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## States Taking Charge: Examining the Role of Race, Party Affiliation, and Preemption in the Development of in-state tuition laws for undocumented immigrant students

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STATES TAKING CHARGE: EXAMINING THE ROLE OF  
RACE, PARTY AFFILIATION, AND PREEMPTION IN THE  
DEVELOPMENT OF IN-STATE TUITION LAWS FOR  
UNDOCUMENTED IMMIGRANT STUDENTS

*Stephen L. Nelson,\* Jennifer L. Robinson,\*\* and Kara Hetrick Glaubitz\*\*\**

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## INTRODUCTION

Immigration policy “continues to command significant attention in state legislatures” across the United States,<sup>1</sup> and in-state tuition benefits for undocumented immigrant students remain near the center of this ongoing debate.<sup>2</sup> Given the controversy and passion surrounding the issue,<sup>3</sup> in-state tuition benefits for undocumented students can be described as the intersection of immigration policy and education policy in legislatures across

1. 2012 *Immigration-Related Laws, Bills and Resolutions in the States: Jan. 1–March 31, 2012*, NAT’L CONFERENCE OF STATE LEGISLATURES (May 2012), <http://www.ncsl.org/issues-research/immig/2012-immigration-laws-bills-and-resolutions.aspx> (noting that “[i]n the first quarter of 2012, 865 bills and resolutions relating to immigrants and refugees were introduced in 45 state legislatures and the District of Columbia” and noting that this number constitutes a significant decrease from immigration bills and resolutions introduced in state legislatures in 2011).

2. See *id.* (“There were 69 [education-related immigration] bills introduced in 25 state legislatures: Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Minnesota, Missouri, Mississippi, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Rhode Island, Tennessee, Utah and Virginia . . . [and] [m]any of these bills address residency requirements for in-state tuition or state financial aid for higher education.”).

3. Proponents and opponents of in-state tuition laws for undocumented immigrant students offer both moral and economic arguments in support of their positions. For example, proponents of in-state tuition for undocumented immigrant students argue that denying this benefit punishes children for their parents’ choice to come to the United States illegally and requiring these students to pay out-of-state tuition to attend college unfairly adds to the barriers they face to earning a college degree and contributing greater tax revenue to public coffers. Opponents of in-state tuition for undocumented students, on the other hand, argue that college-aged students control their own immigration status (regardless of their parents’ choices) and that in-state tuition rewards illegal behavior and encourages others to immigrate to the United States illegally at further cost to taxpayers. See Stephen L. Nelson, Kara Hetrick Glaubitz & Jennifer L. Robinson, *Reduced Tuition Benefits for Undocumented Immigrant Students: The Implications of a Piecemeal Approach to Policymaking*, 53 SANTA CLARA L. REV. 897, 930–31 (2013) (citations omitted).

the United States. The development of this particular intersection among the states has resulted in a “piecemeal approach to policymaking,”<sup>4</sup> which is likely to continue in the foreseeable future.<sup>5</sup>

This Article does not seek to advance any particular position in this policy controversy; rather, it aims to examine more deeply the development and future viability of such laws in the instance of a preemption challenge in state or federal court. The purpose of this Article, in other words, is twofold: (1) to understand the development of laws regarding tuition benefits for undocumented immigrant students throughout the country, in the context of race and party affiliation; and (2) to examine the federal preemption implications for state legislation regarding tuition benefits for undocumented immigrant students. Race, party affiliation, and preemption are important variables to consider in this context given their importance in the policymaking process. For example, with respect to the variable of race, the presence of minority elected officials is positively correlated with public policies that bring benefits to the minority community.<sup>6</sup> Party affiliation is an important factor in this discussion because of the often partisan nature of debates over immigration policy within Amer-

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4. See *id.* at 933 (arguing that a “piecemeal approach” to policymaking in this area has developed because, in the absence of federal guidance on the issue of in-state tuition for undocumented immigrant students, states have enacted a variety of different policies which “range from outright bans of undocumented immigrant students” from attending public colleges and universities, to allowing undocumented immigrant students to attend public colleges and universities but requiring them to pay out-of-state tuition in order to attend classes, to allowing undocumented immigrant students to attend public colleges and universities and allowing them to pay reduced, or in-state, tuition in order to attend classes).

5. See *id.* at 898, 934 (arguing that the “piecemeal approach” to policymaking in the area of in-state tuition to undocumented immigrant students is likely to continue into the future because of: (1) ongoing federal inaction on the subject; (2) procedural barriers to challenging existing state laws granting or denying in-state tuition to undocumented immigrant students; and (3) divided public opinion over the appropriate political direction in this policy area).

6. Numerous studies have found that African Americans elected to office increase the benefits to the African American community. See WILLIAM R. KEECH, *THE IMPACT OF NEGRO VOTING: THE ROLE OF THE VOTE IN THE QUEST FOR EQUALITY* (1968); Leonard Cole, *Electing Blacks to Municipal Office*, 10 *URB. AFF. Q.* 17, 17–39 (1974); Thomas R. Dye & James Renick, *Political Power and City Jobs: Determinants of Minority Employment*, 62 *SOC. SCI. Q.* 475, 475–786 (1981); Peter K. Eisinger, *Black Employment in Municipal Jobs: The Impact of Black Political Power*, 76 *AM. POL. SCI. REV.* 380, 380–92 (1982). In particular, Campbell and Faegin found that Black elected officials have provided constituents with benefits in employment, housing, health care, education, consumer protection, police relations, and psychological recognition. See David Campbell & Joe R. Faegin, *Black Politics in the South: A Descriptive Analysis*, 37 *J. OF POL.* 129, 156 (1975). Browning, Marshall, and Tabb reached similar conclusions. They determined that Black and Hispanic city council members are associated with changes in four policy areas: police civilian review boards, minority appointment to boards and commissions, city contracts with minority firms, and minority employment. See RUFUS P. BROWNING, DALE ROGERS MARSHALL & DAVID H. TABB, *PROTEST IN NOT ENOUGH: THE STRUGGLE OF BLACKS AND HISPANICS FOR EQUALITY IN URBAN POLITICS* (1984). Other studies, noted subsequently, have confirmed these findings. See, e.g., DANIEL C. MCCOOL, SUSAN M. OLSON & JENNIFER L. ROBINSON, *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT*

ican political institutions and amongst the American electorate generally. Democrats<sup>7</sup> and Republicans,<sup>8</sup> for example, have articulated vastly different platforms on the subject of immigration reform. These differences help explain recent congressional failure to pass comprehensive immigration reform. Finally, preemption plays an important role in this discussion because the policy question of whether to award in-state tuition to undocumented immigrant students is an area in which both Congress and state legislatures have actively passed or attempted to pass legislation for more than a decade.<sup>9</sup> State lawmakers, in other words, have raised issues of preemption by debating and passing immigration-related legislation, an arena in which, according to the U.S. Supreme Court, the federal government has a “preeminent role.”<sup>10</sup>

Part I of this Article details both the legislative and legal history of undocumented immigrants’ access to education in the United States. Part II then describes the current U.S. state laws in effect regarding in-state tuition for undocumented immigrant students at state-funded colleges and universities. Part III further explores the development of laws and policies with a keen focus on potential correlations between (1) the racial composition of state legislatures and the passage of in-state tuition policies; (2) the race of governors and the passage of in-state tuition policies; (3) partisan composition of state legislatures and the passage of in-state tuition policies; and (4) party affiliation of governors and in-state tuition policies. Part IV describes the concept of preemption and discusses the extent to which preemption has impacted the state statutes identified in Part II of this Article. Finally, Part V discusses the practical and normative implications of this research.

#### I. THE JUDICIAL AND LEGISLATIVE DEVELOPMENT OF UNDOCUMENTED IMMIGRANTS’ ACCESS TO EDUCATION IN THE UNITED STATES

Part I will discuss the judicial and legislative development of undocumented immigrant students’ access to education in the United States. This Part introduces readers to the legal background of the substantive policies

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TO VOTE (2007); *A Nation of Immigrants*, PEW RESEARCH HISPANIC TRENDS PROJECT, <http://www.pewhispanic.org/2013/0129/a-nation-of-immigrants/> (last visited Mar. 15, 2013).

7. See *Immigration Reform*, DEMOCRATS, [http://www.democrats.org/issues/immigration\\_reform](http://www.democrats.org/issues/immigration_reform) (last visited Mar. 26, 2014) (supporting a path to citizenship for undocumented immigrants).

8. See REPUBLICAN NAT’L COMM., REPUBLICAN PLATFORM 2012, at 25–26 (2012), available at <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf> (condemning the immigration policies of the Democratic administration of President Barack Obama and opposing any form of amnesty for undocumented immigrants).

9. See *infra* Part I.C, II.A–II.B.

10. See *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (discussing federal role with respect to immigration as historically recognized by the United States Supreme Court).

described in Parts II, III, and IV of this Article. This Part begins by explaining the constitutional rights associated with education in the United States. It then moves on to describe *Plyler v. Doe*, the landmark U.S. Supreme Court case on undocumented immigrants' access to education in the United States. Finally, it discusses major federal laws impacting undocumented immigrants' access to education in the United States including the Personal Responsibility and Work Opportunity Reconciliation Act, the Illegal Immigration Reform and Immigrant Responsibility Act, and the Development, Relief and Education for Alien Minors Act—a failed attempt by Congress to increase undocumented immigrants' access to higher education in the United States.

#### A. No Fundamental Constitutional Right to Education

Undocumented immigrants have no fundamental right to education under the U.S. Constitution. In *San Antonio Independent School District v. Rodriguez*,<sup>11</sup> a group of minority parents challenged Texas's method of using revenue generated from local property taxes to fund primary education,<sup>12</sup> on behalf of their children attending primary and secondary schools in a low-income school district in San Antonio, Texas. Although the Supreme Court noted the "vital role of education in a free society"<sup>13</sup> and its "historic dedication to public education,"<sup>14</sup> the Court held that "[e]ducation, of course, 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."<sup>15</sup> Undocumented immigrants' access to primary, secondary, and higher education in the United States is thus governed primarily by federal, state, and local legislation.

#### B. *Plyler v. Doe*

In *Plyler v. Doe*,<sup>16</sup> the Supreme Court addressed a challenge to a Texas statute which sought to limit undocumented immigrants' access to primary and secondary education by allowing schools to bar any students not "legally admitted" to the United States from enrollment.<sup>17</sup> The statute at issue in *Plyler* stated:

- (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and

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11. 411 U.S. 1 (1971).

12. *See id.* at 9–10.

13. *Id.* at 30.

14. *Id.*

15. *Id.* at 35.

16. 457 U.S. 202 (1982). *Plyler* is a consolidated class action case in which several lawsuits brought against local school boards eventually reached the United States Supreme Court. *Id.* at 206.

17. *Id.*

under the age of 21 years on the first day of September in any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

- (b) Every child in the state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
- (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.<sup>18</sup>

Texas school districts interpreted and applied the statute in a number of different ways: some districts took no action whatsoever; some districts completely excluded undocumented students from registering for school; and other districts enacted policies charging undocumented students tuition to attend schools within the district.<sup>19</sup>

The state of Texas initially sought to prevail on equal protection grounds by arguing, “[U]ndocumented aliens, because of their immigration status, are not ‘persons within the jurisdiction’ of the State of Texas, and that they therefore have no right to the equal protection of Texas law.”<sup>20</sup> The *Plyler* Court, finding to the contrary, noted, “[W]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term.”<sup>21</sup> Moreover, the *Plyler* Court noted, “[A]liens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the [Constitution].”<sup>22</sup> The Fifth and Fourteenth Amendments, in short, are “not confined to the protection of citizens.”<sup>23</sup>

Next, the State of Texas advanced two separate arguments in defending the statute at issue in *Plyler*. First, Texas maintained that “the undocu-

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18. TEX. EDUC. CODE ANN. § 21.031 (1975).

19. *Plyler*, 457 U.S. at 206 n.2.

20. *Id.* at 210.

21. *Id.*

22. *Id.*

23. *Id.* at 212 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

mented status of these children vel non establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents.”<sup>24</sup> Second, Texas claimed (1) that it was entitled to “seek to protect itself from an influx of illegal immigrants”;<sup>25</sup> (2) that undocumented children imposed burdens on the State’s efforts to provide “high-quality public education” to its citizen residents;<sup>26</sup> and (3) that undocumented students were not likely to have the opportunity to “put their education to productive social or political use within the State.”<sup>27</sup>

Each of these arguments ultimately failed, however, as the *Plyler* Court invalidated the Texas statute by holding, “[T]he importance of education in maintaining our basic institutions and the lasting impact of its deprivation on the life of the child” make it unique among government benefits.<sup>28</sup> Noting that “[t]he dominant incentive for illegal entry into the [United States] is the availability of employment . . . [and] few if any illegal immigrants come to this country . . . in order to avail themselves of a free education,”<sup>29</sup> the *Plyler* Court also held that the Texas statute imposed “a lifetime hardship on a discrete class of children not accountable for their disabling status[,]” and foreclosed “any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”<sup>30</sup> Finally, the Court concluded that Texas could not “deny a discrete group of innocent children the free public education that it offers to other children residing within its borders” without demonstrating that the denial “furthers some substantial state interest.”<sup>31</sup>

The Court’s holding in *Plyler* is limited to primary and secondary education. Several commentators, however, have argued that *Plyler* should be extended to include postsecondary, or “higher,” education.<sup>32</sup> These arguments center on the notion that in 1982, the year the Court’s decision in *Plyler* was announced, a high school diploma qualified an individual for a long-term career and the possibility of personal and professional advancement.<sup>33</sup> In other words, for these commentators, extending the holding in *Plyler* to higher education would reflect contemporary societal attitudes

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24. *Id.* at 227.

25. *Id.* at 228.

26. *Id.* at 229.

27. *Id.* at 229–31.

28. *Id.* at 221.

29. *Id.* at 228.

30. *Id.* at 223.

31. *Id.* at 230.

32. See Debra Urteaga, *California Dreaming: A Case to Give States Discretion in Providing In-State Tuition to Its Undocumented Students*, 38 HASTINGS CONST. L. Q. 721 (2011); see also Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT’L L. & COM. REG. 393, 395 (2002).

33. See Urteaga, *supra* note 32, at 741 (citing Romero, *supra* note 32, at 411 n.8) (“Twenty years have passed since *Plyler* and in a world in which many opportunities for eco-



that a high school diploma is no longer sufficient for an individual's long term economic prosperity due to the advancements and complexities of the modern economy since the case was decided.<sup>34</sup>

### C. Federal Legislation

The federal government is the ultimate authority for regulating immigration in the United States. The U.S. Constitution grants Congress the power “to establish an uniform Rule of Naturalization,”<sup>35</sup> and states are barred from passing legislation that would be preempted by a valid federal law.<sup>36</sup> Two federal laws passed in 1996, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)<sup>37</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),<sup>38</sup> limit the eligibility of undocumented immigrants for state and local public benefits, including public higher-education benefits. Both of these laws are discussed in detail herein. The Development, Relief, and Education for Alien Minors Act, popularly known as the DREAM Act, is also discussed herein.

#### 1. Personal Responsibility and Work Opportunity Reconciliation Act

Through PRWORA, Congress established a means for determining whether aliens are eligible for state and local public benefits,<sup>39</sup> and also restricted access to these benefits for undocumented aliens.<sup>40</sup> For example, under PRWORA, ineligible aliens cannot receive “any grant, contract,

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conomic and personal advancement require postsecondary education, the opportunity to attend college might very well be the new educational floor.”).

34. *See id.*

35. U.S. CONST. art. I, § 8, cl. 4.

36. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

37. Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Reform Act) of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

38. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

39. *See* Maria Marulanda, *Preemption: Patchwork Immigration Laws, and the Potential for Brown Sundown Towns*, 79 *FORDHAM L. REV.* 321, 333 (2010) (citing Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 *GEO IMMIGR. L. J.* 457, 466 (2008)); *see also* Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 *CONN. L. REV.* 1627, 1637 (1997) (noting that under PRWORA, states can “make independent determinations on the eligibility of legal resident aliens” for public benefits).

40. *See* 8 U.S.C. §§ 1611, 1621 (2012). Under PRWORA, Congress authorized states “to require an applicant for State and local public benefits . . . to provide proof of eligibility.” 8 U.S.C. § 1625 (2012). Moreover, PRWORA also expands the scope of Congress’s immigration regulatory scheme by banning state and local governments from “prohibiting, or in any way restricting [any state, local, or municipal government entities], from sending to or receiving

loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government.”<sup>41</sup> Another section of the Act prohibits aliens from qualifying for most public benefits, including “any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit.”<sup>42</sup> Under PRWORA, the only aliens eligible for public benefits, including postsecondary benefits, are “qualified alien[s],”<sup>43</sup> a term which does not include undocumented immigrants who are unlawfully in the United States.<sup>44</sup>

### 2. Illegal Immigration Reform and Immigrant Responsibility Act

Enacted shortly after PRWORA,<sup>45</sup> IIRIRA contains additional reforms affecting undocumented immigrants to the federal immigration system. Specifically, IIRIRA restricts the reviewability of removal decisions, expands existing grounds for deportation, and limits discretionary relief for violations of immigration law.<sup>46</sup> IIRIRA also contains restrictions for undocumented immigrants specific to postsecondary education. Under Section 505 of IIRIRA, “an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.”<sup>47</sup> Undocumented immigrant students thus may not receive postsecondary education benefits on the basis of their residency within a state, unless all U.S. citizens are eligible for the same benefits regardless of their residency status.<sup>48</sup>

### 3. Development, Relief, and Education for Alien Minors Act

The DREAM Act is the popular name for the Development, Relief, and Education for Alien Minors Act, which was first introduced in Congress by Orrin Hatch (R-UT) and Richard Durbin (D-IL) in 2001.<sup>49</sup> As

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from the [federal immigration officials] information regarding the immigration status, lawful or unlawful, of an alien in the United States.” *Id.*

41. *Id.* § 1621(c)(1)(A).

42. *Id.* § 1621(c)(1)(B).

43. *Id.* § 1621(a)(1).

44. *Id.* § 1621(c)(2)(B).

45. President Clinton signed PRWORA into law on August 22, 1996. IIRIRA was signed into law on September 30, 1996.

46. See 8 U.S.C. § 1357(g)(1) (2014); see also Marulanda, *supra* note 41, at n.98 (citing Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1633 (1997)).

47. 8 U.S.C. § 1623(a).

48. See *id.*

49. The Student Adjustment Act (SAA) is the companion bill to the DREAM Act in the House of Representatives. Student Adjustment Act, H.R. 1918, 107th Cong. (2001). The SAA

proposed, the DREAM Act would amend Section 505 of IIRIRA to “permit States to determine State residency for higher education purposes and to authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents.”<sup>50</sup> Further, the proposed DREAM Act would create a process called “cancellation of removal” whereby undocumented alien college and university students could obtain lawful immigration status in the United States.<sup>51</sup> With lawful status, these students could then become legally employed and be eligible for public educational benefits, including state and federal financial aid.<sup>52</sup>

Undocumented immigrants would have to meet several requirements under the DREAM Act in order to be eligible for the opportunity to receive conditional resident status and, later, lawful permanent resident status.<sup>53</sup> Specifically, for eligibility under the DREAM Act, an alien student must have been physically present within the United States for no less than five years prior to the enactment of the DREAM Act; must have been younger than sixteen years old at the initial time of entry into the United States; must be of good moral character; must demonstrate completion of a high school diploma or GED or have been accepted by an institution of

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was originally introduced in 2001 and then again in 2003. *Id.* Both the 2001 and 2003 versions of the SAA contained proposals very similar to the DREAM Act. For example, like the proposed DREAM Act, the SAA would repeal section 505 of IIRIRA and:

adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

- (i) the alien has not, at the time of application, attained the age of 21;
- (ii) the alien was physically present in the United States on the date of enactment of the Student Adjustment Act of 2001 and has been physically present in the United States for a continuous period of not less than five years immediately preceding the date of such application;
- (iii) the alien has been a person of good moral character during such a period; and
- (iv) the alien, at the time of application, is enrolled at or above the 7th grade level in a school in the United States or is enrolled in or actively pursuing admission to an institution of higher education in the United States . . . .

*Id.* The SAA would only apply to individuals already living within the borders of the United States at its enactment and would also exclude individuals with criminal histories from eligibility for benefits. *Id.*

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

51. *Id.* § 4(a)(1).

52. *Id.* § 12.

53. *Id.* § 4(a)(1).

higher learning;<sup>54</sup> and may not be deportable pursuant to provisions of the Immigration and Nationality Act.<sup>55</sup>

In a report accompanying the proposed legislation in Congress, Senator Hatch described the DREAM Act as “represent[ing] a common-sense approach to our immigration policy.”<sup>56</sup> This report also described the Act as an effort to “not only directly improve the quality of life of its beneficiaries, but . . . also benefit the overall United States economy.”<sup>57</sup> Finally, the report noted, “America’s national interests must shape our immigration policy. We must protect our borders and remove those who do not have permission to remain within them. At the same time, with the DREAM Act, we can extend a welcoming hand, guided by specific and rigorous standards, to those who have already been integrated as part of our society and whose continued presence will benefit our country.”<sup>58</sup>

Congress failed to pass the DREAM Act in 2001.<sup>59</sup> The Act was reintroduced with only minor variations during the 108th and 109th Congresses without ever reaching a full vote in either chamber.<sup>60</sup> In 2007, a revised DREAM Act fell only eight votes short of bypassing a filibuster during the 110th Congress.<sup>61</sup> This amended version of the DREAM Act eliminated the amendment to the IIRIRA that would have granted states the right to determine residency (for purposes of in-state tuition) for undocumented students.<sup>62</sup> In 2009, the DREAM Act failed to make it out of committee despite bipartisan support and forty cosponsors.<sup>63</sup> In December

54. *Id.* § 4(a)(1)(A), (B), (D).

55. *Id.* § 4(a)(1)(C), (E). An alien who is a national security threat is one example of an alien deportable pursuant to provisions of the Immigration and Nationality Act. *Id.* § 4(a)(1)(C); see also 8 U.S.C. 1227(a)(4) (2014).

56. S. Rep. No. 108-224, at 2 (2004).

57. *Id.* at 3.

58. *Id.*

59. See *Bill Summary & Status 111th Cong. (2001–2002) S. 1291: All Congressional Actions*, LIBR. CONGR. THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SN01291:@@X>: (last visited Feb. 18, 2014).

60. See *Bill Summary & Status 108th Cong. (2003–2004) S. 1525: Major Congressional Actions*, LIBR. CONGR. THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN01545:@@R>: (last visited Feb. 18, 2014); *Bill Summary & Status 109th Cong. (2005–2006) S. 2075: All Congressional Actions*, LIBR. CONGR. THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN02075:@@X> (last visited Feb. 18, 2014).

61. See *Bill Summary & Status 111th Cong. (2007–2008) S. 2205: All Congressional Actions*, LIBR. CONGR. THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN02205:@@X> (last visited Feb. 18, 2014).

62. See generally S. 2205, 110th Cong. (2007), available at <http://www.gpo.gov/fdsys/pkg/BILLS-110s2205pcs/pdf/BILLS-110s2205pcs.pdf>.

63. See *Bill Summary & Status 111th Congress (2009–2010) S.729: Cosponsors*, LIBR. CONGR. THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN0729:@@P> (last visited Feb. 18, 2014); see also *Bill Summary & Status 111th Congress (2009–2010) H.R.1751: Cosponsors*, LIBR. CONGR. THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR01751:@@P> (last visited Feb. 18, 2014).

2010, a new version of the DREAM Act passed the U.S. House of Representatives but was blocked from consideration in the Senate after an attempt to end a filibuster was rejected.<sup>64</sup>

The DREAM Act continues to garner both passionate support and vigorous opposition. The most recent versions of the DREAM Act, S. 952 and H.R. 1842, are currently before both chambers of Congress.<sup>65</sup> These versions both include a repeal of Section 505 of the IIRIRA, and both versions explicitly intend to restore the option for states to determine residency for the purpose of tuition at institutions of higher education.<sup>66</sup> As of October 2012, thirty-five cosponsors of the Act have joined Senator Durbin (D-IL) in the Senate, and 115 cosponsors have joined Representative Berman (D-CA) in the House.<sup>67</sup> Despite over ten years of effort, however, supporters of the DREAM Act are no closer to seeing its passage in Congress.

At this point, access to primary and secondary education for undocumented students throughout the United States remains intact; however, access to postsecondary education is not consistent across the states. Without Congressional passage of the DREAM Act, states have approached the issue of access to higher education, in-state tuition benefits, and financial aid for undocumented students in variety of ways. As Part II addresses in detail, some states have created legislation or policies that provide undocumented students access to their higher education institutions as well as provide the in-state tuition benefit. Other states have been more restrictive in their policies, not only denying in-state tuition to undocumented students but also denying admission to their state's higher education institutions. Moreover, as described in Part II, opponents of state laws regarding in-state tuition for undocumented immigrants have been largely unsuccessful in challenging these laws because of difficulties establishing standing.

## II. STATE LAWS REGARDING IN-STATE TUITION FOR UNDOCUMENTED IMMIGRANT STUDENTS AT PUBLIC COLLEGES AND UNIVERSITIES

There remains significant variation across the country in terms of tuition benefits granted to undocumented students. At the conclusion of 2012, fourteen states allowed undocumented students to pay in-state tui-

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64. See *The DREAM Act in the 111th Congress*, NAT'L IMMIGRATION FORUM, <http://immigrationforum.org/legislation/the-dream-act-in-the-111th-congress> (last visited Mar. 31, 2014).

65. *Bill Summary & Status 112th Congress (2011–2012) S. 952: Cosponsors*, LIBR. CONGR. THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:S952:@@P> (last visited Feb. 18, 2014); see also *Bill Summary & Status 112th Congress (2011–2012) H.R. 1842: Cosponsors*, LIBR. CONGR. THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01842:@@P> (last visited Feb. 18, 2014).

66. See *id.*

67. *Id.*

tion, while seven states deny this tuition rate to that population. Three of these states, Alabama, Georgia, and South Carolina, not only deny the in-state tuition benefits but have also barred undocumented students from admission to their state institutions of higher education. Part II of this Article provides an in-depth review of state laws related to tuition rates for undocumented students beginning with an overview of which states grant the tuition benefit. This discussion is followed by an overview of which states deny the tuition benefits and which states deny admission to undocumented students.

A. *States Granting In-State Tuition Benefits to Undocumented Immigrant Students*

In the absence of federal legislation, state legislators and executive branch officials across the nation have taken action to address in-state tuition benefits for undocumented students.<sup>68</sup> In 2001, the State of Texas passed the first state legislation addressing in-state tuition for undocumented students. Since then, states have utilized both the legislative process and the formal policymaking functions of the executive branches of state government to grant in-state tuition to undocumented students. These various state efforts are described in detail below and listed in Table 1 of this Article.

Currently, fourteen states allow undocumented immigrant students to pay in-state tuition rates at their public colleges and universities: California, Connecticut, Illinois, Kansas, Maryland, Massachusetts, Nebraska, New Mexico, New York, Oklahoma, Rhode Island, Texas, Utah, and Washington.<sup>69</sup> The state of Wisconsin enacted legislation granting the tuition benefit in 2009;<sup>70</sup> however, in 2011 the governor's budget banned resident tuition benefits for undocumented students ending the program that had begun just two years prior.<sup>71</sup> Opponents of in-state tuition benefits for undocumented immigrant students have challenged the laws of

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68. See DAVID W. STEWART, IMMIGRATION AND EDUCATION: THE CRISIS AND THE OPPORTUNITIES 198 (1993) (describing absence of federal guidelines for implementing Section 505 of IIRIRA as contributing to a "confusing tangle" of tuition policies at public colleges and universities across the United States).

69. See *infra* Table 1.

70. WIS. STAT. § 36.27 (2009).

71. LEGIS. FISCAL BUREAU J. COMM. ON FIN., NONRESIDENT TUITION EXEMPTIONS FOR CERTAIN UNDOCUMENTED PERSONS (UW SYSTEM AND WTCS), Paper 750, at 1 (2011). The 2009 legislation was signed by a Democratic governor; the budget that removed the policy in 2011 was put into place by a Republican governor, Governor Walker.

California,<sup>72</sup> Kansas,<sup>73</sup> and Texas,<sup>74</sup> in either state or federal court. Opponents of these laws have also filed informal complaint letters with the Department of Homeland Security challenging the validity of the statutes passed by New York<sup>75</sup> and Texas.<sup>76</sup>

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72. The Supreme Court of California heard the challenge to the California law allowing undocumented immigrant students to qualify for in-state tuition in 2010. *See* *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010). This decision is discussed in detail in Part III.C of this Article *infra*.

73. The Federal District Court for the District of Kansas heard the challenge to the Kansas law allowing undocumented immigrant students to qualify for in-state tuition in 2005. *See* *Day v. Sebelius*, 376 F. Supp. 2d 1022 (D. Kan. 2005). This case is discussed in detail in Part III.C of this Article *infra*.

74. In 2010, the Immigration Reform Coalition of Texas (IRCOT) challenged the Texas statute allowing undocumented immigrants to qualify for in-state tuition benefits at state colleges and universities. *Immigration Reform Coal. of Tex. v. Texas*, 706 F. Supp. 2d 760 (S.D. Tex. 2010). In their lawsuit, IRCOT requested a “declaration that ‘in Texas, an illegal alien is not eligible for discounted in-state tuition or any form of state student financial aid,’ and that ‘the provision of Texas law that allows an alien to qualify as a Texas resident for purposes of discounted in-state tuition and state financial aid are preempted, void, and of no effect.’” *Id.* at 762. IRCOT also requested “an order enjoining the [State of Texas] from making, or forwarding, monetary grants to illegal aliens under [Texas law].” *Id.* The Federal District Court for the Southern District of Texas rejected IRCOT’s allegations on the basis of standing, noting that “the injuries of [IRCOT’s] members based solely on their status as taxpayers providing funds to the state treasury is too uncertain and remote to satisfy constitutional standing,” and “IRCOT . . . alleged no injury which . . . resulted from enforcement of the Texas statutes defining residency” for purposes of in-state tuition at state institutions of higher education. *Id.* at 765.

75. On September 7, 2005, the Washington Legal Foundation (WLF), which describes itself as “a public interest law and policy center . . . [that] devotes a significant portion of its resources to protecting the constitutional and civil rights of American citizens and aliens lawfully present in this country,” filed a written complaint and request for investigation with the Department of Homeland Security. *See* Letter from Daniel J. Popeo, Chairman and Gen. Counsel, Wash. Legal Found., & Richard A. Samp, Chief Counsel, Wash. Legal Found., to Daniel Sutherland, Officer for Civil Rights and Civil Liberties, Dep’t of Homeland Sec. (Sept. 7, 2005) [hereinafter *New York Complaint Letter*], available at <http://www.wlf.org/Upload/INSTA-NY.pdf>. In the *New York Complaint Letter*, the WLF indicated that it was directly petitioning the Officer for Civil Rights and Civil Liberties because “all other avenues of relief have been denied.” *Id.* at 7. The WLF also referenced the fact that the United States District Court for the District of Kansas, in *Day v. Sebelius*, dismissed complaints against a similar statute on lack of standing grounds. *Id.* The Department of Homeland Security has not taken any formal action in response to the WLF complaint letter regarding the New York statute on in-state tuition benefits at state colleges and universities for undocumented immigrant students.

76. The WLF also filed a complaint letter, similar to the letter filed in regards to the New York statute granting in-state tuition at state colleges and universities to undocumented immigrant students, “against the State of Texas for violating the civil rights of WLF’s members, in violation of federal law.” Formal Complaint Letter from Daniel J. Popeo, Chairman and Gen. Counsel, Wash. Legal Found., & Richard A. Samp, Chief Counsel, Wash. Legal Found., to Daniel Sutherland, Officer for Civil Rights and Civil Liberties, Dep’t of Homeland Sec. (Aug. 9, 2005) [hereinafter *Texas Complaint Letter*], available at <http://www.wlf.org/upload/instate.pdf>. In the *Texas Complaint Letter*, the WLF alleged that Texas, “in violation of [IRRIIRA], . . . has adopted a statute that permits illegal aliens living in Texas and who graduate from Texas high



While most states have used a formal legislative process for developing statutes and policies related to tuition rates for undocumented students, several states have relied on alternatives. In 2003, the Oklahoma State Legislature passed a bill granting in-state tuition to undocumented students.<sup>77</sup> However, in 2008, the legislature revoked the statute and instead left the decision to the Oklahoma Board of Regents.<sup>78</sup> At present, the Oklahoma Board of Regents allows undocumented students to pay the reduced in-state rate for tuition.<sup>79</sup>

The Rhode Island Board of Governors of Higher Education unanimously passed an amendment to the state's residency requirement policy in 2011 and authorized in-state tuition for undocumented students.<sup>80</sup> To qualify for in-state tuition benefits, students are required to sign an affidavit attesting that they are actively pursuing legal immigration status.<sup>81</sup> This policy became effective in 2012.<sup>82</sup>

Maryland has also taken an alternative route to address in-state tuition. In 2011, the state legislature passed SB 167, which granted in-state tuition to undocumented students. The Maryland bill, which is also called the DREAM Act, was quickly challenged by opponents through a referendum process. Shortly after passage, opponents, led by state delegate, Neil Parrott, organized a petition effort to force the measure to a referendum vote by the public.<sup>83</sup> In November 2012, voters approved of the in-state

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schools to be deemed 'residents' of Texas in order to qualify for discounted tuition rates, yet does not offer the same tuition rates to U.S. citizens and nationals who live outside Texas." *Id.* In the Texas Complaint Letter, the WLF alleged that residency status for purposes of in-state tuition in Texas is a "post secondary benefit" and that, through its legislation, Texas has made it "exceedingly difficult for citizens and nationals living outside the State to qualify as a 'resident' of Texas." *Id.* at 4–6. Similar to the New York Complaint Letter, the Department of Homeland Security has not taken any formal action in response to the WLF complaint letter regarding the Texas statute on in-state tuition benefits at state colleges and universities for undocumented immigrant students.

77. S.B. 596, 49th Leg., 1st Sess. (Okla. 2003).

78. S.B. 1804, 51st Leg. (Okla. 2007).

79. See *Undocumented Student Tuition: State Action*, NAT'L CONFERENCE OF STATE LEGISLATURES, [www.ncsl.org/issues-research/educ/undocumented-student-tuition-state-action.aspx](http://www.ncsl.org/issues-research/educ/undocumented-student-tuition-state-action.aspx) (last visited Apr. 3, 2014).

80. BD. OF GOVERNORS FOR HIGHER EDUC. STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, RESIDENCY POLICY S-5.0 (Sept. 26, 2011); Erika Niedowski, *R.I. Education Board Ok's In-State Tuition for Undocumented Students*, BOSTON GLOBE (Sept. 27, 2011), [http://www.boston.com/news/local/rhode\\_island/articles/2011/09/27/ri\\_education\\_board\\_oks\\_in\\_state\\_tuition\\_for\\_undocumented\\_students/](http://www.boston.com/news/local/rhode_island/articles/2011/09/27/ri_education_board_oks_in_state_tuition_for_undocumented_students/).

81. See *Undocumented Student Tuition*, *supra* note 79.

82. *Id.*

83. Anne Linskey, *Delegate to Challenge In-State Tuition Measure*, THE BALTIMORE SUN (Apr. 18, 2011), [http://weblogs.baltimoresun.com/news/local/politics/2011/04/delegate\\_to\\_challenge\\_instate.html](http://weblogs.baltimoresun.com/news/local/politics/2011/04/delegate_to_challenge_instate.html).



tuition law by a margin of 59 percent to 41 percent.<sup>84</sup> The law allows individuals who attended and graduated from a Maryland high school to pay in-state tuition; however, the student must attend a community college for two years before transferring to a four-year university or college.<sup>85</sup>

The state of Massachusetts also bypassed the legislative process and established an in-state tuition policy in 2012. Governor Deval Patrick announced in November 2012 that under existing Board of Higher Education policy, undocumented students that meet certain criteria will be eligible for in-state tuition at the state's twenty-nine public colleges and universities.<sup>86</sup> The governor's decision followed the U.S. Department of Homeland Security's change in the federal immigration policy regarding the enforcement of deportation for young immigrants, known as the Deferred Action for Childhood Arrivals (DACA).<sup>87</sup> This policy states that the federal government will not prosecute deportation cases for qualifying individuals for a period of two years from the time their application for deferred action is approved. If their application is approved, these individuals will receive work permits in addition to their deferred action status. "In accordance with this change in federal policy, the Administration has determined that under the existing [Massachusetts] Board of Higher Education Policy, DACA beneficiaries are eligible for in-state tuition at our 29 public campuses as long as they meet the Board's other residency requirements for those institutions."<sup>88</sup> It is important to note that while the policy applies to DACA beneficiaries, it does not apply to all undocumented stu-

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84. See *2012 Presidential General Election Results, Question 04*, MD. STATE BOARD OF ELECTIONS (Nov. 28, 2012), [http://elections.maryland.gov/elections/2012/results/general/gen\\_qresults\\_2012\\_4\\_00\\_1.html](http://elections.maryland.gov/elections/2012/results/general/gen_qresults_2012_4_00_1.html).

85. See generally *Question 4: Referendum by Petition*, MD. STATE BOARD OF ELECTIONS, [http://www.elections.state.md.us/elections/2012/summary\\_question\\_4.html](http://www.elections.state.md.us/elections/2012/summary_question_4.html) (last visited Mar. 31, 2014). Under Maryland law, an individual is authorized to pay in-state tuition at a community college in Maryland regardless of residency status if they: (1) attended a Maryland high school for at least three years; (2) either graduated from a Maryland high school or received the equivalent of a high school diploma in Maryland; (3) provide the community college with documentation that the individual or the individual's parents or legal guardian has filed Maryland income tax returns; (4) provide an affidavit stating that the individual will file an application to become a permanent resident within thirty days after eligibility, if the individual is not a permanent resident; (5) provide documentation that the individual has registered with the Selective Service System, if the individual is required to do so; and (6) register at the community college within four years after graduating from high school or within four years after receiving the equivalent of a high school diploma in Maryland. *Id.*

86. *In-State Tuition for DACA Beneficiaries*, MASSACHUSETTS DEP'T OF HIGHER EDUC. (Nov. 19, 2012), <http://www.mass.edu/aboutus/whatsnew.asp>.

87. *Deferred Action for Childhood Arrivals*, DEP'T OF HOMELAND SEC., <http://www.dhs.gov/deferred-action-childhood-arrivals> (last visited Feb. 19, 2014).

88. *Fact Sheet: In-State Tuition for DACA Beneficiaries*, MASS. DEP'T OF HIGHER EDUC. (Nov. 2012), <http://www.mass.edu/aboutus/documents/2012-11%20DACA%20In-state%20Tuition%20Fact%20Sheet.pdf>.

dents. In its Fact Sheet on In-State Tuition for DACA Beneficiaries, the Massachusetts Department of Higher Education noted:

[W]hile this is a fair and appropriate approach, it does not eliminate the need for both state and federal immigration legislation. At the state level, legislation allowing qualified, resident graduates of Massachusetts high schools to pay in-state tuition rates regardless of immigration status is still necessary. In addition, there is still an urgent need for comprehensive federal immigration reform.<sup>89</sup>

TABLE 1: STATES THAT GRANT IN-STATE TUITION RATES TO UNDOCUMENTED STUDENTS

State	Code or Policy	Year Passed
California	Cal. Educ. Code § 68130.5	2001
Connecticut	Conn. Gen. Stat. § 10a-29	2011
Illinois	110 ILCS 305/7e-5	2004
Kansas	K.S.A. § 76-731a	2004
Maryland	Md. Educ. Code Ann. §§ 15-106.4, 15-106.8	2012
Massachusetts	Bd. of Higher Educ. Policy—Residency Status for Tuition Classification Purposes	2012
Nebraska	Neb. Rev. Stat. § 85-502	2006
New Mexico	N.M. Stat Ann. §21-1-4.6	2005
New York	N.Y. Educ. § 355(2)(h)(8)	2002
Oklahoma	70 Okl. St. § 3242 70 Okl. St. § 3242.2	2008
Rhode Island	Bd. of Governors of Higher Educ. Student Residency Policy (S-5.0)	2012
Texas	Tex. Educ. Code § 54.052	2001
Utah	Utah Code Ann. § 53B-8-106	2002
Washington	Wash. Rev. Code § 28B.15.012	2003

#### B. States Denying In-State Tuition Benefits to Undocumented Immigrant Students

Seven states have barred undocumented students from receiving in-state tuition benefits at state institutions of higher education: Alabama, Arizona, Colorado, Georgia, Indiana, New Hampshire, and South Carolina.<sup>90</sup> The policies of Alabama, Colorado, Georgia, Indiana, New

89. *Id.*

90. *See infra* Table 2.

Hampshire, and South Carolina were created through state legislative bodies, while Arizona's law denying in-state tuition to undocumented immigrant students was passed by a citizen initiative. That initiative, titled Proposition 300, took effect in 2007. It indicates, "[S]tudents must prove lawful immigration status to be eligible for in-state tuition at Arizona's public universities."<sup>91</sup> Table 2 of this Article lists the states that have formally denied in-state tuition benefits for undocumented immigrant students.

TABLE 2: STATES THAT DENY IN-STATE TUITION RATES FOR UNDOCUMENTED STUDENTS

State	Code	Year Passed
Alabama	§ 31-13-8	2011
Arizona	ARS. § 15-1803	2006
Colorado	C.R.S. 23-7-103	2008
Georgia	O.C.G.A. § 20-3-66	2008
Indiana	Burns Ind. Code Ann. § 21-14-11-1	2011
New Hampshire*	H.B. 1383	2012
South Carolina	S.C. Code Ann. § 59-101-430.	2008

\* New Hampshire's bill can be found at <http://www.gencourt.state.nh.us/legislation/2012/ HB1383.html>.

### C. *States Denying Admission for Undocumented Immigrant Students to State Institutions of Higher Education*

Several states not only deny undocumented students from receiving the in-state tuition benefits, but also prohibit them from admission to the state's public colleges and universities. In 2008, South Carolina passed the "South Carolina Illegal Immigration Reform Act," which prohibits undocumented students from enrolling in and receiving financial aid at the state's public colleges and universities.<sup>92</sup> In 2011, the state of Alabama passed legislation that prohibits an "alien who is not lawfully present in the

91. Daniel González, *Young Migrants May Get Arizona College Tuition Break*, THE REPUBLIC (Sept. 12, 2012), <http://www.azcentral.com/news/articles/20120912young-migrants-may-get-arizona-college-tuition-break.html>.

92. South Carolina Illegal Immigration Reform Act, S.C. CODE ANN. § 59-101-430 (2008). It read, "Unlawful aliens; eligibility to attend public institution of higher learning; development of process for verifying lawful presence; eligibility for public benefits on basis of residence." It went on to explain:

(A) An alien unlawfully present in the United States is not eligible to attend a public institution of higher learning in this State, as defined in Section 59-103-5. The trustees of a public institution of higher learning in this State shall develop and institute a process by which lawful presence in the United States is verified. In doing so, institution personnel shall not attempt to independently verify the immigration status of any alien, but shall verify any alien's

United States” from being permitted to enroll in or attend any public postsecondary institution; furthermore, they would not be “eligible for any postsecondary education benefit, including, but not limited to, scholarships, grants, or financial aid.”<sup>93</sup> After an adverse ruling from the United States Court of Appeals for the Eleventh Circuit, the Alabama State Legislature amended its law to remove the classification of aliens requirement, “which was understood to define lawful presence as requiring lawful permanent residence or a nonimmigrant visa.”<sup>94</sup> Georgia also prohibits admission of undocumented students into any school that has not accepted all academically eligible students in the prior two years.<sup>95</sup> Table 3 of this Article lists the states that deny admission to undocumented immigrant students at state institutions of higher education.

Although the Virginia General Assembly has taken no formal action in the form of legislation, a memorandum issued by the Virginia Attorney

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immigration status with the federal government pursuant to 8 USC Section 1373(c).

- (B) An alien unlawfully present in the United States is not eligible on the basis of residence for a public higher education benefit including, but not limited to, scholarships, financial aid, grants, or resident tuition.

The code became effective June 4, 2008.

93. ALA. CODE § 31-13-8 (2014) (“An alien who is not lawfully present in the United States shall not be permitted to enroll in or attend any public postsecondary education institution in this state. For the purposes of this section, a public postsecondary education institution officer may seek federal verification of an alien’s immigration status with the federal government pursuant to 8 U.S.C. § 1373(c). A public postsecondary education institution officer or official shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States. Except as otherwise provided by law, an alien who is not lawfully present in the United States shall not be eligible for any postsecondary education benefit, including, but not limited to, scholarships, grants, or financial aid.”).

94. *Hispanic Interest Coal. of Ala. v. Alabama*, 2012 U.S. App. LEXIS 17544, No. 11-14535, at 11, 16–18 (11th Cir. Aug. 20, 2012). The plaintiffs in *Hispanic Interest Coalition of Alabama (HICA)* challenged the Alabama law declaring that undocumented aliens “shall not be permitted to enroll in or attend any [Alabama] public postsecondary education institution” (citing ALA. CODE § 31-13-8). This law originally permitted public higher education officials in Alabama to “seek federal verification of an alien’s immigration status with the federal government,” but did not allow any independent final determination about an individual’s immigration status (citing ALA. CODE § 31-13-8). The law in question also declared undocumented individuals ineligible for “any postsecondary education benefit, including but not limited to, scholarships, grants, or financial aid” (citing ALA. CODE § 31-13-8). The Federal District Court for the Northern District of Alabama “enjoined [the portion of the law limiting enrollment to aliens who possess lawful permanent residence or an appropriate non-immigrant visa] in its entirety on the grounds that it constituted an unconstitutional classification of aliens.” Following the ruling of the district court, the Alabama legislature amended the law to remove the invalidated provision, “which was understood to define lawful presence as requiring lawful permanent residence or a nonimmigrant visa.” This amendment removed the challenged aspect of the law, and the Eleventh Circuit Court of Appeals, therefore, “vacate[d] the district court’s injunction [of the disputed portion of Alabama’s law] and remand[ed] for the dismissal of the challenge.”

95. GA. CODE ANN. § 20-3-66 (2013).

General addressed admission for undocumented immigrant students at Virginia public colleges and universities. This memorandum became the subject of a challenge heard by the United States District Court for the Eastern District of Virginia, in *Equal Access Education v. Merten*.<sup>96</sup> The plaintiffs in *Merten* were a private immigrant advocacy organization and two undocumented students seeking admission to Virginia's public colleges and universities. The students had come to the United States as small children, graduated from Virginia high schools with excellent grades, and scored well enough on entrance exams to qualify for admission at Virginia institutions of higher education.<sup>97</sup>

In the memorandum at issue in *Merten*, the Virginia Attorney General advised all of Virginia's public colleges and universities that "the Attorney General is strongly of the view that illegal and undocumented aliens should not be admitted into our public colleges and universities at all . . . ." <sup>98</sup> The memorandum also urges higher education officials to report to federal immigration enforcement officials any "facts and circumstances that may indicate that a student on campus is not lawfully present in the United States."<sup>99</sup> Under the terms of the memorandum, each Virginia public college and university creates and implements its own admissions policy for undocumented immigrant students.<sup>100</sup>

The plaintiffs in *Merten* argued that the Virginia Attorney General's memorandum violated various rights afforded by the United States Constitution.<sup>101</sup> First, the plaintiffs argued that because the regulation of immigration is an enumerated federal power, the Virginia Attorney General was acting in an arena belonging exclusively to the federal government.<sup>102</sup> The plaintiffs also argued that the Virginia Attorney General's policy violated the Due Process Clause of the Fourteenth Amendment. Specifically, they contended that the denial of admission to Virginia's institutions of higher education constituted a denial of a property interest in: (1) "receiving a public education at Virginia community colleges . . . that have adopted open enrollment admissions policies"; and (2) "receiving a fair and impartial admissions decision" under constitutionally permissible admissions cri-

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96. 305 F. Supp. 2d 585 (E.D. Va. 2004).

97. *Id.* at 592-93.

98. *Id.* at 591 (citing COMMONWEALTH OF VA., OFFICE OF THE ATT'Y GEN., IMMIGRATION LAW COMPLIANCE UPDATE MEMORANDUM 5 (2002), available at <http://www.schev.edu/adminfaculty/immigrationmemo9-5-02apl.pdf>).

99. *Id.*

100. See *id.*; see also *Target of Virginia Immigrant Bills Includes Undocumented Students*, DIVERSE: ISSUES IN HIGHER EDUC. (Feb. 9, 2011), <http://diverseeducation.com/article/14738>.

101. *Merten*, 305 F. Supp. 2d at 594 (arguing specifically for relief under the Supremacy Clause, the Foreign Commerce Clause, and the Due Process Clause of the Fourteenth Amendment).

102. *Id.* at 601.

teria.<sup>103</sup> The *Merten* court rejected both of the plaintiffs' arguments. First, noting that "not every state enactment or action 'which in any way deals with aliens' is a regulation of immigration and thus per se pre-empted by [the Supremacy Clause of the United States Constitution]," the court held that the Virginia Attorney General's memorandum did not violate the Supremacy Clause because its policy used federal standards to determine the immigration status of affected individuals.<sup>104</sup> The *Merten* court also rejected the plaintiffs' Due Process arguments, noting that "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."<sup>105</sup>

Virginia has considered at least two different changes to its longstanding policy of allowing individual state colleges and universities to develop and implement policies regarding admissions decisions for undocumented students.<sup>106</sup> Specifically, a 2011 bill was introduced to the Virginia House of Delegates that would ban undocumented students from admission to any Virginia institution of higher education.<sup>107</sup> More recently, in the 2013 legislative session, the Virginia House Subcommittee on Higher Education and Arts approved H.B. 1525, which, if passed, would allow undocumented students who came to the United States as children to pay in-state tuition to Virginia's public colleges and universities.<sup>108</sup>

Nearly half of the states in the United States have implemented legislation addressing tuition benefits for undocumented students. However, it is critical to note, again, that there is a lack of consistency in state approaches. Fourteen states have granted undocumented students the in-state tuition rate. The manner in which this benefit has been granted has varied. Some states have used the legislative process to grant the benefit, some states legislatures have given the authority to make the tuition policy to the higher education governing body, and in Maryland, voters approved of the in-state tuition law. Moreover, not all states have granted the tuition benefit. As of 2012, seven states have denied the in-state tuition to undocumented students.

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103. *Id.* at 611.

104. *Id.* at 601 (quoting *De Canas v. Bica*, 424 U.S. 351, 355 (1976)).

105. *Id.* at 611.

106. *See supra* note 97.

107. *See* Danielle Holley-Walker, *Searching for Equality: Equal Protection Clause Challenges to Bans on the Admission of Undocumented Immigrant Students to Public Universities*, 2011 MICH. ST. L. REV. 357, 359 (2011) (citing *Target of Virginia Immigrant Bills Includes Undocumented Students*, DIVERSE: ISSUES IN HIGHER EDUC. (Feb. 9, 2011), <http://diverseeducation.com/article/14738>).

108. *See* Kathy Adams, *Panel Ok's In-State Tuition for Undocumented Students*, THE VIRGINIAN-PILOT (Jan. 30, 2013), available at <http://hamptonroads.com/2013/O1/panel-oks/instate-tuition/undocumented-students>.

TABLE 3: STATES THAT DENY ADMISSION TO UNDOCUMENTED STUDENTS

State	Code	Year Passed
Alabama	Ala. Code § 31-13-8	2011
Georgia	Ga. Code Ann. § 20-3-66	2011
South Carolina	S.C. Code Ann. §59-101-430.	2008

*Note:* Virginia is not included in this table because Virginia's policy is not a state-wide policy, but rather, as interpreted by its Attorney General, allows individual Virginia institutions of higher education to adopt and implement their own policies with respect to admission of undocumented immigrant students. See discussion *supra* at Part II.C for more information.

### III. DATA ON RACE, PARTISANSHIP, AND THE DEVELOPMENT OF STATE LAWS ON IN-STATE TUITION BENEFITS FOR UNDOCUMENTED IMMIGRANT STUDENTS

Having discussed the federal government's failure to pass the DREAM Act in Part I of this Article and state efforts to address the development of laws that impact access to in-state tuition at public institutions of higher education in the absence of federal legislative guidance in Part II, Part III now considers whether race and partisanship are influential factors in the development of such law. This Part describes the racial composition and partisan makeup of the state legislative bodies (and the governor of the state at the time of passage) who have (1) increased access to higher education for undocumented immigrant students; (2) decreased access to higher education for undocumented immigrant students; and (3) have not passed legislation either increasing or decreasing access to higher education for undocumented immigrant students. Based on this study, it appears that there is no relationship between tuition benefits and racial composition of the legislature and tuition benefits, racial composition of the state's population and tuition benefits, or the partisan make-up of the legislature or the Governor's office. This discussion gives important context to the conditions and constraints within which these laws were passed. It also may provide information about the future of this issue as it is addressed by legislative bodies across the country.

#### A. *Racial Composition of State Legislatures and Access to Higher Education for Undocumented Students*

Research indicates that the presence of minorities in elected offices correlates to the level of responsiveness regarding minority interests and the inclusion of minorities in decision making.<sup>109</sup> Furthermore, it has been found that populations that lack representation also lack the capacity to influence government, and they consequently receive few public benefits.

109. Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. LAW REV. 1249 (1989).



For example, Morris's study of African American communities found, "Their streets were the last paved or went unpaved; they were the farthest from the parks and recreational facilities; their neighborhoods were less frequently or properly patrolled by the police; and in virtually all areas of benefit distribution, they were generally served last and least."<sup>110</sup> But again, the election of minorities to public office results in more responsiveness to minority interests and inclusion in government decisions. For example, studies indicate that when African Americans are elected to public office there are increased benefits to the African American community.<sup>111</sup> One study found that Black elected officials have provided constituents with benefits in employment housing, healthcare, education, consumer protection, police relations, and psychological recognition.<sup>112</sup> Browning, Marshall, and Tabb's 1984 study specifically found that African American and Hispanic city council members were associated with changes in four policy areas: (1) police civilian review boards; (2) minority appointments to boards and commissions; (3) city contracts with minority firms; and (4) minority employment.<sup>113</sup> In a 1982 study of forty-three cities with Black populations above 10 percent, researchers found that the presence of a Black mayor is the best predictor of Black employment in city government.<sup>114</sup> Based on this data, the election of minorities to public office seems to have a positive impact on policies for minority populations. Thus, this Part examines data on the percentage of Hispanics elected to state legislatures to see if there is a similarly clear relationship to the passage of in-state tuition laws, as these laws benefit undocumented students who are predominantly Hispanic.

Fourteen states have passed laws increasing access to higher education for undocumented students by allowing undocumented students to pay in-state tuition at public colleges and universities. Table 4 illustrates the percentage of Latino state legislators the year each of these fourteen state laws were passed. It appears from this data that there is no threshold necessary, in terms of percentage of Hispanic legislators needed, for a state to pass legislation granting in-state tuition. Out of these fourteen states, California, New Mexico, and Texas all had relatively high percentages of Latino state legislators when in-state laws were passed in their respective states.<sup>115</sup> The other eleven states had lower percentages of Hispanic legislators. For example, Oklahoma had no Hispanic legislators when its bill was passed in 2003.<sup>116</sup>

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110. Milton D. Morris, *Black Electoral Participation and the Distribution of Public Benefits*, in *MINORITY VOTE DILUTION* 271, 271–85 (Chandler Davidson ed., 1984).

111. See sources cited *supra* note 6.

112. Campbell & Feagin, *supra* note 6.

113. BROWNING, MARSHALL & TABB, *supra* note 6.

114. Peter K. Eisinger, *supra* note 6.

115. See *infra* Table 4.

116. See *id.*



There is also no clear trend and no evidence of a relationship between the percentage of the state population that is of Hispanic origin and the passage of in-state tuition laws. For example, California had a 32 percent Hispanic state population in 2001, compared to Oklahoma with a mere 5 percent Hispanic state population in 2003, the year it passed legislation.

TABLE 4: COMPARISON OF RACIAL COMPOSITION OF STATES THAT GRANT IN-STATE TUITION TO UNDOCUMENTED STUDENTS

State	Year Passed	Percentage of Latino State Legislators	Percentage of Latino State Population
California	2001	21.7	32.4*
Connecticut	2011	4.8	13.8
Illinois	2003	6.2	12.3*
Kansas	2004	1.2	7.0*
Maryland	2011	1.6	8.4
Nebraska	2006	2.0	7.4
New Mexico	2005	39.5	43.6
New York	2002	5.7	15.1*
Oklahoma	2003	0	5.2*
Rhode Island	2011	4.4	12.8
Texas	2001	19.3	32.0*
Utah	2002	1.0	9.0*
Washington	2003	2.0	7.5*
Wisconsin	2009	0.8	5.3

Note: Data on percentage of Latino legislators is from the National Association of Latino Elected Officials. Percentage of the state population that is Latino is from the American Community Survey from the year legislation was passed unless otherwise noted.

\* American Community Survey data population estimates were not collected prior to 2005; therefore, state population composition for these states is 2000 United States Census data.

It is also important to highlight that some states which passed legislation barring undocumented students from receiving in-state tuition had higher percentages of Hispanic legislators than the states that grant in-state tuition. Arizona (18.9 percent) and Colorado (7.0 percent) had the highest percentage of Latino state legislators at the time their statutes were enacted.<sup>117</sup> Of the remaining states, only Georgia (1.3 percent) had greater than 1 percent of Latino legislators at the time their statutes were enacted, and two states (Alabama and Montana) had no Latino legislators at the time their statutes were enacted.<sup>118</sup>

117. See *id.*

118. See *id.*

Of the eight states that have passed laws expressly prohibiting in-state tuition for undocumented students, only Arizona (29.2 percent) and Colorado (19.7 percent) had state Latino populations in excess of 10 percent when their state statute was enacted.<sup>119</sup> Of the remaining six states, Alabama, Georgia, Indiana, Montana, New Hampshire, and South Carolina, the state with the highest population of Latinos at the time their statute was enacted was Georgia (7.6 percent).<sup>120</sup>

Table 5 illustrates the percentage of Latino state legislators and the Latino percentage of the state population during the year each of these eight state laws were passed. Again, there is no clear link between percentage of legislators and passage of tuition laws that bar undocumented students from receiving in-state tuition. There is also no clear relationship between the population of the state that is of Hispanic origin and such laws.

TABLE 5: COMPARISON OF RACIAL COMPOSITION OF STATES THAT PROHIBIT IN-STATE TUITION FOR UNDOCUMENTED STUDENTS

State	Year Passed	Percentage of Latino State Legislators	Percentage of Latino State Population
Alabama	2011	0	3.9
Arizona	2006	18.9	29.2
Colorado	2006	7.0	19.7
Georgia	2007	1.3	7.6
Indiana	2011	0.7	6.1
Montana	2011	0	2.9
New Hampshire	2012	0.9	2.9**
South Carolina	2008	0.6	4.1

\*\* Most recent available data is 2011; therefore, New Hampshire's estimate is the American Community Survey 2011 estimate.

Twenty-eight states have not implemented law or policy on in-state tuition for undocumented immigrant students.<sup>121</sup> Of those 28 states, only Florida (10 percent) and Nevada (14.3 percent) had 10 percent or greater percentages of Latino state legislators as of 2012.<sup>122</sup> The remaining twenty-six states all had fewer than 5.9 percent Latino state legislators as of 2012.<sup>123</sup> Ten of these states, Alaska, Arkansas, Idaho, Iowa, Kentucky, Maine, Mississippi, North Dakota, South Dakota, and West Virginia, had no Latino state legislators as of 2012.<sup>124</sup> Table 6 illustrates the 2012 per-

119. *See id.*

120. *See id.*

121. *See infra* Table 6.

122. *See id.*

123. *See id.*

124. *See id.*

centage of Latino state legislators and the 2012 Latino percentage of the state population for states who have not passed laws on in-state tuition for undocumented students.

Of those states, Florida and Nevada had Latino populations in excess of 20 percent (22.9 percent and 27.1 percent, respectively), while Idaho, New Jersey, and Oregon had Latino populations between 10 percent and 20 percent (11.5 percent, 18.1 percent, and 12.0 percent, respectively). The remaining twenty-three states had Latino populations of less than 10 percent.<sup>125</sup>

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125. *See id.*

TABLE 6: RACIAL COMPOSITION OF STATES WITHOUT POLICIES ON IN-STATE TUITION FOR UNDOCUMENTED STUDENTS

State	Percentage of Latino State Legislators	Percentage of Latino State Population
Alaska	0	5.8
Arkansas	0	6.5
Delaware	1.6	8.4
Florida	10	22.9
Hawaii	2.6	9.2
Idaho	0	11.5
Iowa	0	5.0
Kentucky	0	3.0
Louisiana	0.7	4.3
Maine	0	1.3
Massachusetts	2.5	9.9
Michigan	1.4	4.5
Minnesota	1.0	4.8
Mississippi	0	2.7
Missouri	1.0	3.6
Nevada	14.3	27.1
New Jersey	5.8	18.1
North Carolina	1.2	8.6
North Dakota	0	2.2
Ohio	0.8	3.2
Oregon	1.1	12.0
Pennsylvania	0.4	5.9
South Dakota	0	2.8
Tennessee	0.8	4.6
Vermont	0.6	1.5
Virginia	0.7	8.0
West Virginia	0	1.1
Wyoming	2.2	9.1

Note: Data on percentage of Latino legislators is from the National Association of Latino Elected Officials. Percentage of the state population that is Latino is from the most recently available American Community Survey data, which was collected in 2011.

B. *Partisan Makeup of State Legislatures (and Governorships) and Access to Higher Education for Undocumented Students*

Of the fourteen states that have passed laws granting in-state tuition to undocumented immigrant students, seven (in California, Illinois, Maryland, New Mexico, Oklahoma, Utah, and Wisconsin) were passed during a period when a single political party controlled both legislative chambers

and the governorship.<sup>126</sup> Six of these states (California, Maryland, New Mexico, Oklahoma, and Wisconsin) were controlled by Democrats the year their laws were passed.<sup>127</sup> Utah was controlled by Republicans at the time its law was passed.<sup>128</sup> Six states, Connecticut, Kansas, New York, Rhode Island, Texas, and Washington, enacted laws granting in-state tuition to undocumented students during a time of divided government.<sup>129</sup> Table 7 illustrates the partisan makeup of the State House, State Senate, and Governor of various states at the time laws were passed granting in-state tuition to undocumented students.

TABLE 7: PARTY COMPOSITION OF STATE LEGISLATURES & GOVERNORS FOR STATES GRANTING IN-STATE TUITION TO UNDOCUMENTED STUDENTS

State	Year Passed	State House	State Senate	Governor
California	2001	D	D	D
Connecticut	2011	D	D	R
Illinois	2003	D	D	D
Kansas	2004	R	R	D
Maryland	2011	D	D	D
Nebraska	2006	Nonpartisan Unicameral Legislature		R
New Mexico	2005	D	D	D
New York	2002	D	R	R
Oklahoma	2003	D	D	D
Rhode Island	2011	D	D	R
Texas	2001	D	R	R
Utah	2002	R	R	R
Washington	2003	D	R	D
Wisconsin	2009	D	D	D

Note: Data on party composition in various years is from the National Conference of State Legislatures.

Of the eight state laws prohibiting in-state tuition to undocumented immigrant students, four were passed during a time period when both legislative houses and the governorship were controlled by a single party.<sup>130</sup> Colorado and New Hampshire passed such laws while under Democratic control; Georgia and South Carolina passed such laws while

126. See *infra* Table 7.

127. See *id.*

128. See *id.*

129. See *id.* Nebraska's state legislature is unicameral and nonpartisan and is therefore omitted from this portion of analysis.

130. See *infra* Table 8.

controlled by Republicans.<sup>131</sup> The remaining four states, Alabama, Arizona, Indiana, and Montana, all passed laws denying in-state tuition to undocumented students during times of divided government.<sup>132</sup> Table 8 illustrates the partisan makeup of the State House, State Senate, and Governor at the time laws were passed granting in-state tuition to undocumented students.

TABLE 8: PARTY COMPOSITION OF STATE LEGISLATURES & GOVERNORS OF STATES THAT PROHIBIT IN-STATE TUITION TO UNDOCUMENTED STUDENTS

State	Year Passed	House	Senate	Governor
Alabama	2011	D	D	R
Arizona	2006	R	R	D
Colorado	2006	D	D	D
Georgia	2007	R	R	R
Indiana	2011	R	D	R
Montana	2011	R	Split 50/50	D
New Hampshire	2012	D	D	D
South Carolina	2008	R	R	R

Note: Data on party composition in various years is from the National Conference of State Legislatures.

It is expected that state legislatures will continue to address the topic of tuition benefits as well as other issues related to undocumented persons, such as driver's licenses, in the upcoming legislative sessions. However, the results of this research prohibit any predictions based on race or partisan composition of legislative bodies or the Governor. Nor is there any evidence that the percentage of Hispanics in a state is related to the passage of any tuition law related to undocumented students.

#### IV. FEDERAL PREEMPTION AND STATE LAWS GRANTING REDUCED TUITION TO UNDOCUMENTED IMMIGRANT STUDENTS

Having discussed the various state laws regarding in-state tuition for undocumented immigrant students in Part II and the development of these laws in the context of race and partisan affiliation in Part III, this Article now turns to a discussion of preemption as it relates to these laws. This discussion of preemption is important because several of the state laws discussed in Parts II and III have been subject to preemption-related challenges by opponents of the laws. This Part begins by introducing the concept of preemption. It then discusses preemption in the context of state immigration laws generally, and, finally, it discusses the implications of

131. See *id.*

132. See *id.*

preemption for state laws regarding in-state tuition for undocumented immigrant students.

### A. *What is Preemption?*

The concept of preemption originates in the Supremacy Clause of the United States Constitution.<sup>133</sup> The Supremacy Clause “eliminates conflicts between federal and state law by establishing that the Constitution and laws of the United States will trump conflicting state law.”<sup>134</sup> Whether Congress intended the federal law to supersede state law is generally the central question in issues relating to preemption.<sup>135</sup> The concept of preemption encompasses both preemption of state substantive law and preemption of state court jurisdiction over federal claims; only the former directly applies to the state laws at issue in this Article.<sup>136</sup> Preemption of state substantive law includes both express preemption and implied preemption.<sup>137</sup> Although the United States Supreme Court generally recognizes a “presumption against preemption of state substantive law, especially implied preemption,”<sup>138</sup> accurately “[p]redicting the result in preemption cases can often be difficult.”<sup>139</sup>

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133. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

134. Ryan Walters, *Provoking Preemption: Why State Laws Protecting the Right to a Union Secret Ballot Election Are Preempted by the NLRA*, 52 SANTA CLARA L. REV. 1031, 1063 (2012).

135. See *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990).

136. See Walters, *supra* note 134, at 1063–66 (describing the difference between preemption of state substantive law and preemption of state court jurisdiction over federal claims). Because this Article only involves the issue of possible preemption of state substantive law, preemption of state court jurisdiction over federal claims will not be discussed in detail here. In short, preemption of state court jurisdiction over federal claims occurs when Congress expressly removes state courts “of jurisdiction to hear federal claims in order for a federal court to find Congress intended such a result.” *Id.* at 1066 (citing *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823–26 (1990); *Taffin v. Levitt*, 493 U.S. 455, 458–59 (1990)). Notably, “federal courts will almost never find that Congress has impliedly preempted state court jurisdiction over federal claims.” *Id.* at 1066 (citing *Yellow Freight*, 494 U.S. at 823–26). Field preemption can be express as well as implied. See *id.* at 1064 (citing Henry Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, 529 (1993)).

137. See *English*, 496 U.S. at 78–79.

138. Walters, *supra* note 134, at 1064 (citing *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992); *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. 132, 146–52 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236–37 (1947)).

139. Walters, *supra* note 134, at 1065 (citing Caleb Nelson, *Preemption*, 86 VA L. REV. 225, 232 (2000) (describing the prevailing view of the Supreme Court’s “[m]odern preemption jurisprudence [as] a muddle”); Jamelle C. Sharpe, *Toward (A) Faithful Agency in the Supreme Court’s Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 369 (2011) (“Although the language used to describe the various preemption analyses applied by the Court has remained stable for de-

It is also important to note that there are two types of implied preemption: field preemption and conflict preemption.<sup>140</sup> These two types of implied preemption are “not rigidly distinct.”<sup>141</sup> Field preemption specifically occurs when an area of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”<sup>142</sup> Conflict preemption, on the other hand, occurs in instances where “compliance with both federal and state regulation is a physical impossibility”<sup>143</sup> or when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>144</sup> The term “conflict preemption,” is thus “a bit misleading, as there need not be a true conflict between state and federal law in the sense that compliance with each law is not possible.”<sup>145</sup>

In short, any preemption discussion about the validity of a state law requires a three-pronged inquiry. First, does the state law in question directly conflict with federal law by addressing a policy arena which is completely occupied by Congress?<sup>146</sup> Second, does the state law in question attempt to address a policy arena where there is pervasive federal regulation, dominant federal interest, or other federal laws in place that demonstrate congressional intent to fully occupy the policy field?<sup>147</sup> Third, is the state law in question directly invalidated by an existing federal law?<sup>148</sup>

### B. Preemption and State Immigration Laws Generally

Discussing the issue of preemption in the context of state immigration laws is important because of the federal government’s authority over immigration policy. Federal power over immigration is not specifically enumerated in the Constitution, but it is commonly associated with the power vested in Congress “[t]o establish an uniform Rule of Naturalization.”<sup>149</sup> The Supreme Court has historically found this power to be

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acades, the Court has struggled to provide commensurate levels of outcome predictability in its preemption decisions.”) (citation omitted).

140. See Howard A. Learner, *Restraining Federal Preemption When There is an “Emerging Consensus” of State Environmental Law and Policies*, 102 NW. U. L. REV. 649, 659 (2008).

141. Walters, *supra* note 134, at 1064 (citing *English*, 496 U.S. at 79–80 n.5).

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

143. Drummonds, *supra* note 136, at 531.

144. *Id.*

145. Walters, *supra* note 136, at 1064–65 (citing Drummonds, *supra* note 136, at 529).

146. See Beverly N. Rich, *Tracking AB 540’s Potential Resilience: An Analysis of In-State Tuition for Undocumented Students in Light of Martinez v. Regents of the University of California*, 19 S. CAL. REV. L. & SOC. JUST. 297, 309 (2010) (citing *Gade*, 505 U.S. at 98).

147. See *id.* (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230–32 (1947)).

148. See *id.* (citing *Rice*, 331 U.S. at 230–31 (1947)).

149. U.S. CONST., art.I, § 8, cl. 4.



grounded in the Commerce Clause<sup>150</sup> and “principles of international law that hold that sovereign nations have the right to regulate the entrance of foreigners within their boundaries.”<sup>151</sup> The federal government, therefore, has a “preeminent role”<sup>152</sup> in regulating aliens within the borders of the United States, and when Congress “passes lawful standards for admission, naturalization, and residence in the United States, states ‘can neither add to nor take from the conditions.’”<sup>153</sup>

Although federal courts afford significant deference to Congress when evaluating state immigration laws for potential federal preemption,<sup>154</sup> the Supreme Court “has not always held that federal [immigration] laws preempt state [immigration] statutes.”<sup>155</sup> For example, in *DeCanas v. Bica*,<sup>156</sup> the Supreme Court refused to invalidate a California law that prohibited the employment of undocumented immigrant workers “if such employment would have an adverse effect on lawful resident workers.”<sup>157</sup> The *DeCanas* Court specifically noted that not all state statutes concerning aliens are “*ipso facto* regulation of immigration.”<sup>158</sup> Moreover, the *DeCanas* Court “deferred to the police power of states in the regulation of intrastate employment, and pointed to the state’s ability to

150. See generally *Chy Lung v. Freeman*, 92 U.S. 275, 281 (1875) (striking down a California statute authorizing state officials to regulate passengers arriving in California from foreign ports).

151. Jessica Salsbury, Comment, *Evading “Residence”: Undocumented Students, Higher Education, and the States*, 53 AM. U. L. REV. 459, 481 (2003) (citing *Shaughnessey ex rel. Mezei*, 345 U.S. 206, 210 (1953) (“[T]he power to expel or exclude aliens as a fundamental sovereign attribute exercised by the [federal] Government’s political departments largely immune from judicial control.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (identifying the federal government’s power of deportation); *Ekiu v. United States*, 142 U.S. 651, 664 (1892) (recognizing federal government’s power to exclude aliens from the United States); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (“The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship, are all sovereign powers [afforded the federal government].”)).

152. *Toll v. Moreno*, 458 U.S. 1, 10 (1982).

153. Salsbury, *supra* note 151, at 481 (quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948) (invalidating a California statute that restricted aliens from fishing in California coastal waters because the law conflicted with the federal government’s power to regulate immigration)).

154. See *Leading Cases*, 125 HARV. L. REV. 281, 286 (2011) (“At their core, preemption cases are about federalism: the distribution of power between the states and the federal government. Federalism is a value enshrined in the Constitution and, as such, is a value over which the Court has traditionally acted as guardian. Because the Supremacy Clause allows Congress to preempt state law at will, the Court has historically been reluctant to find preemption in the absence of clear congressional intent.”) (citations and footnotes omitted).

155. Salsbury, *supra* note 151, at 482.

156. 424 U.S. 351 (1976).

157. *Id.* at 352.

158. *Id.* at 355.

pass child labor laws, to enforce occupational and safety standards, and to regulate wage laws.”<sup>159</sup>

The Court’s decision in *DeCanas* established the “prevailing three-part test for determining whether federal law preempts a state statute related to immigration.”<sup>160</sup> First, a state immigration law will be preempted if the state law purports to regulate immigration.<sup>161</sup> Second, a state immigration law will be preempted if the state law attempts to regulate an area where Congress intends to “occupy the field,”<sup>162</sup> such as by passing federal law with a “clear and manifest purpose”<sup>163</sup> to be a “complete ouster of state power”<sup>164</sup> in the substantive policy area in question. Third, a state immigration law will be preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,”<sup>165</sup> in that it becomes impossible to comply with both the state and federal laws.

### C. Preemption in the Context of State Laws Regarding In-State Tuition to Undocumented Immigrant Students

Relatively few state laws regarding in-state tuition for undocumented students have been examined by courts using the *DeCanas* three-prong preemption test.<sup>166</sup> The first such case, *League of United Latin American Citizens v. Wilson*,<sup>167</sup> involved a challenge to Proposition 187, which California voters approved on November 8, 1994.<sup>168</sup> Proposition 187 “provide[d] for cooperation between [the] agencies of state and local government with the federal government, and . . . establish[ed] a system of required notification by and between such agencies to prevent illegal

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159. Salsbury, *supra* note 151, at 483.

160. *Id.*

161. See *DeCanas*, 424 U.S. at 355 (explaining that a regulation of immigration is “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain”).

162. *Id.* at 357 n.5.

163. *Id.* at 357 (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963)).

164. *Id.* at 357.

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

166. This Part is not intended to be an exhaustive list of all federal and state cases involving preemption challenges to state laws regarding in-state tuition for undocumented immigrant students. The cases presented in this Part are the “reported” cases available to researchers through publishing outlets such as West Publishing, Westlaw, or LexisNexis. However, these publishing outlets do not publish every decision issued by state and federal courts. Some court decisions are designated as “unpublished” or “not for official publication” by either the judge or the publishing outlet. If this is true of any decision relating to a preemption challenge to a state law regarding in-state tuition for undocumented immigrant students, these cases would not be available to researchers and are, therefore, not part of the analysis of this Article.

167. 997 F. Supp. 1244 (C.D. Cal. 1997).

168. *Id.* at 1249.

aliens in the United States from receiving benefits or public service of California.”<sup>169</sup> Proposition 187 also denied public postsecondary education benefits to anyone not a “citizen of the United States, an alien lawfully admitted as a permanent resident in the United States, or a person who is otherwise authorized under federal law to be present in the United States.”<sup>170</sup>

Using the *DeCanas* three-pronged test, the United States District Court for the Central District of California found that federal immigration law, specifically PRWORA,<sup>171</sup> preempted Proposition 187. The court held that “states have no power to effectuate a scheme parallel to that specified in [PRWORA], even if the parallel scheme does not conflict with [PRWORA]”<sup>172</sup> because Congress is centrally responsible for regulating the policy area of public postsecondary education benefits under PROWRA. The court further noted that under section 505 of IIRIRA,<sup>173</sup> Congress regulates the eligibility of undocumented immigrant students for postsecondary education benefits, which “also manifests Congress’ intent to occupy this field.”<sup>174</sup>

Subsequent preemption challenges to state policies granting in-state tuition to undocumented immigrant students were heard in 2004 and 2005 by the United States District Court for the Eastern District of Virginia<sup>175</sup> and the United States District Court for the District of Kansas.<sup>176</sup> The central question in both of these cases involved whether the plaintiffs had standing to challenge the state laws. In *Day v. Sebelius*,<sup>177</sup> a group of non-resident students of Kansas state colleges and universities (and their parents) challenged the Kansas law on in-state tuition regarding undocumented immigrants who attended an accredited Kansas high school for at least three years prior to graduation and signed an affidavit agreeing to legalize their immigration status in federal district court. Their claim alleged that the Kansas law violated Section 505 of IIRIRA and the Equal

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169. *Id.* (citing Prop. 187, § 1). The relevant provisions of Proposition 187 required “public education personnel to (i) verify the immigration status of persons with whom they come in contact; (ii) notify certain defined categories of persons of their immigration status; (iii) report those persons to state and federal officials; and (iv) deny those persons social services, health care and education.” *Id.*

170. *Id.* at 1256. Interestingly, California enacted legislation in 2001 making undocumented immigrant students eligible for in-state tuition. *See supra* Part II.A.

171. PRWORA is discussed in detail in Part I.C, *supra*.

172. 997 F. Supp. at 1255 (citing 8 U.S.C. § 1642(a)).

173. IIRIRA is discussed in detail in Part I.C, *supra*.

174. 997 F. Supp. at 1256.

175. *See Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585 (E.D. Va. 2004). This decision is discussed in detail in Part II.C, *supra*.

176. *Day v. Sebelius*, 376 F. Supp. 2d 1022 (D. Kan. 2005).

177. *Id.* at 1025.

Protection Clause of the U.S. Constitution.<sup>178</sup> The *Day* court dismissed the plaintiffs' cases for lack of standing, explaining that the plaintiffs could not establish that the Kansas statute actually applied to them since each plaintiff had paid out-of-state tuition both before and after the statute was enacted.<sup>179</sup> Moreover, the *Day* court noted that none of the plaintiffs could demonstrate that relief from the court would address their injuries since the invalidation of the Kansas statute would have left them in the exact same position as before the statute's enactment: as students required to pay out-of-state tuition in order to attend a Kansas state college or university.<sup>180</sup>

In 2010, in *Martinez v. Regents of the University of California*,<sup>181</sup> the California Supreme Court heard a challenge to California's statute granting in-state tuition to undocumented immigrant students at California public institutions of higher education. The plaintiffs in *Martinez*, who were deemed to have standing to challenge the California law, were a group of students paying out-of-state tuition at California public institutions of higher education. Among the plaintiffs' arguments,<sup>182</sup> the court addressed whether "federal immigration laws preempt California's policy of granting in-state tuition to nonresident high school graduates."<sup>183</sup>

The *Martinez* court's preemption analysis focused on Section 505 of IIRIRA. In rejecting the plaintiffs' preemption arguments, the *Martinez*

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178. *Id.* at 1025–26.

179. *Id.* at 1033, 1039–40.

180. *Id.* at 1034.

181. 241 P.3d 855 (Cal. 2010).

182. In addition to their preemption arguments, the plaintiffs in *Martinez* also argued that the California's statute violated federal law in that it conferred a benefit on undocumented individuals without granting the same benefit to out-of-state students who were citizens of the United States. *See id.* at 860. The California Supreme Court addressed the issue of whether California's statute violated IIRIRA, PRWORA, and the Privileges and Immunities Clause of the United States Constitution. *See id.* at 860–861. In their argument, the plaintiffs asserted that "[b]y making illegal aliens who possess no lawful domicile in the state of California eligible for in-state tuition rates, while denying this benefit to U.S. citizens whose lawful domicile is outside California, the state of California has denigrated U.S. citizenship and placed U.S. citizen Plaintiffs in a legally disfavored position compared to that of illegal aliens." *Id.* at 869. The *Martinez* court rejected each of the plaintiffs' arguments, noting that the U.S. Supreme Court interprets the Privileges and Immunity Clause narrowly and only rarely invokes the to strike down a state statute. *Id.* at 869 (citing *Saenz v. Roe*, 536 U.S. 489 (1999) (Rehnquist, C.J., dissenting); *see also Slaughter-House Cases*, 83 U.S. 36 (1872)). The *Martinez* court further reiterated that the Privileges and Immunities Clause, unlike other rights-granting constitutional clauses, only applies to citizens, stating that "no authority suggests the clause prohibits states from ever giving resident aliens ([whether] lawful or unlawful) benefits they do not also give to all American citizens." *Martinez*, 241 P.3d at 869. The *Martinez* court also noted that "[t]he fact that the [Privileges and Immunities C]lause does not protect aliens does not logically lead to the conclusion that it also prohibits states from treating unlawful aliens more favorably than nonresident citizens." *Id.*

183. *Martinez*, 241 P.3d at 860–61.

court noted, “[The IIRIRA’s] language compels us to conclude that it does not prohibit what the [California State] Legislature did in enacting [the California law permitting undocumented students to pay in-state tuition at state colleges and universities].”<sup>184</sup> Further, the *Martinez* court noted that California did not base its statutory exemption from paying nonresident tuition on residence, but instead “on *other* criteria, specifically, that persons possess a California high school degree or equivalent; that if they are unlawful aliens, they file an affidavit stating that they will try to legalize their immigration status; and, especially important, that they have attended ‘[h]igh school . . . in California for three or more years.’”<sup>185</sup> Moreover, the *Martinez* court observed that “many unlawful aliens who would qualify as California residents but for their unlawful status, and thus would not have to pay out-of-state tuition, will not be eligible for [California’s in-state tuition] exemption.”<sup>186</sup> Therefore, “only those who attended high school in California for at least three years and meet the other requirements are eligible”<sup>187</sup> for in-state tuition according to California’s policy.

In addition to their preemption arguments under IIRIRA, the *Martinez* plaintiffs also argued that California’s statute was preempted by PRWORA. Specifically, the plaintiffs claimed, “[N]ot only must the state law specify that illegal aliens are eligible [for in-state tuition], but that the [California S]tate Legislature must also expressly reference PRWORA [when enacting its law].”<sup>188</sup> Additionally, the *Martinez* plaintiffs asserted that in order to avoid preemption under PRWORA, the California law “would have to use the federal statutory term ‘illegal alien’ in its legislation—a term that would clearly put the public on notice.”<sup>189</sup> Neither of these arguments were ultimately persuasive. Refusing to invalidate the California law under PRWORA, the *Martinez* Court noted that PRWORA “requires no specific words”<sup>190</sup> and that the California law “expressly state[s] that it applies to undocumented aliens, rather than conferring a benefit generally without specifying that its beneficiaries may include undocumented aliens.”<sup>191</sup> If Congress’s intentions in passing PRWORA were different, reasoned the *Martinez* court, “it would have said so clearly and would not have set a trap for unwary [state] legislatures.”<sup>192</sup> In the years

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184. *Id.* at 863.

185. *Id.* at 863 (emphasis in original) (citing CAL. EDUC. CODE § 68062; Regents of Univ. of Cal. v. Superior Court 225 Cal. App. 3d 972, 980 (1990), 276 Cal. Rptr. 197 (1990)).

186. *Id.* at 863–64.

187. *Id.*

188. *Id.* at 867.

189. *Id.* at 868 (internal quotations omitted).

190. *Id.*

191. *Id.*

192. *Id.*

subsequent to *Martinez*, no other state laws granting in-state tuition to undocumented immigrant students have been challenged under the theory of federal preemption.

## V. FINDINGS AND IMPLICATIONS

### A. *Race and the Development of In-State Tuition Laws for Undocumented Immigrant Students*

The data presented in this Article, specifically, Tables 4, 5, and 6, indicate that there is no clear relationship between the percentage of Hispanic legislators and the development of in-state tuition laws for undocumented immigrant students. Specifically, while there are states with large Latino populations and high percentages of Latino state legislators that have passed laws granting in-state tuition to undocumented immigrant students (such as California, New Mexico, and Texas),<sup>193</sup> there are also similarly situated states that have passed laws prohibiting undocumented immigrant students from qualifying for in-state tuition (Arizona),<sup>194</sup> and states that have not implemented any policy on in-state tuition for undocumented immigrant students (Florida and Nevada).<sup>195</sup> If a high percentage of Latino state legislators and a large Latino population within a state were positively correlated with state policy granting in-state tuition to undocumented immigrant students, then one might expect that Arizona, Florida, and Nevada would have implemented laws granting in-state tuition to undocumented immigrant students, like California, New Mexico, and Texas.

Interestingly, the development of in-state tuition laws for undocumented students in states with relatively low percentages of Latino state legislators and small Latino populations also appears to not be correlated. As indicated by Tables 4, 5, and 6, there are states with small Latino populations and low percentages of Latino state legislators that have passed laws granting in-state tuition to undocumented students (Connecticut, Illinois, Kansas, Maryland, Nebraska, New York, Oklahoma, Rhode Island, Utah, Washington, and Wisconsin).<sup>196</sup> There are also states, however, with similar percentages of Latino state legislators and Latino populations that have passed laws prohibiting undocumented students from qualifying for in-state tuition (Alabama, Georgia, Indiana, Montana, New Hampshire, and South Carolina) and states that have not implemented any policy on in-state tuition for undocumented immigrant students (Alaska, Arkansas, Delaware, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee,

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193. See *supra* Table 4.

194. See *supra* Table 5.

195. See *supra* Table 6.

196. See *supra* Table 4.

Vermont, Virginia, West Virginia, and Wyoming). If a small percentage of Latino state legislators and a small state Latino population were positively correlated with state policy denying in-state tuition to undocumented immigrant students (or the absence of state legislation on in-state tuition for undocumented immigrant students), one would not expect states like Connecticut, Illinois, Kansas, Maryland, Nebraska, New York, Oklahoma, Rhode Island, Utah, Washington, and Wisconsin to have passed laws granting in-state tuition to undocumented immigrant students.

Oklahoma, Alabama, and Alaska exemplify how difficult it is to draw the conclusion from this data that race contributes to the development of in-state tuition laws for undocumented immigrant students. All three of these states (which are all located in different geographic areas of the United States) have relatively low state Latino populations (between 3.9 percent and 5.8 percent), and none of these three states have any Latino state legislators.<sup>197</sup> Yet Oklahoma has passed a state law granting in-state tuition to undocumented immigrant students, while Alabama has passed a state law denying in-state tuition to undocumented immigrant students and Alaska has not passed legislation either granting or denying in-state tuition to undocumented immigrant students. In short, the data presented in Tables 4, 5, and 6 indicates that the issue of how race influences the development of in-state tuition laws for undocumented immigrant students remains an open question.

B. *Party Affiliation and the Development of In-State Tuition Laws for Undocumented Immigrant Students*

Like the data discussed above relating to race, the data presented in this Article, specifically, Tables 7 and 8, do not indicate that party affiliation plays a substantial role in the development of in-state tuition laws for undocumented immigrant students. Specifically, states have passed laws granting in-state tuition to undocumented immigrant students during times when Democrats have controlled the legislature and the governorship (California, Illinois, Maryland, New Mexico, Oklahoma, and Wisconsin), but similar laws have also been passed when Republicans controlled both houses of the state legislature and the governorship (in Utah) and during times of divided government (Connecticut, Kansas, New York, Rhode Island, Texas, and Washington). Conversely, states have passed laws denying in-state tuition to undocumented immigrant students during times when Democrats have controlled the legislature and the governorship (Colorado and New Hampshire), when Republicans have controlled the legislature and the governorship (Georgia and South Carolina), and during times of divided government (Alabama, Arizona, Indiana, and Montana).

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197. See *supra* Tables 4–6.



Utah and Colorado, which are geographic neighbors, demonstrate how difficult it is to draw a conclusion from the present data that party affiliation contributes to the development of in-state tuition laws for undocumented immigrant students. Utah, a state controlled by Republicans and generally thought of as more politically conservative than Colorado, has passed legislation granting in-state tuition to undocumented immigrant students. Colorado, on the other hand, passed a law denying in-state tuition for undocumented immigrant students during a time in which its legislature and governorship were controlled by Democrats. Regarding the data presented in Tables 7 and 8, it remains an open question as to how party affiliation influences the development of in-state tuition laws for undocumented immigrant students.

*C. Preemption and the Development of In-State Tuition Laws for Undocumented Immigrant Students*

As described in this Article, opponents of state laws regarding in-state tuition for undocumented immigrant students (whether laws granting in-state tuition or laws denying in-state tuition) face an uphill battle when challenging these laws on the basis of preemption. First, as described above, the requirement that a litigant have standing remains a significant procedural barrier to challenging these laws, especially in federal court. The plaintiffs in *Merten* and *Day* failed to demonstrate they had standing, and, therefore, the U.S. District Courts for the Eastern District of Virginia and the District of Kansas declined to reach the central preemption issues raised in these cases.<sup>198</sup> Second, in the most recent preemption challenge, the Supreme Court of California ruled in *Martinez* that California's law did not regulate immigration, did not hinder a Congressional objective, and that Congress did not intend to occupy the field of immigration (at least as it relates to in-state tuition to undocumented immigrant students).<sup>199</sup> Given the reasoning of the *Martinez* decision and the procedural barrier of standing, future successful preemption challenges to state laws either granting or denying in-state tuition to undocumented immigrant students are unlikely.

## CONCLUSION

Immigration policy, especially the issue of in-state tuition for undocumented immigrant students at public colleges and universities, continues to be a salient and controversial policy discussion for state and federal lawmakers. In the absence of federal legislative guidance, states have taken up the issue on their own terms, which has resulted in a patchwork of state laws, or, in other words, a "piecemeal approach to policymaking, in this

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198. See discussion *supra* Part IV.C.

199. See *id.*



substantive policy area.”<sup>200</sup> The development of this approach to policymaking, however, is difficult to explain. The issues of race and party affiliation, according to the data presented in this Article, do not contribute to the development of this issue with state lawmakers. The fact that these laws, whether granting or denying in-state tuition to undocumented immigrant students, are difficult to challenge under a theory of federal preemption, means that this policy direction is likely to continue into the future.

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200. Nelson, Glaubitz & Robinson, *supra* note 3, at 930–31.