Unauthorized Aliens, Higher Education, In-State Tuition, and Financial Aid: Legal Analysis

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Summary

The existence of a sizable population of "DREAMers" in the United States has prompted questions about unauthorized aliens' eligibility for admission to public institutions of higher education, in-state tuition, and financial aid. The term *DREAMer* is widely used to describe aliens who were brought to the United States as children and raised here but lack legal immigration status. As children, DREAMers are entitled to public elementary and secondary education as a result of the Supreme Court's 1982 decision in *Plyler v. Doe*. There, the Court struck down a Texas statute that prohibited the use of state funds to provide elementary and secondary education to children who were not "legally admitted" to the United States because the state distinguished between these children and other children without a "substantial" goal, in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Once DREAMers complete high school, however, they may have less access to public higher education. *Plyler's* holding was limited to elementary and secondary education, and the Court's focus on the young age of those whom Texas denied a "basic education" has generally been taken to mean that measures denying unauthorized aliens access to higher education may be subject to less scrutiny than the Texas statute was. Thus, several states have adopted laws or practices barring the enrollment of unauthorized aliens at public institutions of higher education. In addition, Congress has enacted two statutes that restrict unauthorized aliens' eligibility for "public benefits," a term which has generally been construed to encompass in-state tuition and financial aid. The first of these statutes, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA, P.L. 104-193), bars the provision of "state and local public benefits" to aliens who are "not lawfully present in the United States" unless the state enacts legislation that "affirmatively provides" for their eligibility. The second, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA, P.L. 104-208), bars states from providing "postsecondary education benefits" to aliens who are "not lawfully present" based on their residence in the state unless all U.S. citizens or nationals are eligible for such benefits, regardless of their residence.

State measures that variously *deny* or *grant* access to public higher education, in-state tuition, or financial aid have been challenged on the grounds that they violate the Equal Protection Clause, like the Texas measure at issue in *Plyler*. They have also been alleged to violate the Supremacy Clause of the U.S. Constitution, which establishes that federal law is "the supreme Law of the Land" and may preempt any incompatible provisions of state law. Based on the case law to date, it would appear that states do not, as a general matter, violate the Equal Protection or Supremacy Clauses by excluding unauthorized aliens from public institutions of higher education. On the other hand, access to public higher education has generally not been construed as a public benefit for purposes of PRWORA, such that it may only be provided to "unlawfully present" aliens if a state enacts legislation that affirmatively provides for their eligibility.

In-state tuition and financial aid have generally been seen as public benefits for purposes of PRWORA. However, courts have rejected the view that state statutes providing in-state tuition to unauthorized aliens are preempted unless they expressly refer to PRWORA, or to unauthorized aliens being eligible. Courts have also found that IIRIRA does not bar states from providing in-state tuition to unauthorized aliens who complete a certain number of years of high school in the state and satisfy other criteria. In one case, the court reached this conclusion because it construed IIRIRA as barring only the provision of in-state tuition based on residence in the state, not based on other factors. In another case, the court found that IIRIRA did not create a private right of action such that individuals may sue to enforce alleged violations.

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The existence of a sizable population of "DREAMers" in the United States[1] has prompted questions about unauthorized aliens' eligibility for admission to public institutions of higher education, in-state tuition, and financial aid.[2] The term *DREAMer* is widely used to describe aliens who were brought to the United States as children and raised here but lack legal immigration status.[3] As children, DREAMers are entitled to public elementary and secondary education as a result of the Supreme Court's 1982 decision in *Plyler v. Doe*.[4] There, the Court struck down a Texas statute that prohibited the use of state funds to provide elementary and secondary education to children who were not "legally admitted" to the United States because the state distinguished between these children and other children without a "substantial" goal, in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[5] The *Plyler* Court did not, however, purport to address unauthorized aliens' access to higher education, and several states subsequently adopted laws or practices barring their enrollment at public institutions of higher education.[6] Congress has also restricted unauthorized aliens' eligibility for "public benefits," a term which has generally been construed to include in-state tuition and financial aid.[7]

Emphasizing DREAMers' ties to the United States, including their attendance at public elementary and secondary schools,[8] some would permit them to remain in the United States legally, or expand their access to higher education. For example, in every Congress from the 109th to 113th, Members have introduced, either as separate bills or parts of other measures, versions of the Development, Relief, and Education for Alien Minors (DREAM) Act—from which DREAMers take their name—that would create a pathway to citizenship for them, as well as remove certain restrictions on states' ability to grant in-state tuition to unauthorized aliens.[9] No

[1] For estimates as to the number of persons who might benefit from enactment of some version of the Development, Relief, and Education for Alien Minors (DREAM) Act, see generally CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*, by (name redacted).

[2] The term "unauthorized alien" is used in this report to refer to aliens who entered or remained in the United States in violation of immigration law, and currently lack a legal immigration status. Depending upon their circumstances, such aliens could also be seen as unlawfully present in the United States. *But see infra* note 13.

[3] *See, e.g.*, Immigration Policy Center, Who and Where the DREAMers Are, *available at* http://www.immigrationpolicy.org/just-facts/who-and-where-dreamers-are.

[4] 457 U.S. 202 (1982).

[5] *Id.* at 205. The Texas measure was also amended, following its enactment, to authorize local school districts to deny enrollment to children who were not "legally admitted" to the United States.

[6] *See, e.g.*, ARIZ. REV. STAT. §15-1803(B) (2015) ("In accordance with the illegal immigration reform and immigrant responsibility act of 1996 (P.L. 104-208; 110 stat. 3009), a person who was 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 pursuant to section 15-1802 or entitled to classification as a county resident pursuant to section 15-1802.01."); GA. CODE ANN. §50-36-1(a)(4)(A)(i) (2015) (defining *public benefit* to include adult education). The Georgia provision was challenged as part of the litigation in *Georgia Latino Alliance for Human Rights v. Deal*. *See* No. 1:11-CV-1804, Complaint for Declaratory and Injunctive Relief: Class Action (filed N.D. Ga., June 2, 2011). However, its enforcement, as to enrollment at public institutions of higher education, does not appear to have been affected by that litigation.

[7] *See* Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), P.L. 104-193, tit. IV, §§401-435, 110 Stat. 2261-2276 (August 22, 1996) (generally codified, as amended, in 8 U.S.C. §§1601-1646); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), P.L. 104-208, Div. C, tit. V, subtit. A, §505, 110 Stat. 3009-672 (September 30, 1996) (codified at 8 U.S.C. §1623). Neither PRWORA nor Section 505 of IIRIRA amended the Immigration and Nationality Act (INA), so citations to them reference only Title 8 of the *United States Code*.

[8] *Cf.* Juan Carlos Guzmán & Raúl C. Jara, The Economic Benefits of Passing the DREAM Act, Center for American Progress, October 2012 (copy on file with the author).

[9] For discussion of the various DREAM Act bills, see CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*, by (name redacted) and archived CRS Report R43335, *Unauthorized Alien Students: Legislation in the 109th and 110th Congresses*, by (name redacted). Versions of the DREAM Act would generally repeal (continued...)

such legislation has been enacted by Congress to date.[10] However, several states have passed their own DREAM Acts, which permit some DREAMers to receive in-state tuition or, less commonly, state financial aid[11] (but cannot provide a pathway to citizenship because Congress has exclusive power over naturalization).[12] The Obama Administration also began granting deferred action—a type of relief from removal—to qualifying DREAMers in 2012.[13] Because aliens granted deferred action are generally viewed as "lawfully present" for purposes of federal immigration law,[14] they could potentially be deemed eligible for certain educational benefits that are denied to aliens who are "unlawfully present."[15] However, not all aliens commonly known as DREAMers have been

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Section 505 of IIRIRA, which bars states from providing "postsecondary education benefits" to aliens who are "not lawfully present" based on their residence within the state unless other U.S. citizens or nationals are eligible for such benefits, regardless of their state of residence. *See, e.g.*, DREAM Act of 2011, H.R. 1842, 112th Cong., at §8(b). However, because of how Section 505 has been construed by the courts to date, it has arguably not served as a significant barrier to states' ability to grant in-state tuition to unauthorized aliens. *See infra* notes 112-119 and accompanying text.

[10] The comprehensive immigration bill passed by the Senate (S. 744) in the 113th Congress included provisions that would have provided some DREAMers with a pathway to citizenship. *See generally* archived CRS Report R43097, *Comprehensive Immigration Reform in the 113th Congress: Major Provisions in Senate-Passed S. 744*, by (name redac ted) .

[11] *See, e.g.*, 110 ILL. COMP. STAT. §305/7e-5 (2015) ("[F]or tuition purposes, the Board of Trustees shall deem an individual an Illinois resident ..., if ... [t]he individual graduated from a public or private high school or received the equivalent of a high school diploma in this State ... [and] [t]he individual attended school in this State for at least 3 years as of the date the individual graduated from high school or received the equivalent of a high school diploma...."); MD. EDUC. CODE ANN. §15-106.8(b) & (c) (2015) (similar). Many state DREAM Acts require that unauthorized aliens file an affidavit stating that they have submitted an application to legalize their status, or will submit an application as soon as they are able to do so. *See, e.g.*, CAL. EDUC. CODE §68130.5(a)(4) (2016). However, opponents of state DREAM Acts have noted that these requirements have little practical significance because unauthorized alien students generally cannot legalize their immigration status under current law. *See, e.g.*, Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 473, 506 (2006/2007). It is, in part, to provide DREAMers with a means to legalize their status that Members of Congress have introduced versions of the DREAM Act and related legislation.

[12] *See, e.g.*, Chirac v. Chirac's Lessee, 15 U.S. 259, 269 (1817) ("[T]he power of naturalization is exclusively in Congress.").

[13] *See, e.g.*, Janet Napolitano, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, June 15, 2012, at 1, *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. Implementation of a 2014 proposal by the Obama Administration to expand the DACA program to include older aliens, as well as aliens who entered the United States at later dates, has been enjoined by a federal court. *See generally* CRS Legal Sidebar WSLG1437, *Fifth Circuit Declines to Lift Injunction Barring Implementation of the Obama Administration's 2014 Deferred Action Programs*, by (name redacted) and (name redacted) . However, this injunction does not affect implementation of the 2012 DACA initiative, and a separate legal challenge to that program was dismissed on standing grounds. *See generally* CRS Legal Sidebar WSLG1223, *Appeals Court Affirms Dismissal of Challenge to 2012 Deferred Action Program*, by (name redacted). For more on standing, see *infra* note 116 and accompanying text.

[14] *See, e.g.*, U.S. Citizenship & Immigr. Servs., Frequently Asked Questions, last updated June 15, 2015, *available at* http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions. ("An individual who has received deferred action is authorized by [the Department of Homeland Security (DHS)] to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect.") DACA beneficiaries are currently granted deferred action status for a two-year period, subject to revocation and renewal.

[15] For example, the Virginia Attorney General has declared that DACA beneficiaries are eligible for in-state tuition, in part, because "no provision ... of federal law" bars them from establishing the intent to be domiciled in Virginia. Mark R. Herring, Attorney General, Memorandum to the Director, State Council of Higher Education for Virginia, April 29, 2014, *available at* http://www.ag.virginia.gov/Media%20and%20News%20Releases/News_Releases/Herring/DACA_AG_Advice_Letter.pdf. Insofar as the Attorney General may have considered federal restrictions upon noncitizens' eligibility for public benefits, discussed below, in reaching this conclusion, he could have reasoned that (continued...)

granted deferred action,[16] and even those who have been granted deferred action are considered to be lawfully present only while they are in deferred action or other similar status.

Others, however, emphasize DREAMers' presence in the United States in violation of federal immigration law, and seek to ensure that public benefits are made available only to U.S. citizens, lawful permanent residents (LPRs), and nonimmigrants with legal status.[17] Several states have, for example, adopted measures barring unauthorized aliens from attending public institutions of higher education.[18] Certain states have also reiterated, or sought to expand upon, existing federal restrictions upon unauthorized aliens' receipt of public benefits in order to ensure that they do not receive in-state tuition or state financial aid.[19]

This report surveys key legal issues pertaining to unauthorized alien students' access to higher education, in-state tuition, and financial aid.

Basic Legal Principles

State measures that would *deny* or *provide* access to public institutions of higher education, in-state tuition, and financial aid to unauthorized aliens have been challenged on various grounds. While these grounds can vary depending upon the specific statute or practice in question, the grounds most commonly asserted appear to be violations of the Equal Protection and Supremacy Clauses of the U.S. Constitution. Thus, these provisions are the focus of discussion in this report, and the following paragraphs provide an overview of the basic principles implicated in discussions of equal protection and preemption.

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these restrictions do not preclude DACA beneficiaries from receiving in-state tuition because they apply to aliens who are not "lawfully present," and aliens granted deferred action are generally deemed to be lawfully present for purposes of federal immigration law. For further discussion of this declaration, see CRS Legal Sidebar WSLG923, DACA Beneficiaries' Eligibility for In-State Tuition in Virginia, by (name redacted).

[16] *See, e.g.*, Frequently Asked Questions, *supra* note14 (eligibility limited to aliens who, among other things, came to the United States before their 16th birthday and have resided here continuously since June 15, 2007).

[17] *See, e.g.*, *Immigration Nullification*, *supra* note 11, at 498-500 (arguing that provision of in-state tuition to unauthorized aliens constitutes a poor use of limited financial resources, and "reward[s] illegal behavior").

[18] *See, e.g.*, MONT. CODE ANN. §1-1-411(6)(c)(ii) (2015) (barring unauthorized aliens from receiving state services, and defining *state service* to include "qualification as a student in the university system for the purposes of a public education"); S.C. CODE ANN. §59-101-430(A) (2014) ("An alien unlawfully present in the United States is not eligible to attend a public institution of higher learning in this State ...."); University System of Georgia, Board of Regents Policy Manual, at §4.1.6 ("A person who is not lawfully present in the United States shall not be eligible for admission to any University System institution which, for the two most recent academic years, did not admit all academically qualified applicants.") (copy on file with the author). A 2014 state court decision finding that the Montana statute codified at §1-1-411 was preempted did note that "[f]ederal law does not regulate" qualification as a student in a public university when discussing "conflicts" between the Montana statute and federal law. *See* Montana Immigrant Justice Alliance v. Bullock, No. BDV-2012-1042, Order on Cross-Motions for Summary Judgment, at 9-10 (Mont. First Judicial District, Lewis and Clark County, June 20, 2014) (copy on file with the author). However, this decision did not directly address whether states are preempted from restricting unauthorized aliens from enrolling at public institutions of higher education. Instead, the court found the state measure was preempted because it relied upon classifications of aliens not used in federal law and upon state officials' determinations of aliens' status. *See infra* note 64 and accompanying text. For discussion of a reported challenge in Georgia state court to the Georgia Board of Regents' policy, see Angela Adams & Kerry S. Boyne, *Access to Higher Education for Undocumented and "Dacamented" Students: The Current State of Affairs*, 25 IND. INT'L & COMP. L. REV. 47, 59 (2015).

[19] *See supra* note 6.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment bars states from "deny[ing] to any person within [their] jurisdiction the equal protection of the laws."[20] Aliens have been found to be encompassed by the Fourteenth Amendment's usage of "person."[21] As a result, measures that would treat aliens differently than citizens may be subject to challenge on equal protection grounds. The level of scrutiny applied by the courts in reviewing such measures frequently determines whether the measure is upheld or struck down. With "rational basis review," the challenged measure will generally be upheld if it is a rational means of promoting a legitimate government objective. The measure is "presumed constitutional," and those challenging the law have the burden of negating all possible rational justifications for the classification.[22] In contrast, with "strict scrutiny," the challenged measure will be upheld only if the government can demonstrate that the measure is necessary to achieve a compelling interest and is narrowly tailored for that purpose.[23] Courts have also applied other tests, falling between rational basis review and strict scrutiny, in some cases due to the persons or rights affected by the measure.[24]

The level of scrutiny applied to measures that classify on the basis of alienage depends, in part, on whether the measure is federal, or state or local. Because Congress's plenary power over immigration permits it to enact measures as to aliens that would be unconstitutional if applied to citizens,[25] federal classifications based on alienage are subject to rational basis review, and have generally been upheld. For example, in its 1976 decision in *Mathews v. Diaz*, the Supreme Court upheld a federal law that barred LPRs who had not resided in the United States for five years from enrolling in Medicare Part B, because it viewed the measure as a valid exercise of the federal government's authority to regulate the entry and residence of aliens, not as "irrational."[26] State and local measures, in contrast, have generally been subject to strict scrutiny,[27] unless (1) the restrictions involve "political and governmental functions,"[28] or (2) Congress has "by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien

[20] U.S. Const., amend. XIV, §1.

[21] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term."). *But see* Mathews v. Diaz, 426 U.S. 67, 78 (1972) ("The fact that all persons, aliens and citizens alike, are protected by the [constitutional guarantee of equal protection] does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogenous legal classification.").

[22] *See, e.g.*, Heller v. Doe by Doe, 509 U.S. 312, 320 (1993) ("[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record[, and] courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends.") (internal citations omitted).

[23] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (racial classifications must be shown to be necessary to some "legitimate overriding purpose"); McLaughlin v. Florida, 379 U.S. 184, 192, 194 (1964) (racial classifications "bear a far heavier burden of justification" than other classifications, and are invalid absent an "overriding statutory purpose").

[24] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996) (requiring the state to provide an "exceedingly persuasive justification" for its policy of maintaining an all-male military academy).

[25] *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 765-70 (1972).

[26] 426 U.S. 67 (1976).

[27] *See, e.g.*, Nyquist v. Mauclet, 432 U.S. 1, 8 n. 9 (1977) ("[C]lassifications based on alienage are inherently suspect, and are therefore subject to strict scrutiny whether or not a fundamental right is impaired.") (internal quotations omitted).

[28] Foley v. Connelie, 435 U.S. 291, 295-96 (1978) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)) (applying rational basis review to a New York law that barred noncitizens from becoming police officers on the grounds that states must have the power to "preserve the basic conception of a political community" for a democracy to function).

subclass."[29] However, it is important to note that the Supreme Court decisions applying strict scrutiny to state or local measures that treated aliens differently than citizens all involved lawful permanent resident aliens (LPRs),[30] and the Court in *Plyler* expressly declined to apply strict scrutiny to the Texas statute because "undocumented status is not irrelevant to any proper legislative goal."[31] Instead, the *Plyler* Court applied a level of scrutiny that has since come to be characterized as "intermediate scrutiny," requiring the state to show that the challenged measure furthered a "substantial" goal.[32] Some have suggested, however, that the heightened level of scrutiny given to the Texas measure in *Plyler* reflects the facts and circumstances of the case—which involved a law that a majority of the Court viewed as depriving "minor children" of a "basic education"—and is not generally applicable to classifications involving unauthorized aliens.[33]

Neither education,[34] nor receipt of public benefits,[35] has been recognized as a fundamental right for purposes of equal protection, such that its denial would result in the application of strict scrutiny. The *Plyler* Court subjected the denial of access to public elementary and secondary education to intermediate scrutiny. However, as previously noted, this degree of scrutiny may reflect the facts and circumstances of the case. Similarly, receipt of public benefits has generally been seen to fall within the "area of economics and social welfare,"[36] and classifications affecting such interests, standing alone (i.e., not involving a suspect classification of persons), are generally subject to rational basis review.[37]

[29] *Plyler*, 457 U.S. at 219 n.19. For further discussion of whether PRWORA provides a "uniform rule." see *infra* note 73 and accompanying text.

[30] *See, e.g.*, League of United Latin American Citizens [LULAC] v. Bredesen, 500 F.3d 523 (6th Cir. 2007) (noting that the Supreme Court has never applied strict scrutiny to a state or local measure affecting aliens who are not LPRs); LeClerc v. Webb, 419 F.3d 405, 416 (5th Cir. 2005) (noting that the Supreme Court "ha[s] never applied strict scrutiny review to a state law affecting ... other alienage classifications [than LPRs]" and citing, as evidence of this, *Toll v. Moreno*, 458 U.S. 1 (1982) (foregoing equal protection analysis in a case involving lawful nonimmigrant aliens); *De Canas v. Bica*, 424 U.S. 351 (1976) (foregoing equal protection analysis in a case involving unauthorized aliens); *Plyler v. Doe*, 457 U.S. 202 (1982) (applying modified rational basis review in a case involving unauthorized aliens).

[31] *Plyler*, 457 U.S. at 220-21. *See also id.* at 223 ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'").

[32] *Id.* at 220.

[33] *See, e.g.*, Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 459 (1988) (stating of *Plyler*, "We have not extended this holding beyond the 'unique circumstances,' that provoked its 'unique confluence of theories and rationales'") (internal citations omitted); Laura S. Yates, *Plyler v. Doe and the Rights of Undocumented Immigrants to Higher Education: Should Undocumented Students Be Eligible for In-State Tuition Rates?*, 82 WASH. UNIV. L. REV. 585, 592 (2004) ("Since *Plyler*, the Supreme Court has posited that the intermediate scrutiny standard is only applicable when state legislation affects undocumented children in the area of public education, and even then only when the legislation enjoys neither implied nor express [federal] congressional approval.") (internal quotations omitted).

[34] *Plyler*, 457 U.S. at 220-21 (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35-38 (1973) (noting the "vital role of education in a free society" and a "historic dedication to public education" but nonetheless finding that "[e]ducation ... is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.")).

[35] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974).

[36] Dandridge v. Williams, 397 U.S. 471, 485 (1970).

[37] *Graham*, 403 U.S. at 371-72.

Preemption

The doctrine of preemption, in turn, derives from the Supremacy Clause of the U.S. Constitution, which establishes that federal law, treaties, and the Constitution itself are "the supreme Law of the Land, ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."[38] Thus, one essential aspect of the federal structure of government is that states can be precluded from taking actions that would otherwise be within their authority if federal law would be thwarted thereby.

Because the Constitution entrusts Congress with the power to regulate immigration,[39] state or local measures that purport to regulate immigration—by determining which aliens may enter or remain in the United States, or the terms of their continued presence—are, per se, preempted, regardless of whether Congress has legislated on the matter.[40] Other measures, which affect aliens, but do not constitute regulation of immigration, could also be found to be preempted, depending upon the scope of any congressional enactments. Specifically, federal statutes may preempt state and local measures in one of three ways:

1. the statute expressly indicates its preemptive intent (*express preemption*);
2. a court concludes that Congress intended to occupy the regulatory field, thereby implicitly precluding state or local action in that area (*field preemption*); or
3. state or local action directly conflicts with or otherwise frustrates the purpose of the federal scheme (*conflict preemption*).[41]

State actions in fields that have traditionally been subject to state regulation are sometimes said to be accorded a presumption against preemption whenever Congress legislates in the field.[42] Education has historically been seen as a local, not a federal, matter.[43] However, a presumption against preemption does not appear to have been applied, to date, in any case involving

[38] U.S. Const., art. VI, cl. 2.

[39] Courts have located the source of federal immigration power in various provisions of the Constitution, and in the inherent power of sovereign nations to control the terms upon which noncitizens may enter and remain within their borders. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius,—U.S.—, 132 S. Ct. 2566, 2600 (2012) (Congress's powers under the Commerce Clause); Arizona v. United States,—U.S.—132 S. Ct. 2492, 2498 (2012) (power to establish a uniform rule of naturalization); Nishimara Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); Henderson v. Mayor of New York, 92 U.S. 259 (1876) (power to regulate interstate commerce); Chy Lung v. Freeman, 92 U.S. 275 (1875) (power to regulate the admission of noncitizens); *The Passenger Cases*, 48 U.S. 283 (1849) (power to regulate foreign commerce).

[40] *See* De Canas v. Bica, 424 U.S. 351, 355 (1976).

[41] *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000); English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248-49 (1984); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983). The delineation between these categories, particularly between field and conflict preemption, is not rigid. *See English*, 462 U.S. at 79 n.5 ("By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation."); *Crosby*, 530 U.S. at 373 n.6 (similar).

[42] *See, e.g.*, Meditronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("In all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (internal citations omitted); Wyeth v. Levine, 555 U.S. 555, 565 (2009) (similar).

[43] *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools.").

unauthorized aliens' access to higher education, in-state tuition, or financial aid. To the contrary, at least one court has questioned whether a presumption against preemption continues to apply in the immigration context.[44]

Two federal statutes are generally noted in discussions of whether state measures regarding unauthorized aliens' access to public higher education, in-state tuition, and state financial aid are preempted. The first of these, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), enacted in August 1996, defines *state public benefit* to mean

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State ... or by appropriated funds of a State ...; and (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State ... or by appropriated funds of a State,

and generally bars states from providing such benefits to aliens who are "not lawfully present in the United States" unless they enact legislation that "affirmatively provides" for such aliens' eligibility.[45] PRWORA also generally bars U.S. government agencies from providing *federal public benefits*—which are defined in the same way as state public benefits[46]—to unauthorized and other aliens who are not "qualified aliens" for purposes of PRWORA.[47] The second statute, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, enacted a little over a month after PRWORA, bars states from providing "postsecondary education benefits" to aliens who are not "lawfully present" based on their residence in the state unless other U.S. citizens or nationals are eligible for such benefits, regardless of their state of residence, but does not define *benefit*.[48] IIRIRA has been described as "narrowing" states' authority under PRWORA,[49] but this early characterization of IIRIRA may have been undermined by subsequent interpretations of IIRIRA, discussed below.[50]

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[44] *Cf.* Martinez v. Regents of the University of California, 241 P.3d 855 (Cal. 2010) ("The parties disagree as to whether a presumption against preemption exists. The point is unclear. In the past, the high court has indicated that a general presumption against preemption applies even in the context of immigration law. However, more recent high court authority suggests that no particular presumption applies. We need not resolve the question here because, as we explain, we find no preemption even without a presumption.") (internal citations omitted).

[45] 8 U.S.C. §1621(c) & (d).

[46] 8 U.S.C. §1611(c).

[47] 8 U.S.C. §1611(a). Further, PRWORA generally bars aliens who are qualified aliens from receiving federal means-tested public benefits for five years after their admission into the United States in a qualifying status. 8 U.S.C. §1613. PRWORA does not define *federal means-tested public benefits*, and the executive branch has generally taken the view that Medicaid, food stamps, supplemental security income, Temporary Assistance to Needy Families (TANF), and the state Child Health Insurance Program (SCHIP) are the only federal means-tested public benefits. *See* CRS Report R43221, *Noncitizen Eligibility for Public Benefits: Legal Issues*, by (name redacted). For further discussion of federal public benefits, as well as the meaning of *qualified alien*, see generally *infra* notes 90-95 and accompanying text.

[48] 8 U.S.C. §1623. The INA defines *national of the United States* to mean "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." INA §101(a)(22); 8 U.S.C. 1101(a)(22). It should also be noted that some have questioned whether "benefit" has the same meaning for purposes of PRWORA and IIRIRA. *See* Martinez v. Regents of the Univ. of Cal., 83 Cal. Rptr. 518, 531 (Cal. App. 2008), *rev'd on other grounds*, 241 P.3d 855 (Cal. 2010).

[49] *See Martinez*, 83 Cal. Rptr. at 530 n.15.

[50] *See infra* notes 112-119 and accompanying text.

State Restrictions on Access

State measures that would deny unauthorized aliens access to public institutions of higher education and in-state tuition have been challenged by plaintiffs and commentators on the grounds that they violate the Equal Protection or Supremacy Clauses. However, the limited case law to date suggests that restrictions on access to higher education do not, as a general matter, deprive unauthorized aliens of equal protection. Such restrictions have also not been seen as preempted by PRWORA as a general matter, although specific measures could potentially be found to be preempted, or otherwise impermissible, on other grounds. Restrictions on access to in-state tuition have also been seen as permissible. In-state tuition has generally been considered a public benefit, and PRWORA and IIRIRA restrict the circumstances in which states may provide public benefits to unauthorized aliens. PRWORA has also been construed to restrict unauthorized aliens' access to federal and state financial aid.

Public Higher Education

To date, it does not appear that any state measure barring unauthorized aliens from public institutions of higher education has been found to be impermissible on equal protection grounds. The Supreme Court's 1982 decision in *Plyler v. Doe* has generally been taken to mean that the Equal Protection Clause precludes states from denying unauthorized alien children access to public elementary and secondary schools.[51] However, *Plyler* did not purport to address access to higher education, and several aspects of the Court's 5-4 decision in *Plyler* suggest that its applicability in the context of higher education may be limited. In particular, the Court noted both the young age—and the lack of culpability[52]—of those whom Texas would have deprived of the "basic education" needed for democratic self-governance and economic self-sufficiency[53] in determining that the Texas measure warranted heightened scrutiny.[54] This heightened scrutiny, in turn, resulted in the measure being invalidated because none of the goals proffered by the state—which included protecting itself from an "influx of illegal immigrants" and preserving state funds for use in educating students who are likely to remain within the state—was "substantial."[55] Some commentators have suggested that state laws barring unauthorized aliens from public institutions of higher education should be subject to a similar level of scrutiny because higher education

[51] *See, e.g.*, Hispanic Interest Coalition of Ala. v. Gov. of Ala., 691 F.3d 1236, 1245 (11th Cir. 2012) (striking down Alabama requirements regarding verification of the citizenship and immigration status of students enrolling in public elementary and secondary schools on the grounds that they "significantly interfere[d] with the exercise of the right to an elementary public education as guaranteed by *Plyler*"), *cert. denied*, Alabama v. United States, 133 S. Ct. 2022 (2013); LULAC v. Wilson, 908 F. Supp. 755, 785 (C.D. Cal. 1995) (striking down those provisions of California's Proposition 187 that purported to bar unauthorized alien students from public elementary and secondary schools).

[52] The Court repeatedly described those affected by the Texas measure as "minors" and "minor children." *See, e.g.*, *Plyler*, 457 U.S. at 220, 240. It also noted that these children "can affect neither their parents' conduct nor their own status," and denying them an education because of their parents' conduct would be "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility for wrongdoing." *Id.* at 220 (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977) (striking down a provision of Illinois law that permitted illegitimate children to inherit by intestate succession only from their mothers, while legitimate children could inherit from both their mothers and fathers, in part, on the grounds that "penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent").

[53] *Id.* at 221-23. The Court specifically emphasized that it viewed the denial of an education to "some isolated group of children" as contrary to the Fourteenth Amendment's goal of abolishing "governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." *Id.* at 222-23.

[54] *Id.* at 223.

[55] *Id.* at 228-30.

currently plays the same socioeconomic role that primary and secondary education played in the 1970s and 1980s.[56] However, no court appears to have adopted this view, and contrary arguments could be made.[57] For example, one could argue that college students are adults, who have the ability to conform their conduct to "societal norms,"[58] and that lack of access to higher education does not result in the "enduring disability" of illiteracy noted by the *Plyler* Court.[59] Perhaps because of this uncertainty as to the standard of scrutiny that would be applied, post-*Plyler* challenges to state measures denying unauthorized aliens access to public institutions of higher education have generally been brought on grounds other than equal protection, usually preemption, as discussed below.[60]

Federal district courts have found preemption in three cases, although none of these cases should be construed to mean that state restrictions on access to public institutions of higher education are preempted as a general matter.[61] To the contrary, as explained below, two cases found preemption based on the language of the specific state statute at issue, while the court in the third relied upon an interpretation of PRWORA that has not been widely adopted. In the first case, *Hispanic Interest Coalition of Alabama v. Bentley*, a federal district court found that provisions of Alabama's H.B. 56 that bar "any alien who is not lawfully present in the United States" from enrolling in or attending "any public postsecondary education institution in this state" were per se preempted because the state attempted to regulate immigration by relying upon its own definition of who is lawfully present, instead of the federal one.[62] However, an appellate court subsequently vacated the injunction barring enforcement of these provisions after they were amended to

[56] *See, e.g.*, Laura A. Hernández, *Dreams Deferred: Why In-State College Tuition Rates Are Not a Benefit under the IIRIRA and How This Interpretation Violates the Spirit of Plyler*, 21 CORNELL J. L. & PUB. POL'Y 525, 536 (2012); Johnny Sinodis, *The DREAM Act Still Just a Dream for Now: The Positive Effects of Creating a New Path to Lawful Status by Encouraging Military Enlistment and the Pursuit of Higher Education*, 2 L.J. FOR SOCIAL JUSTICE, 159, 176-78 (2011); Kari E. D'Ottavio, *Deferred Action for Childhood Arrivals: Why Granting Driver's Licenses to DACA Beneficiaries Makes Constitutional and Political Sense*, 72 MD. L. REV. 931, 954 (2013).

[57] *Cf.* Regents of the Univ. of Cal. v. Superior Court of Los Angeles Cty., 225 Cal. App. 3d 972, 981 (1990). ("There is, of course, a significant difference between an elementary education and a university education.")

[58] This is potentially significant because the *Plyler* Court distinguished the unauthorized alien children from their parents, in part, on the grounds that children "can affect neither their parents' conduct nor their own status," while their parents, as adults, have "the ability to conform their conduct to societal norms, and presumably the ability to remove themselves from the State's jurisdiction." *Plyler*, 457 U.S. at 220.

[59] *Id.* at 222. The *Plyler* Court also noted that there are no "[c]ompulsory school attendance laws" as to higher education. *Id.* at 222-23.

[60] For example, the plaintiffs in *Equal Access Education v. Merten*, discussed below, challenged a policy of denying admission to unauthorized aliens adopted by Virginia public institutions of higher education on the grounds that it violated the Supremacy, Due Process, and Commerce Clauses. 305 F. Supp. 2d 585, 611 (E.D. Va. 2004). However, the court denied the Due Process claim, in part, because "illegal immigration status is not a constitutionally impermissible criterion on which to base an admissions decision and plaintiffs have no property interest in an admissions decision that does not take illegal immigration into account." It similarly denied the Commerce Clause claim because it did not view the potentially diminished remittances that unauthorized aliens denied a higher education would send home as significantly burdening foreign commerce. *Id.*

[61] For example, in some cases, state or local measures that would bar unauthorized aliens from renting housing have been found to be "thinly veiled" attempts to regulate aliens' entry into the United States and the conditions of their continued presence and thus preempted by federal immigration law. *See, e.g.*, Lozano v. City of Hazleton, 724 F.3d 297, 315 (3d Cir. 2013), *cert. denied*, City of Hazleton v. Lozano, 134 S. Ct. 1491 (2014).

[62] Case Number 5:11-CV-2484-SLB, 2011 U.S. Dist. LEXIS 137846, at *69-*80 (N.D. Ala., September 28, 2011). Previously, in *Equal Access Education v. Merten*, a federal district court had suggested that a policy of denying admission to unauthorized aliens could constitute a preempted regulation of immigration if the state were to use its own standards, as opposed to federal ones, in determining aliens' immigration status. 305 F. Supp. 2d 585, 611 (E.D. Va. 2004). However, the court did not actually find that the practice in question was preempted, and the case was subsequently dismissed on standing grounds. Equal Access Educ. v. Merten, 325 F. Supp. 2d 655 (E.D. Va. 2004).

remove the language the district court had found imposed the state's definition, rather than the federal definition, of who is lawfully present.[63] Similarly, in the second case, *Montana Immigrant Justice Alliance v. Bullock*, a state court found that a Montana law which, among other things, barred "illegal alien[s]" from receiving "state services," including qualification as a student at state institutions of higher education, was preempted because it relied upon classifications of aliens not used in federal law and upon state officials' determinations of aliens' status.[64]

In the third case, *League of United Latin American Citizens [LULAC] v. Wilson*, a federal district court found that the provisions of California's Proposition 187 barring persons who are "not authorized under federal law to be present in the United States" from admission to public institutions of higher education were preempted because "Congress ... occupied the field of regulation of public postsecondary education benefits to aliens" when it enacted PRWORA.[65] The *LULAC* court offered no rationale for this conclusion, however, and its interpretation of PRWORA has been expressly rejected by another federal district court.[66] The *LULAC* court's interpretation also arguably does not reflect the prevailing interpretation of PRWORA. In other cases, dealing with benefits unrelated to higher education, courts have found that PRWORA does not preempt the field of aliens' access to benefits because it expressly permits states to provide public benefits to aliens who are not "qualified aliens" in specified circumstances.[67]

Challenges on other grounds, not involving equal protection or preemption, may also be possible depending upon the facts and circumstances surrounding particular state measures. For example, in 2013, beneficiaries of the Deferred Action for Childhood Arrivals (DACA) initiative challenged their exclusion from Virginia community colleges on the grounds that the state's determination that they are ineligible to establish Virginia domicile was "contrary to Virginia law."[68] This suit was reportedly withdrawn after the state adopted a policy of providing in-state tuition to DACA beneficiaries.[69]

[63] Hispanic Interest Coalition of Alabama v. Bentley, 691 F.3d 1236, 1242-43 (11th Cir. 2012).

[64] Montana Immigrant Justice Alliance v. Bullock, No. BDV-2012-1042, *supra* note 18.

[65] No. CV 94-7569 MRP, 1998 U.S. Dist. LEXIS 3418, at *24-*26 (C.D. Cal., March 13, 1998). Prior to PRWORA's enactment, the *LULAC* court had found that Proposition 187's provisions restricting access to public institutions of higher education were not preempted by federal law. *See LULAC*, 908 F. Supp. at 786. However, after PRWORA's enactment, it viewed the measure as preempted by PRWORA. *See* LULAC v. Wilson, 997 F. Supp. 1244, 1256 (C.D. Cal. 1997).

[66] *Equal Access Educ*., 305 F. Supp. 2d at 605.

[67] *See, e.g.*, United States v. Alabama, 691 F.3d 1269, 1300 (11th Cir. 2011); Kaider v. Hamos, 975 N.E.2d 667, 678 (Ill. App. 2012); *Martinez*, 241 P.3d at 855.

[68] *See* Orella v. State Council of Higher Educ. for Va., Complaint for Declaratory Relief (filed Arlington County Circuit Court, December 17, 2013) (copy on file with the author). Virginia seems to have initially adopted the policy of denying unauthorized aliens access to public institutions of higher education in response to a 2002 memorandum from the state Attorney General, which asserted that, although "no federal or state statute ... precludes an institution from admitting an applicant known to be an illegal alien," "[a]s a matter of policy, ... illegal and undocumented aliens should not be admitted into our public colleges and universities ... when doing so would displace a competing applicant who is an American citizen or otherwise lawfully present here." Commonwealth of Virginia, Office of the Attorney General, Immigration Compliance Update, September 5, 2002 (copy on file with the author).

[69] *See, e.g.*, Trip Gabriel, *Virginia State Attorney General Opens In-State Tuition to Students Brought to the U.S. Illegally*, NEW YORK TIMES, April 29, 2014, *available at* http://www.nytimes.com/2014/04/30/us/dreamers-eligible-for-in-state-tuition-virginias-attorney-general-says.html?_r=1.

In-State Tuition

State measures that would deny unauthorized aliens in-state tuition would also appear to be permissible as a general matter. At least one commentator has suggested that the holding of *Plyler* should be extended not just to access to higher education, but also to eligibility for in-state tuition.[70] However, no court appears to have adopted this view, and it would seem difficult to maintain given that in-state tuition is generally seen as a public benefit, as discussed below, and federal law restricts unauthorized aliens' receipt of public benefits. PRWORA, in particular, establishes a "default rule" that unauthorized aliens are ineligible for public benefits unless a state enacts legislation that "affirmatively provides" for their eligibility.[71] Thus, state measures that essentially reflect PRWORA's default rule—that unauthorized aliens are ineligible—seem unlikely to be found to be preempted by federal law. Such measures also seem unlikely to be found to violate the Equal Protection Clause because Congress established the default rule that unauthorized aliens are generally ineligible for public benefits, and its plenary power over immigration extends to restricting aliens' eligibility for public benefits. As previously noted, federal measures limiting aliens' eligibility for public benefits are subject to more deferential review than state measures, and will generally be upheld so long as there is a reasonable basis for the limitation.[72] Further, the Supreme Court has indicated that states may impose restrictions upon aliens' receipt of public benefits that would otherwise be impermissible if Congress has "by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass."[73] Thus, while two pre-PRWORA Supreme Court cases invalidated state measures that barred certain aliens from receiving in-state tuition and state financial aid,[74] these cases should

[70] *See Dreams Deferred*, *supra* note 56, at 533 ("If the purpose of *Plyler* was to remove unreasonable obstacles to education, a legislatively created barrier—such as increased tuition rates—must violate it.").

[71] 8 U.S.C. §1621(d). In some cases, instead of "qualified alien" or some other term, PRWORA and IIRIRA use the term "not lawfully present," apparently as a shorthand for referring to aliens who entered or remained in the United States in violation of federal immigration law and currently lack a legal immigration status. However, because aliens granted deferred action are generally seen to be lawfully present for purposes of federal immigration law, this usage has opened the door to the argument that certain restrictions in PRWORA and IIRIRA do not apply to aliens granted deferred action through DACA because such aliens are generally seen to be lawfully present for purposes of immigration law. *See* CRS Legal Sidebar WSLG1295, *Recent Arizona Court Decision Regarding DACA Beneficiaries' Eligibility for In-State Tuition Renews Questions about Which Aliens Are "Lawfully Present"*, by (name redacted). *Cf. Access to Higher Education for Undocumented and "Dacamented" Students*, *supra* note 18, at 53 (2015) (asserting that "[b]ecause DACA students are lawfully present in the United States, this federal law [i.e., IIRIRA] does not apply to them.").

[72] *Compare Mathews*, 426 U.S. at 85 (upholding, under rational basis review, a federal law that barred LPRs who had not resided in the United States for five years from enrolling in Medicare Part B) *with* Graham, 403 U.S. at 366-70 (applying strict scrutiny in striking down Pennsylvania and Arizona laws that barred or limited receipt of state "general assistance" by LPRs).

[73] *Plyler*, 457 U.S. at 219 n.19. Several courts have suggested that state measures affecting aliens remain subject to heightened scrutiny, notwithstanding PRWORA's enactment, because PRWORA does not provide a uniform rule for states to follow since it permits states to decide whether to grant certain benefits to aliens. *See, e.g.*, Ehrlich v. Perez, 908 A.2d 1220 (Md. 2006); Aliessa v. Novello, 754 N.E.2d 1085 (N.Y. 2001). However, other courts have taken the opposite view. *See, e.g.*, Soskin v. Reinertson, 353 F.3d 1242, 1255 (10th Cir. 2004); Cid v. S.D. Dep't of Social Servs., 598 N.W.2d 887, 892 (S.D. 1999). At least one court has also suggested that in-state tuition is distinguishable from access to higher education, and a state's interests in denying in-state tuition may be seen as more substantial than Texas's interests in *Plyler*. *See, e.g.*, *Regents of the Univ. of Cal.*, 276 Cal. Rptr. at 202 ("The state's legitimate interests in denying resident tuition to undocumented aliens are manifest and important. ... There is, of course, a significant difference between an elementary education and a university education.").

[74] *See* Toll v. Moreno, 458 U.S. 1, 12-13 (1982) (finding, by a 7-2 margin, that a Maryland law which denied certain lawful nonimmigrants domiciled in Maryland in-state status for tuition purposes was preempted because it "impose[d] additional burdens not contemplated by Congress" on these aliens); *Nyquist*, 432 U.S. at 7-12 (striking down, by a 5-4 margin, a New York law that made LPRs ineligible for state educational financing unless they signed a declaration of (continued...)

not necessarily be construed to mean that similar measures would necessarily be invalid post-PRWORA, particularly insofar as the measures affect unauthorized aliens.

At least one commentator, apparently concerned about PRWORA's restrictions on the provision of public benefits to unauthorized aliens, has also suggested that in-state tuition should not be viewed as a public benefit because it does not involve "direct financial assistance," or payments of money, to students.[75] However, the only court that appears to have addressed the issue held otherwise, finding that a California law—which permits unauthorized aliens who complete at least three years of secondary school within the state and meet other criteria to receive in-state tuition—provides a public benefit for purposes of PRWORA because in-state tuition involves a calculable amount.[76] This decision was subsequently overturned on other grounds,[77] but the view that in-state tuition constitutes a public benefit has been espoused by another court and the Colorado Attorney General.[78] The view that in-state tuition constitutes a public benefit would also appear to be supported by cases addressing whether other government services and assistance constitute public benefits for purposes of PRWORA. These cases have generally found that a public benefit is something that "assist[s] people with economic hardship,"[79] and could "create [an] incentive for illegal immigration."[80] An argument could be made that in-state tuition is a public benefit in light of these decisions on the ground that it makes college more affordable for needy students.[81] Some have also suggested that eligibility for in-state tuition is an incentive for illegal immigration.[82]

It is, however, important to note that, insofar as it is a public benefit, in-state tuition is a benefit for the student, not the student's household, and PRWORA neither authorizes nor requires states to restrict the eligibility for in-state tuition of U.S. citizen students whose parents are unauthorized aliens.[83] Some states have previously sought to classify U.S. citizen students who reside within the state as "out of state" residents because their parents—who also reside within the state—are unauthorized aliens. These states have sometimes argued that they "are merely

(...continued)

intent to become a citizen on the grounds that the state lacked a compelling interest for discriminating against LPRs). It should also be noted that both cases dealt with aliens who had a legal immigration status.

[75] *See Dreams Deferred*, *supra* note 56, at 526. The State of California made a similar argument in defending a statute permitting unauthorized aliens to receive in-state tuition based upon their completion of at least three years of secondary education in the state, discussed below. *See Martinez*, 83 Cal. Rptr. at 531.

[76] *Id.*

[77] *See* 241 P.3d 855 (Cal. 2010).

[78] *See, e.g.*, Ruiz v. Robinson, 892 F. Supp. 2d 1321 (S.D. Fla. 2012); State of Colorado, Dep't of Law, Opinion No. 12-04, June 19, 2012, at 5 (copy on file with the author).

[79] Rajeh v. Steel City Corp., 813 N.E.2d 697, 707 (Ohio App. 2004) (workers' compensation not a public benefit for purposes of PRWORA because it is a "substitutionary remedy" for a negligence suit).

[80] County of Alameda v. Agustin, 2007 Cal. App. Unpub. LEXIS 7665, at *10 (1st App. Dist., Div. One, September 24, 2007) (rejecting the argument that "child collection support services" and the issuance of a court order requiring child support payments constituted state public benefits and, thus, could not be provided to an unauthorized alien in the absence of a state law that expressly provided for noncitizens' eligibility).

[81] *See, e.g.*, Opinion No. 12-04, *supra* note 78, at 5 ("Assistance is defined as 'aid' or 'help.' It is quite clear that Metro State's new discounted tuition would be a significant aid or help to students who qualify. After all, the very purpose of Metro State's plan [to provide discounted tuition to unauthorized aliens] ... is to make attending college easier for certain students (that is, to 'help' them attend college).").

[82] *See, e.g.*, Hans A. von Spakovsky & Charles Stimson, Providing In-State Tuition for Illegal Aliens: A Violation of Federal Law, The Heritage Foundation, November 22, 2011, *available at* http://www.heritage.org/research/reports/2011/11/providing-in-state-tuition-for-illegal-aliens-a-violation-of-federal-law.

[83] *See, e.g.*, Ruiz v. Robinson, 892 F. Supp. 2d 1321 (S.D. Fla. 2012).

complying with federal law" in adopting such measures.[84] However, courts have uniformly rejected this view as "fundamentally misconstru[ing]" PRWORA, which does not purport to restrict the provision of public benefits to U.S. citizens,[85] and as impermissibly distinguishing between similarly situated U.S. citizens based on their parentage. One court, in particular, emphasized that these measures would "classify U.S. citizens as aliens, and in doing so, create a second-tier of U.S. citizenship that depreciates the historic values of Plaintiffs' citizenship by affording Plaintiffs some of the benefits that other similarly situated U.S. citizens enjoy but not all of the benefits."[86]

Financial Aid

Neither courts nor commentators appear to have raised any significant questions about the permissibility of state measures denying *state* financial aid (i.e., financial aid provided using only state funds)[87] to unauthorized aliens post-PRWORA,[88] perhaps because financial aid has been widely recognized as a public benefit for purposes of PRWORA and IIRIRA. This means that any state that would provide state financial aid to unauthorized aliens must enact legislation that affirmatively provides for their eligibility, as required by PRWORA.[89] Also, depending upon the interpretation of IIRIRA that is adopted, the state may need to avoid conditioning eligibility upon residence when enacting such legislation. See "State Measures Granting Access: In-State Tuition," below.

PRWORA has also apparently been construed to bar unauthorized aliens from receiving *federal* financial aid. Amendments made to the Higher Education Act in 1986 permit those "in the United States for other than a temporary purpose" who can provide evidence from immigration officials of their intent to become permanent residents to qualify for federal financial aid.[90] These amendments could, on their face, potentially be read as permitting at least some unauthorized aliens to receive federal financial aid.[91] However, consistent with the view that PRWORA "invalidated all existing" federal, state, or local measures regarding noncitizens' eligibility for public benefits to the degree that these measures conflict with PRWORA,[92] the Department of

[84] *Ruiz*, 892 F. Supp. at 1330. *See also* A.Z., a Minor, by B.Z., Her Guardian v. Higher Educ. Student Assistance Authority, 48 A.3d 1151, 1156 (N.J. Super. 2012) (similar).

[85] *Ruiz*, 892 F. Supp. at 1330; *A.Z.*, 48 A.3d at 1156.

[86] *Ruiz*, 892 F. Supp. at 1331.

[87] *See, e.g.*, Pimentel v. Dreyfus, 670 F.3d 1096, 1099 n.4 (9th Cir. 2012) (finding that the Supplemental Nutrition Assistance Program (SNAP) is a federal public benefit, even though it is provided through the states, because it relies on federal funds).

[88] Prior to PRWORA's enactment, a state measure restricting certain alien's right to in-state tuition was struck down by the Supreme Court in a 1982 decision issued shortly after *Plyler*. *See* Toll v. Moreno, 458 U.S. 1, 12-13 (1982).

[89] 8 U.S.C. §1621(d).

[90] An Act to Reauthorize and Revise the Higher Education Act of 1965, and For Other Purposes, P.L. 99-498, §407(a), 100 Stat. 1480 (October 17, 1986) (codified, as amended, at 20 U.S.C. §1091(a)(5)). *See, e.g.*, Mashiri v. Dep't of Educ., 709 F.3d 1299 (9th Cir. 2013), *as amended*, 2013 U.S. App. LEXIS 11050 (9th Cir., May 30, 2013) (declining to order the Department to provide federal financial aid to the plaintiff because he failed to present any proof that he was in the United States for other than a temporary purpose).

[91] Indeed, prior to PRWORA's enactment, the Department of Education (DOE) interpreted this provision as permitting noncitizens granted temporary resident cards, or who had suspension of deportation cases pending before Congress, to receive federal financial aid. *See* U.S. Dep't of Education, The Student Guide: Financial Aid from the U.S. Department of Education: Grants, Loans, and Work Study, 1989-1990, at 71, quoted in CRS Report 89-435, *Alien Eligibility Requirements for Major Federal Assistance Programs*, by Joyce C. Vialet and (name redacted) (out of print, available upon request).

[92] *Kaider*, 975 N.E.2d at 673. *See also Pimentel*, 670 F.3d at 1101 ("Upon enactment of the Welfare Reform Act, (continued...)

Education has determined that only those aliens who fall within PRWORA's definition of *qualified alien* are eligible for federal financial aid.[93] This definition includes LPRs; aliens granted asylum; refugees; aliens paroled into the United States for a period of at least one year; aliens whose deportation is being withheld; aliens granted conditional entry; and Cuban and Haitian entrants.[94] All other aliens excluded from PRWORA's definition of "qualified alien," although certain aliens (e.g., those who have been subject to domestic violence) are treated as if they were qualified aliens for purposes of PRWORA.[95]

State Measures Granting Access

State measures that would grant unauthorized aliens access to public institutions of higher education, in-state tuition, and financial aid would also appear to be generally permissible. Because access to public institutions of higher education has not been viewed as a public benefit for purposes of PRWORA, states may generally provide for unauthorized aliens' access without enacting legislation to this effect. In-state tuition and financial aid, in contrast, have generally been viewed as public benefits. This means that states must enact legislation that affirmatively provides for unauthorized aliens' eligibility for such benefits. Also, depending upon how IIRIRA is interpreted, states may need to base unauthorized aliens' eligibility on factors other than their residence in the state (e.g., high school attendance and graduation in the state).

Public Higher Education

Under current law, states would not appear to be barred from granting unauthorized aliens access to public institutions of higher education. They would also not appear to be required to enact legislation that "affirmatively provides" for unauthorized aliens' eligibility on the ground that access to higher education has generally not been viewed as a public benefit for purposes of PRWORA. Some commentators have suggested that it should be viewed as such because institutions of higher education rely upon federal and state funds in educating students,[96] and the *LULAC* court characterized access to higher education as a public benefit in a decision issued

(...continued)

however, Washington's food stamp program automatically conformed to the new eligibility requirements concerning aliens."); Doe v. Wilson, 67 Cal. Rptr. 2d 187, 190 (Cal. App. 1997) (upholding regulations terminating a state program that benefitted unauthorized aliens because the program was "rendered immediately illegal by [PRWORA]"); Dep't of Health v. Rodriguez, 5 So. 3d 22 (Fla. App. 2009) (finding that the program in question was created prior to PRWORA and not subsequently reenacted, so its services could not be provided to unauthorized aliens).

[93] *See* U.S. Dep't of Education, Federal Student Aid Handbook, 2014-2015, Vol. 1, at 1-21 to 1-50, April 2013 (copy on file with the author). The difference between DOE's interpretation pre-PRWORA and that post-PRWORA could potentially be significant if Congress were to enact legislation that permitted unauthorized alien students to remain in the United States while their legalization is pending, but did not categorize them as qualified aliens.

[94] 8 U.S.C. §1641(b)(1)-(7).

[95] *See* 8 U.S.C. §1641(c).

[96] *See, e.g.*, Perla Trevizo, Georgia Bill Banning Illegal Immigrants from Public Colleges Advances, March 5, 2012, *available at* http://timesfreepress.com/news/2012/mar/05/georgia-bill-banning-illegal-immigrants-public-col/ ("Proponents argue that higher education is a federal public benefit because colleges and universities receive federal funding, and illegal immigrants aren't eligible for federal benefits."); George G. Cleveland & Chris Whitmire, *Bill Would Bar Illegal Immigrants from Public Colleges*, WINSTON-SALEM J., March 5, 2013, *available at* http://www.journalnow.com/news/state_region/article_c4f5654e-8609-11e2-8279-001a4bcf6878.html; Jennifer L. Maki, *The Three R's: Reading, 'Riting, and Rewarding Illegal Immigrants: How Higher Education Has Acquiesced in the Illegal Presence of Undocumented Aliens in the United States*, 13 WM. & MARY BILL RTS. J. 1341 (2005).

shortly after PRWORA's enactment.[97] However, the *LULAC* court did not articulate any rationale for viewing access to higher education as a public benefit, and another district court subsequently adopted the opposite view based on the definition of *public benefit* given in federal law.[98] This definition encompasses "postsecondary education ... or other similar benefit[s] for which payments or assistance are provided to an individual, household, or family eligibility unit by [a government] agency ... or by appropriated funds."[99] In particular, the latter court noted that admission does not involve "payments" to students or their households.[100] Admission could arguably also be said not to constitute "assistance" if this term is interpreted in light of its "plain meaning" as "aid" or "help."[101] The case law generally construing the meaning of public benefit for purposes of PRWORA also suggests that access to public higher education is unlikely to be viewed as a public benefit. These cases have generally taken the term *public benefits* to refer to resources that "assist people with economic hardship,"[102] and could "create [an] incentive for illegal immigration."[103] An argument could be made that eligibility to enroll at a public institution of higher education does neither of these things. Eligibility to enroll, if acted upon, creates an obligation for the alien to pay, rather than provides for payment to the alien. Also, the availability of nonimmigrant visas for foreign students arguably lessens the need to enter or remain in the United States unlawfully in order to attend public institutions of higher education.[104]

In-State Tuition

States would also not appear to be barred from providing in-state tuition to unauthorized aliens so long as the state complies with PRWORA and, potentially, IIRIRA in doing so. PRWORA generally prohibits states from providing public benefits to unauthorized aliens unless they enact legislation that "affirmatively provides" for unauthorized aliens' eligibility, and in-state tuition has generally been viewed as a public benefit for purposes of PRWORA. Some state statutes providing public benefits, such as in-state tuition, have been challenged on the grounds that the statute is barred by PRWORA because it does not expressly reference PRWORA, or clearly specify that "illegal aliens" are eligible, so as to "put the public on notice."[105] This view appears

[97] *LULAC*, 1998 U.S. Dist. LEXIS 3418, at *24-*26.

[98] *See, e.g.*, *Equal Access Educ.*, 305 F. Supp. 2d at 605 ("PRWORA does not govern college admissions for illegal aliens. As a result, not only has Congress failed to occupy completely the field of illegal alien eligibility for public post-secondary education, it has failed to legislate in this field at all.").

[99] 8 U.S.C. §1611(c)(1) (federal public benefits); 8 U.S.C. §1621(c)(1) (state and local public benefits). However, certain things are expressly excluded from these definitions (e.g., professional or commercial licenses for nonimmigrants with employment-based visas). *See* 8 U.S.C. §1611(c)(2)(A)-(C); 8 U.S.C. §1621(c)(2)-(3).

[100] *See, e.g.*, *Equal Access Educ.*, 305 F. Supp. 2d at 605.

[101] *See, e.g.*, Opinion No. 12-04, *supra* note 78, at 5 (relying on the "plain meaning" of *assistance* as "aid" or "help").

[102] *Rajeh*, 813 N.E.2d at 707 (workers' compensation not a public benefit for purposes of PRWORA).

[103] *County of Alameda*, 2007 Cal. App. Unpub. LEXIS 7665, at *10 ("child collection support services" and the issuance of a court order requiring child support payments not public benefits for purposes of PRWORA).

[104] *See* U.S. Citizenship & Immigration Services, Student and Exchange Visas, *available at* http://www.uscis.gov/working-united-states/students-and-exchange-visitors (last accessed: March 14, 2014) (listing the various visas available to nonimmigrant students and their immediate family members).

[105] *Martinez*, 83 Cal. Rptr. at 1155-58. The appellate court in *Martinez* also viewed the California measure at issue as impliedly preempted by PRWORA because it stood as an obstacle to Congress's stated purposes in enacting PRWORA. *Id*. at 542-43. It based this conclusion, in part, on the congressional findings included in PRWORA, which state that "[i]t 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." *See* 8 U.S.C. §1601(2)(A)-(B).

to be based on the conference report accompanying PRWORA, which states that "[o]nly the affirmative enactment of a law by a ... legislature and signed by the Governor after the date of enactment of this Act, that references this provision, will meet the requirements of this section."[106] However, as enacted, PRWORA does not require that states refer either to PRWORA, or to an enactment benefitting "illegal aliens," and reviewing courts have found that there are no such requirements. In reaching this conclusion, the courts have noted that Congress has elsewhere required states to reference specific provisions of federal law when enacting particular measures, and PRWORA does not do so.[107] Thus, they concluded, Congress is presumed not to have intended to impose such a requirement with PRWORA. Courts have also found that nothing in PRWORA requires states to include in any enactments making unauthorized aliens eligible for public benefits language that "clearly put[s] the public on notice that tax dollars are being used to benefit illegal aliens,"[108] although one court did suggest that a state could not be said to have "affirmatively provided" for unauthorized aliens' eligibility if it were to "confer[] a benefit generally without specifying that its beneficiaries may include undocumented aliens."[109] At least one court has also found that state legislatures may delegate to administrative agencies or local governments the authority to determine whether unauthorized aliens are eligible for particular benefits.[110] However, the significance of these decisions in the higher education context may be limited by state statutes which require that new tuition classifications be created and/or approved by the legislature.[111]

What, if any, limits IIRIRA may impose upon states enacting legislation that would provide for unauthorized aliens' eligibility for in-state tuition is less clear because the courts have taken different approaches in the two challenges decided, to date, to state laws permitting unauthorized aliens to receive in-state tuition based on high school attendance in the state. Some have suggested that these measures run afoul of IIRIRA insofar as they do not provide for all U.S. citizens and nationals to receive in-state tuition. However, in the most recent of these two cases, *Martinez v. Regents of the University of California*, the California Supreme Court upheld a California statute which provided that all students (other than nonimmigrant aliens) are exempt from paying nonresident tuition at public institutions of higher education if they attended high school in California for three or more years, graduate from a California high school or attain the equivalent thereof, and meet other criteria. A state appeals court had found that this statute ran

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[106] *Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Conference Report to Accompany H.R. 3734*, H.R. Rpt. 104-725, 104th Cong., 2d Sess., July 30, 1996, at 383.

[107] *Martinez*, 241 P.3d at 1296 ("Congress has shown it knows how to require a state specifically to reference a federal law when it wishes to do so, because it has done just that numerous times."); *Kaider*, 975 N.E.2d at 674 (similar).

[108] *Martinez*, 83 Cal. Rptr. at 544, *rev'd*, 241 P.3d at 1296; *Kaider*, 975 N.E.2d at 674.

[109] *Martinez*, 241 P.3d at 1296. The court further found that resorting to the conference report and PRWORA's legislative history in construing "affirmatively provides" is inappropriate, since the plain meaning is clear. *Id*. at 1295. *See also Kaider*, 975 N.E.2d at 672.

[110] *Kaider*, 975 N.E.2d at 678. In other words, in the *Kaider* court's view, while PRWORA requires that legislation must be enacted that "affirmatively provides" for unauthorized aliens' eligibility for public benefits, it does not preclude the delegation of certain authority from the legislative branch to the executive branch, or from a state government to local governments. Other courts have taken similar views. *See, e.g.*, Cano v. Mallory Mgmt., 760 N.Y.S.2d 816 (2003) (even if ability to sue for negligence were a public benefit for purposes of PRWORA, the court could extend such benefits to unauthorized aliens); CRS Legal Sidebar WSLG1361, *State Court Decision Makes New York the 3rd State Where DACA Beneficiaries May Practice Law*, by (name redacted) (discussing a New York state court decision which opined that PRWORA could be seen to raise constitutional issues insofar as it purported to require that particular actions be taken by a state legislature, as opposed to other branches of the state government).

[111] *See, e.g.*, Opinion No. 12-04, *supra* note 78 at 7 (noting the existence of such a statute in Colorado among the reasons that a community college system could not provide for in-state tuition for unauthorized aliens).

afoul of IIRIRA because it effectively provided in-state tuition to unauthorized aliens based on their residence in the state, without also providing it to U.S. citizens and nationals residing in other states.[112] The California Supreme Court reversed, however, because the statute specifically conditioned eligibility for in-state tuition upon high school attendance and graduation within the state. Thus, the high court found that the measure did not conflict with IIRIRA since IIRIRA refers to in-state tuition based on residence, not based on high school attendance and graduation.[113] Further, because the high court viewed the statute as unambiguously providing for in-state tuition based on high school attendance and graduation, not residence, it declined to consider the legislative history materials that the appellate court had viewed as evidencing an intent to benefit unauthorized aliens.[114] However, the high court also expressed the view that, even if the legislative history were to reflect such an intent, there is "nothing ... legally wrong with the Legislature's attempt to avoid [IIRIRA] ... mere desire to avoid the restrictions provides no basis to overturn the [California statute]."[115]

Previously, however, in *Day v. Sebelius*, the federal district court in Kansas dismissed a suit filed by out-of-state students alleging that a Kansas statute like the California one was barred by IIRIRA, on the grounds the students lacked standing and had no right to sue to enforce IIRIRA. Specifically, as to standing, the court found that the plaintiffs could not demonstrate that they were injured in fact by the Kansas statute, given that the statute did not apply to them, and they paid out-of-state tuition both before and after its enactment.[116] Similarly, the court found that IIRIRA did not create a private right of action, which means that individuals cannot sue to enforce it.[117] The court's decision was subsequently affirmed by a federal appeals court,[118] and the Supreme Court declined to grant certiorari.[119]

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[112] *Martinez*, 83 Cal. Rptr. at 538-41.

[113] *Martinez*, 241 P.3d at 863-64 ("The fatal flaw in plaintiffs' argument concerning [IIRIRA] is their contention that [the California statute's] exemption from paying out-of-state tuition is based on residence. It is not. ... If Congress had intended to prohibit states entirely from making unlawful aliens eligible for in-state tuition, it could easily have done so."). Some commentators have faulted this interpretation, on the grounds that it "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 afford in-state tuition rates to illegal aliens as long as the word 'residence' was avoided." *Immigration Nullification*, *supra* note 11, at 510; Ralph W. Kasarda, *Affirmative Action Gone Haywire: Why State Laws Granting College Tuition Preferences to Illegal Aliens Are Preempted by Federal Law*, 2009 B.Y.U. EDUC. & L.J. 197 (2009); Kyle William Colvin, *In-State Tuition and Illegal Immigrants: An Analysis of Martinez v. Regents of the University of California*, 2010 B.Y.U. EDUC. & L. J. 392 (2010).

[114] *Martinez*, 241 P.3d at 865.

[115] *Id*. at 866.

[116] 376 F. Supp. 2d. at 1033, 1039-40. Furthermore, the court noted that even if the plaintiffs had suffered an injury in fact, they still failed to demonstrate that a favorable court decision with respect to most of their claims would redress that injury because they would still have to pay out-of-state tuition if the Kansas statute were invalidated. *Id*. at 1034. Standing requirements, which are concerned with who is a proper party to raise a particular issue in the federal courts, derive from Article III of the Constitution, which confines the jurisdiction of federal courts to actual "Cases" and "Controversies." U.S. Const., art. III, §2, cl. 1. The case-or-controversy requirement has long been construed to restrict Article III courts to the adjudication of real, live disputes involving plaintiffs who have "a personal stake in the outcome of the controversy." Baker v. Carr, 369 U.S. 186, 204 (1962). Plaintiffs appearing before an Article III court must generally show three things in order to demonstrate standing: (1) they have suffered an "injury in fact" that is concrete and particularized; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) the injury is likely to be redressed by a favorable decision. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

[117] *Day*, 376 F. Supp. 2d at 1039-40.

[118] Day v. Bond, 500 F.3d 1127 (10th Cir. 2007).

[119] Day v. Bond, 554 U.S. 918 (2008).

Following the *Day* decision, the Washington Legal Foundation (WLF) filed several complaints with the Department of Homeland Security (DHS) alleging that certain in-state tuition laws violated IIRIRA. The WLF specifically called on DHS to enforce IIRIRA against states that offer in-state tuition to unauthorized aliens based on high school attendance in the state on the grounds that the *Day* court had found that private individuals cannot do so.[120] DHS does not appear to have responded publicly to these complaints, although it elsewhere expressed the view that states may decide whether to provide in-state tuition to unauthorized aliens.[121] However, recent litigation in state court has raised the possibility that private individuals could potentially bring suits challenging at least some state practices in providing in-state tuition to unauthorized aliens based on standing as state taxpayers.[122]

Financial Aid

Fewer states provide state financial aid to unauthorized aliens than provide in-state tuition,[123] and neither plaintiffs nor commentators appear to have raised significant issues regarding states providing for unauthorized aliens' eligibility for state financial aid, separate and apart from their eligibility for in-state tuition. However, in the event of such a challenge, it seems likely that state financial aid would be found to constitute a public benefit for purposes of PRWORA and IIRIRA for reasons previously discussed. Thus, state measures that would provide for unauthorized aliens' eligibility would generally be seen as permissible so long as the state enacts legislation that makes clear that unauthorized aliens are eligible.[124] The state may also need to provide for unauthorized aliens' eligibility upon some basis other than residence in the state, at least given one of the two interpretations of IIRIRA to date.[125]

[120] Press Release, Washington Legal Foundation, WLF Files Civil Rights Complaint Against State of New York Regarding Benefits for Illegal Aliens (September 7, 2005); Press Release, Washington Legal Foundation, WLF Files Civil Rights Complaint Against State of Texas Regarding Benefits for Illegal Aliens (August 9, 2005) (copies on file with the author).

[121] Letter from Jim Pendergraph, Executive Director, Office of State and Local Coordination, U.S. Immigration and Customs Enforcement, to Thomas J. Ziko, Special Deputy Attorney General, N.C. Dep't of Justice, July 9, 2008 (copy on file with the author).

[122] *See, e.g.*, Lone Star College Sys. v. Immigration Reform Coalition of Texas, No. 14-12-00819-CV, 2013 Tex. App. LEXIS 14411 (Tex. Ct. App., November 26, 2013). As a general matter, Texas recognizes taxpayer standing to sue to enjoin allegedly illegal expenditures of public funds without demonstrating a distinct injury. *See, e.g.*, Andrade v. Venable, 372 S.W.3d 134, 137 (Tex. 2012).

[123] *Cf.* Arlene Russell, State Policies Regarding Undocumented College Students: A Narrative of Unresolved Issues, Ongoing Debate, and Missed Opportunities, A Higher Education Policy Brief, March 2011, at 4 (copy on file with the author) (noting that, as of the date of the brief, only two states provided unauthorized aliens with in-state tuition and state financial aid, while eight states provided in-state tuition, but not state financial aid). Since 2011, additional states have made provision for at least some unauthorized alien students to receive in-state tuition and, in some cases, financial aid. *See, e.g.*, Nat'l Conference of State Legislatures, Tuition Benefits for Immigrants, July 15, 2015, available at http://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx ("Twenty states offer in-state tuition to unauthorized immigrant students, 16 by state legislative action and four by state university systems."); David H.K. Nguyen & Zelideh R. Martinez Hoy, "*Jim Crowing" Plyler v. Doe: The Re-Segregation of Undocumented Students in American Higher Education through Discriminatory State Tuition and Fee Legislation*, 63 CLEV. ST. L. REV. 355 (2014/2015) (reporting five states as allowing state financial aid for unauthorized alien students).

[124] *See supra* notes 105-111 and accompanying text.

[125] *See supra* notes 112-119 and accompanying text.

Conclusion

Further developments in this area seem likely, particularly in terms of federal and state legislative proposals and enactments. The enactment of laws permitting unauthorized aliens to receive in-state tuition was cited in 2014 as a "trend" in state immigration legislation.[126] The courts, in contrast, may be unlikely to reconsider existing precedents as to the right to higher education, or whether in-state tuition and financial aid constitute public benefits for purposes of PRWORA and IIRIRA. There could, however, potentially be developments in the state courts based on litigation asserting state taxpayer standing to challenge alleged violations of IIRIRA,[127] or challenging state measures' conformity with provisions of state law.[128]

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[126] *See, e.g.*, Laura D. Francis, *Legislative Overhaul, Employer-Friendly Immigration Policies in Spotlight in 2014*, 8 WORKPLACE IMMIGRATION REP. 110 (February 3, 2014).

[127] *See supra* note 122 and accompanying text.

[128] *See supra* note 68 and accompanying text.