

IMMIGRATION NULLIFICATION: IN-STATE TUITION AND LAWMAKERS WHO DISREGARD THE LAW

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I.

INTRODUCTION

It has become a favorite refrain of state legislators and city council members who are confronted with problems arising from illegal immigration to place blame on the federal government. “If only the federal government would deal with this country’s illegal immigration crisis, then we would not be faced with the problems that we have in our area,” or so the complaint goes.¹ Interestingly, this complaint

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1. See, e.g., Press Release, Office of the Governor, Governor Schwarzenegger Lobbies President for Greater Percentage of Federal Funding (Feb. 26, 2007), <http://gov.ca.gov/index.php/?/press-release/5605> (“I am committed to working with the federal government to protect our great nation and to reform our immigration laws. However, until the federal government can achieve control of our borders, every effort should be made to help states and local governments cover a greater share of the considerable expense they incur to incarcerate criminal aliens.”); *Cutting Farm Pollution Focus of Ad Campaign*, RICHMOND TIMES-DISPATCH, Feb. 15, 2007, at B4 (“Prince William Chairman Corey A. Stewart said he doubts the county will receive any money. ‘I think that the point is that the federal government’s failure to control the borders, failure to enforce federal immigration regulations . . . the cost of that failure and burden of that failure is landing in our laps.’”); Scott Rothschild, *Experts: Immigration Laws Not a Solution*, KNIGHT RIDDER TRIB. BUS. NEWS (D.C.), Jan. 22, 2007, at 1 (“‘The public is frustrated,’ said Sheri Steisel, federal affairs counsel with the National Conference of State Legislatures. And much of that frustration is directed toward the federal government’s inability to control its borders, Steisel said. This has resulted in an explosion of bills in state capitals nationwide, including Topeka.”); Jim Lockwood & Maura McDermott, *Crackdown on Illegal Immigration Spreads to Town Level*, NEWHOUSE NEWS SERV. (D.C.), Sept. 6, 2006 (quoting Newton, N.J., councilman Philip Diglio) (“I just want to see these people to be docu-

comes both from opponents of illegal immigration who wish to see stronger enforcement, as well as from illegal immigration apologists who advocate amnesties and a loosening of immigration laws. The premise for both sides is: “We state and local legislators are willing to help, but we need to see leadership and action at the federal level first.”

Congress has at times been paralyzed by division on immigration legislation.² But Congress has also acted on many occasions to pass sweeping immigration reforms.³ The untold story—one that makes such complaints by state and local legislators ring hollow—is what happens when state and local legislators confront federal immigration laws that they do not like. Recent years have seen instances of outright repudiation and violation of federal law by such lawmakers, the Supremacy Clause of Article VI of the United States Constitution notwithstanding.⁴ This article describes what is perhaps the most brazen case of state legislators defying federal immigration law—the offering of resident tuition rates to illegal aliens at state universities.⁵

mented to pay back into the system they’re taking from. If the federal government would control the borders like it should be, we wouldn’t be dealing with this. If every municipality across the country would do this, then maybe the problem wouldn’t exist.”).

2. For example, in December 2005, the House of Representatives passed H.R. 4437, which would have toughened penalties on violators of immigration laws and required employers to use the Basic Pilot Program to verify the work authorization of aliens, among other things. *See* Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. §§ 203, 702 (2005). Meanwhile, in May 2006, the Senate passed S. 2611, which granted a sweeping amnesty to the majority of illegal aliens in the United States and would have repealed 8 U.S.C. § 1623, discussed herein. *See* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. §§ 601–632 (2006). Neither chamber acted to vote on the other chamber’s bill. *See* Thomas (Library of Congress), H.R. 4437, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04437:@@X> (last visited May 10, 2007); Thomas (Library of Congress), S. 2611, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN02611:@@X> (last visited May 10, 2007).

3. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546–3009-724 (codified as amended in scattered sections of 8 U.S.C.); Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

4. U.S. CONST. art. VI, § 2.

5. I use the term “illegal alien” because it is a legally-accurate term used repeatedly in the immigration laws of the United States. *See, e.g.*, 8 U.S.C. § 1356(r)(3)(ii) (2000) (“expenses associated with the detention of illegal aliens”); 8 U.S.C. § 1366(1) (2000) (“the number of illegal aliens incarcerated in Federal and State prisons”). Another phrase that is used throughout the immigration laws of the United States is “alien not lawfully present in the United States.” *See, e.g.*, 8 U.S.C. § 1229a(c)(2) (2000) (“the alien has the burden of establishing . . . by clear and convincing evidence, that the alien is lawfully present in the United States”); 8 U.S.C. § 1357(g)(10)

I trace the history of this confrontation, beginning with Congress's enactment of an express statutory prohibition in 1996, followed by the violation of this statute by ten states between 1999 and 2007. I describe the process by which state legislators concluded that they should take this extraordinary action in five brief case studies and note the movement of other states (particularly Arizona) in the opposite direction. I lay out the policy considerations that militate against state laws offering resident tuition rates to illegal aliens and explain in detail why it is clear that the states were barred from enacting the laws through well-established principles of express and implied preemption. These laws are plainly unconstitutional and should be struck down. Finally, I argue against recent efforts by some members of Congress to "forgive and forget" this transgression by removing the federal statutory bar to such laws. They would accomplish this by enacting the proposed Development, Relief, and Education for Alien Minors Act (DREAM Act).⁶ If the constitutional structure of federal supremacy is to be maintained, and if the rule of law in immigration is to be restored, states cannot violate federal law with impunity. On the contrary, Congress should modify federal law to impose significant financial penalties on states that flagrantly violate federal immigration laws.

II.

CONGRESS DRAWS A LINE IN THE SAND: 8 U.S.C. § 1623

In September 1996, Congress passed the landmark Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁷ Led by Lamar Smith in the House and Alan Simpson in the Senate, members

(2000) ("for any officer or employee of a State or political subdivision of a State . . . otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States"). This term, however, is a bit too cumbersome for a writing of this nature. A third term, "unauthorized alien," is found in federal immigration laws, but is limited to the employment context. *See, e.g.*, 8 U.S.C. § 1324a(a) (2000) ("[m]aking employment of unauthorized aliens unlawful"); 8 U.S.C. § 1324b(a)(1) (2000) ("other than an unauthorized alien, as defined in section 1324a(h)(3) of this title"). In contrast, the ambiguous terms "undocumented immigrant" and "undocumented alien" do not appear anywhere in the immigration laws of the United States. *See* 8 U.S.C. § 1101, *et seq.* (2000). Accordingly, I will use the shorter of the two appropriate terms recognized by federal statute, namely "illegal alien."

6. S. 2611, 109th Cong. §§ 621–623 (2006); S. 1348, 110th Cong. §§ 621–632 (2007).

7. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546–3009-724 (codified as amended in scattered sections of 8 U.S.C.). The specific provision of IIRIRA at issue in this Article, Section 505, is codified as amended at 8 U.S.C. § 1623 (2000).

of Congress significantly toughened the nation's immigration laws in this omnibus legislation.⁸ On September 25, 1996, the bill passed resoundingly in the United States House of Representatives 305 to 123.⁹ On September 30, 1996, the Senate passed the bill as part of an omnibus appropriations measure, and President Clinton signed it into law on the same day.¹⁰

Congress had already taken action to stop the flow of federal, state, and local public benefits to illegal aliens. A few months prior to the passage of IIRIRA, Congress had enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).¹¹ The PRWORA included a provision that prevented giving state or local public benefits to illegal aliens, with limited exceptions in areas such as emergency medical care, immunizations, and disaster relief.¹² In an unusual step, the 1996 Congress expressly spelled out what was driving these bills:

It continues to be the immigration policy of the United States that (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and (B) the availability of public benefits not constitute an incentive for immigration to the United States.¹³

Lest any court fail to regard this government interest as one of the highest order, the same section reiterated, "[i]t is a *compelling gov-*

8. Senator Alan Simpson (R-Wyo. retired) and Representative Lamar Smith (R-Tex.) were both sponsors of the 1996 IIRIRA. See Mountain States Legal Found., *Kansas: Students May Sue to Bar In-State Tuition for Illegal Aliens*, MICHNEWS.COM, Oct. 31, 2005, <http://www.michnews.com/cgi-bin/artman/exec/view.cgi/215/10107>. Another law enforcement-oriented provision of the IIRIRA is now codified at 8 U.S.C. 1357(g) and provides for the training of state and local law enforcement officers to perform functions of federal immigration officers. These functions go well beyond the inherent authority of state and local police to make immigration arrests of removable aliens and transfer such aliens to federal custody. See Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 196–201 (2005).

9. Maria Durand, *Rep. Smith Calls Immigration Bill a Good Start; Vows More Reforms*, SAN ANTONIO EXPRESS-NEWS, Oct. 9, 1996, at 2B (corrected in *Setting It Straight*, SAN ANTONIO EXPRESS-NEWS, Oct. 10, 1996, at 2A).

10. The IIRIRA was passed as part of the Department of Defense Appropriations Act of 1997. H.R. REP. NO. 104-863, at 560–741 (1996); THOMAS (Library of Congress), H.R. 3610, <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR03610:@@X> (last visited July 4, 2007).

11. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

12. *Id.* § 411(a)–(b) (codified at 8 U.S.C. § 1621(a)–(b) (2000)).

13. *Id.* § 400(2) (codified at 8 U.S.C. § 1601(2) (2000)).

ernment interest to remove the incentive for illegal immigration provided by the availability of public benefits.”¹⁴

Advocates for illegal aliens in some states—most notably California—had already raised the possibility of making in-state, or resident, tuition rates available to illegal aliens who attend public universities.¹⁵ Illegal aliens had been eligible for in-state tuition rates at the California State University System prior to the passage of Proposition 187 by California voters in 1994.¹⁶ To prevent states from extending in-state tuition eligibility to illegal aliens, IIRIRA’s sponsors inserted a section that prohibited any state from doing so, unless the state also provided the same discounted tuition to all U.S. citizens. It was written in plain language that any layman could understand:

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.¹⁷

The meaning was clear. If a state wished to make resident tuition rates available to illegal aliens, it would have to make the benefit available to all nonresident U.S. citizens and nationals.

The bar imposed by 8 U.S.C. § 1623 added yet another barrier to states that might undermine federal immigration law enforcement by providing benefits to illegal aliens. Obviously, proponents of the section reasoned, no state in the union would be interested in giving up the extra tuition revenue derived from out-of-state students, so this provision would ensure that illegal aliens would never be rewarded with taxpayer-subsidized college educations. Members of Congress evidently never imagined that some states might simply disobey federal law. But that is precisely what happened.

III.

STATE LEGISLATURES CROSS THE LINE

California, Texas, and New York were the first states to challenge federal law by offering in-state tuition rates to illegal aliens. Over the ensuing years, interest groups lobbying for illegal aliens pro-

14. *Id.* § 400 (6) (codified at 8 U.S.C. § 1601(6) (2000)) (emphasis added).

15. Linda Chavez, *What to Do about Immigration*, COMMENTARY, Mar. 1995, at 29.

16. *Id.*

17. 8 U.S.C. § 1623(a) (2000).

posed the same legislation in other states. The vast majority of state legislatures rejected the idea. However, seven more states followed the examples of the first three, including some surprises—states right in the heart of “red” America. As of this writing, the ten states that offer in-state tuition rates to illegal aliens are, in order of enactment: Texas, California, New York, Utah, Illinois, Washington, Oklahoma, Kansas, New Mexico, and Nebraska.¹⁸ In this section, I describe the legislative deliberations in the three largest states—California, Texas, and New York. I also offer a brief narrative of how Utah and Nebraska came to adopt similar statutes. I include these two smaller states because of interesting permutations in their legislative consideration of the issue. In Utah, legislators believed that they were making their state law contingent upon the passage of the DREAM Act by Congress;¹⁹ in Nebraska, the issue determined the outcome of a gubernatorial election.²⁰

A. California

Offering in-state tuition rates to illegal aliens has been an issue in California since the mid-1980s. In 1985, some public universities in California began allowing illegal aliens to attend college at resident rates.²¹ This policy ended with the passage of Proposition 187 in 1994.²² In 1999, California legislators launched a plan to have taxpayers subsidize the college education of illegal aliens once again—this time at all public postsecondary institutions in the state. Assemblyman Marco Firebaugh introduced a bill that would make illegal aliens who had attended a high school in California for three years eligible for in-state tuition rates at California community colleges and

18. See CAL. EDUC. CODE § 68130.5 (West Supp. 2003) (enacted 2002); 110 ILL. COMP. STAT. ANN. § 305/7e-5 (LexisNexis Supp. 2007) (enacted 2003); KAN. STAT. ANN. § 76-731a (Supp. 2005) (enacted 2004); NEB. REV. STAT. § 85-502 (LexisNexis Supp. 2007) (enacted 2006); N.M. STAT. ANN. § 21-1-4.6 (LexisNexis Supp. 2007) (enacted 2005); N.Y. EDUC. LAW § 6301.5 (LexisNexis Supp. 2007) (enacted 2002); OKL. STAT. ANN. tit. 70, § 3242 (LexisNexis Supp. 2007) (enacted 2003) (as amended by H.B. 1804, 51st Leg., 1st Sess. (Okl. 2007)); TEX. EDUC. CODE ANN. §§ 54.051–54.060 (2007) (enacted 2001); UTAH CODE ANN. § 53B-8-106 (2006) (enacted 2002); WASH. REV. CODE ANN. § 28B.15.012 (LexisNexis Supp. 2007) (enacted 2003).

19. See *infra* Part III.D.

20. See *infra* Part III.E.

21. David Holley, *Decades of Doubt: Law's New "Registry" Date Can End Uncertainty for Longtime Illegal Aliens*, L.A. TIMES, Mar. 2, 1987, at 3.

22. Chavez, *supra* note 15, at 29.

universities.²³ The California State Senate passed the bill on August 29, 2000, and the State Assembly passed it on August 31, 2000.²⁴

California Governor Gray Davis vetoed the bill on September 29, 2000, stating clearly in his veto message that the offer of resident tuition rates to illegal aliens would violate federal law:

Undocumented aliens are ineligible to receive postsecondary education benefits based on state residence. . . . IIRIRA would require that all out-of-state legal residents be eligible for this same benefit. Based on Fall 1998 enrollment figures . . . this legislation could result in a revenue loss of over \$63.7 million to the state.²⁵

Undeterred, Assemblyman Firebaugh introduced his bill again, and the Legislature passed it again.²⁶ The legislative record does not indicate that anyone mentioned the prohibition found in federal law at 8 U.S.C. § 1623. Lawyers for the California Board of Regents would subsequently assert that the law does not violate 8 U.S.C. § 1623 because it awards resident-tuition eligibility on the basis of attendance at a California high school for three years, rather than on the basis of “residence” in the state.²⁷ However, it appears that many California legislators understood the bill’s three-year high school attendance requirement to be a residency requirement. Assemblywoman Charlene Zettel said that she “opposed an early version of the bill because it did not make it clear that students would have to show proof of *three years’ residency in California* and would be in the process of *becoming a legal resident*.”²⁸ She subsequently agreed to support the second version of the bill because it included a provision that she regarded as a residency requirement.²⁹ “I think we shouldn’t let bureaucracy get in the way of taxpayers who are lawful California *re-*

23. A.B. 1197, 1999–2000 Leg., Reg. Sess. (Cal. 1999).

24. The Assembly vote was twenty-three ayes and twelve noes. AB 1197 Assembly Bill – History, http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1151-1200/ab_1197_bill_20000929_history.html (last visited June 8, 2007). The Senate vote was fifty-two ayes and sixteen noes. *Id.*

25. Gray Davis, A.B. 1197 Assembly Bill – Veto (Sept. 29, 2000), http://info.sen.ca.gov/pub/99-00/bill/asm/ab_1151-1200/ab_1197_vt_20000929.html.

26. In 2001, Assemblyman Marco Firebaugh reintroduced the bill as Assembly Bill 540. A.B. 540, 2001–2002 Leg., Reg. Sess. (Cal. 2001) (codified at CAL. EDUC. CODE § 68130.5 (West Supp. 2003)).

27. Memorandum of Points and Authorities in Support of Demurrer to Complaint at 2, *Martinez v. Regents of the U. of Cal.*, No. CV 05-2064 (Cal. Super. Ct. Jan. 31, 2006) (dismissed Oct. 6, 2006) (on appeal before the Cal. 3d App. Dist., No. C054124).

28. Edward Sifuentes, *Bill Would Help Poor California Immigrants Pay for College*, NORTH COUNTY TIMES (Escondido, Cal.), Sept. 10, 2000, 2000 WNLR 6372459 (emphasis added).

29. *Id.*

sidents,” she said.³⁰ Assemblyman Howard Kaloogian also changed his vote when the perceived residency requirement was included.³¹

The official Higher Education Committee analysis of the bill described A.B. 540 as a measure that “[q]ualifies long term California *residents* . . . regardless of citizenship status, for lower ‘resident’ fee payments.”³² The official analysis referred to the sponsor’s belief that the benefit was extended to those illegal aliens who resided in California: “According to the author . . . [t]he majority of these students consider California their *home*”³³ This understanding was reiterated in public statements by Firebaugh: “‘They are undocumented kids *who’ve lived here a long time* and want to go to college.’”³⁴ His office publicly described A.B. 540 in the same way: “‘There’s a significant amount of students *who’ve lived here for a long time,*’ [Firebaugh’s press secretary Ricardo] Lara said. ‘They were educated in the public-school system in California. For all intents and purposes, this is their *primary home.*’”³⁵ The bill was passed by the California State Assembly on September 14, 2001, and by the California Senate on September 12, 2001.³⁶

In early October 2001, the bill came to Governor Gray Davis’s desk once again.³⁷ This time, Davis faced flagging poll numbers³⁸ and a Republican challenger (former Los Angeles Mayor Richard Riordan) with strong support among Latino voters.³⁹ Seeking to cut into his challenger’s base of support in the Latino electorate, Gray

30. *Id.*

31. *Id.*

32. Concurrence in Senate Amendments of A.B. 540, 2001–2002 Leg., Reg. Sess. (Cal. 2001), as amended Sept. 7, 2001, at 1 (emphasis added).

33. *Id.* at 3. (emphasis added).

34. Jake Henshaw, *Bill Would Allow In-State Tuition for Immigrants*, DESERT SUN, July 5, 2001, at B2 (quoting Assemblyman Firebaugh) (emphasis added).

35. Erika Davila, *Some States Liberalize Tuition for Illegals*, SANTA FE NEW MEXICAN, Dec. 2, 2001, at A6 (emphasis added).

36. A.B. 540 passed the State Assembly on Sept. 14, 2001 (fifty-seven ayes, fifteen noes). A.B. 540 Assembly Bill – Vote Information, http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0501-0550/ab_540_vote_20010914_1218AM_asm_floor.html (last visited May 11, 2007). A.B. 540 passed the State Senate on Sept. 12, 2001 (twenty-seven ayes, seven noes). A.B. 540 Assembly Bill – Vote Information, http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0501-0550/ab_540_vote_20010912_0635PM_sen_floor.html (last visited May 11, 2007).

37. A.B. 540 came to Governor Davis’s desk on October 2, 2001. A.B. 540 Assembly Bill – History, http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0501-0550/ab_540_bill_20011013_history.html (last visited June 8, 2007).

38. Dan Walters, Editorial, *Davis’ Appeal Wanes with Voters*, ALAMEDA TIMES-STAR (Cal.), Dec. 17, 2001.

39. Peter Schrag, *A GOP Resurgence in California?* SAN DIEGO UNION-TRIB., Oct. 20, 2001, at B8.

Davis changed his position and chose to ignore what he previously regarded as a prohibition imposed by federal law. He signed Firebaugh's bill on October 12, 2001, without offering any explanation for the change of position or why the bill was not still preempted by federal law.⁴⁰ It was codified at California Education Code § 68130.5.

However, the University of California Board of Regents (Board) had not forgotten about the countervailing provision of federal law. Shortly after § 68130.5 was enacted, the Board urged the California Legislature to pass legislation that would attempt to shield the universities from liability for violating federal law.⁴¹ Responding to the Board's concern, the California Legislature began deliberating on A.B. 1543 (which would be codified at California Education Code § 68130.7). Assembly Bill 1543 purported to preclude the recovery of damages from the University of California (UC), the California State University (CSU), or California Community Colleges (CCC) for liability arising from a lawsuit challenging the legality of § 68130.5.⁴² Legislators offered no explanation of how a state could give itself permission to violate federal law and immunize itself from any damages that might otherwise apply.

Moreover, the Legislature was evidently not in agreement with the Board's lawyers' subsequent assertion that § 68130.5 evaded the constraints of federal law by operating on the basis of high school attendance rather than on the basis of state residence. The official legislative report describing the California Legislature's understanding of § 68130.5 stated that it was providing resident tuition rates to illegal aliens on the basis of residence in the state: "Existing law qualifies specified *long-term California residents*, regardless of citizenship status, for lower 'resident' fees at CSU and CCC."⁴³ The California State Senate passed A.B. 1543 on January 30, 2002.⁴⁴ The California Assembly followed on March 21, 2002.⁴⁵ The Board of Regents received the immunization that it desired. Whether this state law would

40. See A.B. 540 Assembly Bill – History, http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0501-0550/ab_540_bill_20011013_history.html (last visited June 8, 2007).

41. Editorial, *Our Views: Tuition Equity*, PRESS - ENTERPRISE (Riverside, Cal.), Dec. 19, 2005, at B6.

42. A.B. 1543, 2001–2002 Leg., Reg. Sess. (Cal. 2001).

43. Concurrence in Senate Amendments to A.B. 1543, 2001–2002 Leg., Reg. Sess. (Cal. 2002), as amended Jan. 24, 2002, at 1 (emphasis added), available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1501-1550/ab_1543_cfa_20020208_163744_asm_floor.html.

44. A.B. 1543, 2001–2002 Leg., Reg. Sess. (Cal. 2002) (enrolled version).

45. *Id.*

succeed in protecting the Board from liability for violating federal law remains to be seen.

B. Texas

Although the California Legislature was the first to pass a bill offering resident tuition rates to illegal aliens, Texas was the first state to see such a bill signed into law.⁴⁶ Governor Davis's initial veto deprived California of this first-place distinction. Texas Governor Rick Perry was apparently unaware of the countervailing federal law, so he did not impede the Legislature's progress.⁴⁷ The most notable aspect of the Texas Legislature's enactment of the bill (H.B. 1403 with companion S.B. 1526) was how little deliberation the measure received.

With five authors and nineteen co-authors,⁴⁸ the bill passed through the Texas Legislature with relatively little resistance. House Bill 1403 was passed by the House Higher Education Committee with a unanimous vote of eight committee members.⁴⁹ The bill came up for a record vote on the floor of the House on April 23, 2001, and passed with only one dissenting vote.⁵⁰

The bill passed through the Senate Education Committee on a seven to zero vote.⁵¹ This committee hearing was uneventful: only proponents of the bill addressed the Committee, and no one spoke against its enactment.⁵² The barrier imposed by 8 U.S.C. § 1623 was

46. Texas's bill was signed by the Governor and made effective on June 16, 2001. Texas Legislature Online – History for H.B. 1403, <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=77R&Bill=HB1403> (last visited May 11, 2007).

47. Governor Perry's apparent ignorance of the existence of 8 U.S.C. § 1623 is remarkable because one of its primary sponsors in Congress had been Representative Lamar Smith of Texas. See Mountain States Legal Found., *Kansas: Students May Sue to Bar In-State Tuition for Illegal Aliens*, MICHNEWS.COM, Oct. 31, 2005, <http://www.michnews.com/cgi-bin/artman/exec/view.cgi/215/10107>.

48. The authors of this bill were: Rick Noriega, Juan Garcia, Fred Hill, Elvira Reyna, and Kino Flores. The co-authors were: Lon Burnam, Norma Chavez, Debra Danburg, Joe Deshotel, Harryette Ehrhardt, Scott Hochberg, Carl Isett, Jose Longoria, Trey Martinez Fischer, Glen Maxey, Joe Moreno, Manny Najera, Dora Olivo, Robert Puente, Arthur Reyna, Jim Solis, Carlos Uresti, Mike Villarreal, and Miguel Wise. Texas Legislature Online – History for H.B. 1403, <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=77R&Bill=HB1403> (last visited May 11, 2007).

49. *Id.*

50. *Id.*

51. *Id.* However, two members of the committee were absent for this vote. *Id.*

52. The witnesses listed to be at the hearing were from the following groups: Harris County Tax Assessor/Collection, Texas League of United Latin American Citizens, Texas Association of Business and Chambers of Commerce, Houston I.S.D., Texas Catholic Conference, Center for Public Policy Priorities, City of Houston, American Civil Liberties Union, Barbara Hines (immigration attorney), Texas Federa-

not mentioned; nor was Governor Davis's veto of a nearly-identical bill in California.⁵³

The little discussion that occurred focused primarily on adjustments that were made to the fiscal note of the bill. The cost according to the fiscal note had decreased slightly at first and increased in 2002 and 2003.⁵⁴ In terms of the substance of the bill, proponents stated that Texas already had made an investment in illegal alien students by educating them in primary and secondary school and that this investment should be maximized by subsidizing their college education.⁵⁵

The bill passed the Texas State Senate twenty-seven to three, with one abstention.⁵⁶ Because of minor amendments made by the Senate, the House voted on the bill once again. This time it passed with only two dissenting votes.⁵⁷ The bill was signed by Governor Perry on June 16, 2001.⁵⁸

C. New York

Although Texas was the first state to enact a law providing resident tuition rates to illegal aliens, New York—like California—had made this benefit available to illegal aliens through university system administrative policies since the 1980s. Both the City University of New York (CUNY) and the State University of New York (SUNY) offered in-state tuition rates to illegal aliens prior to state legislation enacted in 2002. The CUNY system claims to have been the first postsecondary institution to offer this benefit, in 1998.⁵⁹ In-state tuition rates were made available by university policy and were offered

tion of Teachers, Mexican American Legal Defense and Education Fund, Association of Texas Professional Educators, and The Greater Houston Partnership. *Hearing on H.B. 1403 Before the S. Educ. Comm.*, 77th Leg., Reg. Sess. (Tex. 2001) (witness list), available at <http://www.legis.state.tx.us/tlodocs/77R/witlistmtg/html/C5302001050710301.HTM>.

53. Audio tape: Hearing on H.B. 1403 Before the S. Educ. Comm., 77th Leg., Reg. Sess. (Tex. 2001), available at <http://www.senate.state.tx.us/avarchive/?mo=05&yr=2001&lim=50>.

54. This was attributed to the new methodology used in examining the fiscal impact of the bill by prorating the number of eligible students according to the percentage of the Texas population attending community colleges and colleges. *Id.*

55. *Id.*

56. See S. JOURNAL, SEVENTY-SEVENTH DAY, 77th Leg., Reg. Sess., at 2680 (Tex. 2001).

57. See H. JOURNAL, EIGHTY-FIRST DAY, 77th Leg., Reg. Sess., at 4240 (Tex. 2001).

58. Texas Legislature Online – History for H.B. 1403, <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=77R&Bill=HB1403> (last visited May 11, 2007).

59. Joyce Purnick, *Tuition, Out of State and Beyond*, N.Y. TIMES, Feb. 18, 2002, at B1; see also GOVERNOR'S PROGRAM B., No. 127 (N.Y. 2002), reprinted in B. JACKET, L. 2002, ch. 327 (N.Y. LEGIS. SERVS.).

to “individuals who have lived in New York State, have a connection to the community, and have strong educational ties to New York State.”⁶⁰

In 1998, SUNY responded to the enactment of 8 U.S.C. § 1623 by denying eligibility for resident tuition rates to illegal aliens in accordance with the new requirements of federal law.⁶¹ In November 2001, CUNY followed suit, noting that federal law required the university system to cease offering resident tuition rates to illegal aliens.⁶² New York State Senator Pedro Espada introduced S. 7784 in the New York State Senate shortly thereafter, on January 1, 2002, to “direct the SUNY and CUNY Trustees to promulgate regulations allowing certain immigrants and other individuals who have lived in New York State, have a relationship to the community, and have strong educational ties to New York State to be charged the State resident tuition rate if they meet specific qualifications.”⁶³ Essentially, the bill commanded CUNY and SUNY to return to their former policy, federal law notwithstanding. An identical bill was introduced in the New York State Assembly by Assemblyman Peter Rivera.⁶⁴ Interestingly, CUNY Chancellor Matthew Goldstein acknowledged that the University had to cease providing in-state tuition rates to illegal aliens to comply with federal law; but he nevertheless felt that the proposed state bill would somehow authorize New York to overcome this federal barrier.⁶⁵

The Senate bill was referred to the Senate Higher Education Committee on January 16, 2002.⁶⁶ Senator Espada pushed the bill through the legislative process as quickly as possible because “CUNY has generously extended an IOU to undocumented immigrant students

60. Purnick, *supra* note 59, at B1.

61. Senator Espada’s Introducer’s Memorandum in Support of S. 7784 states that the in-state tuition bill was introduced because, “absent the enactment of this bill, CUNY would be required to change [its in-state tuition policy] in order to comply with Federal law that would disallow an estimated 2800 students from being charged the State resident tuition level.” Introducer’s Memorandum in Support of S. 7784, *reprinted in* B. JACKET, L. 2002, ch. 327 (N.Y. LEGIS. SERVS.).

62. Sara Hebel, *N.Y. Governor Backs Plan to Help Some Illegal Immigrants*, CHRON. HIGHER EDUC., May 3, 2002, at A26; Letter from Michael R. Bloomberg, Mayor of N.Y. City, to George E. Pataki, Governor of N.Y. (July 3, 2002), *in* B. JACKET, L. 2002, ch. 327, at 14–16 (N.Y. LEGIS. SERVS.).

63. Introducer’s Memorandum in Support of S. 7784, *reprinted in* B. JACKET, L. 2002, ch. 327 (N.Y. LEGIS. SERVS.).

64. Hebel, *supra* note 62, at A26.

65. *Id.*

66. Status of S. 7784, *reprinted in* B. JACKET, L. 2002, ch. 327 (N.Y. LEGIS. SERVS.).

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who attended the University this 2002 spring semester.”⁶⁷ Although in 2000 CUNY did not require proof of citizenship (so the administration could not be sure how many illegal aliens attended CUNY),⁶⁸ 2788 of the 200,000 CUNY students self-identified as being in the country illegally.⁶⁹

Senate Bill 7784 was drafted with provisions nearly identical to the Texas and California bills.⁷⁰ To qualify for in-state tuition rates, a student must (1) attend a New York high school for at least two years, have graduated, and apply to SUNY or CUNY within five years of graduation; (2) attend a New York GED exam preparation, receive a New York GED, and apply to SUNY or CUNY within five years; or (3) have been enrolled at a SUNY or CUNY school during the fall 2001–2002 academic year and have received (or been authorized to receive) in-state tuition rates during that time.⁷¹ In addition, “students who do not have lawful immigration status will be required to file an affidavit stating that the student has filed an application to legalize their immigration status or will file such an affidavit upon being eligible to do so.”⁷²

Senators Espada, Ruth Hassell-Thompson, Toby Ann Stavisky, Olga Mendez, and Byron Brown made floor speeches in favor of the

67. Letter from Pedro Espada, Jr., Sen., to James M. McGuire, Counsel to Governor (July 16, 2002), in B. JACKET, L. 2002, ch. 327, at 3 (N.Y. LEGIS. SERVS.). Essentially, CUNY never actually stopped giving in-state tuition rates to illegal aliens. CUNY called these “IOUs” temporary hardship deferrals. See Letter from Miriam Kramer, Higher Educ. Coordinator, to George E. Pataki, Governor of N.Y. (June 28, 2002), in B. JACKET, L. 2002, ch. 327, at 13 (N.Y. LEGIS. SERVS.).

68. CUNY does not require students to demonstrate proof of citizenship at this time. OFFICE OF ADMISSIONS OF CUNY, CUNY ADMISSION GUIDE 4–5 (2006), http://portal.cuny.edu/cms/id/cuny/documents/informationpage/cuny_guide_all.pdf.

69. GOVERNOR’S PROGRAM B., No. 127 (N.Y. 2002), reprinted in B. JACKET, L. 2002, ch. 327 (N.Y. LEGIS. SERVS.). This was the number that was associated with S. 7784 for analyzing its fiscal impact on the state. See *id.* With this small number, it is no wonder the Budget Report on the Bill said there was no significant state fiscal impact even though the difference between in-state and out-of-state tuition was \$600–\$4900. BUDGET REP. ON BILLS, S. 7784, at 1 (N.Y. 2002), reprinted in B. JACKET, L. 2002, ch. 327, at 5–6 (N.Y. LEGIS. SERVS.). The budget report stated, “[o]stensibly, any revenue foregone at CUNY due to the lower tuition levels being charged undocumented students would be offset by those students that would have dropped out if charged at a higher level. SUNY will lose a minimal amount of tuition revenue from current students affected by this legislation.” BUDGET REP. ON BILLS, S. 7784, at 2 (N.Y. 2002), reprinted in B. JACKET, L. 2002, ch. 327, at 6 (N.Y. LEGIS. SERVS.).

70. See H.B. 1403, 77th Leg., Reg. Sess. (Tex. 2001); A.B. 540, 2001–2002 Leg., Reg. Sess. (Cal. 2001).

71. GOVERNOR’S PROGRAM B., No. 127 (N.Y. 2002), reprinted in B. JACKET, L. 2002, ch. 327 (N.Y. LEGIS. SERVS.).

72. *Id.*

bill; only Senator Frank Padavan spoke against it.⁷³ Senator Padavan objected to S. 7784 primarily because of its conflict with federal law and the inherent unfairness of the bill to U.S. citizens, particularly citizens from New Jersey, who pay out-of-state tuition.⁷⁴ Senator Padavan actually read section 505 of the IIRIRA (8 U.S.C. § 1623) to the Senate:

The IIRIRA says, and I'll quote it correctly: "An alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a state for any postsecondary education benefit unless—unless—a citizen or national of the United States is eligible for such benefit." Now what does that mean? That means if a youngster comes across the George Washington Bridge [which connects New York and New Jersey] and attends City College and today that youngster is paying a nonresident tuition, then an undocumented alien, under that federal law, should also be paying nonresident tuition. Unless you give the youngster from New Jersey the resident tuition, which we're obviously not about to do.⁷⁵

Senator Mendez conceded that, under the bill, New Jersey citizens would not be allowed to pay in-state tuition rates.⁷⁶ However, none of the other Senators addressed Senator Padavan's concerns that the bill was contrary to federal law. When Senator Padavan asked if a person could move to New York, attend a GED exam preparation class, receive a GED, and the next day apply to CUNY or SUNY and get in-state tuition rates, Senator Espada replied that it was possible.⁷⁷ In addition, when Senator Padavan asked if it was possible for these students to actually obtain citizenship, Senator Espada dodged the question and responded that residency was not germane to the bill.⁷⁸

The advocates of the bill spoke mainly of the social justice and economic benefits of offering in-state tuition rates to immigrants.⁷⁹ They ignored the statement by Senator Padavan that citizenship was an impossibility for most of the illegal alien students provided in-state tuition rates under the bill.⁸⁰ Senator Hassell-Thompson claimed that he was concerned about the citizens who would not benefit from the bill but dismissed that concern by concluding that he had to vote for

73. S. Deb. Transcripts, ch. 327, at 6075–98 (N.Y. LEGIS. SERVS. 2002).

74. *Id.* at 6082–83.

75. *Id.* at 6083.

76. *Id.* at 6090.

77. *Id.* at 6079–80.

78. *Id.* at 6080–81.

79. *Id.* at 6077–78, 6081–82, 6088–90, 6093–95.

80. *Id.*

the bill because of his constituency.⁸¹ He said that the Immigration and Naturalization Service backlog should not keep students from getting an education.⁸² He was apparently unaware that the backlog was not the problem for illegal aliens at New York universities. For virtually all, signing the affidavit stating that they intended to “legalize” their status was an empty gesture; there was no way to legalize their status.⁸³

Senator Mendez conceded that the unfairness to New Jersey citizens existed but then justified his vote for the bill because the United States Senate was expected to pass the DREAM Act, which would repeal 8 U.S.C. § 1623 and allow states to offer illegal aliens in-state tuition rates.⁸⁴ This argument reveals, of course, the Senator’s understanding that passing the bill would *not* be legal under federal law but might become legal in the future if Congress were to pass the DREAM Act. Interestingly, the same argument was offered by proponents of a similar bill in the Utah Legislature in 2002.⁸⁵

One provision in S. 7784 that is particularly troubling is the provision excluding *legal* aliens who possess student visas from receiving the benefit of in-state tuition rates.⁸⁶ The provision is worded in terms

81. *Id.* at 6077–78.

82. *Id.*

83. There is no provision in federal immigration law for an illegal alien to “legalize” his status under most circumstances. Other than narrow categories of relief, such as temporary protected status for aliens from countries experiencing war or natural disaster, 8 U.S.C. § 1254a(b) (2000), the only way that broad categories of illegal aliens could become legal is through the granting of a large-scale amnesty by Congress.

84. S. Deb. Transcripts, ch. 327, at 6091 (N.Y. LEGIS. SERVS. 2002); *see* DREAM Act, S. 1291, 107th Cong. (2001).

85. *See infra* Part III.D.

86. The provision in S. 7784 reads:

‘Resident.’ . . . this term shall include any student who is not a resident of New York state, other than a non-immigrant alien within the meaning of paragraph (15) of subsection (a) of section 1101 of title 8 of the United States Code, if such student:

(i) attended an approved New York high school for two or more years, graduated from an approved New York high school and applied for attendance at an institution or educational unit of the state university within five years of receiving a New York state high school diploma; or

(ii) attended an approved New York state program for general equivalency diploma exam preparation, received a general equivalency diploma issued within New York state and applied for attendance at an institution or educational unit of the state university within five years of receiving a general equivalency diploma issued within New York state; or

(iii) was enrolled in an institution or educational unit of the state university in the fall semester or quarter of the two thousand one–two thousand two academic year and was authorized by such institution or

that only an immigration lawyer, or a state legislator who took the time to carefully scrutinize the Immigration and Nationality Act, would understand. It excludes from the benefit of in-state tuition rates any student who is “a non-immigrant alien within the meaning of paragraph (15) of subsection (a) of section 1101 of Title 8 of the United States Code.”⁸⁷ That paragraph is actually more than five pages long and describes every temporary visa category under U.S. law.⁸⁸

In other words, an alien in the state of New York is only made eligible for in-state tuition rates by S. 7784 if he is present in the United States *illegally*. If he goes to the trouble of following the law, obtaining an appropriate visa authorizing study in the United States, and entering the country legally, he must pay out-of-state tuition. That is, to say the least, a perverse incentive structure. It is also an aspect of S. 7784 that many legislators may not have recognized when they voted in favor of this innocuous-sounding provision in 2002. For example, Senator Byron Brown believed that S. 7784 applied specifically to nonimmigrant aliens—individuals who were legally present in the United States. Senator Brown’s statements indicated that he thought that S. 7784 gave them the benefit of in-state tuition rates, not understanding that the bill specifically *excluded* them and reserved the benefit only to aliens unlawfully present in the United States.⁸⁹

Ultimately, the New York State Senate passed S. 7784 by a vote of forty-four to seventeen on June 20, 2002.⁹⁰ There was no noteworthy debate in the State Assembly.⁹¹ The Assembly passed the bill by voice vote on June 25, 2002, and Governor George Pataki signed it into law on August 6, 2002.⁹²

educational unit to pay tuition at the rate or charge imposed for students who are residents of the state.

Provided, further, that a student without lawful immigration status shall also be required to file an affidavit with such institution or educational unit stating that the student has filed an application to legalize his or her immigration status, or will file such an application as soon as he or she is eligible to do so.

2002 N.Y. Sess. Laws 1045–47 (McKinney) (codified at N.Y. EDUC. LAW § 6301.5 (Consol. Supp. 2007)).

87. N.Y. EDUC. LAW § 6301.5.

88. 8 U.S.C. § 1101(a)(15) (2000).

89. S. Deb. Transcripts, ch. 327, at 6092–93 (N.Y. LEGIS. SERVS. 2002) (statement of Sen. Brown).

90. *Id.* at 6098.

91. Assemb. Deb. Transcripts, ch. 327, at 26–28 (N.Y. LEGIS. SERVS. 2002).

92. *Id.*; Status of S. 7784, reprinted in B. JACKET, L. 2002, ch. 327 (N.Y. LEGIS. SERVS.).

D. Utah

In Utah, the deliberations of the Legislature differed markedly from those in Texas, where 8 U.S.C. § 1623 was not mentioned, and those in New York, where the federal law was mentioned but largely ignored. In the Utah Legislature, there was extensive debate about the constraints imposed by federal law. Several legislators stated that the barrier posed by 8 U.S.C. § 1623 prevented the Legislature from offering resident tuition rates to illegal aliens.⁹³ Even the sponsor of the legislation (H.B. 144), Representative David Ure, acknowledged that federal law stood in the way of his plan to offer resident tuition rates to illegal aliens.⁹⁴ However, in 2002, two prominent members of Congress from Utah, Senator Orrin Hatch and Representative Chris Cannon, were vocal proponents of the DREAM Act in Congress.⁹⁵ The DREAM Act, if passed, would have repealed 8 U.S.C. § 1623 and allowed states that wished to provide the benefit of in-state tuition rates to illegal aliens to do so.⁹⁶ It also would have provided legal status to illegal aliens who attended postsecondary educational institutions and met other requirements.⁹⁷

Representative Ure, apparently believing that passage of the DREAM Act in Congress was a virtual certainty, inserted a proviso at the beginning of his bill, indicating that it should only become effective “[i]f allowed under federal law.”⁹⁸ He explained on the floor of the Utah State House that this clause would prohibit H.B. 144 from going into effect unless and until the DREAM Act was passed by Congress:

This bill is not planned to go into effect until after Congress gives permission and goes through all the rituals they do in Congress and fixes both the college laws and the immigration laws to put this bill into effect. . . . [T]his bill will not go into effect until after they have changed the law, which Senator Hatch and Representative Cannon are both working on very diligently in order to put this thing into effect.⁹⁹

93. Audio tape: Utah H. Deb. on H.B. 144 (Mar. 4, 2002), available at <http://www.le.state.ut.us/asp/audio/index.asp?Sess=2002GS&Day=43&Bill=&House=H> (transcript on file with author) [hereinafter Utah H. Deb.].

94. *Id.*

95. Twila Van Leer, *Analysis Sought on Enacting Immigrant-Tuition Plan*, *DESERET NEWS* (Salt Lake, Utah), Sept. 8, 2002, at B2.

96. DREAM Act, S. 1291, 107th Cong. § 2 (2002).

97. *Id.* §3.

98. UTAH CODE ANN. §53B-8-106(1) (2006).

99. See Utah H. Deb., *supra* note 93.

Of course, Congress did not pass the DREAM Act in 2002. This posed a problem for the proponents of H.B. 144. The “[i]f allowed under federal law” clause was supposed to place the state law on hold until Congress acted first.¹⁰⁰ Nevertheless, after the Utah Legislature passed H.B. 144, the Utah Board of Regents decided that they did not need to wait for the DREAM Act to pass; they implemented the statute immediately, contrary to the understanding of many legislators who voted for the measure.¹⁰¹

That was not the only assurance made by Representative Ure that would prove to be false. He also assured the Utah House of Representatives that the number of illegal aliens who would take advantage of the subsidized tuition rate would be extremely small: “I think we may be talking ten to twenty at the most in the State of Utah a year.”¹⁰² By the 2005–2006 academic year, the number of illegal alien beneficiaries of H.B. 144 attending Utah’s nine public colleges and universities would hit 182.¹⁰³

In spite of these assurances, H.B. 144 encountered vigorous opposition on the floor of the House. It was clear that at least the opponents of the bill were well aware of the existence of 8 U.S.C. § 1623 and the requirements of federal law. Representative Margaret Dayton actually proposed an amendment to H.B. 144 that would bring it into compliance with federal law—by waiving nonresident tuition and fees at Utah public colleges and universities for all U.S. citizens as well.¹⁰⁴ She was adamant that federal law required all U.S. citizens to receive the same tuition break extended to illegal aliens:

My reason for wanting to make this amendment refers to the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. Congress prohibited states from allowing illegal immigrants who were students to attend higher education and pay in-state tuition unless the state allowed all non-residents to pay in-state tuition. I feel like there is a discrimination at issue here, and for that reason I would ask your support on these amendments.¹⁰⁵

100. Van Leer, *supra* note 95, at B2.

101. Minutes of Meeting, Utah State Board of Regents, Salt Lake Community College, at 19 (Nov. 8, 2002), in AGENDA: MEETING OF THE UTAH STATE BOARD OF REGENTS, tab R, (UTAH STATE BD. OF REGENTS, OFFICE OF THE COMM’R OF HIGHER EDUC. ed., 2003), http://www.utahsbr.edu/Agendas/2003_Agendas/Jan172003.pdf (last visited May 11, 2007).

102. Utah H. Deb., *supra* note 93.

103. Jennifer W. Sanchez, *Governor Says He Will Fight to Keep In-State Tuition*, SALT LAKE TRIB., Jan. 12, 2007.

104. See H.B. 144, H. Floor Amend., 2002 Leg., Gen. Sess. (Utah 2002), available at <http://www.le.state.ut.us/~2002/pamend/hb0144.hfa.01.pdf>.

105. Utah H. Deb., *supra* note 93.

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Unwilling to contemplate an amendment that would deprive the state of millions of dollars in extra tuition and fees from nonresidents (and likely kill the bill), proponents of H.B. 144 spoke against the amendment. As Representative A. Lamont Tyler protested, “[t]his is a dramatic change in the way colleges and universities are funded in the state. . . . This is a fiscal impact that the sponsor hasn’t even determined. And it’s many, many millions of dollars for all the colleges and universities in the state.”¹⁰⁶ The amendment was rejected on a voice vote.¹⁰⁷ This is, of course, precisely what Congress intended: no state would seriously contemplate providing in-state tuition rates to illegal aliens if doing so would require the state to forego the revenue gained by charging nonresident U.S. citizens much higher rates.

Representative Steve Urqhart, another opponent of the bill, estimated that it would cost the state two million dollars over four years, even if Representative Ure’s estimation of only twenty beneficiaries a year was correct.¹⁰⁸ He suggested that that money should be allocated to assist U.S. citizens residing in Utah who were unable to afford even in-state tuition rates and advocated amending the bill to provide a 25% tuition discount to them instead.¹⁰⁹ Representative Ure responded that such an amendment would be “short-sighted” and insisted that the taxpayer subsidy should go to illegal aliens: “These people are here to stay. These people are a vibrant part of our work force. And we have a better workforce having the better educated. So I would oppose this amendment.”¹¹⁰

The debate continued at length, with proponents reiterating Representative Ure’s argument that illegal aliens in Utah would be more productive if their college educations were subsidized and opponents insisting that H.B. 144 was unfair to U.S. citizens and to aliens who followed the law.¹¹¹ Illustrating just how confused some legislators were, Representative Judy Ann Buffmire, a proponent of H.B. 144, insisted, “We are confusing undocumented aliens with people that are here illegally. And we need to get that into your head.”¹¹² The bill passed the House narrowly, with thirty-nine votes in favor and thirty-five votes opposed.¹¹³ Representative Ure’s legislative career hit a roadblock four years later in 2006 when he lost a primary election for

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

an open Senate seat in the Utah Legislature—a loss that may have been partially attributable to his high profile role as the sponsor of H.B. 144 and chief defender of in-state tuition rates for illegal aliens.¹¹⁴

In contrast to the extended debate in the Utah House, the Utah Senate passed H.B. 144 with much less discussion.¹¹⁵ Governor Michael Leavitt signed it into law on March 26, 2002.¹¹⁶ However, the Utah story does not end there. Opponents of H.B. 144 remained undaunted. Representative Glen Donnelson introduced bills to repeal H.B. 144 in 2005, 2006, and 2007.¹¹⁷ In February 2007, his repeal effort finally made it to the floor of the Utah House of Representatives. The chamber deadlocked, voting thirty-seven to thirty-seven on Donnelson's bill to repeal H.B. 144.¹¹⁸ Given the closeness of this vote and the fact that some 71% of Utah voters oppose offering in-state tuition rates to illegal aliens,¹¹⁹ it is fair to say that the future of H.B. 144 remains uncertain.

E. Nebraska

In most of the states that decided to offer resident tuition to illegal aliens, the bills were signed into law with little fanfare. The governors declined to hold press conferences or signing ceremonies heralding the new laws. This was not surprising, because public opinion polls consistently registered strong opposition to subsidizing the college education of illegal aliens.¹²⁰ However, in the last of the ten states to pass such a law—Nebraska—something unusual happened.

114. See Deborah Bulkeley, *Ure's Defeat May Mean End of Tuition Law*, DESERET NEWS (Salt Lake, Utah), July 5, 2006, at A1.

115. In contrast to the seven days on which House discussion of H.B. 144 was officially recorded, the Senate only officially recorded H.B. 144 discussion on two days. See H.B. 144, Bill Status, 2002 Leg., Gen. Sess. (Utah 2002), <http://www.le.state.ut.us/~2002/status/hbillsta/hb0144.htm>.

116. *Id.*

117. H.B. 239, 2005 Leg., Gen. Sess. (Utah 2005); H.B. 7, 2006 Leg., Gen. Sess. (Utah 2006); H.B. 224, 2007 Leg., Gen. Sess. (Utah 2007).

118. Deborah Bulkeley, *Tuition Repeal Loses but Could be Revived*, DESERET NEWS (Salt Lake, Utah), Jan. 31, 2007, at B1.

119. Seventy-one percent of Utah residents thought that the law offering resident tuition rates to illegal aliens should be repealed, according to a June 2006 poll of 625 Utah residents commissioned by the *Salt Lake Tribune*. Jennifer W. Sanchez, *Immigration Worries: A Cold Welcome*, SALT LAKE TRIB., June 22, 2006. The poll was performed by Mason-Dixon Polling & Research, Inc., and had a margin of error of 4% points. *Id.*

120. See *supra* note 119. An October 2005 poll of New Mexico residents by Research & Polling, Inc., found 72% opposed allowing some illegal immigrant students to pay in-state college tuition. Leslie Linthicum, *Immigration Divide*, ALBUQUERQUE J., Oct. 30, 2005, at A1.

The issue took center stage in a gubernatorial election. In the 2006 legislative session, Nebraska's unicameral legislature set the stage by passing an in-state tuition bill for illegal aliens.¹²¹

Nebraska's in-state tuition bill, L.B. 239, was introduced by Senator DiAnna Schimek, read for the first time on January 10, 2006, and referred to the Education Committee.¹²² One of the issues mentioned in the Education Committee's Bill Summary was the fact that the bill was in conflict with 8 U.S.C. § 1623.¹²³ The Bill Summary also mentioned that the DREAM Act was before Congress and predicted that the Act was likely to pass, which would bring L.B. 239 into full compliance with federal law.¹²⁴ The legal barrier imposed by 8 U.S.C. § 1623 was discussed by both proponents and opponents of the bill. An attorney lobbying for the passage of the bill argued that it could be interpreted as satisfying the requirements of federal law if *some* U.S. citizens—those who were similarly situated to the undocumented students—were also eligible for the resident tuition benefit.¹²⁵ On the other hand, a representative of the Federation for American Immigration Reform pointed out that 8 U.S.C. § 1623 requires a state to offer in-state tuition rates to *all* U.S. citizens, not a select subset of U.S. citizens, if any illegal alien received the privilege.¹²⁶ She also argued that it was the intent of Congress to bar any state from offering in-state tuition rates to illegal aliens—an intent that Nebraska would be defying if it enacted L.B. 239.¹²⁷ At the end of the hearing, the senators voted the bill out of the committee by a vote of five to two.¹²⁸

During the floor debate, the predominant question was whether or not L.B. 239 conflicted with federal law. Senator Schimek attempted to deflect this criticism by saying that L.B. 239 dealt with education (a state issue), not immigration (a federal issue).¹²⁹ Obviously, this answer was insufficient, since express preemption is not

121. L.B. 239, 99th Leg., 2d Sess. (Neb. 2006).

122. See L.B. 239, 99th Leg., 1st Sess. (Neb. 2005). The sponsor of the bill, Senator Schimek, stated that she had been working on this bill for five years. L.B. 239, Floor Deb., 99th Leg., 2d Sess. 13571 (Neb. Apr. 13, 2006) [hereinafter Floor Deb., L.B. 239].

123. B. Summary, L.B. 239, Comm. on Educ., 99th Leg., 1st Sess. (Neb. Mar. 15, 2005).

124. *Id.*

125. *Hearing on L.B. 239 Before the Comm. on Educ.*, 99th Leg., 1st Sess. 20 (Neb. Mar. 15, 2005) (testimony of Milo Mumgaard).

126. *Id.* at 38 (testimony of Susan Tully).

127. *Id.* at 37.

128. Comm. Statement, L.B. 239, Comm. on Educ., 99th Leg., 1st Sess. (Neb. Mar. 15, 2005). One senator abstained from the vote. *Id.*

129. Floor Deb., L.B. 239, *supra* note 122, at 12027.

dependent upon the category of legislation enacted.¹³⁰ It also is evident that Senator Schimek did not understand that restricting the benefit to illegal aliens undermined its legality under 8 U.S.C. § 1623. She offered as her primary justification for L.B. 239 the fact that its beneficiaries were *ineligible* for federal student aid¹³¹—clearly reflecting her understanding that illegal aliens were the beneficiaries of L.B. 239 and that U.S. citizens were not. She described these beneficiaries as “a very select group of students.”¹³² At one point later in the debate, Senator Jeanne Combs expressed surprise at the prospect that L.B. 239 could conflict with federal law and said that this was the first time that that issue had been raised.¹³³ One wonders where she had been.

Senator Mike Flood was the most vocal opponent of L.B. 239. He repeatedly read aloud the text of 8 U.S.C. § 1623 to show that L.B. 239 was in conflict with it.¹³⁴ Senator Philip Erdman took the additional step of actually reading to the Senate the Conference Report on the section of the IIRIRA that would become 8 U.S.C. §1623 to make it clear that L.B. 239 would conflict with the intent of Congress.¹³⁵

Senator Chris Beutler apparently believed that it did not matter whether L.B. 239 violated federal law. In his view, Nebraska legislators should feel no obligation to comply with federal law, since not all federal immigration laws were being enforced with equal vigor by the federal government:

I submit to you all that the federal government is in no position to be enforcing any such law [referring to 8 U.S.C. § 1623]. It would be the height of hypocrisy to not enforce a law with respect to the employment of adults and then turn around and enforce the law with respect to the education of their children after they have benefited society with their work. We would take away the opportunity from their children to share in the benefits of our society. I think it's preposterous to even give weight to any sort of argument with regard to federal law.¹³⁶

Ultimately, L.B. 239 passed the Senate by a vote of twenty-seven to eighteen and was presented to the Governor on April 13, 2006.¹³⁷

130. *See infra* Part V.B.

131. Floor Deb., L.B. 239, *supra* note 122, at 12028–29. Senator Preister also made this point. *Id.* at 12033. So did Senators Connealy and Aguilar. *Id.* at 12046, 12039.

132. Floor Deb., L.B. 239, *supra* note 122, at 12026.

133. *Id.* at 12061.

134. *Id.* at 12054.

135. *Id.* at 13271–75.

136. *Id.* at 13579.

137. NEB. LEG. J., 99th Leg., 2d Sess., No. 60 (Apr. 13, 2006) (final reading of L.B. 239).

Governor Dave Heineman vetoed the bill the same day.¹³⁸ The Nebraska Senate overrode the Governor's veto by a vote of thirty to sixteen.¹³⁹

Interestingly, it appears that someone finally instructed Senator Schimek on how she should describe the effect of L.B. 239 with respect to the eligibility of U.S. citizens—an issue that would arise if L.B. 239 were ever challenged in court. During the veto override debate, she contradicted her earlier statements indicating that the benefits were only available to illegal aliens by declaring that L.B. 239 would not exclude American citizens.¹⁴⁰ She also went so far to say that eligibility for the tuition benefit of L.B. 239 was not dependent upon a student's residence.¹⁴¹ This later statement that L.B. 239 did not provide the benefit on the basis of residence is difficult to reconcile with the text of the bill; unlike the laws in most of the other states, L.B. 239 expressly refers to residence in Nebraska as a criterion that illegal aliens must meet to be eligible for the benefit.¹⁴²

The Nebraska story does not end with the override of Governor Heineman's veto, however. The issue created subsequent fallout in the gubernatorial campaign of 2006, in which Governor Heineman's veto became a pivotal issue in the Republican primary. Governor Heineman's opponent was the legendary University of Nebraska football coach and sitting United States Representative Tom Osborne. A political demigod in the Cornhusker State, Representative Osborne had never received less than 82% of the vote in any election.¹⁴³ Governor Heineman, on the other hand, had not yet won a gubernatorial election (he had moved into the Governor's office from the Lieutenant Governor post in 2005 when Governor Mike Johanns resigned to become United States Secretary of Agriculture).¹⁴⁴

138. *Id.*

139. *Id.* This also included three abstentions. *Id.*

140. Floor Deb., L.B. 239, *supra* note 122, at 13582–83.

141. *Id.* at 12059–60.

142. The relevant provision in L.B. 239 reads as follows:

(5) Except as provided in subdivision (8) of this section, such student, if an ALIEN, has applied to or has a petition pending with the United States Immigration and Naturalization Service to attain lawful status under federal immigration law and *has established a home in Nebraska* for a period of at least one hundred eighty days where he or she is habitually present with the bona fide intention to make this state his or her permanent *residence*, supported by documentary proof.

L.B. 239, 99th Leg., 2d Sess. (Neb. 2006) (emphasis added).

143. Blair Kerkhoff, *Upset! Cornhuskers Voters Said No to Osborne*, PITTSBURGH POST-GAZETTE, May 14, 2006, at C1.

144. Martha Stoddard, *Nebraska Governor Calls for Turning Tide*, OMAHA WORLD-HERALD, Jan. 5, 2007, at 3B.

No one thought that Governor Heineman had a chance. He was behind in all of the polls from the beginning of the race until March 2006.¹⁴⁵ Then Coach Osborne fumbled. During a debate, he stated that he favored the idea of making in-state tuition rates available to illegal aliens.¹⁴⁶ Governor Heineman said that he was opposed to the idea, signaling his upcoming veto of L.B. 239.¹⁴⁷ In the home stretch of the campaign, Governor Heineman proceeded to attack Representative Osborne's position on the issue in television advertisements and direct mail.¹⁴⁸ The voters sided with Governor Heineman in the dispute, and Governor Heineman surged ahead in the final weeks before the vote.¹⁴⁹ It was game over for Osborne; Heineman beat him 50% to 44% in the May 9, 2006, primary election.¹⁵⁰ After the vote, both candidates stated that the tuition issue had been a decisive factor in Governor Heineman's victory.¹⁵¹

F. Arizona's Proposition 300

As noted above, public sentiment in most states leans heavily against the idea of offering in-state tuition rates to illegal aliens. In November 2006, the Arizona Legislature gave voters an opportunity to decide the question themselves. Proposition 300 was a legislative resolution (S.C.R. 1031) that was referred by the Legislature to be placed on the November 7, 2006, election ballot.¹⁵² It included the following provisions:

In accordance with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 . . . a person who [is] not a citizen or legal resident of the United States or who is without lawful immigration status is not entitled to classification as an in-state student . . . or entitled to classification as a county resident

A person who is not a citizen of the United States, who is without lawful immigration status and who is enrolled as a student at any university under the jurisdiction of the Arizona Board of Regents or at any community college under the jurisdiction of a community

145. Robynn Tysver, *Winner Never Wavered: Heineman Made Steady Gains in Campaign*, OMAHA WORLD-HERALD, May 14, 2006, at 1A.

146. *Id.*

147. *Id.*

148. Don Walton, *Bush Plan Turns Nebraska Politics Upside-Down*, LINCOLN J. STAR, June 7, 2006, at A1.

149. Tysver, *supra* note 145, at 1A; Robynn Tysver, *Ricketts, Nelson Now Tougher on Immigration*, OMAHA WORLD-HERALD, Sept. 17, 2006, at 1B.

150. Kerkhoff, *supra* note 143, at C1.

151. Don Walton, *supra* note 148, at A1.

152. Christian Palmer, *Arizona Voters OK 4 Immigration Measures*, ARIZ. CAPITOL TIMES, Nov. 7, 2006, at 1.

college district in this state is not entitled to tuition waivers, fee waivers, grants, scholarship assistance, financial aid, tuition assistance or any other type of financial assistance that is subsidized or paid in whole or in part with state monies.¹⁵³

These provisions were combined with language restricting Arizona's adult literacy and family education programs to both U.S. citizens and aliens lawfully present in the United States.¹⁵⁴ Proposition 300 was introduced by Senator Dean Martin.¹⁵⁵ Representative Russell Pearce also played an instrumental role by shepherding it through the Arizona House of Representatives.¹⁵⁶ The proposition was introduced in the Arizona Senate and was first read on January 31, 2006.¹⁵⁷ It was submitted to the Senate's K-12 Education Committee, where it was passed by a vote of five to three on February 15, 2006.¹⁵⁸ There were eight attempts to amend S.C.R. 1031 on the Senate floor, all of which failed.¹⁵⁹

Senate Concurrent Resolution 1031 passed the Senate with a vote of eighteen to eleven on March 16, 2006, and was transferred to the Arizona House.¹⁶⁰ It ultimately passed the House by a vote of thirty-three to twenty-two, with five members not voting.¹⁶¹ Because amendments were made in the House Rules Committee and House Appropriations Committees, S.C.R. 1031 went back to the Senate.¹⁶² It was passed again on June 21, 2006, by a vote of seventeen to eleven, with two members not voting.¹⁶³ The next day, Proposition 300 was transferred to the Secretary of State to be placed on the November ballot.¹⁶⁴ It is interesting to note that in 2006, in the states that addressed the illegal immigration issue as a ballot measure, legis-

153. Ariz. Sec'y of State, 2006 Ballot Propositions & Judicial Performance Review, Proposition 300, §§ 3-4, <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop300.htm> (last visited May 8, 2007).

154. *See id.* §§ 1, 2, 5, 6.

155. Mark Flatten, *Election 2006*, KNIGHT RIDDER TRIB. BUS. NEWS (D.C.), Nov. 12, 2006, at 1.

156. *See* Editorial, *Proxy Wars: Prop. 300 Is Immigration Frustration Run Amok*, ARIZ. DAILY WILDCAT, Jan. 29, 2007, available at <http://media.wildcat.arizona.edu/media/storage/paper997/news/2007/01/29/Opinions/Proxy.Wars.Prop.300.Is.Immigration.Frustration.Run.Amok-2682612.shtml>.

157. Ariz. State Legislature, Bill Status Overview, S.C.R. 1031, <http://www.azleg.gov/FormatDocument.asp?inDoc=/Legtext/47leg/2r/bills/scr1031o.asp> (last visited Apr. 19, 2007).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

latures (and the people) were not split down party lines. Both Republicans and Democrats voted in favor of measures designed to discourage illegal immigration.¹⁶⁵

Arizona voters cast their ballots decisively in favor of its passage. On election day, Arizona residents voted over two to one in favor of Proposition 300, thereby denying in-state tuition rates to illegal aliens. At the end of the day, Proposition 300 garnered 71.4% of the vote.¹⁶⁶ Had the question been put to a popular vote in the ten states that offer in-state tuition rates to illegal aliens, it is not unreasonable to suggest that the outcome would have been similar.

IV.

WHY OFFERING IN-STATE TUITION RATES TO ILLEGAL ALIENS IS POOR PUBLIC POLICY

Enacting legislation to provide taxpayer-subsidized college education to illegal aliens should, in theory, be an uphill battle. Scientific polls have consistently shown that U.S. citizens reject the idea, usually by majorities in excess of 70%.¹⁶⁷ The legislative successes of in-state tuition bill proponents represent a textbook case of elite opinion triumphing over popular opinion in the halls of state legislatures.

The reasons for popular opposition to the policy are not difficult to understand. One is that the policy gives an extremely valuable financial benefit to aliens who are in violation of federal law, while at the same time denying the same benefit to U.S. citizens who come from out of state. At a time when college costs are draining the savings of millions of American families, this is an argument that evokes a strong reaction from many students and their parents.¹⁶⁸ College

165. See Kavan Peterson, *Immigration Hardliners Trailing in Ariz., Colo.*, STATELINE.ORG, Nov. 3, 2006, <http://www.stateline.org/live/details/story?contentId=154392>.

166. Ariz. Sec'y of State, 2006 General Election – Ballot Measures, <http://www.azsos.gov/results/2006/general/BM300.htm> (last visited Apr. 17, 2007).

167. In addition to the 71% approval rate of Proposition 300 in Arizona, note the identical 71% of Utah residents who thought that the law offering resident tuition rates to illegal aliens should be repealed, according to a June 2006 poll of 625 Utah residents commissioned by the *Salt Lake Tribune*. Sanchez, *supra* note 119. An October 2005 poll of New Mexico residents by Research & Polling, Inc., found 72% opposed to allowing some illegal immigrant students to pay in-state college tuition. Linthicum, *supra* note 120, at A1.

168. See, e.g., Nancy Kercheval, *College Co\$ts*, DAILY REC. (Baltimore, Md.), Apr. 27, 2002, at A1; Sara Hebel, *D.C. Students Are No Longer "Out of State" Everywhere*, CHRON. OF HIGHER EDUC., Jul. 14, 2000, at A26.

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costs rose 35% from 2002 to 2007, after adjusting for inflation.¹⁶⁹ This upward trend is nothing new; the cost of college tuition and fees has been rising faster than consumer prices and personal income for the past twenty-five years.¹⁷⁰ Two-thirds of college students now graduate with debt, and the amount of debt has risen dramatically in recent years, to an average of \$19,200.¹⁷¹

In such an environment, taxpayer-subsidized tuition is extremely valuable, reducing what could otherwise constitute a crippling financial burden. On average, taxpayers cover approximately two-thirds of the cost of the college education of students who pay in-state tuition rates; the students or their parents pay for the remaining third through tuition bills.¹⁷² In contrast, out-of-state students or their parents bear the full cost of their education. In states with large numbers of illegal aliens enrolled in public institutions of higher education, the provision of a publicly-subsidized education to illegal aliens costs taxpayers a staggering amount of money. In California, for example, taxpayers pay an excess of \$100 million every year to subsidize the college educations of thousands of illegal aliens.¹⁷³ This is a subsidy that many taxpayers presumably would rather not provide. Or if it is going to be

169. Sandra Block, *Rising Costs Make Climb to Higher Education Steeper; Parents, Students Wonder Why Tuition, Fees Increase so Rapidly*, USA TODAY, Jan. 12, 2007, at B1.

170. *Id.*

171. *Id.*

172. *Id.*

173. "The UC's [University of California's] undergraduate fee for a state resident is \$6,769 a year, compared with \$24,589 a year for nonresidents." Editorial, *Our Views: Tuition Equity*, PRESS ENTERPRISE, Dec. 19, 2005, at B6. The University of California has indicated that 430 illegal aliens were enrolled and taking advantage of the resident tuition benefit in 2006. Louis Freedberg, *Personal Perspective: College for All Californians?*, SAN FRANCISCO CHRON., Jan. 30, 2006, at B6. Assuming that the taxpayer-subsidized portion of in-state tuition roughly equals the difference between the tuition amounts (\$17,820) and multiplying that amount by the number of illegal aliens enrolled (430), the resulting figure is a subsidy of \$7,662,600 a year for the UC system alone. In the California State University (CSU) system, the difference between the tuition amounts for resident and nonresident tuition payers is approximately \$11,000 per year. Joyce Howard Price, *Students Sue for Tuition Parity with California Illegals*, WASH. TIMES, Dec. 15, 2005, at A3. Assuming conservatively that the number of illegal aliens paying resident tuition rates in the CSU system is the same as in the UC system (it is undoubtedly much larger, given the higher enrollment numbers and lower exclusivity of the CSU system), the total taxpayer subsidy would be approximately \$4,730,000 a year. In the community college system of California, which has a total of 1.5 million students, the tuition differential is approximately \$6000 a year. Price, *supra* note 173, at A3. The number of illegal aliens paying in-state fee levels at California's community colleges is estimated at 15,000. Stuart Silverstein, *Out-of-State Students Sue Over Tuition; Plaintiffs Are Challenging California Practices that Require Them to Pay Higher College Costs than Some Illegal Immigrants*, L.A. TIMES, Dec. 15, 2005, at B3. Multiplying this number by the tuition differential

extended beyond the state's resident U.S. citizens, they would rather give it to law-abiding U.S. citizens from out of state, who can legally settle and work in the state after graduation.

It seems unfair to charge a U.S. citizen who has played by the rules three times the tuition that is charged to an alien whose very presence is a violation of federal law. Some advocates of in-state tuition rates for illegal aliens sometimes respond to this argument by noting that U.S. citizens from out of state can always return to their home states and receive in-state tuition rates there. While that is true, it is also true that an alien illegally present in the United States can return to his home country and likely receive a subsidized college education (at a cost less than that charged to foreign nationals) at a public university there.¹⁷⁴

The second argument leveled against these laws is that they reward illegal behavior. Ten states are undeniably rewarding aliens who violate federal immigration law. In addition to rewarding past unlawful presence in the United States, all ten states also require the illegal alien to *continue* breaking federal law in order to be eligible. This is because an alien is eligible for in-state tuition rates only if he remains in the state in violation of federal law (which is necessary to remain enrolled and attend classes) and if he evades federal law enforcement. The states directly reward this illegal behavior.

Moreover, four of the ten states go one step further in rewarding illegal behavior by *expressly denying the benefit to aliens who comply with federal immigration law and obtain appropriate student visas*.¹⁷⁵ Such law-abiding students who possess nonimmigrant visas must pay the higher, nonresident tuition rates. Thus, following federal law disqualifies an alien from receiving the benefit. It is a truly perverse incentive structure when lawfully present aliens are excluded from the benefit outright, while aliens who break the law are eligible. It is undeniable that, in this sense, the states in question are directly undermining the enforcement of federal immigration law.

Amazingly, some state legislators are unapologetic about their desire to exclude law-abiding foreign students. For example, in Washington, the law offering in-state tuition rates to illegal aliens does

of \$6000 yields a total taxpayer subsidy of \$90 million. Thus, the total taxpayer subsidy in the three systems combined is approximately \$102,392,600 a year.

174. For example, Canadian citizens are entitled to reduced tuition rates at Canadian universities. *Canadian on Board*, *GLOBE & MAIL* (Can.), Sept. 7, 1991.

175. The four states that do so are California, Kansas, New York, and Utah. See CAL. EDUC. CODE § 68130.5 (West Supp. 2003); KAN. STAT. ANN. § 76-731a (Supp. 2005); N.Y. EDUC. LAW § 6301.5 (Consol. Supp. 2007); and UTAH CODE ANN. § 53B-8-106 (2006).

not disqualify law-abiding foreign students who possess nonimmigrant visas.¹⁷⁶ However, the sponsor of the Washington state law had apparently intended to limit the benefit to illegal aliens but had neglected to include a provision doing so in the bill. When she learned holders of nonimmigrant visas were seeking and obtaining in-state tuition rates, she was not pleased:

Told that the law is mainly benefiting visa-holding students, at least at the university level, state Rep. Phyllis Gutierrez-Kenney, the prime sponsor of the legislation, was momentarily speechless.

“Then somebody is screwed up,” the Seattle Democrat finally said. “I’ll have to check it out.”

Registrars said the state Attorney General’s Office advised them not to deny in-state tuition rates to visa-holding students who had met the requirements of the law, because the statute does not specify that it applies solely to illegal aliens.¹⁷⁷

Although law-abiding aliens at Washington’s public institutions of higher education received a break through the apparent ineptitude of the bill’s sponsor, the unfairness that exists in the four states that expressly exclude law-abiding foreign students is striking. The usual excuse that is offered for this inequity is that illegal aliens who have attended American high schools have developed a connection with the United States and therefore deserve in-state tuition rates. However, many law-abiding aliens who attend American high schools or universities also develop that same connection and seek to adjust their statuses to that of lawful permanent resident.

Imagine if a state passed a law that rewarded residents for cheating on their federal income taxes—by giving state tax credits to those who break federal tax laws. That is the equivalent of what these states have done. They have awarded a valuable financial benefit to those who violate federal law. If such a state tax credit were enacted, it would be appropriately regarded as an unconstitutional and intolerable interference with Congress’s power to tax. So, too, the provision of in-state tuition rates to those who violate federal immigration laws interferes with Congress’s objective of encouraging compliance with such laws. Congress’s insistence that “[i]t is a compelling government interest to remove the incentive for illegal immigration provided by

176. John Iwasaki, *Tuition Break has Surprise Beneficiaries: Undocumented Students Often Unaware of Benefit*, SEATTLE POST-INTELLIGENCER, Oct. 30, 2003, at A1.

177. *Id.* Seven of nineteen beneficiaries at the university level were illegal aliens. *Id.* However, at the community college level, there were 110 beneficiaries in the first year. *Id.* It is likely that the majority of these students were illegal aliens.

the availability of public benefits”¹⁷⁸ apparently fell on deaf ears in the state legislatures in question.

In all ten states, proponents of in-state tuition rates relied principally on two policy arguments to advance their bills. First, they contended that it was a matter of compassion. Students who were brought into the United States illegally by their parents need help to be able to afford the rising cost of a college education. But while this is certainly true for many illegal aliens, it is also true for many U.S. citizens. In a world of limited higher education resources, it is difficult to fathom why taxpayer subsidies should be offered to illegal aliens who are violating federal law, while law-abiding U.S. citizens from out of state are denied such subsidies.

Second, proponents argued that most illegal alien students intend to continue living in the United States.¹⁷⁹ Therefore, it makes sense to make them part of a more productive workforce. As the author of one comment wrote: “Studies indicate that a bachelor’s degree can lead to a yearly salary almost twice that of someone with only a high school diploma.”¹⁸⁰ There are two fatal flaws in this argument. First, the student beneficiaries of these laws cannot legally remain in the United States for any purpose. They are subject to removal at any time. Thus, the ten states are providing valuable postsecondary education subsidies to develop a workforce that cannot legally work anywhere in the United States and can be removed from the country at any moment. Second, even if the federal government did not succeed in removing these illegal aliens during or after their postsecondary education, it is highly unlikely that they would be able to take full

178. 8 U.S.C. § 1601(6) (2000).

179. For example, Representative Sue Storm, the sponsor of the Kansas in-state tuition bill explained:

Most of these students have lived most of their lives in Kansas, are not going anywhere and will hold jobs in Kansas. It is in their best interest and in the best interest of all Kansans that they have the training and education necessary to get good jobs in order to provide for themselves and their children.

Minutes of the Senate Education Committee (Mar. 24, 2003), <http://www.kslegislature.org/committeeminutes/03-04/senate/SnEd3-11-2003.pdf>.

180. 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 Immigrants*, 43 HOUS. L. REV. 847, 872 (2006). This simplistic argument is a common one among supporters of in-state tuition for illegal aliens. See Thomas R. Ruge & Angela D. Iza, *Higher Education for Undocumented Students: The Case for Open Admission and In-State Tuition Rates for Students without Lawful Immigration Status*, 15 IND. INT’L & COMP. L. REV. 257, 275 (“It makes better sense for states to educate their residents so they can contribute to society and the nation’s economy to their fullest potential.”).

advantage of their newly-minted college degrees. Employers who seek employees with college educations are reluctant to violate federal immigration laws¹⁸¹ by hiring unauthorized workers.¹⁸²

Consequently, in the years since the earliest states' resident tuition laws have been in effect, it has been reported that the illegal aliens graduating from the respective states' public universities have been unable to secure higher-paying jobs at companies seeking employees with college degrees.¹⁸³ Unlike employers who rely on low-skill labor, such companies have proven extremely reluctant to hire aliens who lack work authorization.¹⁸⁴ As a result, the ten states have subsidized the creation of a well-educated class of illegal aliens who cannot take full economic advantage of their education if they remain in the United States. The fact that a bachelor's degree usually leads to a higher income level for a U.S. citizen means little when the degree holder is an alien who is unauthorized to work in the United States.

V.

THE LEGAL CHALLENGE: FEDERAL PREEMPTION

In July 2004, a group of nonresident U.S. citizen students filed suit in federal district court in Kansas against public university officials and the Board of Regents to enjoin the defendant state officials from providing in-state tuition rates to illegal aliens.¹⁸⁵ They argued that Kansas's statute was in direct conflict with, and therefore preempted by, 8 U.S.C. § 1623, as well as 8 U.S.C. § 1621 and other provisions of federal law.¹⁸⁶ The district court judge did not render any decision on the merits of the case. Instead, he ruled that the plaintiffs lacked a private right of action to bring their statutory challenges and lacked standing to bring their Equal Protection challenge.¹⁸⁷ At

181. Specifically, the employers would be violating 8 U.S.C. § 1324a (2000).

182. Miriam Jordan, *Illegals' New Lament: Have Degree, No Job*, WALL STREET J., Apr. 26, 2005, at B1.

183. *Id.*

184. *Id.*

185. Day v. Sebelius, 376 F. Supp. 2d 1022, 1025–26 (D. Kan. 2005). The Governor of Kansas, Kathleen Sebelius, was a named defendant in the case; however, pursuant to the order of the district court, she was removed from the list of defendants. *Id.* at 1031.

186. Amended Complaint for Injunctive and Declaratory Relief ¶¶ 79–92, Day v. Sebelius, 376 F. Supp. 2d 1022 (D. Kan. 2005) (No. 5:04-CV-04085). They also argued that Kansas was violating the Equal Protection Clause of the United States Constitution by discriminating against them and in favor of illegal aliens. *Id.* ¶¶ 108–114.

187. Day v. Sebelius, 376 F. Supp. 2d at 1033, 1039–40.

the time of this writing, the appeal of the district court order is pending before the United States Court of Appeals for the Tenth Circuit.¹⁸⁸

Then, on December 14, 2005, a group of U.S. citizen nonresident students attending state universities in California filed a class-action suit in California state court.¹⁸⁹ They, too, maintained that their host state was violating federal law and the United States Constitution.¹⁹⁰ Pursuant to a California civil rights statute, they also sought damages to compensate them for the extra tuition they paid, over and above that charged to illegal aliens.¹⁹¹ In September 2006, the Yolo County district judge hearing the case issued a cursory order finding that the plaintiffs possessed standing to bring their lawsuit but upholding the statute against similar challenges with little explanation.¹⁹² The plaintiffs then appealed to the California Court of Appeals, where the case is pending at the time of this writing.¹⁹³

This section describes the preemption claims upon which the challenges to the Kansas and California laws turn and answers the counterarguments made by attorneys defending the state laws. The legal challenges to these in-state tuition laws go well beyond federal preemption to include Equal Protection Clause claims, Privileges and Immunities Clause claims, and state law claims. However, the heart of the legal challenges to the Kansas and California laws is the fact that Congress has preempted them, both expressly and through implied preemption. Accordingly, I focus on the preemption issues below.

A. *The Text of the State Statutes*

Although the ten states' statutes differ in minor respects, they are all drafted from the same model. The Kansas law, which is a fairly representative version, reads as follows:

188. Plaintiff-Appellants' Opening Brief, *Day v. Bond*, No. 05-3309 (10th Cir. Oct. 17, 2005).

189. Silverstein, *supra* note 173, at B3.

190. Class Action Complaint for Damages ¶ 3, *Martinez v. Regents of the Univ. of Cal.*, No. CV 05-2064 (Cal. Super. Ct. Dec. 14, 2005).

191. *Id.* ¶¶ 175–177.

192. Order on Demurrers, Motion to Strike and Motions by Proposed Intervenors at 7–8, *Martinez v. Regents of the Univ. of Cal.*, No. CV 05-2064 (Cal. Super. Ct. Oct. 4, 2006).

193. California Courts – Appellate Court Case Information, *Martinez v. Regents of the Univ. of Cal.*, No. C054124, http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=3&doc_id=54103&doc_no=C054124&search=party&start=1&query_partyLastNameOrOrg=martinez&query_partyFirstName=robert (last visited May 8, 2007).

76-731a. Certain persons without lawful immigration status deemed residents for purpose of tuition and fees.

(a) Any individual who is enrolled or has been accepted for admission at a postsecondary educational institution as a postsecondary student shall be deemed to be a resident of Kansas for the purpose of tuition and fees for attendance at such postsecondary educational institution.

(b) As used in this section:

(1) "Postsecondary educational institution" has the meaning ascribed thereto in K.S.A. 74-3201b, and amendments thereto; and

(2) "Individual" means a person who (A) has attended an accredited Kansas high school for three or more years, (B) has either graduated from an accredited Kansas high school or has earned a general educational development (GED) certificate issued within Kansas, regardless of whether the person is or is not a citizen of the United States of America; and (C) in the case of a person without lawful immigration status, has filed with the postsecondary educational institution an affidavit stating that the person or the person's parents have filed an application to legalize such person's immigration status, or such person will file such an application as soon as such person is eligible to do so or, in the case of a person with a legal, nonpermanent immigration status, has filed with the postsecondary educational institution an affidavit stating that such person has filed an application to begin the process for citizenship of the United States or will file such application as soon as such person is eligible to do so.

(c) The provisions of this section shall not apply to any individual who:

(1) Has a valid student visa; or

(2) At the time of enrollment, is eligible to enroll in a public postsecondary educational institution located in another state upon payment of fees and tuition required of residents of such state.

(d) Any individual who: (1) files an affidavit which contains false information; (2) fails to file an application to legalize such person's immigration status within one year of becoming eligible; (3) fails to begin the process for citizenship within one year of becoming eligible; or (4) fails to maintain an active application for citizenship after filing therefor shall not be deemed a resident of the state of Kansas for the purpose of tuition and fees. In addition, such individual shall be required to repay the difference between the amount of fees and tuition actually paid and the amount such person would have paid as a nonresident of the state of Kansas, plus interest at a rate not to exceed the maximum under K.S.A. 16-201, and amend-

ments thereto, for the time such individual was enrolled as a resident pursuant to this section.¹⁹⁴

There are several defining elements that are common to most of the state statutes. First, nine of the ten states attempt to evade the requirements of 8 U.S.C. § 1623 by making eligibility for in-state tuition rates contingent upon attending a high school in the state for three years, rather than upon “residing” in the state for any period of time. As noted above, many legislators who voted in favor of the bills were not aware of this evasion; they described their bills during legislative debates as providing benefits based upon residence in the state.¹⁹⁵ Second, all of the statutes require an alien who seeks the benefit of in-state tuition rates to sign an affidavit stating that he or she intends at some undefined point in the future to become a U.S. citizen and that he or she will “[file] an application to legalize such person’s immigration status . . . as soon as such person is eligible to do so.”¹⁹⁶ Never mind that such an application does not exist. Under current immigration law, virtually all of the illegal aliens who might take advantage of this tuition benefit have no route to legal status, much less U.S. citizenship.¹⁹⁷ Although this affidavit requirement is legally meaningless, in terms of reflecting any existing path to adjustment of status, it was undoubtedly attractive to state legislators who were unfamiliar with federal immigration laws and who may have been on the fence about passing tuition bills for illegal aliens.

Third, four of the state statutes exclude from the benefit nonimmigrant aliens who are lawfully present in the United States.¹⁹⁸ Some do so in laymen’s terms, such as Kansas’s exclusion of any individual

194. KAN. STAT. ANN. § 76-731a (Supp. 2005).

195. See discussion *supra* Part III.A. The one exception is Nebraska, which expressly refers to residence in defining eligibility to receive in-state tuition. “(5) Except as provided in subdivision (8) of this section, such student, if an alien, has applied to or has a petition pending with the United States Immigration and Naturalization Service to attain lawful status under federal immigration law and *has established a home in Nebraska* for a period of at least one hundred eighty days where he or she is habitually present with the bona fide intention to make this state his or her permanent *residence*, supported by documentary proof.” NEB. REV. STAT. § 85-502 (Supp. 2006) (emphasis added).

196. KAN. STAT. ANN. § 76-731a(b)(2).

197. A person who has been unlawfully present in the United States for more than 180 days may not normally adjust to F, M, or J nonimmigrant (student) status. See 8 U.S.C. § 1182(a)(9)(B)(i) (2000).

198. The four states that do so are California, Kansas, New York, and Utah. See CAL. EDUC. CODE § 68130.5 (West Supp. 2003); KAN. STAT. ANN. § 76-731a (Supp. 2005); N.Y. EDUC. LAW § 6301.5 (Consol. Supp. 2007); UTAH CODE ANN. § 53B-8-106 (2006).

who “[h]as a valid student visa.”¹⁹⁹ Others do so in more opaque terms. For example, California, New York, and Utah exclude every “nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code.”²⁰⁰ What most legislators probably did not know was that this “paragraph” of the United States Code is actually many pages long, describing every category of lawful visa holder under federal law. Notably, foreign students who played by the rules and obtained F, J, or M visas would thereby be denied this valuable tuition benefit.

Finally, some of the statutes were written to exclude U.S. citizens from the benefit, although this exclusion is not always apparent at first glance. For example, Kansas legislators included a clause that denied the benefit to any individual who “is eligible to enroll in a public post-secondary educational institution located in another state upon payment of fees and tuition required of residents of such state.”²⁰¹ Because state residency laws operate in complimentary fashion so that every U.S. citizen is a “resident” of a state, this provision excluded all U.S. citizens who were not already residents of Kansas.

B. Express Preemption under 8 U.S.C. § 1623

The simplest and most direct form of preemption under the Supremacy Clause of Article VI of the United States Constitution occurs when a federal law, by its own terms, displaces a particular set or type of state laws through express preemption.²⁰² That is the form of preemption that occurs under 8 U.S.C. § 1623. It is an express statement by Congress that such a law may not be enacted and shall have no effect. As noted above, the plain meaning of 8 U.S.C. § 1623 is difficult to escape; it very clearly prohibits the offering of resident tuition rates to illegal aliens unless all U.S. citizens receive resident tuition rates. The language of the statute bears repeating:

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount,

199. KAN. STAT. ANN. § 76-731a(c)(1).

200. CAL. EDUC. CODE § 68130.5(a); N.Y. EDUC. LAW § 6301.5; UTAH CODE ANN. § 53B-8-106(1).

201. KAN. STAT. ANN. § 76-731a(c)(2).

202. See generally ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.2.2 (1997).

duration, and scope) without regard to whether the citizen or national is such a resident.²⁰³

Clearly, Congress sought to prohibit states from offering resident tuition rates to illegal aliens by making it impossibly expensive to do so. Any state offering this benefit would have to kill the goose that lays the golden egg—nonresident tuition from out-of-state students. It is difficult to read this section and come to any other conclusion.

The Supreme Court has consistently stressed that “the purpose of Congress is the ultimate touchstone” of any preemption analysis.²⁰⁴ In ascertaining the purpose of Congress, the first reference point must be the committee report on a bill. As the Supreme Court has noted, “the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill, which ‘represent the considered and collective understanding of those [members of Congress] involved in drafting and studying proposed legislation.’”²⁰⁵ The Supreme Court has also identified conference reports and statements from a bill’s proponents as valid sources of legislative intent: “To be sure, we gain only limited insight into congressional intent from statements made during floor debate and from conference reports, but we have always relied heavily upon authoritative statements by proponents of bills in our search for the meaning of legislation.”²⁰⁶ As the Fourth Circuit has recognized, “conference reports are the most persuasive evidence of legislative intent, after the statute itself.”²⁰⁷ The conference committee report accompanying Section 507 of H.R. 2202 (which would become 8 U.S.C. § 1623) was straightforward and unconditional: “This section provides that illegal aliens are not eligible for *in-state tuition rates* at public institutions of higher education.”²⁰⁸

The understanding of the conference report—that illegal aliens would not be eligible for in-state tuition rates—is consistent with the recorded statement of every member of Congress who addressed the issue. There were a total of four statements on the subject. Represen-

203. 8 U.S.C. § 1623 (2000).

204. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

205. *Eldred v. Ashcroft*, 537 U.S. 186, 209 n.16 (2003) (quoting *Garcia v. United States*, 469 U.S. 70, 76 (1984)) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

206. *INS v. Phinpathya*, 464 U.S. 183, 204 (1984) (citing *Lewis v. United States*, 445 U.S. 55, 63 (1980); *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976)).

207. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881 (4th Cir. 1996) (citing *Davis v. Lukhard*, 788 F.2d 973, 981, *cert. denied*, 479 U.S. 868 (1986)).

208. H.R. REP. NO. 104-828, at 240 (1996) (Conf. Rep.) (emphasis added).

tative Christopher Cox, one of the leading proponents of the measure, explained it in unambiguous terms:

What else does he want dropped from the bill after it was passed by a historic bipartisan margin in this House of 305 to 123? The President wants to drop the provision that says that—now listen carefully to this because it is a shocker—that the President would be in favor of this kind of public benefit to illegal aliens, people who have broken the law here in this country. He wants to drop the part of the bill that says that when somebody comes from Thailand, when somebody comes from Russia, when somebody comes from you name it, it is a big world, into your State, they will not get in-State tuition benefits at your State college.

Now if I move from California to Indiana, I am not going to get in-State benefits because I am from California, but illegal aliens, unless we pass this bill, are going to get in-State tuition. *Title V says illegal aliens are not eligible for in-State tuition at public colleges, universities, technical and vocational schools.*²⁰⁹

Representative Dana Rohrabacher also spoke in favor of the provision and in opposition to President Clinton:

He promised us he would help us solve this problem. Tonight he is telling us that he will shut down the government unless we agree to give welfare payments to illegal immigrants [in] our State. He will shut down the government unless we agree to let people who have never paid into the system receive Social Security benefits, that he is going to shut down the government unless illegal aliens get the same tuition as local residents.²¹⁰

The legislative understanding of 8 U.S.C. § 1623 in the United States Senate was the same. Senator Alan Simpson, the principal sponsor of the Senate version of the bill, spoke of the provision twice. He summarized it in the same way: “Without the prohibition on States treating illegal aliens more favorably than U.S. citizens, States will be able to make illegals eligible for reduced in-State tuition at taxpayer-funded State colleges.”²¹¹ The next day, he reiterated this unambiguous legislative intent: “Illegal aliens will *no longer be eligible* for reduced in-State college tuition.”²¹² No competing interpretation of the provision was offered.

209. 142 CONG. REC. H11, 376–77 (1996) (statement of Rep. Cox) (emphasis added).

210. *Id.* at 378–79 (statement of Rep. Rohrabacher).

211. 142 CONG. REC. S11, 508 (1996) (statement of Sen. Simpson).

212. 142 CONG. REC. S11, 713 (1996) (statement of Sen. Simpson) (emphasis added).

Faced with the plain language of 8 U.S.C. § 1623 and the unmistakable intent of Congress that “illegal aliens are not eligible for in-state tuition rates at public institutions of higher education,”²¹³ attorneys defending the state statutes have attempted to persuade courts to adopt a bizarrely narrow reading of the text of 8 U.S.C. § 1623. According to these attorneys, Congress was only interested in prohibiting those states that used *residence* as a criterion from offering in-state tuition rates to illegal aliens, but Congress had no objection to states providing in-state tuition rates to illegal aliens using other criteria.²¹⁴ This is an unsupportable reading of the statutory text for the three following reasons.

First, the most plausible explanation for the phrasing of 8 U.S.C. § 1623 is that Congress simply intended to prevent state postsecondary institutions from providing resident tuition rates to illegal aliens. Rather than use the phrase “eligible for resident tuition rates,” Congress chose a phrase that conveyed the same meaning, but was more encompassing, in order to stop states from circumventing the statute by calling resident tuition rates something else. Accordingly, the drafters of the text chose the phrase “eligible on the basis of residence within a State . . . for any postsecondary education benefit.” This is simply a broader way of saying “eligible for resident tuition rates.” The phrasing selected by Congress was broad enough to encompass resident tuition rates, resident fee rates, resident tuition discounts, and scholarships for state residents. In other words, 8 U.S.C. § 1623 refers to “residence” in defining the benefit because Congress was concerned about states offering illegal aliens a particular benefit—*resident* tuition rates. Congress chose the phrase “on the basis of residence within a State” to *define the benefit, not to define a mechanism through which the benefit could not be offered*. Ironically, the attorneys defending the state statutes have twisted Congress’s language—which was intended to defeat state evasion—to evade Congress’s intent. As is explained below, this statutory interpretation yields absurd results.

Second, the defenders’ interpretation creates a semantic loophole so large that it swallows the rest of the statute. Under this strained reading of 8 U.S.C. § 1623, Congress did not mind if states afforded in-state tuition rates to illegal aliens as long as the word “residence” was avoided. Therefore, all a state needed to do in order to avoid violating 8 U.S.C. § 1623 when offering in-state tuition rates to illegal aliens was to use a phrase that equates to “residence” without actually

213. H.R. REP. NO. 104-828, at 240 (1996) (Conf. Rep.).

214. See Memorandum in Support of Defendants’ Motion to Dismiss at 21–26, *Day v. Sebelius*, 376 F. Supp. 2d 1022 (D. Kan. 2005) (No. 04-4085-RDR).

saying it—such as “attendance at a high school in the state,” or “graduation from a high school in the state,” or “possession of a driver’s license from the state,” or “intent to work in the state.” According to this theory, any state could avoid Congress’s demands by simply choosing a useful synonym for residing in the state. Congress, according to these defenders of the state statutes, created a massive loophole in federal immigration law for the convenience of any state willing to play semantic games.

Third, this implausible reading of 8 U.S.C. § 1623 violates one of the oldest canons of statutory construction—the “whole act” rule. The attorneys defending the state statutes interpret the words “on the basis of residence” extremely narrowly, to mean by employing a specific requirement that the individual reside in the state for a designated period of time.²¹⁵ However, this narrow definition ignores the context of the rest of the IIRIRA and the manifest intent of Congress. The whole act rule demands a “holistic” approach when interpreting a statute, taking the entire statute into account, rather than focusing on terms in isolation.²¹⁶ As the Supreme Court has explained, “[w]hen ‘interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature’”²¹⁷ The unmistakable purpose of the IIRIRA was to discourage illegal immigration generally and to increase specific penalties for violations of U.S. immigration laws, while ensuring that states did not undermine congressional efforts.²¹⁸ This narrow reading of 8 U.S.C. § 1623—which supposes that Congress really did not mind if states offered in-state tuition rates to illegal aliens as long as the right criteria were used—is inconsistent with the general purpose of the Act.

In addition to misreading the federal statute so that it only prohibits the offering of in-state tuition rates to illegal aliens on the basis of residency, the attorneys defending the states in question ignore the fact

215. *See id.*

216. *See, e.g.,* United Savings Ass’n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988).

217. *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 19 How. 183, 194 (1857)).

218. For example, another provision of the IIRIRA, 8 U.S.C. § 1373 (2000), prohibits states and cities from adopting policies that prevent law enforcement officers from communicating with federal immigration officers about the legal status of aliens (also known as “sanctuary” policies).

that the state statutes effectively operate on the basis of residency. It should be noted that, in most states, attendance at a high school in the state and residence within the state are linked to one another, both de jure and de facto. Most states establish such a connection legally, both in statutes and in case law. For example, a California statute explicitly links high school attendance and residence in the state. California Education Code Section 48200 requires that a pupil attend school in the district in which the parent resides. “Section 48200 embodies the general rule that parental *residence* dictates a pupil’s proper school district. . . . Section 48200 ‘generally requires that children attend school in the district where the *residence* of either the parent or legal guardian is located.’”²¹⁹ In this way, high school attendance in California serves as a de jure proxy for residence in California. In addition, it is plain that high school attendance in a state is a de facto surrogate for residence in the state. Even if there were no de jure link between residence and high school attendance under California law, there would be an undeniable de facto link. Physical presence in California is necessary to satisfy its in-state tuition law for illegal aliens, which requires high school attendance *in California*.²²⁰ For an illegal alien, physical presence is the de facto equivalent to “residence” in California, which the state cannot legally acknowledge in any event.²²¹

The only other argument offered by attorneys defending the state laws is that even if the state in question does offer an educational benefit on the basis of residence within a state, the state satisfies the second half of 8 U.S.C. § 1623 by offering a few nonresident U.S. citizens the opportunity to qualify for in-state tuition rates too.²²² For example, in California, it appears that some U.S. citizens who attended a private boarding school in California (while retaining their state resident status elsewhere) would be able to qualify for in-state tuition rates under the law.²²³ They argue that because a select group of U.S. citizens might qualify to receive benefits under the law, the California law meets the requirements of 8 U.S.C. § 1623.

219. *Katz v. Los Gatos-Saratoga Joint Union High School Dist.*, 11 Cal. Rptr. 3d 546, 553 (Cal. Ct. App. 2004) (quoting 67 Ops. Cal. Atty. Gen. 452, 453 (1984)) (emphasis added).

220. CAL. EDUC. CODE § 68130.5(a)(1) (West Supp. 2003) (emphasis added).

221. Federal law prohibits a state from legally acknowledging an illegal alien’s “residence” in any state. 8 U.S.C. § 1101, *et seq.* (2000); *Elkins v. Moreno*, 435 U.S. 647, 666 (1978).

222. See Memorandum of Points and Authorities in Support of Demurrer to Complaint at 8–9, *Martinez v. Regents of the Univ. of Cal.*, No. CV 05-2064 (Cal. Super. Ct. Dec. 14, 2005).

223. CAL. EDUC. CODE § 68130.5 (West Supp. 2003).

The problem with this argument is that the text of 8 U.S.C. § 1623 makes clear that *all* U.S. citizens must receive in-state tuition rates if a state confers that benefit on an illegal alien, not just a few U.S. citizens who meet certain additional requirements. States are barred from offering in-state tuition rates to an illegal alien “unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.”²²⁴ Two aspects of the statute’s phrasing confirm that all U.S. citizens attending public universities in the state must receive in-state tuition rates in order to satisfy 8 U.S.C. § 1623. First, Congress made it clear that a state would have to cease considering the state residency of U.S. citizens altogether when determining tuition rates. “[W]ithout regard to whether the citizen or national is such a resident” plainly conveys that condition. Second, the text states that a U.S. citizen must be entitled to the “benefit” itself, not merely an opportunity to qualify for the benefit. Indeed, only a benefit can possess “an amount, duration, and scope.” An opportunity to meet certain criteria in order to receive a benefit does not have “an amount, duration, and scope.” For these reasons, a state cannot satisfy the requirements of 8 U.S.C. § 1623 by simply providing to a select group of U.S. citizens the opportunity to jump through a set of hoops and *potentially* qualify for the benefit.

In any case, these interpretive arguments must not be viewed with tunnel vision. The biggest problem for the ten states that have enacted such laws is that every word of the legislative record indicates that Congress intended to completely prohibit states from offering in-state tuition rates to illegal aliens. The interpretations offered by the attorneys defending the states cannot be squared with this intent. As the Tenth Circuit has opined, “[o]ur goal in analyzing the meaning of any statute is to ‘give effect to the will of Congress.’”²²⁵ Or, as the Ninth Circuit has put it, “[w]e interpret a federal statute by ascertaining the intent of Congress and by giving effect to its legislative will.”²²⁶ When the intent of the Legislature is clear—as is undoubtedly the case here—the statute must be interpreted to advance the legislative agenda unless the language of the statute absolutely precludes such an interpretation. In the words of the Supreme Court, “[o]ur ob-

224. 8 U.S.C. § 1623(a) (2000).

225. *United States v. Nichols*, 184 F.3d 1169, 1171 (10th Cir. 1999) (quoting *Griffin v. Oceanic Contractors, Inc.*, 548 U.S. 564, 570 (1982)).

226. *Hernandez v. Ashcroft*, 345 F.3d 824, 838 (9th Cir. 2003) (quoting *Bedroc, Ltd. v. United States*, 314 F.3d 1080, 1083 (9th Cir. 2002) (quoting *Ariz. Appetito’s Stores, Inc. v. Paradise Vill.*, 893 F.2d 216, 219 (9th Cir. 1990))).

ligation is to give effect to congressional purpose so long as the congressional language does not itself bar that result.”²²⁷ That obligation cannot be satisfied under any interpretation of 8 U.S.C. § 1623 offered by the attorneys defending the states in question.

C. *Implied Preemption Under DeCanas v. Bica*

Express preemption is not the only way in which state laws may be displaced by Congress. In conducting preemption analysis, courts must look for: (1) express preemption by congressional statement; (2) field preemption—where the federal regulatory scheme is so pervasive as to create the inference that Congress intended to leave no room for the states to supplement it; or (3) conflict preemption, where compliance with both state and federal law is impossible or state law prevents the accomplishment of congressional objectives.²²⁸ The latter two categories are collectively described as “implied preemption.”²²⁹ Although a great deal of attention has rightly been focused on express preemption by 8 U.S.C. § 1623, the state laws in question are barred by implied preemption as well. In other words, even if 8 U.S.C. § 1623 had never been enacted by Congress, the state laws would still be unconstitutional due to the fact that they are impliedly preempted by other provisions of the Immigration and Nationality Act (INA).

The Supreme Court explained how implied preemption occurs in immigration law in the landmark case of *De Canas v. Bica*.²³⁰ In *De Canas*, the Court described three circumstances under which a state or local regulation affecting immigration is displaced through implied preemption. A state regulation is preempted if: (1) it falls into the narrow category of a “regulation of immigration;” (2) the federal government has completely occupied the field; or (3) if the state regulation “conflicts in any manner with any federal laws or treaties.”²³¹ Under the third category, a state law is unconstitutional if it “‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the INA.’”²³² The in-state tuition laws are textbook cases of conflict preemption under the third prong of *De Canas*. They stand as an obstacle to the accomplishment of the objectives of Congress for three reasons.

227. *Johnson v. United States*, 529 U.S. 694, 710 n.10 (2000).

228. *See Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

229. *See CHEMERINSKY*, *supra* note 202, at § 5.2.1.

230. 424 U.S. 351 (1976).

231. *Id.* at 355, 357.

232. *Id.* at 363 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

First, they plainly conflict with the objective of Congress expressed in federal law: “It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.”²³³ Eligibility for in-state tuition rates is certainly a “public benefit,” as that term is used in federal immigration law.²³⁴ Not only is it a public benefit, it is an extremely valuable one, worth tens of thousands of dollars over the course of a college education. By providing this benefit to aliens unlawfully present in the United States, the ten states stand in conflict with the “compelling government interest” expressly spelled out by Congress.

Second, and more importantly, these state laws stand as a general obstacle to the enforcement of the INA. By their own terms, the laws make it impossible for an alien to enjoy the benefit of in-state tuition rates and comply with federal law. For example, the first clause of the California law excludes from the benefits of the law any “nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code.”²³⁵ In other words, it excludes any alien holding a nonimmigrant visa. Indeed, lawful permanent residents aside, only an *illegal* alien can enjoy in-state tuition rates.²³⁶ Moreover, he must continue to remain in the United States and attend university in violation of federal law in order to receive those benefits. If such an alien leaves the United States, as required by federal law, he loses eligibility for the benefit. On the other hand, if he obtains a student visa to attend college in compliance with federal law, he loses eligibility for the benefit. This legal framework plainly encourages illegal aliens to continue breaking federal law. Receiving benefits under the state law and following federal law is therefore an “impossibility” for an alien. This is, *ipso jure*, conflict preemption.²³⁷ As the Supreme Court put it in *Hines v. Davidowitz*, a 1941 immigration law implied preemption case, “states cannot, incon-

233. 8 U.S.C. § 1601(6) (2000).

234. *See* 8 U.S.C. § 1621(c)(1) (2000) (defining “State or local public benefit” to include postsecondary education).

235. CAL. EDUC. CODE § 68130.5(a) (West Supp. 2003).

236. Aliens who are lawful permanent residents are also eligible for resident tuition on the same terms as U.S. citizens. They were eligible for resident tuition rates long before the ten states passed the laws in question. *See, e.g.*, CAL. EDUC. CODE § 68062(h) (West Supp. 2003).

237. In contrast, the California Court of Appeals, when reviewing California’s previously-controlling statute *denying* in-state tuition rates to illegal aliens (§ 68062), found that law to be *consistent* with federal law. “Federal law forbids aliens to enter the United States without applying for admission.” *Regents of the Univ. of Cal. v. Super. Ct.*, 276 Cal. Rptr. 197, 200–01 (Cal. Ct. App. 1990).

sistently with the purpose of Congress, conflict or interfere with . . . the federal law.”²³⁸

The third reason that the in-state tuition statutes fail on the conflict prong of *De Canas* is that they all use terms that are inconsistent with federal law, and they require state officers to make independent judgments about students’ immigration statuses. It was such transgressions that led to the demise of California’s Proposition 187 in the United States District Court for the Central District of California in the case of *League of United Latin American Citizens v. Wilson (LULAC)*.²³⁹ The Court held that it is impermissible for a state statute to use terms to describe aliens that are in any way inconsistent with federal law.²⁴⁰ In that case, the Court found that Proposition 187 used the term “lawfully admitted” when federal law used the term “lawfully present.”²⁴¹ This inconsistency of terminology was sufficient to preempt the offending state law in that case.²⁴² All of the in-state tuition laws use terms that are inconsistent with federal law. For example, the Kansas law uses the term “person without lawful immigration status” and the phrase “application to legalize such person’s immigration status.”²⁴³ Neither appears anywhere in federal immigration law. Such peccadilloes of terminology may seem insignificant, but they were sufficient to render Proposition 187 unconstitutional.

Moreover, it is plain that the state laws also require state officials to make judgments about an alien’s immigration status. Because nine of the ten states deny benefits to aliens possessing legal nonimmigrant status, state officials must make independent judgments regarding whether or not students are disqualified by being nonimmigrant aliens under 8 U.S.C. §1101(a)(15).²⁴⁴ According to the *LULAC* court, “a state cannot, on its own, determine who is or is not entitled to be present in the United States.”²⁴⁵ Plainly, the state laws require university officials to do exactly that. Perversely, they then require those officials to penalize those who are lawfully present in the United States.

238. *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941).

239. 908 F. Supp. 755 (C.D. Cal. 1995).

240. *Id.* at 772.

241. *Id.*

242. *Id.* California Governor Gray Davis declined to appeal the state’s loss in federal district court to the Ninth Circuit. Patrick J. McDonnell, *Davis Won’t Appeal Prop. 187 Ruling, Ending Court Battles*, L.A. TIMES, July 29, 1999, at 1.

243. KAN. STAT. ANN. § 76-731a(b)(2)(C) (Supp. 2005).

244. *See, e.g.*, CAL. EDUC. CODE § 68130.5(a) (West Supp. 2003).

245. 908 F. Supp. at 772 (citing *De Canas v. Bica*, 424 U.S. 351, 355 (1976)).

In summary, the grounds of preemption that render these state laws unconstitutional are numerous and varied. The conflict with the intent of Congress is obvious. If we take the Supremacy Clause seriously, then these laws must be regarded as unconstitutional.

VI.

THE DREAM ACT

Enter proponents of the DREAM Act. First introduced by Senator Orrin Hatch on August 1, 2001, the bill would repeal 8 U.S.C. § 1623 as well as create an amnesty for illegal alien students who meet certain criteria.²⁴⁶ The 2001 DREAM Act bill never made it out of committee. Subsequent versions of the DREAM Act would be introduced in 2003, 2005, 2006, and 2007.²⁴⁷

It is important to note that in the 2003 version of the DREAM Act, congressional proponents inserted an unusual provision that would reappear in subsequent versions of the bill.²⁴⁸ Seeing that by July 2003, seven states had already violated 8 U.S.C. § 1623—Texas, California, New York, Utah, Washington, Illinois, and Oklahoma²⁴⁹—the sponsors of the DREAM Act offered the offending states a pardon. The text of the DREAM Act was altered to include an unusual reprieve to the states that had already violated federal law. In addition to repealing 8 U.S.C. § 1623 to pave the way for states to legally offer in-state tuition rates to illegal aliens in the future, the bill stated, “EFFECTIVE DATE—The repeal . . . shall take effect as if included in the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.”²⁵⁰ In other words, it would be a retroactive repeal—as if 8 U.S.C. § 1623 had never been enacted.

Retroactive repeals are anomalous in federal law. Congress virtually never repeals a statute in such a fashion as to create the legal

246. S. 1291, 107th Cong. §§ 2, 3 (2001).

247. S. 1545, 108th Cong. (2003); S. 2075, 109th Cong. (2005); H.R. 5131, 109th Cong. (2006); S. 2611, 109th Cong. §§ 621–632 (2006); H.R. 1275, 110th Cong. (2007); S. 774, 110th Cong. (2007); S. 1348, 110th Cong. §§ 621–632 (2007) (as amended by S.A. 1150 §§ 612–619).

248. The only subsequent version in which the provision did not appear was the comprehensive Senate immigration reform bill of 2007. S. 1348.

249. See *More In-State Tuition for Illegal Immigrants*, CNN.COM, May 22, 2003, <http://www.cnn.com/2003/EDUCATION/05/22/immigrant.tuition.ap>.

250. S. 1545 § 3(b) (2003). This version of the DREAM Act was introduced in the United States Senate by Senator Orrin Hatch on July 31, 2003. S. 1545. The original version of the DREAM Act, which was introduced by Senator Hatch on August 1, 2001, stated simply, in relevant part: “Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Division C of Public Law 104-208; 110 Stat. 3009-672; 8 U.S.C. 1623) is repealed.” S. 1291 § 2.

fiction that the repealed statute never existed. The retroactive repeal provision was an undeniable indication that congressional proponents of the DREAM Act believed that the states that had already made illegal aliens eligible for in-state tuition rates were in violation of 8 U.S.C. § 1623 and potentially exposed to liability for their violations of federal law. There is no other plausible explanation for taking the extraordinary step of making the repeal retroactive. Mere opposition to 8 U.S.C. § 1623 does not account for it. Nor does a desire to encourage more states to offer in-state tuition rates to illegal aliens. A normal repeal provision would satisfy such objectives. A retroactive repeal can be plausibly explained only by a desire to cure the legal infractions of those states that had already violated 8 U.S.C. § 1623.

Realizing, perhaps, that the DREAM Act's prospects for being enacted on its own merits as a free-standing bill were limited, Senate proponents in 2006 hitched it to what appeared to be a fast-moving train. Just before the Senate Judiciary Committee approved the first version of the Comprehensive Immigration Reform Act of 2006²⁵¹ on March 27, 2006, Senator Richard Durbin (whose home state of Illinois is one of the ten that offers in-state tuition rates to illegal aliens) offered the DREAM Act as an amendment.²⁵² It passed on a voice vote and remained in the restyled "compromise" version of the bill that the Senate passed on May 25, 2006.²⁵³ The bill never became law, as the House of Representatives did not vote on it before the end of the 109th Congress. The House had already passed a competing bill—one that emphasized stricter enforcement of immigration laws.²⁵⁴ In the resulting stalemate, neither bill received a vote in the opposite chamber.²⁵⁵

Although the Comprehensive Immigration Reform Act of 2006 was never voted on by the House of Representatives in the 109th Congress, the DREAM Act reappeared early in the 110th Congress. A free-standing DREAM Act bill was introduced in the House of Repre-

251. S. 2611, 109th Cong. (2006).

252. See 152 CONG. REC. 37, 2522–23 (daily ed. Mar. 29, 2006) (statement of Sen. Sessions).

253. S. 2611 §§ 621–632. For the record of the Senate vote, see U.S. Senate: Legislation & Records Home, Votes, Roll Call Vote, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00157 (last visited May 10, 2007).

254. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

255. See Thomas (Library of Congress), H.R. 4437, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04437:@@X> (last visited May 10, 2007); Thomas (Library of Congress), S. 2611, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN02611:@@X> (last visited May 10, 2007).

sentatives by Representative Howard Berman on March 1, 2007;²⁵⁶ and a Senate equivalent was introduced on March 6, 2007, by Senator Durbin.²⁵⁷ More significantly, the DREAM Act once again made its way into the Senate's comprehensive immigration package—the Comprehensive Immigration Reform Act of 2007 introduced by Senator Reid on May 9, 2007.²⁵⁸

This time around, the bill's authors took a slightly different approach. Instead of simply repealing 8 U.S.C. § 1623, the bill sought to create a massive amnesty for virtually all illegal aliens who were in the United States prior to January 1, 2007, in the form of a so-called "Z visa."²⁵⁹ The terms of 8 U.S.C. § 1623 would then be made inapplicable to the millions of aliens who received amnesty in the form of a Z visa: "Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1623) shall have no force or effect with respect to an alien who is a probationary Z or Z nonimmigrant."²⁶⁰ This would mean that previously-illegal aliens would be treated as lawfully present in the United States and states would be free to offer them in-state tuition rates. It would be an effective repeal of 8 U.S.C. § 1623 with respect to the illegal alien population already in the United States, although the 8 U.S.C. § 1623 would remain in effect with respect to future illegal aliens.

It should be noted that, in addition to repealing 8 U.S.C. § 1623, either expressly or effectively, the DREAM Act would also offer a separate route to lawful permanent resident status to more than one million illegal alien students.²⁶¹ This wide-open path to legal status—and then citizenship—would apply to illegal aliens who entered the country before the age of sixteen, and remained in the country for a stipulated period of time.²⁶² Beyond that, the only significant requirements that an alien would have to satisfy would be the obtaining of a

256. American Dream Act, H.R. 1275, 110th Cong. (2007).

257. DREAM Act of 2007, S. 774, 110th Cong. (2007).

258. S. 1348, 110th Cong. §§ 621–632 (2007) (as amended by S.A. 1150 §§ 612–619).

259. S. 1348 (as amended by S.A. 1150 §§ 601–602).

260. *Id.* (as amended by S.A. 1150 § 616(a)).

261. Jeanne Batalova & Michael Fix, *New Estimates of Unauthorized Youth Eligible for Legal Status Under the DREAM Act*, IMMIGR. BACKGROUNDER (Migration Pol'y Inst., D.C.), Oct. 2006, at 1 (explaining that the DREAM Act offers a path to conditional legal status, which could become permanent if the conditional legal residents attend college or join the military within six years of receiving conditional legal status).

262. In the 2007 Senate free-standing version of the DREAM Act, an alien was required to be in the United States at least five years to qualify. S. 774, 110th Cong. § 4(a)(1)(A) (2007). In the Comprehensive Immigration Reform Act of 2007, the DREAM Act provisions required eligible aliens to have been physically present in the

high school diploma or a GED earned in the United States, plus the completion of two years of postsecondary education (or two years of military service), in order to be eligible for adjustment to lawful permanent resident status.²⁶³ Under the 2007 Senate comprehensive immigration bill, DREAM Act beneficiaries would enjoy a fast track to lawful permanent resident status, becoming eligible for adjustment of status to lawful permanent resident only three years after the date of enactment.²⁶⁴ Beneficiaries would also be eligible for federal student loans and federal work-study programs.²⁶⁵ No such fast track to lawful permanent resident status exists for law-abiding foreign students possessing nonimmigrant visas. Nor are law-abiding foreign students on nonimmigrant visas eligible for federal student loans and work-study programs.²⁶⁶ Like many of the state laws that violated 8 U.S.C. § 1623 in the first place, the DREAM Act would treat illegal alien students more favorably than foreign students who had not violated federal immigration laws.

After a highly charged debate in the United States Senate in May and June of 2007, the DREAM Act faltered once again. The Senate comprehensive immigration bill in which it was included failed twice to achieve the necessary sixty votes for cloture on June 7, 2007, and the bill was withdrawn.²⁶⁷ Then, later the same month, the bill was revived. And once again it was defeated, falling fourteen votes short of the necessary sixty votes for cloture on June 28, 2007.²⁶⁸ At the time of this writing, a comprehensive immigration bill appears un-

United States since January 1, 2007. S. 1348 (as amended by S.A. 1150 § 614(a)(1)(A)).

263. For the Comprehensive Immigration Reform Act of 2007, these requirements are found in S.A. 1150 § 614(a)(1). In the 2007 Senate free-standing version of the bill, similar requirements were found at S. 774 § 5(d)(1).

264. S. 1348 (as amended by S.A. 1150 § 614(a)(1)).

265. *Id.* (as amended by S.A. 1150 § 616(b)).

266. 20 U.S.C. § 1091(a)(5) (2000).

267. Carl Hulse & Robert Pear, *Immigrant Bill, Lacking 15 Votes, Stalls in Senate*, N.Y. TIMES, June 8, 2007, at A1 (“The sweeping immigration overhaul endorsed by President Bush crumbled in the Senate on Thursday night, leaving the future of one of the administration’s chief domestic priorities in serious doubt. . . . Supporters of cutting off debate got only 45 of the 60 votes they needed; 50 senators opposed the cutoff. ‘We are finished with this for the time being,’ said Senator Harry Reid, Democrat of Nevada and the majority leader. . . .”).

268. Robert Pear & Carl Hulse, *Immigrant Bill Dies in Senate; Defeat for Bush*, N.Y. TIMES, June 29, 2007, at A1 (“President Bush’s effort to overhaul the nation’s immigration policy . . . collapsed Thursday in the Senate, with little prospect that it can be revived before Mr. Bush leaves office in 19 months. . . . [The Senate] voted, 53 to 46, to turn back a motion to end debate and move toward final passage.”).

likely to be enacted in 2007.²⁶⁹ Nor has either of the free-standing versions of the DREAM Act received a committee vote.²⁷⁰ In July of 2007, Senator Durbin indicated that he would attempt to attach the DREAM Act to a defense authorization bill as an amendment, on the theory that the DREAM Act might increase the number of individuals recruited into military service.²⁷¹ As of the time of this writing, he has not done so. In any event it appears that congressional proponents of the DREAM Act—unable to muster enough support to pass the bill on its own—have settled on a strategy of attaching it to legislation that stands a better chance of passage.

VII.

CONCLUSION

The decision of ten states to violate 8 U.S.C. § 1623 is more than just an interesting sideshow in the larger theater of U.S. immigration policy; it is a preempted action that should be invalidated by the courts reviewing the statutes in question. It is also poor policy, rewarding those who violate the law with a valuable subsidy while penalizing those aliens and out-of-state U.S. citizens who play by the rules. The DREAM Act, if passed, would pave the way for more states to make this mistake.

The far better approach for Congress to take in response to the ten states' defiance of federal law would be to impose significant penalties on states that violate 8 U.S.C. § 1623. It is now quite clear that some states are willing to ignore federal mandates in the immigration arena—an outcome that the Congress of 1996 evidently did not anticipate. The best way to bring such recalcitrant states into compliance with federal law is to threaten to remove the one thing that they cannot do without: federal funds. This option has been placed before Congress. On January 11, 2007, Congressman Elton Gallegly introduced the Fairness in Higher Education Act “[t]o amend the Higher Education Act of 1965 to prohibit assistance to institutions of higher education located in States that provide in-State tuition or other forms of student financial assistance to illegal aliens.”²⁷² This bill would deny

269. *Id.* (“Representative Zoe Lofgren, the California Democrat who is chairwoman of the House Judiciary subcommittee on immigration, said: ‘The Senate vote effectively kills comprehensive immigration reform for this Congress.’”).

270. THOMAS (Library of Congress), H.R. 1275, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR01275:@@X> (last visited July 3, 2007); THOMAS (Library of Congress), S. 774, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN00774:@@X> (last visited July 3, 2007).

271. 153 CONG. REC., S9201–9203 (July 13, 2007) (statement of Sen. Durbin).

272. H.R. 416, 110th Cong. (2007).

federal funding to all public postsecondary institutions in any state that enacted a law providing such assistance to illegal aliens.²⁷³ No doubt, the prospect of such a penalty would have a salutary effect on states that have offered in-state tuition rates to illegal aliens in the past and states that might consider doing so in the future. However, the one necessary component missing from the Fairness in Higher Education Act is the assignment of responsibility to a specific executive branch official to determine when a state has violated the law, to deny federal funds, and to report to Congress on a regular basis. In the sensitive realm of federal-state relations, executive branch officials can be tempted to ignore conflicts rather than to address them. With this modification of assigning a specific enforcement official, the enactment of such federal legislation would likely end state violations of 8 U.S.C. § 1623 and would do much to achieve Congress's statutory objective of "remov[ing] the incentive for illegal immigration provided by the availability of public benefits."²⁷⁴

Regardless of one's policy preferences in this area, it is difficult to ignore the deeper problem that is presented. The ten states that have violated 8 U.S.C. § 1623 have created a conflict that strikes at the core of the relationship between the states and the federal government. These states have produced a twenty-first century version of the nullification movement, defying federal law simply because they disagree with it.²⁷⁵ In many of the states, legislators acted with full knowledge of the countervailing federal law. In other states, they acted with disturbing ignorance or disregard of federal law. These legislators have challenged the basic structure of the Republic, brazenly violating the Supremacy Clause of the United States Constitution by passing laws that are expressly preempted.²⁷⁶ The DREAM Act

273. *Id.* § 2.

274. 8 U.S.C. § 1601(6) (2000).

275. One who favors providing in-state tuition rates to illegal aliens might regard this violation of federal law by the ten states to be a necessary evil in the pursuit of a desirable policy. However, it may be useful to put this latter-day nullification into perspective by reversing the ideological position of the nullifying states. To switch the ideological direction of this predicament, imagine if several states, dismayed by the bankruptcy and closing of hospitals due to illegal aliens routinely using emergency rooms for both emergency and non-emergency care, passed statutes prohibiting illegal aliens from using emergency rooms of public hospitals unless they provide cash. Such state statutes would violate the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd (2000), which requires hospitals to provide emergency medical care to all individuals, regardless of their immigration status or ability to pay for such care. Plainly, such state statutes would be preempted and would be intolerable in the face of the Supremacy Clause of the United States Constitution.

276. U.S. CONST. art. VI, § 2.

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would ignore this offense and, in so doing, would encourage states to defy federal law in the future.

In the struggle to enforce federal immigration laws, states cannot be allowed to undermine the efforts of the federal government. Enforcement is difficult enough, even if the federal government and the states are operating in concert with one another. The rule of law can be fully restored in immigration only if all levels of government are working to uphold it.

