressed the need to incorporate the undocumented "shadow" population through legalization provisions, the major emphasis appeared to be on border security and employment verification:

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166. *See, e.g.*, FAREED ZAKARIA, THE POST-AMERICAN WORLD (2008); Richard Florida, *How the Crash Will Reshape America*, ATLANTIC MONTHLY, Mar. 2009, at 44; ANDREW ROSS SORKIN, TOO BIG TO FAIL, THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS—AND THEMSELVES (2009); JOHN CASSIDY, HOW MARKETS FAIL, THE LOGIC OF ECONOMIC CALAMITIES (2009). *See* Gregory Koger, *Making Change: A Six-Month Review*, THE FORUM, July 2009, *available at* http://www.bepress.com/forum/vol7/iss3/art8 (last visited Apr. 21, 2010) (reviewing first six months of Obama legislative agenda); *see also* John M. Broder, *Obama Hobbled in Fight Against Global Warming*, N.Y. Times, Nov. 16, 2009, at A1.

167. *See also* Daniel J. Tichenor, *Navigating an American Minefield: The Politics of Illegal Immigration*, THE FORUM, July 2009, *available at* http://www.bepress.com/forum/vol7/iss3/art1 (last visited Apr. 21, 2010); Eckstein, *supra* note 112 at A19. By early 2010, these efforts were stalled in Congress. David M. Herszenhorn & Robert Pear, *Democrats Put Lower Priority on Health Bill*, N.Y. TIMES, Jan. 27, 2010, at A27; Paul Kane & Shailagh Murray, *Democrats Confused About Road Forward*, WASH. POST, Jan. 29, 2010, at A1; Carl Hulse & Sheryl Gay Stolberg, *His Health Bill Stalled, Obama Juggles an Altered Agenda*, N.Y. TIMES, Jan. 29, 2010, at A1.

168. Kelly Field, *Deal Is Reached on Immigration Bill Affecting Students, Says Senate Leader*, CHRON. HIGHER EDUC., Nov. 24, 2008. Senators Reid's views are set out at his website and in remarks he made at a national Latino organization in 2008: http://reid.senate.gov/issues/immigration.cfm (website); http://reid.senate.gov/newsroom-/pr_070308_NALEO.cfm (last visited Apr. 21, 2010) (remarks). In addition, on June 24, 2009, at Georgetown University Law Center, Sen. Reid's chief immigration staff counsel Serena Houl addressed a group of immigration professionals and outlined the Senator's plans and legislative strategies. A webcast recording of her remarks is available at http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=863 (last visited June 11, 2010).

> Let me be clear: when I talk about "immigration reform," I'm referring to what I call the "three-legged stool" that includes a commitment to serious and effective enforcement, improved legal flows for families and workers, and a firm but fair way to deal with those who are already here. That's the way that this problem has to be solved, because we need all three aspects to build a successful system. This approach has at its heart the conviction that we must demand responsibility and accountability from everyone involved in the system: immigrants, employers and government. And that begins with fair, reliable enforcement.[169]

Until the actual proposals are introduced, whether by Congress or by President Obama and the Executive branch, the full contours will not be evident, but everything points to an omnibus approach, and the convolutions of the 2009-2010 health care reform strategy may suggest that the most salient consideration will be which of the large scale systemic initiatives is able to move forward and under what timing and calendar constraints it will emerge. Can climate control, economic and banking reform, immigration, and the continuing war efforts all move to the front burner or will they compete for the political resources in serial fashion?[170]

Senator Charles Schumer (D-N.Y.) has assumed the responsibility for shepherding immigration reform through the Senate, following the death of Senator Kennedy, and his remarks have shown him to be much more conservative than was the late senator. For example, in his public remarks, he has adopted restrictionist code words and rhetoric (for example, "force-multiplier," "border security"), has made it clear that his first priority is to "secure the border," and has even touted language to

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169. Janet Napolitano, Sec'y of Homeland Sec., Remarks at Center for American Progress (Nov. 13, 2009), video *available at* http://www.americanprogress.org-/issues/2009/11/napolitano_event.html (last visited Apr. 21, 2010); *see also* Lee Hockstader, *Immigration Awaits Its Turn*, WASH. POST, Sept. 13, 2009, at A23; Julia Preston, *White House Plan on Immigration Includes Legal Status*, N.Y. TIMES, Nov. 14, 2009, at A10; Spencer S. Hsu, *Obama Presses Congress to Rework Immigration Laws*, WASH. POST, Nov. 14, 2009, at A16.

170. In 2010, health care and insurance reform efforts stalled. *See* David M. Herszenhorn & Robert Pear, *Democrats Put Lower Priority on Health Bill*, N.Y. TIMES, Jan. 27, 2010, at A27; Paul Kane & Shailagh Murray, *Democrats Confused About Road Forward*, WASH. POST, Jan. 29, 2010, at A1; Carl Hulse & Sheryl Gay Stolberg, *His Health Bill Stalled, Obama Juggles an Altered Agenda*, N.Y. TIMES, Jan. 29, 2010, at A1. *See also* Sewell Chan, *Dodd Calls Obama Plan Too Grand*, N.Y. TIMES, Feb. 3, 2010, at B1 (banking and financial institutions reform bogged down).

signal and characterize the problems.[171] For example, in summer 2009, he gave a public lecture where he laid out his first principle, objecting to widely-employed terminology such as "undocumented workers."[172]

> The first of these seven principles is that illegal immigration is wrong—plain and simple. When we use phrases like "undocumented workers," we convey a message to the American people that their Government is not serious about combating illegal immigration, which the American people overwhelmingly oppose.
>
> Above all else, the American people want their Government to be serious about protecting the public, enforcing the rule of law, and creating a rational system of legal immigration that will proactively fit our needs rather than reactively responding to future waves of illegal immigration. People who enter the United States without our permission are illegal aliens, and illegal aliens should not be treated the same as people who entered the United States legally.[173]

On the subject of the DREAM Act, his principles did not include specific reference to the topic, but he did vote for the bill in 2007, suggesting his inclination and support for this part of the larger issue.[174] The draft versions of reform legislation have included DREAM Act provisions, buried in larger, omnibus overhaul approaches, drawing attention away from their "legalization" or "amnesty" features.

IV. CONCLUSION

Despite my personal opinion that the DREAM Act, once enacted, would clear the decks and would show that bipartisan differences could be resolved, leading to the larger, more comprehensive overhaul, this wishful thinking is unlikely. There was a brief window in time, in 2007, when this might have occurred, and the narrative recounted here shows

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171. Senator Schumer, Keynote Speaker at the Immigration Law and Policy Conference, Migration Policy Institute (June 24, 2009), *available at* http://schumer.senate.gov/ (accessed from homepage by searching keywords "reform principles") (website) (last visited Feb. 6, 2010) *and* http://www.law.georgetown.edu/ (accessed from homepage by searching keywords "Schumer webcast") (GULC webcast) (last visited Feb. 6, 2010).

172. *Id*.

173. *Id*.

174. For details of the vote, *see* note 123, *supra*.

that a little luck might have helped turn the corner: had Senator Kennedy been well, had Senator Specter not backed away, had the fires not broken out in California, had Senator Dodd voted, had there not been a presidential election looming, all for want of a nail. But all legislation, not just that affecting immigration, has to face the cards in play on the table at the time of its consideration.

President Obama has undertaken so many major initiatives, including an early and unexpected announcement of a Supreme Court Justice,[175] that there may be a situation where all the oxygen in the room has been inhaled. As one observer has noted:

> On February 24, [2009], Obama addressed Congress to explain his budget priorities and urge Congressional action on three key priorities: energy, health care, and education . . . . This three-part agenda, combined with other pending legislative initiatives (immigration reform, highway programs, banking system regulation) not mentioned in the address, was remarkably ambitious. President Obama's strategy was to begin by pushing for several major initiatives at once . . . .[176]

The agenda items are not only "remarkably ambitious," but they are inextricably interrelated. In another setting where President Obama was addressing the entire Congress, it was during his discussion of health care proposals that Rep. Joe Wilson (R-S.C.) famously shouted out, "You lie!," concerning putative immigrant benefits. [177] If there ever had

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175. *See* Charlie Savage, *Senate Confirms Sotomayor for the Supreme Court*, N.Y. TIMES, Aug. 7, 2009, at A1. Justice Sonia Sotomayor was confirmed to the U.S. Supreme Court on August 6, 2009, with a 68-31 vote. Jess Bravin, *Senate Confirms Sotomayor in Largely Partison 68-31 Vote*, WALL ST. J., Aug. 7, 2009, at A3.

176. Koger, *supra* note 119, at 11. For a useful study of how the political and media cycles of the U.S. presidency have evolved, see JEFFREY E. COHEN, THE PRESIDENCY IN THE ERA OF 24-HOUR NEWS (2008).

177. Julia Preston, *Congress Quarrels on Covering Immigrants*, N.Y. TIMES, Nov. 4, 2009, at A14. A week after he shouted out in the chambers, Rep. Wilson was admonished by the House, by a vote of 240-179: "[The House d]eclares that the House of Representatives disapproves of the behavior of the Representative from South Carolina, Mr. Wilson, during the joint session of Congress held on September 9, 2009." H.R. Res. 744, 111th Cong. (2009) (as passed by Senate, Sept. 15, 2009). On the issue of immigrant health care, see RANDY CAPPS, MARC R. ROSENBLUM, & MICHAEL FIX, MIGRATION POL'Y INST., IMMIGRANTS AND HEALTH CARE REFORM, WHAT'S REALLY AT STAKE? (2009); Kevin Sack, *Hospital Falters as Refuge for Illegal Immigrants*, N.Y. TIMES, Nov. 21, 2009, at A1.

been a need to demonstrate the relationship among several volatile topics, surely this unprecedented breach of protocol was Exhibit One.[178]

A final reason why comprehensive immigration reform may require an omnibus and overarching legislative strategy is because the issue is simply one of such transcendent complexity, with so many interrelated moving parts, that it cannot be incrementally reformed. While partisan politics will always be present, the bedfellows of immigration reform cannot be easily identified by the traditional scorecards. In 2001, I would have taken any bet that immigration legislation introduced by Senators Hatch and the late Senator Kennedy would have been enacted into law; indeed, I did take that bet, and in print.[179] If co-sponsorship is a signaling device or leading indicator, the DREAM Act would be law today, and these young adults would be working their way through a form of legalization. However, even if the legislation were passed tomorrow, it would not affect the ability of states to grant resident tuition, to enable them to award state scholarships or grants, or to allow them to withhold enrollment. Thus, no matter the fate of omnibus immigration reform or the DREAM Act, this issue will remain an agenda item at the state level. Reich and Ayala Mendoza, in their thoughtful study of the unlikely passage of tuition legislation in Kansas, noted that its successful enactment, was due, in a traditional sense, to the careful framing of the

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178. There is a lifetime of reading on the subject of nativism, restrictionism, and the racist roots of immigration. *See generally* Mae Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69 (2003) (examining the immigration and deportation policy under the Immigration Act of 1924); DANIEL J. TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA (Ira Katznelson, Martia Shefter, Theda Skocpol, ed.) (2002); CAROLYN WONG, LOBBYING FOR INCLUSION: RIGHTS POLITICS AND THE MAKING OF IMMIGRATION POLICY (2006); KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS (2007); DAVID BACON, ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS (2008); LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION (2008); Laura E. Gomez, *What's Race Got to Do With It? Press Coverage of the Latino Electorate in the 2008 Presidential Primary Season*, 24 ST. JOHN'S J. LEGAL COMMENT. 425 (2009).

179. Olivas, *supra* note 4 at 456-57 (internal citations omitted).

> While . . . only a few states have changed their practice post-IIRIRA and enacted statutes to allow the undocumented to attend college as resident students, the major receiver states have done so, and it is likely that political pressure will continue to fill in the spots on the map, at least the spots where the undocumented are likely to enroll. In addition, the unlikely scenario of a major conservative Republican U.S. Senator from Utah (Sen. Orrin Hatch) taking on this issue after September 11 has rendered it more likely that federal action will occur, and not only accord these students federal protection, but a limited amnesty of one form or another.

issue as one of educating a vulnerable population and to the persistence and skill of its advocates:

> Given the conservative bent of the Kansas legislature and the generally negative perception of undocumented workers among Kansas residents, the state would appear to be a least-likely case for adoption of a policy granting undocumented students in-state college tuition status. However, in spite of the odds against adoption of a pro-immigrant policy in a generally anti-immigrant state, advocates were successful. As argued here, that success stems in large measure from the ability of advocates to reframe the issue as one of educational opportunities for public school students, an issue frame that was more likely to garner bipartisan support within the Kansas legislature. The results in this paper are consistent with the view that issue framing can be an effective, low-cost resource by which policy advocates may influence policymaking, even in inhospitable environments.
>
> How is the issue framing used in Kansas applicable to other states in which in-state tuition for undocumented students has become part of the legislative agenda? The Kansas case suggests two factors that are key for framing such legislation in other states. First, the presentation of cost-benefit ratios is crucial. In Kansas, proponents of HB 2008 were able to credibly present the argument that the legislation involved low costs to taxpayers and that the benefits applied to a broad group of state residents. However, in states where the population of undocumented workers is growing at even faster rates than Kansas (such as North Carolina, Alabama, Georgia, or Tennessee) the effectiveness of this argument becomes less clear. On the one hand, voters and legislators in the new high immigrant growth states may be more likely to perceive immigration as contributing to socioeconomic upheaval; this perception may be more acute because these states lack a history of integrating immigrant communities into social service networks, as has occurred in traditional immigrant destination states such as Texas, California, New York, and Illinois. Thus, the cost of in-state tuition may be more readily perceived (and framed) as a broad redistribution of tax revenue benefiting newly-arrived immigrant families at the expense of native taxpayers. On the other hand, where immigration is growing most rapidly, local businesses are more dependent on immigrant labor. In such a

> situation, the business community may be more receptive to in-state tuition as a labor training and retention tool.
>
> Second, the local framing of in-state tuition is crucial. Advocates of in-state tuition in Kansas consistently couched their arguments in the local terms of Kansan children desiring an education. By contrast, the main opponent of HB 2008 employed an issue frame based on national immigration policy and terrorism to argue against the bill. The appeals to national immigration policy and terrorism did not appear to resonate with state legislators, nor were they supported by any major elected state official (for example, neither the governor nor the attorney general played a role in the debate over the bill). However, where concerns about immigration law and the threat of terrorism have more local salience for voters and elected officials (Arizona may be a relevant example), we would expect FAIR's arguments to be more effective. In this regard, national immigration debates may work against proponents of in-state tuition in the future. In Kansas, debates about HB 2008 occurred in a climate in which illegal immigration was not as prominent a public policy issue as it would become just a year later, when the Bush administration's immigration reform bill prompted extensive media attention.[180]

Of course, there are a million stories in the Naked Citystate**,** and there are features evident in Kansas that were simultaneously unique and generic, as there have been in every state where the issue has been taken up, whether successfully, unsuccessfully, or, as in the case of Oklahoma, where both the thrill of victory and the agony of defeat were evident in the rescission of the statute.[181] In this sense, the legislative strategy will have a different playbook in every state, even as the toolkit will have certain common instruments that may be deployed or not, as the localized circumstances require. Indeed, this is the case of every statute ever enacted, and is unremarkable in one very real sense.

However, at the federal level, where immigration resides, the basics of the system are so complex, the policy issues are so politicized and so intertwined, and the different coalitions are so evanescent that the polity cannot feed all the smaller parts through the legislative scheme and

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180. Reich & Mendoza, *supra* note 22, at 192-94 (internal citations omitted).

181. McCormick, *supra* note 57. A similar strategy has been employed by restrictionists in Texas and in Nebraska, where repeal efforts were undertaken in Texas. *See supra* notes 82, 89.

process one component at a time.[182] This is the view that the Immigration Policy Center has urged, and it may have the final word:

> It is misleading to characterize our immigration crisis as solely a question of what to do about the 11 to 12 million unauthorized immigrants living in the United States. Our problems extend to a much broader range of issues. For instance: Insufficient numbers of visas are made available to bring in either high-skilled or less-skilled workers at the levels needed to meet the changing needs of the U.S. economy and labor market. Arbitrary visa caps have created long backlogs of family members who must wait up to 20 years to be reunited with family living in the United States. Wage and workplace violations by unscrupulous employers who exploit immigrant workers are undercutting honest businesses and harming all workers. Inadequate government infrastructure is delaying the integration of unauthorized immigrants who want to legalize and become U.S. citizens. Furthermore, the lack of a comprehensive federal solution has created a range of lopsided, enforcement-only initiatives that have cost the country billions of dollars, while doing little to impede the flow of unauthorized immigrants. In fact, the current immigration system's structural failures, and the inadequate or misguided responses to these failures, have led to the largest unauthorized population in our nation's history.[183]

At some point, and by all indications, legislation will likely pass in one form or another, and the subsequent never-ending line of complex

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182. In Fall 2009, Rep. Luis Gutierrez, the chief House proponent of the DREAM Act and immigration reform introduced his "Core Principles," as his Senate counterpart Charles Schumer did. David Montgomery, *No Turning Back, Rep. Luis Gutierrez Is Making Immigration Reform a Personal Cause*, WASH. POST, May 8, 2009, at C1. *See also* Lee Hockstader, *Immigration Awaits Its Turn*, WASH. POST, Sept. 13, 2009, at A23; MUSZAFFAR CHISHI & CLAIRE BERGERON, NEW IMMIGRATION BILL EDGES COMPREHENSIVE REFORM BACK ON THE LEGISLATIVE AGENDA (JANUARY 2010) [Migration Policy Institute], *available at* http://www.migrationinformation.org-/USfocus/display.cfm?id=769 (last visited Apr. 10, 2010); *see also* Paul Kane & Shailagh Murray, *Democrats Confused About Road Forward*, WASH. POST, Jan. 29, 2010, at A1; Carl Hulse & Sheryl Gay Stolberg, *His Health Bill Stalled, Obama Juggles an Altered Agenda*, N.Y. TIMES, Jan. 29, 2010, at A1; Sewell Chan, *Dodd Calls Obama Plan Too Grand*, Feb. 3, 2010, at B1, B9 (discussing complexities of financial regulation).

183. IMMIGRATION POL'Y CTR., BREAKING DOWN THE PROBLEMS: WHAT'S WRONG WITH OUR IMMIGRATION SYSTEM? 3 (2009).

problems will be taken up.[184] These issues will have their own narratives and legislative histories and their own arcs and trajectories. Immigration will continue to claim a permanent place in the congressional agenda, especially in a globalized world where the United States will require immigrants and immigrants will come. When a DREAM Act becomes law, the structural features of federal immigration legislation and state college tuition policies will necessitate coordinated and integrated state legislation for full implementation at the institutional level, thereby guaranteeing continued attention to the issue. If perfect federal legislation were enacted tomorrow, there would still be many roadblocks for the students, as many of them reside in California, a state where

184. Here is the Spring 2010 status of the legislation, as of this writing: Sen. Ted Kennedy's seat was permanently filled by a Republican, who was seated in February, 2010; this turn of events gave the Republicans 41 seats in the Senate, and the opportunity to mount filibusters with more regularity. David M. Herszenhorn & Robert Pear, *Democrats Put Lower Priority on Health Bill*, N.Y. TIMES, Jan. 27, 2010, at A27; Paul Kane & Shailagh Murray, *Democrats Confused About Road Forward*, WASH. POST, Jan. 29, 2010, at A1; Carl Hulse & Sheryl Gay Stolberg, *His Health Bill Stalled, Obama Juggles an Altered Agenda*, N.Y. TIMES, Jan. 29, 2010, at A1. Notwithstanding, the logjam broke in March, 2010, as President Obama made his first formal announcement on immigration reform, linking it to the need for bipartisan support. Julia Preston, *Obama Links Immigration Overhaul in 2010 to G.O.P. Backing*, N.Y. Times, Mar. 12, 2010, at A12. By use of the reconciliation process, Congress gave final approval to health care legislation, without a single Republican vote. Robert Pear and David M. Herszenhorn, *House Approves Health Overhaul, Sending Landmark Bill to Obama*, N.Y. Times, March 22, 2010, at A1. As of the 111st Congress, the House and Senate versions have been filed, and are waiting in the queues. In the US House: H.R. 1751: To amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to permit States to determine State residency for higher education purposes and to authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children, and for other purposes. Its chief sponsor is Rep. Howard L. Berman (D-Cal.), and it was introduced on March 26, 2009, with 102 cosponsors. It has been referred to the House Judiciary and House Education and Labor Committees; on May 14, 2009, it was referred to House subcommittee, and in turn, to the Subcommittee on Higher Education, Lifelong Learning, and Competitiveness. In the US Senate: S. 729 : A bill to amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to permit States to determine State residency for higher education purposes and to authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children, and for other purposes. Its chief sponsor is Sen. Richard Durbin (D-Ill.), and it was introduced on March 26, 2009, with 31 Cosponsors. On the same day, it was referred to the Senate Judiciary Committee. *See* http://thomas.loc.gov/cgi-bin/thomas; *see also* Carl Hulse and Adam Nagourney, *Obama's Afghanistan Decision Is Straining Ties With Democrats*, N.Y. TIMES, Dec. 4, 2009, at A20; John M. Broder & Elisabeth Rosenthal, *Obama Has Goal to Wrest a Deal in Climate Talks*, N.Y. TIMES, Dec. 18, 2009, at A1; Sewell Chan, *Dodd Calls Obama Plan Too Grand*, Feb. 3, 2010, at B1, B9 (discussing complexities of financial regulation).

higher education institutions are extremely crowded, where college costs have risen rapidly,[185] and where a state supreme court case still hangs like a sword of Damocles over the issue of resident tuition. The students would still be ineligible for state financial aid, and depending upon the details of the federal legislation, may be ineligible for Title IV financial assistance.

Paradoxically, the wall-to-wall blare of talk radio, cable television, and electronic and digital technologies in the universal media market will

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185. *See generally* Tamar Lewin, *A Crown Jewel of Education Struggles with Cuts in California*, N.Y. TIMES, Nov. 20, 2009, at A1; Tamar Lewin & Rebecca Cathcart, *Students Protest Decision to Raise Tuition in California*, N.Y. TIMES, Nov. 20, at A26, *available at* http://www.nytimes.com (accessed from homepage by entering article title in search) (last visited Feb. 6, 2010); Larry Gordon & Amina Khan, *Regents OK Hike in UC Fees*, L.A. TIMES, Nov. 20, 2009, at A3; Rivera, *supra* note 81. In one fascinating case, where a Princeton honors graduate earned a Marshall Scholar award to England, it turned out the Dominican student was undocumented. His case drew national attention. *See, e.g.*, Jordan, *supra* note 130. The Princeton student went off to Oxford on a two-year scholarship. He applied for a temporary visa to visit his family in the U.S. As part of the visa process he applied for a waiver under INA § 212(d)(3); these were both denied in November, 2006. That same month, Princeton filed an H-1B petition on his behalf. He re-applied for the 212(d)(3) waiver that would allow him to return to the U.S. on term breaks from Oxford to work for Princeton. In April 2007, he received that waiver, overcoming his "unlawful presence" problem. After completing his graduate degree, he renewed his visa and worked temporarily at Princeton on an H-1B. In 2008, he successfully changed status to F-1 so that he could start a Ph.D. program in Classics at an elite west coast institution, where he is enrolled, as of 2009-2010. Email from Dan-el Padilla Peralta to Michael A. Olivas (Nov. 23, 2009) (on file with author). *See also* Susan Carroll, *Immigrant Spends Life Looking Over Her Shoulder*, HOUS. CHRON., Nov. 28, 2009, at B1 (Houston-area undocumented teacher). Padilla was not the only undocumented student to be surfaced when he or she was outed by public achievements, as when they win national awards that bring press coverage. For two such examples of achieving undocumented high schoolers, both prompted by robotics competitions, see Peter Carlson, *Stinky the Robot, Four Kids and a Brief Whiff of Success*, WASH. POST, Mar. 29, 2005, at C1 (reporting on undocumented Mexican students' science project); Mel Melendez, *Ingenuity Brightens Future: Doors Finally Open for 4 Phoenix Migrant Youths a Year After Beating MIT in Robotics Competition*, ARIZ. REPUBLIC, Apr. 23, 2005, at 1A (same); and Nina Bernstein, *Student's Prize is a Trip Into Immigration Limbo*, N.Y. TIMES, Apr. 26, 2006, at A1 (reporting Senegalese student science project reveals illegal status); Nina Bernstein, *Senegalese Teenager in Deportation Fight Wins Right to Study in America*, N.Y. TIMES, July 29, 2006, at B2; *see also* Karina Bland, *District Backs Aid for Kids of Migrants; Phoenix Union Board Votes to Lend Support to Federal DREAM Act*, ARIZ. REPUBLIC, Jan. 13, 2007, at 3; *see also* Julia Preston, *Illegal Immigrant Students Publicly Take Up a Cause*, N.Y. TIMES, Dec. 11, 2009, at A25; Julia Preston, *To Overhaul Immigration, Advocates Alter Tactics*, NY Times, N.Y. TIMES, Jan. 2, 2010, at A11. He was not even the sole undocumented student to surface at Princeton and achieve. *See* Joseph Berger, *An Undocumented Princetonian*, N.Y. TIMES, Jan. 3, 2010, at ED28 (recounting the history of an undocumented Princeton graduate who, after he gained status, became a heart surgeon).

both facilitate communication and atomize our ability to form a discourse where comprehensive legislative solutions are called for. But the Republic will survive, legislative work will get done, and our experiment in representative democracy will continue to evolve. And these *Plyler* children among us will have graduated from college and taken up their place in the larger community.[186]

186. As of the 111th Congress in the Spring 2010, the House and Senate versions of this legislation have been filed, and are waiting in the queues. H.R. 1751, 111th Cong. (2009). In the House: H.R. 1751:

> To amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to permit States to determine State residency for higher education purposes and to authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children, and for other purposes.

Id. Its chief sponsor is Rep. Howard L. Berman (D-CA-28), and it was introduced on March 26, 2009, with 106 cosponsors. *Id.* It has been referred to the House Judiciary and House Education and Labor Committees; on May 14, 2009, it was referred to House subcommittee, and in turn, to the Subcommittee on Higher Education, Lifelong Learning, and Competitiveness. *Id.* In the US Senate: S. 729:

> A bill to amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to permit States to determine State residency for higher education purposes and to authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children, and for other purposes.

S. 729, 111th Cong. (2009). Its chief sponsor is Sen. Richard Durbin (D-IL). *Id*. it was introduced on March 26, 2009, with thirty-two co-sponsors. On the same day, it was referred to the Senate Judiciary Committee. *Id*.