CSMU Law Review
Winter 2008

Article

# *99 LAWMAKERS GONE WILD? COLLEGE RESIDENCY AND THE RESPONSE TO PROFESSOR KOBACH

Michael A. Olivas[FNa1]

Copyright (c) 2008 Southern Methodist University; Michael A. Olivas

> Of critical importance is the fact that all four of the [September 11th] hijackers who were stopped by local police prior to 9/11 had violated federal immigration laws and could have been detained by the state or local police officers. Indeed, there were only five hijackers who were clearly in violation of immigration laws while in the United States--and four of the five were encountered by state or local police officers. These were four missed opportunities of tragic dimension. Had information about their immigration violations been disseminated to state and local police through the NCIC system, the four terrorist aliens could have been detained for their violations. Adding even greater poignancy to these missed opportunities is the fact that they involved three of the four terrorist pilots of 9/11. Had the police officers involved been able to detain Atta, Hanjour, and Jarrah, these three pilots would have been out of the picture. It is difficult to imagine the hijackings proceeding without three of the four pilots. The four traffic stops also offered an opportunity to detain the leadership of the 9/11 terrorists. Had the police arrested Atta and Hazmi, the operation leader and his second-in-command would have been out of the picture. Again, it is difficult to imagine the attacks taking place with such essential members of the 9/11 cohort in custody.
>
> Importantly, all of these transgressions were civil, not criminal, violations of the INA. Therefore, according to the view of those who contend that Congress has preempted state and local police from making arrests for civil violations of the INA, no local police officer would have had the authority to arrest any of these hijackers on the basis of his immigration violation(s). In other words, even if the INS had developed a program to detect such violations and report the names of violators to local law enforcement agencies prior to the 9/11 attacks, the hands of local police would have been tied, and they ***100** would have been unable to help stop the attacks. Not only is it implausible to assert that Congress would have intended such a consequence as a policy matter, it is difficult to sustain such an assertion as a legal matter. [FN1]
>
> To prevent states from extending in-state tuition eligibility to illegal aliens, IIRARA's sponsors inserted a section that prohibited any state from doing so, unless the state also provided the same discount tuition to all U.S. citizens . . . . [T]he sponsors of the [2003 version] of the DREAM Act offered the [ten] offending states a pardon . . . . In addition to repealing 8 U.S.C. § 1623 to pave the way for states to legally offer in-state tuition rates to illegal aliens in the future, the bill . . . would be a retroactive repeal as if 8 U.S.C. § 1623 had never been enacted . . . . The far better approach for Congress to take in response to the ten states' defiance of federal law would be to impose significant penalties on states that violate 8 U.S.C. § 1623. It is now quite clear that some states are willing to ignore federal mandates in the immigration arena . . . . The best way to bring such recalcitrant states into compliance with federal law is to threaten to remove the one thing that they cannot do without: federal funds. [FN2]

WHAT can I do to drive a wooden stake through the heart of Professor Kris W. Kobach's proposals that the DREAM Act not be enacted and that state DREAM Acts be repealed? He and I are mirror opposites of each other, and if I did not exist he would have to conjure me up. We have in common that our students complained about us:

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

his students complain from the Left, while mine have harped from the Right. The complaints render us symmetrical, as they are largely about our politics, and not our competences. [FN3] And even I understand the politics of this issue, which is the efficacy of Plyler v. ***101** Doe [FN4]--the fundamental objection that immigration restrictionists hold; Plyler is their Roe v. Wade, and for that matter, my Roe v. Wade. We should all agree about this: objections to the undocumented attending college are collateral, second-order priorities. The bottom line is that Professor Kobach and his collaborators resent the holding of Plyler and its results. That is, since 1982, undocumented school children have been allowed to remain in elementary and secondary schools. If there were no Plyler, there could be no undocumented college students. In contrast, I believe that Plyler is a good, indeed, a magnificent decision, and is a victory worth keeping and expanding upon. Thus, our disagreements are being played out on proxy fields, but it is important to understand and acknowledge the true bottom line.

The focus of this Article is postsecondary residency, with all its immigration-related nuances. Like a fugue playing in the background, the issue in play here is the inchoate permission to participate in the U.S. polity and cultural life that Plyler represents. And with the torrent of state legislation related to immigration, it is clear that the larger polity is as concerned with these localized conditions as is Professor Kobach. As the best indicator of this trend, the National Conference of State Legislatures ("NCSL") gathers and analyzes immigration legislation data, and it has recorded that, in the first half of 2007, hundreds of immigration-related bills had been introduced in state legislatures and hundreds had been enacted in most states. [FN5]

These bills run the full range of concerns, from enacting two pro-immigrant state programs for college tuition (one of which, in Nebraska, extends even to the undocumented) [FN6] to a number of blatantly restrictionist ***102** statutes, including one in Georgia that covers the entire spectrum-- work authorization, human trafficking, enforcement provisions, regulation of immigration assistance services, penalties and deductions for business expenses and tax withholding, and overall benefit eligibility. [FN7] The Georgia state initiative (which I am involved in challenging) even exceeds the scope of California's 1994 Proposition 187, almost all of which was struck down by federal courts, despite the exploitation of the political issues for partisan advantage. [FN8] These state statutes are matched by an increasing array of municipal, county, and regional laws affecting immigration regulation, and many older (or dormant) codes that have also been applied against aliens, some of them in fresh and creative ways that appear to incorporate immigration-specific provisions. These include a Maricopa County, Arizona, statute enacted to deem individual undocumented presence itself violative of county smuggling law, [FN9] and longstanding trespass and loitering ordinances that have been reconstituted to conduct alien sweeps and to prevent day laborers from congregating. [FN10] The Hazleton, Pennsylvania City Council enacted a comprehensive "Illegal Immigration Relief Act" in July, 2006, with harsh provisions aimed at alien renters, English-only documents, and provision of municipal services; one year later, a federal judge struck down the Hazleton ordinance (and its successors).***103**[FN11] Similar ordinances are pending in several jurisdictions targeted by national restrictionist legal organizations, although many have either been withdrawn, repealed, or struck down in courts as exceeding constitutional authority or failing the basic requirements of due process. [FN12]

In the language of one such judicial opinion,

> The evidence, viewed as a whole, makes it clear that the Village's claim that defendants' actions were driven by legitimate law enforcement concerns is a pretext dreamed up to try to legitimate its activity in opposition to the presence of day laborers. Ultimately, this conclusion rests on the clear contradiction between defendants' conclusory testimony that their campaign was not race-based and the hard facts, which indicate that it was. Defendants' stated reason for conducting their ticketing campaign (the unprecedented influx of day laborers into Mamaroneck) was entirely specious, and the accusations they made concerning the anti-social conduct of the day laborers themselves have no support whatever in the record. Defendants' contemporaneous, public defense of their conduct is completely incredible, which undermines the credibility of their self-serving statements that "race had nothing to do with it." The fact that the attitude of these Village officials differs radically from the historical attitude of Village officials toward transient laborers makes the Village's testimonial claim that officials would have taken the same steps regardless of the race/ethnicity of

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

the day laborers that much harder to believe. [FN13]

***104** While this particular case involved the selective enforcement of worksites in suburban New York, it is eerily reminiscent of 1870-vintage cases concerning petty nuisance regulations aimed at the Chinese working population, such as one involving men's pigtails and grooming laws:

> The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied. Besides, we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly. [FN14]

As Table One reveals, the subject-matter concerns addressed by states touch on a wide array of civic issues, including education, employment, identification, drivers' licenses, law enforcement, legal services, omnibus immigration matters, public benefits, housing and rental options, trafficking, voting, along with miscellaneous issues such as alcohol and tobacco purchase identification, gun and firearms permits, residency/domicile determinations, flag displays, and juvenile reporting requirements. This sharp rise in such legislative action is undoubtedly due to issues of perceived terrorism threats, overburdened locales, well-publicized and highly ***105** polarized federal failures in immigration enforcement, an increase in conservative media and advocates flogging the issue (the "Lou Dobbs effect"), and a decline in President George W. Bush's popularity. This combination of circumstances has led to a leadership vacuum in the field and a failure at the national level to enact comprehensive immigration reform. In some ways, it has been a "perfect storm" and a witches' brew of anti-immigrant factors, especially anti-Mexican sentiment. While the November 2006 elections appeared on one level to ameliorate some of these resentments, there is obviously a substantial interest in the larger community and a simmering anger towards immigrants, especially those who are undocumented or who are perceived to be undocumented. These resentments flare up without warning or provocation. [FN15]

TABLE ONE: MAIN TOPICS IN STATE IMMIGRATION-RELATED LEGISLATION AS OF JULY 2, 2007

| Main Topics | Number of Bills Introduced | States | Enacted Laws | States |
|---|---|---|---|---|
| Education | 118 | 31 | 10 | 8 |
| Employment | 234 | 44 | 26 | 19 |
| Health | 134 | 31 | 11 | 9 |
| Human Trafficking | 79 | 29 | 15 | 11 |
| ID/Driver's Licenses/Other | 229 | 45 | 35 | 26 |

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

| | | | | |
|---|---|---|---|---|
| Licenses | | | | |
| Law Enforcement | 148 | 34 | 11 | 7 |
| Legal Services | 20 | 10 | 3 | 3 |
| Miscellaneous | 103 | 29 | 6 | 5 |
| Comprehensive Measures | 26 | 8 | 0 | 0 |
| Public Benefits | 115 | 39 | 15 | 11 |
| Voting | 46 | 20 | 0 | 0 |
| Resolutions | 152 | 34 | 38 | 14 |
| TOTAL | 1404 | 50 | 170 | 41 |

Source: NCSL data, available at: http://www.ncsl.org/programs/immig/2007ImmigrationUpdate.htm

It is my thesis, and my response to Kobach's thesis, that state, county, and local ordinances aimed at regulating general immigration functions ***106** are unconstitutional as a function of exclusive federal preemptory powers. If purely state, county, or local interests are governed and if federal preemptory powers are not triggered, such ordinances could be properly enacted, provided they are not subterfuges for replacing exclusive federal authority. As one example, purely state benefits can be extended or withheld to undocumented college students, because tuition benefits and state residency determinations are properly designated as state classifications and may incorporate, but not determine, immigrant status. [FN16] The federal government has also enacted statutes and promulgated regulations that subcontract or designate state or sub-federal immigration enforcement; one of many examples

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

includes assorted Memoranda of Understanding ("MOU's") that calibrate and regulate the proper role for effectuating and carrying out federal obligations. Professor Kobach has singled out federal provisions for regulating undocumented college admissions and tuition benefits, but he has selected the wrong example for his analysis. A more careful reading clearly reveals that he has fundamentally misread the statute. [FN17] Indeed, there is not a more clearly defined, dictionary example of federalism and its reach than is evident in the college residency issue. And a number of United States Supreme Court decisions do not reserve or allow a substantive non-federal role for local, county, state, or multi-state authorities in immigration enforcement absent such delegation and carefully controlled, designated purposes. [FN18]

***107** In addition, even if the courts that have addressed this issue had not ruled against Kobach's arguments (and they have actually rejected them in all his federal and state court cases trying to overturn existing law in this area), [FN19] he misapprehends the politics here and thus fails the efficacy test. In response to an earlier scholarly argument that ran in the same direction as Kobach's, I concluded:

> shifting immigration enforcement powers to sub-federal levels will more likely lead to weaker federal enforcement and even less effective national security resources aimed at immigration enforcement and administration. In my view, not only is shifting immigration authority downward contrary to constitutional law and theory, it is bad policy and will lead to bad results both with immigration enforcement and local enforcement. Restrictionist proposals must of necessity meet a very high burden of persuasion to enact major changes to the established order of things. We do not want fifty Border Patrols any more than we want fifty foreign policies in the immigration context, and such a shift would leave the U.S. worse off in every respect. For starters, there is no excess slack in the system at present, and the high fiscal and political cost of decentralizing immigration enforcement will be predictably ruinous and prejudicial. [FN20]

In this Article, I demonstrate this thesis by two interlocking points. First, I examine residency issues in detail, noting how Plyler v. Doe has extended beyond its K-12 origins. This will reveal that despite twenty-five years, immigrant childrens' well-established rights have not been fully resolved and have required additional litigation and additional vigilance to secure the Supreme Court's narrow holding. I believe this to be Kobach's real objection, if all our cards were up on the felt-covered table. Then, I review the assertions by Professor Kobach, who has litigated benefits issues (including the Hazleton case) and who has advanced a theory of "inherent authority" to justify extending immigration apprehensions and enforcement to local levels by using a "quintessential force multiplier" rationale. [FN21] In both these sections, he and I fundamentally disagree upon the basics of these cases, upon these regulations, and upon the proper values inherent in these issues.

## ***108** I. COLLEGE TUITION AND POSTSECONDARY PLYLER

To re-state my thesis, I believe there is no good or allowable reason to extend immigration enforcement to non-federal authorities any more than current law already allocates. In the next Section, I examine and contest Kobach's world-view and prescriptions in both the police context and in the resident tuition arena. I also believe this thesis can be revealed by thick descriptions of the case of undocumented school children, where the record reveals substantial and longstanding accommodation to the 1982 development of Plyler v. Doe. This accommodation that has stretched back more than thirty years, to 1975, when Texas enacted the offending original state law, giving public school districts the authority to charge tuition to undocumented school children. [FN22] As I have documented in another piece, the underlying legislative history was unclear and hidden from sight: without public hearings at the time, certain border Texas school superintendents had urged the legislation, which was then enacted without controversy as a small piece of larger, routine education statutes. [FN23] In 1982, the MALDEF attorneys prevailed in the U.S. Supreme Court in a 5-4 decision authored by Justice William Brennan. [FN24]

Justice Brennan struck down the Texas statute, finding the state's theory to be "nothing more than the assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools." [FN25] He determined that Texas could not enact legislation "merely by defining a disfavored group as non-resident." [FN26] He did not reach the issue of preemption, as he was able to strike down the statute's

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

provisions on more narrow, Equal Protection grounds. He dismissed the three arguments that Texas had advanced: that it was preserving "limited resources," [FN27] that it had narrowly tailored the legislation "to stem the tide of illegal immigration," [FN28] and that the legislature singled out these children because their undocumented presence meant that they might not be allowed to remain in the state once the educational benefit had been consumed. [FN29] In all, Justice Brennan held the provision did "not comport with fundamental conceptions of justice." [FN30] In addition, in a footnote, he indicated that, "illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State." [FN31] Texas moved for rehearing of the case, which ***109** the Supreme Court denied. [FN32]

Research shows that most of the alien children in Tyler, Texas who had been the anonymous plaintiffs in Plyler had graduated from the public schools and that they then regularized their legal status. [FN33] In 1983, a corollary issue was litigated, involving a U.S. citizen child of undocumented Mexican parents who had been left by his parents in the care of his adult sister in a Texas town. [FN34] This time, the U.S. Supreme Court determined that his domicile was not in Texas, following a precept of traditional family law that holds that the domicile of unemancipated children is that of their parents. Since the child was not a legal charge of his sister, he could not be considered a "resident" of the Texas school district. [FN35] Martinez v. Bynum did not limit the earlier Plyler decision, and no other K-12 residency-related immigration case has been decided by the U.S. Supreme Court since 1983. A postsecondary residency case involving non-immigrant visa holders was decided in 1982 for the alien college students on preemption grounds, and Plyler remains in force, undisturbed since 1982. [FN36]

Characterizing it as "undisturbed since 1982" is not the same as saying that it has not been contested or challenged, at a variety of levels, in the twenty-five years since it was decided. MALDEF has been forced to defend several dozen actions since the case was decided to enforce Plyler's clear holding and to oppose hundreds of local and state school board actions concerning Social Security number requirements, school requests for driver's licenses to identify parents, school grounds and chase practices, additional "registration" of immigrant children, "safety notification" for immigrant parents, separate schools for immigrant children, truancy practices, and other policies and practices designed to identify ***110** immigration status or single-out undocumented children. [FN37]

In 1994, California's Republican Governor Pete Wilson backed a popular state referendum, Proposition 187, that would have denied virtually all state-funded benefits (including public education) to undocumented Californians. [FN38] The initiative was passed by nearly 60% of the voters, and Wilson was re-elected. Before Senator Robert Dole won his party's presidential nomination, Wilson also mounted a presidential campaign on a get-tough-on-immigration platform. [FN39] MALDEF went into federal court and was able to strike down almost all of Proposition 187's provisions at the trial court level, and ultimately reached an agreement with Wilson's successor, Governor Gray Davis. [FN40] The year 1996 saw the re-election of President Clinton, his move to the political middle that led to the enactment of restrictionist federal legislation IIRIRA and PRWORA, [FN41] and the efforts of California Representative Elton Gallegly to amend federal law and allow states to enact the type of legislation that Texas had passed in 1975 and had led to Plyler. [FN42] This "Gallegly Amendment" drew sufficient negative attention that it was withdrawn from several other legislative proposals, but a number of such amendments were adopted. [FN43]

Flash forward to 2006, when two new threats arose at the school level, both of which ultimately resolved themselves. In March, 2006, the school board in Elmwood Park, Illinois, refused to let an undocumented student enroll, on the grounds that she and her family had entered on long-expired tourist visas. [FN44] Citing Plyler, the Illinois State Board of Education ***111** threatened to remove state education funds, and the local board blinked, revising its attendance policies. [FN45]

Even though persons can become undocumented either by surreptitious entry or by violating the terms of legal entry, earlier education decisions had not turned on the means by which unauthorized status or entry were effected; rather, cases turned on undocumented status, not upon exactly how the alien had become undocumented. And in June, 2006, a federal suit against the Albuquerque, New Mexico Public Schools was settled, eliminating a school

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

and police practice of arresting students suspected of being out of status and turning them over to the Border Patrol. [FN46] In addition, there were several well-publicized instances of undocumented school children winning national awards and other academic***112** honors, keeping these issues in the public eye. [FN47]

As indicated earlier, the issue of undocumented students has not been limited to K-12 public school students, as a number of cases before and since Plyler have dealt with the corollary issue of undocumented college students, and the extent to which college resident tuition and admissions benefits are to be extended to the postsecondary, post-compulsory schooling level. [FN48] Since 2001, when Texas Governor Rick Perry, George W. Bush's successor, signed legislation granting postsecondary residency for undocumented students into law, more than a dozen states have acted: ten allowing residency and several denying it. [FN49] Two federal cases have been filed, one in Kansas and another in Virginia, both upholding the state practice. Kansas allows residency [FN50] and Virginia denies such status. [FN51] On appeal to the Tenth Circuit, the claims brought by a restrictionist group and their lawyer, Professor Kobach, were dismissed, affirming the ruling below. [FN52] The same case was filed in California state court, where Kobach and the plaintiffs lost; an appeal is pending as of Spring, 2008. [FN53] And Congress has under consideration a federal version of the ***113** state statutes, the DREAM Act, that if enacted would also accord limited legalization benefits. [FN54] Elsewhere, I have analyzed many of these details, so I only summarize here briefly, but I also note that when Utah Senator Orrin Hatch introduced the original legislation, it signaled to me and to most observers that this was an issue that the conservative Right would not oppose and that ground cover was thus available. [FN55] But Professor Kobach has led this charge, most notably in his Heritage Foundation screed, The Senate Immigration Bill Rewards Lawbreaking: Why the DREAM Act is a Nightmare, [FN56] and the topic of college residency for the undocumented has gotten caught in this political tarpit.

Remarkably, Plyler has proven quite resilient, fending off litigative as well as federal and state legislative efforts to overturn it, while simultaneously nurturing efforts to extend its reach to college attenders who Plyler allowed to stay in school. IIRIRA and PRWORA, however imperfectly, gave it additional life, by choking off the 1996 Gallegly Amendment. [FN57] Plyler has had to be reinforced by vigilant efforts, but it has proven more hardy than it appeared twenty-five years ago. Wide-ranging discussions with many restrictionist advocates have convinced me that the real purpose behind their comprehensive efforts is to reverse Plyler, in the hopes ***114** that doing so will deter families from entering the country illegally. Professor Kobach notes this ability to attend college as an attractive nuisance and pull-factor, despite evidence to the contrary. [FN58]

TABLE TWO: STATE LEGISLATION CONCERNING UNDOCUMENTED COLLEGE STUDENTS (FALL, 2007)

States That Allow Undocumented Students to Gain Resident Tuition Status (by Statute): Texas, H.B. 1403, 77th. Leg., Reg. Sess. (Tex. 2001), amended by S.B. 1528, (Tex. 2005)
California, A.B. 540, 2001-02 Cal. Sess. (Cal. 2001)
Utah, H.B. 144, 54th Leg., Gen. Sess. (Utah 2002)
New York, S. B. 7784, 225th Leg., 2001 NY Sess. (NY 2002)
Washington, H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003)
Oklahoma, S.B. 596, 49th Leg., 1st Sess. (OK 2003) [rescinded, 2007]
Illinois, H.B. 60, 93rd Leg., Reg. Sess. (Ill. 2003)
Kansas, K.S.A.76-731a (KS 2004)
Nebraska, LB 239 (enacted over veto, April 13, 2006)
New Mexico, N.M.S.A. 1978, Ch. 348, Sec.21-1-1.2 [47th Leg. Sess. (2005)]

## II. PROFESSOR KOBACH'S PARALLEL UNIVERSES

### A. The “Quintessential Force Multiplier” Effect

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

The law of political thermodynamics holds that for every academic civil rights action, there is an equal and opposite political reaction. So it is with the hydraulic principle of immigrant rights. The modest successes have been matched by a substantial blowback in the political arena, as evidenced by the NCSL data above in Table One. The essential failure of Proposition 187 slowed state or local initiatives to enact comprehensive anti-alien legislation for almost a decade. Even the enactment of IIRIRA and PWRORA in 1996, as reactionary as any immigration legislation in the late twentieth century, still occurred at a time when IRCA's legalization program and successes (enacted in the Reagan presidency) were being played out. [FN59] The terrorist attacks of 2001 stalled any legalization or ***115** regularization initiatives President Bush might have undertaken, [FN60] but the changed circumstances in the postsecondary residency area have been instructive on how local and state politics can surprise. Except for the Texas statute, signed by Republican Governor Rick Perry (who assumed office when Governor George W. Bush became president) just before 9/11, all the residency statutes have been signed into law after the terrorist attacks against the United States. [FN61] Major immigrant-receiving states such as Texas, California, Illinois, New Mexico, and New York have granted residency to undocumented college students, but so have some surprising states including Nebraska, Kansas, Oklahoma, and Utah. [FN62] Along with other senators, it has been conservative Utah Republican Senator Orrin Hatch who has advocated for the DREAM Act at the federal level, [FN63] but support for residency tuition classification by some politicians (or even failure to oppose a measure sufficiently) has created controversy in some states, where polarized electorates are evident on wedge issues. [FN64]

Notwithstanding the support that has been evident for these Plyler college students, of course there is another side: persons who feel that the students should not benefit from their parents' actions and that they, in essence, do not have clean hands. One such believer is Professor Kobach, who has undertaken lawsuits (in Kansas and in California), [FN65] who has advocated through national organizations to repeal state laws or discourage federal legislation, [FN66] and who has written articles and reports against ***117** alien benefits generally. [FN67] He also ran for Congress in Kansas on an anti-alien campaign, and although he was defeated, he has continued these advocacy efforts. [FN68]

TABLE THREE: Immigration/Residency and College Tuition

States That Do Not Allow Undocumented Students to Gain Resident Tuition Status (by Statute):
Arizona
Georgia
Mississippi

States That Have Formally Considered Legislation Concerning Undocumented Students and Residency Tuition Status (Statutes introduced by Fall, 2007):

Alaska
California (eligibility for State financial aid)
Colorado
Connecticut**
Delaware*
Florida
Hawaii
Kansas
Maryland**
Massachusetts**
Michigan
Minnesota+
Missouri#
New Jersey
North Carolina
Oklahoma++

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Oregon
Rhode Island
Virginia***
Wisconsin
Wyoming****

* (public institutions in Delaware have agreed to allow undocumented students to establish residency status, in lieu of legislation that had been introduced)

** (pro-immigrant bill vetoed by governor)

*** (anti-immigrant bill vetoed by governor); also, 2006 bill (SB 542) affected refugee tuition

**** (W.S. 21-16-1303 enacted, limiting state scholarships to LPR and citizens)

# (bill introduced to repeal existing residency statute)

(bill introduced to preclude undocumented attendance)

+ (legislation enacted that eliminated non-resident tuition, irrespective of immigration status)

++ The Oklahoma Taxpayer and Citizen Protection Act of 2007 (HB 1804) repealed the 2003 provision for according residency tuition and grants to eligible undocumented students, although the actual language of the bill, signed into law in May, 2007, grandfathered in those students already eligible and enrolled. In January, 2008, the state's Board of Regents issued a memo outlining the new policies. Valerie Jobe, Immigration Reform Would Affect OCCC, Okla. City Comm. Coll. Pioneer, Apr. 2, 2007, 1, 16: http://www.okc.cc.ok.us/pioneer/Archives/April_2_2007/news1.html.

In a long 2005 piece in the Albany Law Review, The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests, [FN69] Kobach makes a forceful argument that municipal authorities have all the intrinsic authorization they need to enforce laws, including laws affecting immigration and immigrants (and non-immigrants, in or out of proper status). His thesis is straightforward: "This inherent arrest authority has been possessed and exercised by state and local police since the earliest days of federal immigration law." [FN70] I do not parse all his arguments here, as others have already done so persuasively and in great detail. [FN71] However, it is one thing to delegate training, to share resources, and to agree to cooperate, and it is quite another to consider such non-emergency federal measures as impliedly conceding any enforcement authority; it is certainly not an indication of "inherent authority," but the reverse. It is a textbook example of the proper delegation of powers in a field preempted by Congress.

There are provisions that reserve to ICE or other federal immigration authorities the exclusive enforcement authority. While Congress has granted states the authority to share some aspects of enforcement, it has done so in a narrow, formal, and specific fashion. For example, 8 U.S.C.A. section 1324(c) ("Authority to arrest") gives the U.S. Attorney General the right to "make any arrests for a violation of [the Harboring provisions as an officer] . . . whose duty it is to enforce criminal laws." [FN72] Provisions for cooperative arrangements to share data and act as liaison with internal security officers are spelled out in U.S.C.A. section 1105. [FN73]***118** Another example of such modest law enforcement is the section 287(g) provisions for non-emergency assistance in the enforcement of immigration laws. [FN74] It is clear that Congress did not act to solely occupy the field in these areas, nor did Congress concede interest or intrinsic authority; rather, these are examples of delegation by Congress. [FN75]

None of these provisions or any other such narrow cooperative arrangement implicate core immigration functions, nor do they exemplify "inherent" local authority. This limited cooperative assistance is carefully set out

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

by Congress as a modest delegation that very few jurisdictions have undertaken and some have even abandoned after enactment. [FN76] Clearly, even with its impatience at the underwhelming federal success in border security and immigration enforcement, Congress has made provisions only for a small scale sub-federal role that does not necessitate or create realignment of responsibilities. And nearly all local law enforcement and governmental authorities have declined to use these modest tools--even those tools that might arguably help municipalities combat overall crime in their jurisdictions--on the reasonable grounds that to do so would compromise their ability to work with the affected communities. [FN77]

Professor Kobach's argument is more grounded than was, say, Professor Peter Spiro's, in the sense that Kobach provides detail of on-the-ground law enforcement. Although the demi-sovereignty ideal outlined ***119** by Spiro is more ethereal and rooted in the foreign powers, [FN78] the essence is the same, whether one tries to stretch preemption by fire or by ice. Congress does not want--and the doctrines of separation of powers and federal preemption do not allow--a substantial subcontracting of this basic immigration enforcement authority to state and local governments. Additional problems of efficacy, likely non-uniformity in enforcement, and a race-to-the-bottom if law enforcement were to take on tasks for which it is not institutionally prepared are fundamental constitutional problems finessed by the Kobach proposals. One careful study characterized his proposals as "[t]he Inherent Flaws in the Inherent Authority Position," [FN79] while another noted the probable result that "these measures seem likely to expose local police to liability for wrongful arrest and in some instances for violations of state or local anti-profiling ordinances." [FN80] Even President Bush has acknowledged that if undocumented communities are "victimized by crime, they are afraid to call the police, or [to] seek recourse in the legal system." [FN81]

B. Professor Kobach and College Residency

While reasonable people may disagree on which values to stress regarding terrorism and its overlap with immigration enforcement, it is difficult to understand Professor Kobach's harsh take on the DREAM Act, which he has characterized as a "disregard" of the law. [FN82] Nothing could be further from the truth. He raises several objections, predominantly the following: As bad as Plyler is, this stretches community tolerance even further, and invites lawlessness. [FN83] In 1996, Congress acted to stop this objectionable practice and "drew the line in the sand." [FN84] Several states have enacted legislation or practices, contrary to Section 1623, and have "disobey[ed] federal law." [FN85] He contends that all these wrongs flow from misreadings of 8 U.S.C.A. section 1623, which he implausibly characterizes***120** as being "written in plain language that any layman could understand," [FN86] and he relegates the important Section 1621 to a footnote. [FN87] To understand just how he could have gotten this so wrong, it is important to read the entire two Sections, which provide in pertinent parts:

IIRIRA, CHAPTER 14--RESTRICTING WELFARE AND PUBLIC BENEFITS FOR ALIENS
§ 1621. Aliens who are not qualified aliens or nonimmigrants ineligible for State and local public benefits

(a) In general

Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an alien who is not --

(1) a qualified alien (as defined in section 1641 of this title),

(2) a nonimmigrant under the Immigration and Nationality Act, or

(3) an alien who is paroled into the United States under section 212(d)(5) of such Act for less than one year,

is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

(b) Exceptions

Subsection (a) of this section shall not apply with respect to the following State or local public benefits:

(1) Assistance for health care items and services that are necessary for the treatment of an emergency medical condition (as defined in section 1396b (v) (3) of Title 42) of the alien involved and are not related to an organ transplant procedure.

(2) Short-term, non-cash, in-kind emergency disaster relief.

(3) Public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(4) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (A) deliver in-kind services at the community level, including through public or private nonprofit agencies; (B) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (C) are necessary for the protection of life or safety.

(c) ‘State or local public benefit‘ defined

(1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term ‘State or local public benefit‘ means --

***121** (A) any grant, contract, 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; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

(2) Such term shall not apply --

(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States, or to a citizen of a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99-239 or 99-758 (or a successor provision) is in effect;

(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act qualified for such benefits and for whom the United States under reciprocal treaty agreements is required to pay benefits, as determined by the Secretary of State, after consultation with the Attorney General; or

(C) to the issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States.

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

(3) Such term does not include any Federal public benefit under section 1611(c) of this title.

(d) State authority to provide for eligibility of illegal aliens for State and local public benefits

A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

***

§ 1623. Limitation on eligibility for preferential treatment of aliens not lawfully present on basis of residence for higher education benefits

(a) In general

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

***122** (b) Effective date

This section shall apply to benefits provided on or after July 1, 1998. [FN88]

Others have interpreted this provision similarly, [FN89] but I believe that they also have mistakenly read the statute, which by any measure, is confusingly worded. Surely none who have done so first determined that it was "written in plain language." My reading follows this reasoning: the word "unless" in Section 1623 can only mean that Congress enacted a condition precedent for states enacting rules in this area; [FN90] the word "benefit" is defined in Section 1621 in a way that makes it clear that Congress intended it as a "monetary benefit," [FN91] whereas the determination of residency is a status benefit. [FN92] Section 1621 says explicitly that states may provide this benefit only if they act to do so after August 22, 1996. [FN93] Taken together, these provisions form an interlocking logic that points toward only one reasonable conclusion: that IIRIRA, however badly written, allows states to confer (or, importantly, not to confer) [FN94] residency status upon the undocumented in their public postsecondary institutions. No other reading makes any sense.

First, in-state residency is entirely a state-determined benefit or status. [FN95] There are no federal funds tied to this status, as opposed to, for example, federal highway programs, where acceptance of the dollars obligates a state to abide by federal speed limits. On the one occasion when this jurisdictional matter was considered by the U.S. Supreme Court, in the Maryland case of Moreno v. Elkins, where the issue was whether G-4 non-immigrants could establish postsecondary residency in the state for in-state tuition purposes, the Court certified this exact question to the ***123** Maryland State Court of Appeals. [FN96] The Maryland State Court of Appeals held that G-4 aliens were not precluded from establishing domicile, and the U.S. Supreme Court then deferred to this finding, and adopted it into its final ruling on the issue, in Toll v. Moreno. [FN97] Had state residency benefits been a matter of federal law, the U.S. Supreme Court would have decided the issue itself; but instead, it left the interpretation and determination of a state benefit to a state court. [FN98] While Toll concerned non-immigrants rather than the undocumented, I believe it is instructive on the issue of delegation as well. [FN99]

The provisions of IIRIRA, the 1996 federal statute, do not preclude the ability of states to enact residency statutes for the undocumented. Section 505, 8 U.S.C. § 1623 reads:

[A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

> within a state (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident. [FN100]

Congress does not have the authority to regulate purely state benefits, and the Maryland case established this in the area of postsecondary residency/domicile issues. [FN101] But even if this were not true and if Congress did have such authority, section 1623 would not preclude any state from enacting undocumented student legislation, due to the word "unless." [FN102] A flat bar would not include such a modifier. The only way to read this convoluted language is: State A cannot give any more consideration to an undocumented student than it can give to a nonresident student from state B. For example, Kansas could not enact a plan to extend resident status to undocumented students after they had resided in the state for twelve months, and then accord that same status to U.S. citizens or permanent residents from Missouri or Nebraska after eighteen months of such residence. No state plan does this; indeed, several of the plans require three years of residency for the undocumented, as well as state high school attendance--neither of which is required for citizen non-residents. New Mexico's 2005 statute is the only statute that accords full participation after a mere twelve months. [FN103] As such, it does not favor the undocumented***124** over other nonresident applicants. This is the only plausible reading of section 1623. Kobach thus misconstrues both the immigration dimensions and the actual operations of residency determinations.

Several readers have also misread what constitutes a benefit. In section 1623, the term "benefit" refers to dollars ("amount, duration, and scope"), [FN104] as if prohibiting state scholarships or fellowships. However, the benefit actually being conferred by residency statutes is the right to be considered for in-state resident status. [FN105] This is a non-monetary benefit, and this definition lends support to my reading of the statute. Congress has enacted a separate program for federal financial aid, which limits eligibility to certain classes of aliens, including PRUCOL students--students "permanently residing under color of law." [FN106]

Some commentators, including Professor Kobach, have also incorrectly read section 1621(c) to prohibit residency reclassification. [FN107] That provision reads, in pertinent part: '[An undocumented] alien . . . is not eligible for any State or local public benefit (as defined in subsection (c) of this section.' [FN108] But a more careful reading of subsection (c) confirms my interpretation, by referencing payments. It prohibits 'any retirement, ***125** welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government. ' [FN109] Thus, the benefit of being reclassified as a resident student in a state does not trigger any of the prohibitions. Subsection (1)(B)'s reference to "postsecondary education" is modified by "or any other similar benefit for which payments or assistance are provided . . . by an agency of a State or local government or by appropriated funds of a State or local government." [FN110] This clearly indicates that what is proscribed is money or appropriated funds (arguably financial aid or grants), but not the 'status benefits' confirmed by the right to declare state residency. [FN111] In classic residency determinations, such as these, no money or proscribed appropriated funds are in play. To educate an undocumented student costs a state or institution no more than it does to educate a native-born citizen or other nonresident. So when Professor Kobach concludes that millions of dollars are being expended upon the undocumented, he misconstrues both the transaction and the prohibition. [FN112]

Further, subsection (d) provides that states may provide otherwise-prohibited public benefits 'only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility. ' [FN113] This must allow states to do as I believe they may do. Any fair reading of this statute refutes Kobach's position on this matter. Beginning with Texas, ironically the state where Plyler originated twenty-five years earlier, a number of states have enacted statutes to allow these few students-- who have personally broken no law--to enroll in college. [FN114]

Kobach is simply wrong when he somehow concludes that the states are breaking the law or somehow thumbing their noses at federal law. While the data indicate that only a few states have changed their practice post-IIRIRA and enacted statutes to allow the undocumented to attend college as resident students, the major receiver

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

states have done so, and it is likely that political pressure will continue to fill in the spots on the map, at least those spots where the undocumented are likely to enroll. [FN115]

***126** Advocates for the undocumented went to court in Virginia in 2003 to challenge the state's refusal to accord them benefits and lost; the court held that the state was not required to accord them residency status. [FN116] But most tellingly, courts have thus far repudiated the Kobach position, as he has never won in federal or state court on this issue. Indeed, the opposite occurred in 2004, when the first challenge to a post-IIRIRA state statute that accorded status to undocumented college students came. In Day v. Sebelius, while Professor Kobach was running for the Republican Congressional seat in the Kansas City, Kansas district, he filed a suit to challenge the Kansas provision that had been enacted earlier the same year. [FN117] The provision allowed undocumented public college applicants in the state to establish that they had attended a Kansas public school for three years and graduated. [FN118] The challenge was supported by the Federation for American Immigration Reform ("FAIR"), the restrictionist group that had made this issue one of its national priorities, and they advertised in Midwest college newspapers to locate enrolled students who had had their own residency claims denied. [FN119] After finding several in Kansas, FAIR filed their suit with Kobach as local counsel. In an unusual development, the Kansas Attorney General declined to have his office argue the defense and instead hired local private counsel to undertake defense of the statute. [FN120] In July 2004, the federal district judge found for the state by determining that the plaintiff students had no standing to bring the case, since they had not been denied any benefit or received any harm by the state's practice. [FN121]

***127** While District Judge Richard D. Rogers denied standing to the plaintiffs, he conceded:

> In reaching the decisions in this case, the court did not reach the issues of most of the claims asserted by the plaintiffs. This is both regrettable and fortunate. The issues raised by this litigation are important ones. The decision on what to do concerning the education of illegal aliens at the postsecondary level in our country is indeed significant. That decision, however, is probably best left to the United States Congress and the Kansas legislature. [FN122]

After oral arguments in Fall, 2006, this decision was upheld by the Tenth Circuit. [FN123]

The judge got this formulation exactly right, although he might have added that both the United States Congress and the Kansas legislature had done exactly this, by means of IIRIRA and K.S.A. section 76-731a. In the complex calculus concerning the state status of in-state residency to the undocumented, if Merten can be law in Virginia, [FN124] then Day must prevail in Kansas. The pneumatics of this policy are that states are allowed to deny the status and enact a policy not to enroll the undocumented and accord them the lower tuition; symmetrically, they may also do so. Kobach elides these two principles, as when he asserts in his Heritage Foundation paper:

> not only are such laws unfair to aliens who follow the law, but they are slaps in the faces of law-abiding American citizens. For example, a student from Missouri who attends Kansas University and has always played by the rules and obeyed the law is charged three times the tuition charged to an alien whose very presence in the country is a violation of federal criminal law. [FN125]

Not only does he misapprehend the concept of standing and misconstrue the harm (my getting in-state residency status triggers no harm to a student properly denied the classification), but he does not understand that the "student from Missouri" is ineligible because she is not a Kansas resident by that state's traditional criteria, and hence is not eligible for the reclassification. [FN126] Whatever else it is, the federal law is not a requirement that any student from any place is eligible to be reclassified as a resident in a receiver state without meeting the underlying durational requirements. This is simply not what residency classifications entail, and it betrays a fundamental misunderstanding of the entire concept.

***128** In the meantime, while the Tenth Circuit Court of Appeals considered the appeal, opposing groups did not let grass grow underneath their feet. Attorney Kobach and another restrictionist group filed virtually the same case in California state court as they had in Kansas; their case met the same fate in state court as did Day v. Sebelius did

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

in federal court, and, on the same grounds. [FN127] Initiatives such as this will continue to stall state-level efforts elsewhere to accord resident status to undocumented college students, as they have already in Massachusetts, Maryland, Georgia, and elsewhere. The Washington Legal Foundation has filed an improbable administrative action with the Department of Homeland Security ("DHS"), [FN128] seeking a vague form of relief under IIRIRA concerning the New York scheme and the Texas state statute. [FN129] By Spring, 2008, DHS had not answered, and there is no clearly-defined legal means for them to do so. [FN130]

In May, 2005, the Texas Legislature acted to revise its statute, broadening it slightly to address some of the technical problems that had arisen under the first statute. [FN131] In the meantime, thousands of undocumented ***129** Texas students have enrolled under the provision, as they have in other states that have enacted policies under IIRIRA. [FN132] It would have been difficult to predict that the state that occasioned Plyler v. Doe twenty-five years earlier would lead the way on its extension to college students. In an interesting historical footnote, both Chief Justice John Roberts and Justice Samuel Alito, then in governmental and private practice, respectively, went on the record at the time that they considered Plyler to have been wrongly decided, and both their earlier views surfaced during their Supreme Court nomination hearings. [FN133] It has also recently come to light that then-Chief Justice Rehnquist and then-Justice Marshall had an open argument in chambers concerning Rehnquist's mocking characterization of the children as "illegal," which Marshall argued was a slur. [FN134]

## CONCLUSION

There has been a surprising amount of litigation and, more recently, legislation on this arcane matter, a subject that affects only a small number of extremely vulnerable students. Both immigration advocates and opponents have targeted this issue as an important line in the sand. [FN135]***130** The DREAM Act provisions, originally introduced by a conservative Republican senator, are more generous than any of the state laws enacted to ameliorate this problem. And, of course, the provisions to allow the undocumented students to legalize their status would be relatively generous. In other states, advocates on both sides have engaged in efforts to get new provisions signed into law or to prevent them from becoming law. A recent Virginia candidate for governor politicized the issue by accusing the current Virginia governor of being soft on immigration after the current governor had vetoed the legislation that would have denied such status. [FN136] Professor Kobach's narrative details the immigrant higher education politics of several states, although he omits the Texas story, an odd omission under the circumstances. Apparently, the ground cover given by Utah Senator Orrin Hatch is not helping guard the right flanks, as immigrant-bashing has a long and venerable tradition in U.S. politics. At the federal level, the DREAM Act is stalled, a victim of many bruises and the larger failure of immigration reform, overrun by the events of 9/11. It was attached to the Department of Defense spending bill, in part because of its military path to legalization; through complex cloture rules, it was defeated in Fall, 2007. [FN137] Ultimate resolution of this issue will be accomplished through a combination of state and federal laws, even with the specter of 9/11 casting its long shadow.

When I consider the hydraulics of preemption, about which I have thought and litigated for a long time, and the likely downsides of the "inherent authority" issue, and when I count the rise of immigration-related proposals at the local and state level, I am convinced that no good can come of these. Some of the inefficiencies in the current system are incontestably dysfunctional, but so would be the result of increased overlap in immigration enforcement. Most importantly, increased overlap would not appreciably improve the current system, which already has built-in ***131** coordinating provisions, although they have not been widely adopted. The reaction in affected communities, and the resultant prejudice sure to follow from, for example, enforcing U.S. flag displays and English-only practices and signs; [FN138] requiring Spanish-language preachers not to proselytize in their congregants' native language; [FN139] or necessitating landlords in Hazleton, Pennsylvania, or Farmers Branch, Texas, to check the immigration status of renters [FN140]--are all sure signs of an ethnic and national origin "tax" that will be levied only upon certain groups, likely either Mexicans, or Mexican-Americans. These more than petty nuisances, reminiscent of longstanding immigration history of racial exclusion in the United States, are pigtail ordinances in modern guise. [FN141] Those practices ***132** were an embarrassment then, and remain so today. This is particularly true in the context of residency practices, where there are longstanding, thoughtful practices and policies. Anyone seriously

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

suggesting otherwise has a substantial burden of persuasion.

[FNa1]. William B. Bates Distinguished Chair in Law and Director, Institute for Higher Education Law & Governance, University of Houston Law Center. I acknowledge with gratitude the assistance of Deborah Y. Jones, Chenglin Liu, Deterrean S. Gamble, and the Mexican American Legal Defense and Educational Fund ("MALDEF") legal staff, a number of whom have litigated cases described in this Article. I serve as a MALDEF Board member, and have assisted in some of the cases described, including some in a formal manner as an expert witness or other participant. All views are identified as my own, however, and I hold any organizations, clients, or others who assisted me in this project harmless. God knows, as do the others, we have often disagreed on these complex issues.

[FN1]. Kris W. Kobach, The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests, 69 Alb. L. Rev. 179, 187-188 (2005).

[FN2]. Kris W. Kobach, Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law, 10 N.Y.U.J. Legis. & Pub. Pol'y 473, 477, 517, 521 (2006-07) [hereinafter Kobach, Lawmakers]. See also Kris W. Kobach, The Senate Immigration Bill Rewards Lawbreaking: Why the DREAM Act is a Nightmare, Backgrounder no. 1960 (The Heritage Found., Wash. D.C.), Aug. 14, 2006, available at http://www.heritage.org/Research/Immigration/bg1960.cmf [hereinafter Kobach, Lawbreaking]. Professor Kobach apparently suffers from recurring dreams--he also characterized the 2007 comprehensive immigration reform proposals as a "nightmare." Kris W. Kobach, The Senate Immigration Bill: A National Security Nightmare, WebMemo no. 1513 (The Heritage Found., Wash D.C.), June 19, 2007, available at http://www.heritage.org/Research/Immigration/wm1513.cfm [hereinafter Kobach, Nightmare].

[FN3]. Carolyn Szczepanski, Back to School: Even Though He's No Longer Running for Office, UMKC's Most Famous and Controversial Professor Continues His Campaigns, Kansas City Pitch, Jan. 4, 2007, at 10, http://www.pitch.com/Issues/2007-01-04/news/feature_full.html (summarizing controversies over Kobach's teaching, especially complaints from liberal students). But see, Michael A. Olivas, Immigration Law Teaching and Scholarship in the Ivory Tower: A Response to Race Matters, 2000 U. Ill. L. Rev. 613, 631-32 (2000) (reviewing issues of student objections to faculty views and teaching).

[FN4]. Plyler v. Doe, 457 U.S. 202 (1982). This Article draws in part from earlier work on this subject: see, in particular, Michael A. Olivas, Storytelling Out of School: Undocumented College Residency, Race, and Reaction, 22 Hast. Const. L.Q. 1019 (1995) [hereinafter Olivas, Storytelling]. See also Michael A. Olivas, Immigration--Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement, 2007 U. Chi. Legal F. 27, 36-45 [hereinafter Olivas, Immigration-Related State and Local Ordinances]; see generally Michael A. Olivas, IIRIRA, the DREAM Act, and Undocumented College Student Residency, 30 J.C. & U.L. 435 (2004) [hereinafter Olivas, Undocumented College Student Residency].

[FN5]. National Conference of State Legislatures, Immigrant Pol'y Proj., 2007 Enacted State Legislation Related to Immigrants and Immigration (Aug. 6, 2007), http://www.ncsl.org/programs/immig/2007ImmigrationUpdate.htm. In addition, there are a number of publicly-available listings of the various ordinances; two of the most useful and current are the NCSL website above and Bender's Immigration Bulletin, Daily Edition, www.bibdaily.com (last visited Aug. 19, 2007). For a story about the data, see Julia Preston, Surge in Immigration Laws Around U.S., N.Y. Times, Aug. 6, 2007, at A12.

[FN6]. Neb. Rev. Stat. § 85-502 (1999 & Supp. 2006). The Nebraska Legislature revised the statute in 2006 over the governor's veto, allowing unauthorized immigrant students to qualify for in-state tuition upon proof of Nebraska residency of at least 180 days. Id. § 85-502(5). The Virginia Legislature established eligibility for in-state tuition for those holding an immigration visa or classified as a political refugee in the same manner as any other resident student. Va. Code Ann. § 23-7.4 (2006 & Supp. 2007). Students with temporary or student visa status are ineligible

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

for Virginia resident status and in-state tuition. Id. For descriptions of other pending bills, see National Conference of State Legislatures, Immigration--Left to the States, State Legislatures, Oct.-Nov. 2006, at 14, available at http://www.ncsl.org/programs/pubs/slmag/2006/06SLoctnov2006.htm; Nat'l Conference of State Legislatures, Immigrant Policy, In-State Tuition and Unauthorized Immigrant Students, (July 26, 2006), http://www.ncsl.org/programs/immig/immig_ InStateTuition0706.htm.

[FN7]. See Rachel L. Swarns, In Georgia, Immigrants Unsettle Old Sense of Place, N.Y. Times, Aug. 4, 2006, at A1. See also Alene Russell, In-State Tuition for Undocumented Immigrants: States' Rights and Educational Opportunity 4 (Aug. 2007), http://www.aascu.org/policy_matters/in-state_tuition07.pdf.

[FN8]. See, e.g., League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995) (striking down Proposition 187 provisions prohibiting social services and benefits to undocumented residents in scheme to deter immigration).

[FN9]. Maricopa County undertook to prosecute undocumented persons for having conspired to smuggle themselves in violation of Arizona's anti-smuggling statute. See Ariz. Rev. Stat. Ann. § 13-2319 (Supp. 2007) ("human smuggling" statute); Ariz. Rev. Stat. Ann. § 13-1003 (2001) (general conspiracy statute). See also Joseph Lelyveld, The Border Dividing Arizona, N.Y. Times, Oct. 15, 2006, § 6 (Magazine), at 40. See also David B. Thronson, Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts, 11 Tex. Hisp. J.L. & Pol'y 45, 48 (2005) (discussing the influence of immigration status on traditional family law determinations); Christopher Caldwell, A Family or a Crowd?, N.Y. Times, Feb. 26, 2006, § 6 (Magazine), at 9 (describing Manassas, Virginia's use of its zoning code to deal with overcrowding caused by immigrants).

[FN10]. Order on Motions to Dismiss and Objections for State v. Barros-Batistele, (No. 05-CR-1474, 1475), slip op. at 5 (Nashua Dist. Ct., N.H., Aug. 12, 2005) ("The import of the analysis the court has conducted ... is that even if the police departments have applied the [state] statute in a manner not otherwise unlawful, its application in that manner violates the Supremacy Clause of the United States Constitution, and is thus barred by federal preemption"). See also Pam Belluck, Towns Lose Tool Against Illegal Immigrants, N.Y. Times, Aug. 13, 2005, at A7; Paul Vitello, Path to Deportation Can Start With a Traffic Stop, N.Y. Times, Apr. 14, 2006, at A1; Julia Preston, Sheriff Defies Immigrants by Billboard and by Blog, N.Y. Times, July 31, 2006, at A15. Sometimes, a local regulation is just a regulation, as in liberal Santa Fe, New Mexico, where the aim was not to harass immigrants, but to keep peddlers and nuisances off the historic Santa Fe Plaza. See Erica Cordova, Buskers Claim They're Bullied, Albuquerque J. (N.M.), Aug. 8, 2006, at A1.

[FN11]. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 554 (M.D. Pa. 2007).

[FN12]. Id. See Hazleton, Pennsylvania, Agrees Not to Enforce "Illegal Immigration Relief Act Ordinance" for Now, 83 No. 35 Interpreter Releases 1947, 1947-48 (Sept. 11, 2006). See also Jenny Jarvie, The Nation; Georgia Law Chills Its Latino Housing Market; A Measure Meant to Deny Jobs and Services to Illegal Immigrants Has Even Legal Residents Rethinking Their Future in the State, L.A. Times, June 19, 2006, at A4; Deborah Post, Long Island Topic; Two Cases, Two Reactions, Same Lingering Problem, Newsday, Sept. 25, 2005, at A49. The first local ordinance in recent Texas history arose in Farmers Branch, a suburb of Dallas, in November, 2006. See Ralph Blumenthal, Texas Lawmakers Put New Focus on Illegal Immigration, N.Y. Times, Nov. 16, 2006, at A22. By January 2007, there were three federal suits and a state suit in this case, and a temporary restraining order was issued. See Thomas Korosec, Leasing Rule Sent to Voters for OK / Councilman Says Farmers Branch May Set Precedent on Illegal Residents, Houston Chron., Jan. 23, 2007, at B1; Gretel C. Kovach, Dallas Suburb Amends Its Ban on Renting to Illegal Immigrants, N.Y. Times, Jan. 25, 2007, at A22 (reporting Farmers Branch City Council voted to revise policy which "allows landlords to rent to families with a head of household or a spouse who has legal residency or citizenship, and ... exempts minors from mandatory document checks"). I serve on the Board of the Mexican American Legal Defense and Educational Fund ("MALDEF"), and we have filed one of the federal cases. All opinions and analysis of these issues are my own, and do not necessarily comport with the organization's views.

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

See MALDEF Home Page, http://www.MALDEF.org, for reports and filings.

[FN13]. Doe v. Village of Mamaroneck, 462 F. Supp. 2d 520, 554 (S.D.N.Y. 2006). For another detailed story about immigration in the workplace, see the interesting (if breathless) story about a stucco company. Miriam Jordan, Trading Places: How Immigration Upended Dreams of an Entrepreneur--Mr. Hairston's Stucco Workers Quit to Become His Rivals; Illegals Drive Prices Down--A Wife's Political Riposte, Wall St. J., Dec. 13, 2006, at A1. See also Canyon Cty. v. Syngenta Seeds, Inc., No. CV05-306-S-EJL, 2005 WL 3440474, at *6 (D. Idaho Dec. 14, 2005) (dismissing County's RICO claims to recover "damages it [allegedly] has suffered as a direct result of the knowing employment of large numbers of illegal immigrants by the defendants").

[FN14]. Ho Ah Kow v. Nunan, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879) (No. 6,546) (striking down local ordinance regulating hair length). I believe that most of the current local and state ordinances, even as they are sometimes undifferentiated and aimed in a vague way at perceived "foreigners," are primarily aimed at excluding and stigmatizing immigrants of Mexican heritage, whether citizen, undocumented, or ascribed-undocumented. Why else would anyone care how a commercial enterprise takes its money, as long as it is legal tender, or whether or not schoolchildren informally converse in a language other than English? See infra note 15. I believe that such prejudice is clearly aimed at Mexicans, real or imagined. Read carefully, the nineteenth century pigtail ordinances were struck down with language, however quaint, that could apply with equal force today:

We are aware of the general feeling--amounting to positive hostility-- prevailing in California against the Chinese, which would prevent their further immigration hither and expel from the state those already here. Their dissimilarity in physical characteristics, in language, manners and religion would seem, from past experience, to prevent the possibility of their assimilation with our people. And thoughtful persons, looking at the millions which crowd the opposite shores of the Pacific, and the possibility at no distant day of their pouring over in vast hordes among us, giving rise to fierce antagonisms of race, hope that some way may be devised to prevent their further immigration. We feel the force and importance of these considerations; but the remedy for the apprehended evil is to be sought from the general government, where, except in certain special cases, all power over the subject lies.

Ho Ah Kow, 12 F. Cas. at 256. For a comprehensive review of how vagrancy statutes have been employed historically to remove immigrants and migrants, see Ahmed A. White, A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913-1924, 75 U. Colo. L. Rev. 667, 674-86 (2004).

[FN15]. In suburban Chicago (Mt. Prospect, Ill.), a school administrator required a number of Latino students to sign a pledge that they would not use Spanish in school, and that doing so would constitute "bullying," in violation of the District's anti-bullying policy. See Jeff Long, 'Bully' Contract Leads to Apology; District 26 Denies Spanish Speakers Were Targeted, Chi. Trib., Dec. 13, 2006, at Metro-1 (Nw. Final Edition). The action to rescind the policy was brought by MALDEF. In Dallas, the Primo! Pizza Patrón chain, self-described as "cater[ing] heavily to Latinos," announced a policy to accept Mexican pesos as acceptable currency in its stores, only to cause a flood of protests and attention from the Fox Network. See Karen Robinson-Jacobs, Paying in Pesos: Primo! Pizza Patrón Chain to Accept Mexican Bills at Cash Registers, Dallas Morning News, Jan. 6, 2007, at 1D; Pizza for Pesos Chain Receives Threats, Hate Mail, FoxNews.com, Jan. 11, 2007.

[FN16]. In fact, Kobach does not cite even one of the many scholarly articles in this field, perhaps accounting for his lack of familiarity with the procedures and issues. See, e.g., Michael A. Olivas, Undocumented College Student Residency, supra note 4, at 436-37; Victor C. Romero, Noncitizen Students and Immigration Policy Post-9/11, 17 Geo. Immigr. L.J. 357, 366 (2003); Victor C. Romero, Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls, 27 N.C. J. Int'l L. & Com. Reg. 393, 395-96 (2002); Jessica Salsbury, Comment, Evading "Residence": Undocumented Students, Higher Education, and the States, 53 Am. U. L. Rev. 459, 465-66 (2003); Daniel Walfish, Note, Student Visas and the Illogic of the Intent Requirement, 17 Geo. Immigr. L.J. 473, 476-78 (2003) (reviewing non-immigrant policy and procedures); Stanley Mailman & Stephen Yale-Loehr, College for Undocumented Immigrants After All?, N.Y. L.J., June 25, 2001, available at http://www.millermayer.com/site/new/undoc.html. Professor Peter Schuck, whose views on this subject are much more conservative than are mine, sees residency requirement developments as evidence the system is not stacked

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

against the undocumented. Peter H. Schuck, Taking Immigration Federalism Seriously, 2007 U. Chic. Legal F. 57, 62-63.

[FN17]. Kobach, Lawmakers, supra note 2, at 507-14.

[FN18]. See Toll v. Moreno, 458 U.S. 1, 17 (1982) (explaining that where federal immigration classification acts to apportion a state benefit and scheme makes distinctions clear, immigration classifications may be used); Mathews v. Diaz, 426 U.S. 67, 81 (1976) (upholding medical benefit restrictions on theory that "decisions in [immigration] matters may implicate our relations with foreign powers"); DeCanas v. Bica, 424 U.S. 351, 354 (1976) (holding that regulation of immigration with modest and explicit exceptions, "is unquestionably exclusively a federal power"); Graham v. Richardson, 403 U.S. 365, 382-83 (1971) (striking down welfare restrictions on equal protection and preemption grounds); Hines v. Davidowitz, 312 U.S. 52, 73-74 (1941) (finding federal preemption of Pennsylvania state law that required alien registration); Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (striking down state English-only provisions, which "cannot be coerced by methods which conflict with the Constitution ..."). See Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 Sup. Ct. Rev. 255, 255; Michael A. Olivas, Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications, 35 Va. J. Int'l L. 217, 219-20 (1994); Erwin Chemerinsky, The Values of Federalism, 47 Fla. L. Rev. 499, 501 (1995).

[FN19]. Day v. Sebelius, 376 F. Supp. 2d 1022, 1039-40 (D. Kan. 2005) (denying standing to challengers, upholding residency requirement that allows undocumented aliens to establish residency). Because the trial judge removed the governor as a defendant, the case at the Tenth Circuit was styled as Day v. Bond, 500 F.3d 1127, 1136-40 (10th Cir. 2007) (upholding trial court). The California state court case is Martinez v. Regents of the University of California, No. CV-05-2064, 2006 WL 2974303, at *1-4 (Cal. Super. Ct., Oct. 4, 2006) (Order on Demurrers, Motion to Strike, and Motions by Proposed Intervenors) (dismissing challenge to state residency statute). That action, dismissed on October 4, 2006, was the state court equivalent of Day v. Sebelius.

[FN20]. Olivas, Immigration-Related State and Local Ordinances, supra note 4, at 35-36.

[FN21]. Kobach, supra note 1, at 182-83.

[FN22]. Tex. Educ. Code Ann. § 21.031 (Vernon).

[FN23]. Michael A. Olivas, Plyler v. Doe, the Education of Undocumented Children, and the Polity, in Immigration Stories 197, 198 (David A. Martin & Peter H. Schuck eds., 2005).

[FN24]. Plyler v. Doe, 457 U.S. 202, 230 (1982).

[FN25]. Id. at 227.

[FN26]. Id.

[FN27]. Id.

[FN28]. Id. at 229-30.

[FN29]. Id.

[FN30]. Id. at 220.

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

[FN31]. Id. at 227 n.22.

[FN32]. Id., reh'g denied, 458 U.S. 1131 (1982).

[FN33]. Paul Feldman, Texas Case Looms over Prop. 187's Legal Future, L.A. Times, Oct. 23, 1994, at A1. For a thoughtful story on current issues concerning undocumented children in California, see Teresa Watanabe, Illegal Immigrant Youths in a Benefits Twilight Zone; State Policies Toward Such Children Vary, Reflecting Sympathy for Their Situation and Disapproval of Their Parents' Behavior, L.A. Times, Jan. 25, 2007, at B1. The twenty-fifth anniversary of the decision has prompted several news stories with various parties involved in the case, including lawyers, children, school officials, and Judge Justice. See, e.g., Barbara Belejack, A Lesson in Equal Protection, The Texas Cases that Opened the Schoolhouse Door to Undocumented Immigrant Children, Tex. Observer, July 13, 2007, available at http:// www.texasobserver.org/article.php?aid=2548 (Plyler story, including interview with Judge Justice); Mary Ann Zehr, With Immigrants, Districts Balance Safety, Legalities, Educ. Wk., Sept. 12, 2007, at 1, 14-15, available at http:// www.edweek.org/ew/articles/2007/09/12/03safehaven.h27.html (Plyler story).

[FN34]. Martinez v. Bynum, 461 U.S. 321, 322-23 (1983).

[FN35]. Id. at 323.

[FN36]. Toll v. Moreno, 458 U.S. 1, 17 (1982). Decided by the same Supreme Court, Toll v. Moreno was a higher education case concerning residency requirements for long-time non-immigrants, and whether they could be eligible for in-state tuition. Id. at 3. They could be, and were. Id. at 17; see also Michael A. Olivas, Plyler v. Doe, Toll v. Moreno, and Postsecondary Admissions: Undocumented Adults and "Enduring Disability", 15 J.L. & Educ. 19, 29 (1986) [hereinafter Olivas, Postsecondary Admissions]; Olivas, Storytelling, supra note 4, at 1046-47.

[FN37]. See, e.g., Maria Pabon Lopez, Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe, 35 Seton Hall L. Rev. 1373, 1398 n.18 (2005). For another thoughtful study of Plyler, see Peter H. Schuck, The Transformation of Immigration Law, 84 Colum. L. Rev. 1, 54 (1984) (noting "epochal significance" of case for undocumented aliens).

[FN38]. Lolita K. Buckner Inniss, California's Proposition 187--Does It Mean What It Says? Does It Say What It Means? A Textual and Constitutional Analysis, 10 Geo. Immigr. L.J. 577, 578 (1996); Kevin R. Johnson, Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class, 42 UCLA L. Rev. 1509, 1560-75 (1995).

[FN39]. Lopez, supra note 37, at 1395-96.

[FN40]. Id. at 1395-98; Olivas, supra note 23, at 212-213. See also Patrick J. McDonnell, Davis Won't Appeal Prop. 187 Ruling, Ending Court Battles, L.A. Times, July 29, 1999, at A1; Patrick J. McDonnell, Prop. 187 Talks Offered Davis Few Choices, L.A. Times, July 30, 1999, at A3.

[FN41]. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) [hereinafter PRWORA]; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) [hereinafter IIRIRA]. See Stephen H. Legomsky, Fear and Loathing in Congress and the Courts: Immigration and Judicial Review, 78 Tex. L. Rev. 1615, 1624 (2000); Gerald L. Neuman, Jurisdiction and the Rule of Law After the 1996 Immigration Act, 113 Harv. L. Rev. 1963, 1975 (2000).

[FN42]. Halle I. Butler, Note, Educated in the Classroom or on the Streets: The Fate of Illegal Immigrant Children in the United States, 58 Ohio St. L.J. 1473, 1485 (1997).

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

[FN43]. Id.; Lopez, supra note 37, at 1395-96.

[FN44]. The student was the dependent of a tourist (B-2), who overstayed. See Eric Herman, Elmwood Park Schools Reinstated: District Agrees to Stop Barring Students Due to Immigration Status, Chi. Sun Times, Feb. 25, 2006, at A3; Rosalind Rossi, State Strips Schools of $3.5 Million: District Following Law, It Claims, by Refusing to Enroll Immigrant, Chi. Sun Times, Feb. 24, 2006, at A8. In a very similar Illinois situation, a school administrator not only refused to admit an undocumented child residing in the district, but also called Homeland Security officials. See School is Accused of Barring Student, Chi. Trib. (North), Aug. 10, 2007, at Metro-3. See also Nina Bernstein, On Lucille Avenue, the Immigration Debate, N.Y. Times, June 26, 2006, at A1; Sam Dillon, In Schools Across U.S., the Melting Pot Overflows, N.Y. Times, Aug. 27, 2006, at A1; Jennifer Radcliffe, 1982 Ruling a Catalyst in Immigration Debate, Houston Chron., May 21, 2006, at B1. As with most of the issues in this field, there are competing values here. To my way of thinking, how someone becomes undocumented plays a large role in arguing the equities of their situation. In this calculus, a child brought surreptitiously or legally by adults does not have dirty hands; an adult who falls out of status is a different matter, with fewer equitable arguments. Courts and critics do not always acknowledge this distinction, or do so, but argue that it is irrelevant. See, e.g., Dan Stein, Why Illegal Immigrants Should Not Receive In-State Tuition Subsidies, Univ. Bus., Apr. 2002, at 64, 64 (arguing that according resident status to students or allowing undocumented students to enroll only encourages lawbreaking). But see, e.g., Michael A. Olivas, A Rebuttal to FAIR, Univ. Bus., June 2002, at 72, 72 (making “dirty-hands” distinctions).

[FN45]. Colleen Mastony & Diane Rado, Elmwood Park Schools Give In; To Keep State Funds, District Drops Fight on Immigrant Student, Chi. Trib., Feb. 25, 2006, at News-1; Colleen Mastony & Diane Rado, Barred Teen Pleased as Lawsuit is Dropped; Elmwood Park District Reluctantly Ends Fight, Chi. Trib., Feb. 28, 2006, at Metro-1. For another example of a non-immigrant visa holder, one a bit less disadvantaged (an E-2, the dependent of a treaty investor), who was precluded from securing a student visa (an F-1), see Kelly Griffith, Immigration Rules Bug Brits, Orlando Sentinel, Sept. 10, 2006, at J1. Although the article does not say so, the likely culprit was the requirement that such applicants for student visas not have an “intending immigrant” intent; that is, if the applicant appears to want to remain in the United States after their studies are completed, else the consular official will, with virtually-unreviewable discretion, refuse admission into the country. See Walfish, supra note 16, at 479.

[FN46]. See Amy Miller, APS Safe for Migrant Students; Informal Policy Now Official, Albuquerque J. (N.M.), June 2, 2006, at A1; Amy Miller, Migrants are Safe at APS; School Board Enacts Ban on Taking Part in Investigation of Students' Legal Status, Albuquerque J. (N.M.), June 15, 2006, at C1. While MALDEF settled with the school district, there were still additional defendants, including the City of Albuquerque and the Albuquerque Police Department, who settled in Fall, 2007. See Albuquerque Police Will Not Turn in Illegal Immigrants, Albuquerque J. (N.M.), Aug. 14, 2007, available at http:// www.abqjournal.com/news/appolicy08-14-07.htm. See also Rene Romo, Pregnant Roswell Student Deported, Albuquerque J. (N.M.), Dec. 13, 2007, at A1. An earlier such case in El Paso prevented the then-INS from conducting sweeps on school campuses. Murillo v. Musegades, 809 F. Supp. 487, 503-04 (W.D. Tex. 1992) (enjoining immigration officers from searching El Paso high school students on mere suspicion of immigration non-compliance and Mexican appearance). This issue arose more recently in the context of summer children's camp funding. See Stephanie Sandoval, Funding Intact for Youth Camp FB: Official's Effort to Eliminate Aid for Illegal Immigrants Rejected, Dallas Morning News, Sept. 21, 2006, at Metro-1B.

[FN47]. Sometimes these children surface when they are outed by public achievements, as when they win national awards that bring press coverage. See, e.g., Miriam Jordan, Princeton's 2006 Salutatorian Heads to Oxford, Still an Illegal Immigrant, Wall St. J., Sept. 14, 2006, at B1. For two such examples of achieving undocumented high schoolers, both prompted by robotics competitions, see Peter Carlson, Stinky the Robot, Four Kids and a Brief Whiff of Success, Wash. Post, Mar. 29, 2005, at C1 (reporting on undocumented Mexican students' science project); Mel Melendez, Ingenuity Brightens Future: Doors Finally Open for 4 Phoenix Migrant Youths a Year After Beating MIT in Robotics Competition, Ariz. Republic, Apr. 23, 2005, at 1A (same); Nina Bernstein, Student's Prize is a Trip Into Immigration Limbo, N.Y. Times, Apr. 26, 2006, at A1 (reporting Senegalese student science project reveals

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

illegal status); Nina Bernstein, Senegalese Teenager in Deportation Fight Wins Right to Study in America, N.Y. Times, July 29, 2006, at B2 (same); Karina Bland, District Backs Aid for Kids of Migrants; Phoenix Union Board Votes to Lend Support to Federal DREAM Act, Ariz. Republic, Jan. 13, 2007, at 3.

[FN48]. Olivas, Undocumented College Student Residency, supra note 4, at 437.

[FN49]. The updated versions in Table 2 and Table 3 are taken from available state data, including those available from www.nilc.org and www.ncsl.org, both of which usefully track DREAM Act issues.

[FN50]. Kan. Stat. Ann. § 76-731a (Supp. 2006); see Day v. Sebelius, 376 F. Supp. 2d 1022, 1034 (D. Kan. 2005) (denying standing to plaintiffs challenging statute).

[FN51]. Doe v. Merten, 219 F.R.D. 387, 396 (E.D. Va. 2004) (resolving procedural issues); see also Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 614 (E.D. Va. 2004) (denying defendant's motions to dismiss); Equal Access Educ. v. Merten, 325 F. Supp. 2d 655, 672-73 (E.D. Va. 2004) (reaching the merits of the case and upholding statute denying alien residency). See also Nathan G. Cortez, The Local Dilemma: Preemption and the Role of Federal Standards in State and Local Immigration Laws, 61 SMU L. Rev. 47 (2008).

[FN52]. On appeal to the Tenth Circuit, it became Day v. Bond, and the arguments were heard the week of September 25, 2006. The Court of Appeals announced its decision on August 30, 2007. See 500 F.3d 1127, 1139-40 (10th Cir. 2007).

[FN53]. Martinez v. Regents of the Univ. of Cal., CV-05-2064, 2006 WL 2974303 (Cal. Super. Ct. Oct. 4, 2006) (Order on Demurrers, Motion to Strike, and Motions by Proposed Intervenors) (dismissing challenge to state residency statute). This action, dismissed on October 4, 2006, was the state equivalent of the Day v. Sebelius federal case in Kansas, which was argued at the Tenth Circuit in September 2006, and decided in August 2007. In an unrelated case, MALDEF and others filed a case challenging section 68040 of the California Education Code, title V, section 41904 of the California Code of Regulations, and the State Constitution (postsecondary residency and financial aid provisions) in California Superior Court, County of San Francisco, in November, 2006. A consent decree was entered by that court on April 19, 2007. Student Advocates for Higher Educ. v. Trustees, Cal. St. Univ., No. CPF-06-506755 (Cal. Super. Ct. Apr. 19, 2007), available at http:// www.sftc.org; see also Cal. Educ. Code § 68040 (West 2003); Cal. Code Regs., tit. V, § 41904 (2007).

[FN54]. There is a remarkable amount of literature on this small topic. See also Romero, Postsecondary School, supra note 16; see generally Jody Feder, Cong. Res. Serv., Order Code RS22500, Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis, at CRS01 (July 20, 2006); Paz M. Olivérez, Maria Lucia Chavez, Mayra Soriano & William G. Tierney, USC Ctr. for Higher Educ. Pol'y Analysis, Rossier Sch. of Educ., Univ. of S. Ca., The College & Financial Guide for AB540 Undocumented Immigrant Students (Oct. 2006); Migration Pol'y Inst., Wash. D.C., No. 1, New Estimates of Unauthorized Youth Eligible for Legal Status Under the DREAM Act 1 (Oct. 2006); Am. Ass'n of State Coll. and Univ. ("AASCU"), Access For All? Debating In-State Tuition for Undocumented Alien Students 3, available at http://www.aascu.org/policy/special_report/access_for_all.htm (last visited Jan. 12, 2007); Laura J. Callahan Ragan, Educating the Undocumented: Providing Legal Status for Undocumented Students in the United States and Italy Through Higher Education, 34 Ga. J. Int'l & Comp. L. 485 (2006).

[FN55]. Senator Orrin Hatch (R-UT) was then the co-sponsor of the DREAM Act. It is likely that his not being a co-sponsor of the 2005 version was due in part to having a primary opponent for re-election. He was re-elected to the Senate by a wide margin in 2006, but the FAIR website continues to label the DREAM Act as his bill, and characterizes it (in 2007) as a giveaway to illegal aliens. Press Release, Federation for American Immigration Reform, The 'DREAM Act': Hatch-ing Expensive New Amnesty for Illegal Aliens (Oct. 23, 2003), available at

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

http://www.fairus.org/site/PageServer?pagename=media_mediaf23a. In a 2004 article, I assumed that Hatch's co-sponsorship would likely hasten passage. Olivas, Undocumented College Student Residency, supra note 4, at 456-57.

[FN56]. Kobach, Lawmakers, supra note 2.

[FN57]. Inniss, supra note 38, at 577; Johnson, supra note 38, at 159. See Olivas, Storytelling, supra note 4, at 1057-61 (detailing the court's error in mischaracterizing federal law on undocumented college residency). For a more modern mistake on the same issue, committed by restrictionist groups and lawyers, see generally Kobach, Lawmakers, supra note 2; Dan Stein, Why Illegal Immigrants Should Not Receive In-State Tuition Subsidies, supra note 44, at 64. But see Olivas, A Rebuttal to FAIR, supra note 44, at 72.

[FN58]. Kobach, Lawmakers, supra note 2, at 498-503.

[FN59]. Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986) [hereinafter IRCA]. See also Linda S. Bosniak, Membership, Equality, and the Difference That Alienage Makes, 69 N.Y.U. L. Rev. 1047 (1994); Kevin R. Johnson, The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens, 28 St. Mary's L.J. 833, 878-82 (1997).

[FN60]. Steven Erlanger, A Day of Terror: The World's Reaction, N.Y. Times, Sept. 12, 2001, at A23.

[FN61]. In a number of these legislative sessions, the discussions and politics have been quite fascinating. For example, on April 14, 2006, Nebraska became the tenth state to provide in-state, resident tuition to undocumented immigrant students who have attended and graduated from its high schools. It did so in dramatic fashion, overriding Governor Dave Heineman's veto. The bill had passed by a 26-19 margin, but needed thirty votes for an override; supporters managed to change exactly four votes to get the necessary thirty. See Ruth Marcus, Immigration's Scrambled Politics, Wash. Post, Apr. 4, 2006, at A23.

[FN62]. Professor Kobach discusses some of these state dynamics in his most recent publication. See Kobach, Lawmakers, supra note 2, at 477-96. For the record, not all students in all public colleges of a particular state are subject to the same tuition and residency requirements. For example, although California's UC and CSU systems accord in-state tuition to the undocumented, those students in California's community colleges are not eligible, as then-Governor Gray Davis vetoed a bill that would have extended this status to them. See Michael Gardner, Davis Vetoes Waiver of College Fees for Illegal Immigrants, San Diego Union Trib., Oct. 14, 2003, at A-4.

[FN63]. Press Release, Sen. Orrin G. Hatch, DREAM Act Continues to Gain Support (Sept. 4, 2003), available at http://hatch.senate.gov/index.cfm? FuseAction=PressReleases.view&PressRelease_id.=884.

[FN64]. Carl Hulse, In Bellwether District, G.O.P. Runs on Immigration, N.Y. Times, Sept. 6, 2006, at A1; Joyce Purnick, In a G.O.P. Stronghold, 3 Districts in Indiana Are Now Battlegrounds, N.Y. Times, Oct. 21, 2006, at A1. After the November 2006 elections, the returns appear to have reflected a moderation of anti-immigrant views--trust but verify. Randal C. Archibold, Democratic Victory Raises Spirits of Those Favoring Citizenship for Illegal Aliens, N.Y. Times, Nov. 10, 2006, at A27 (assessing election results for ballot initiatives, anti-immigrant candidates). See also Ryan Lizza, Return of the Nativist, New Yorker, Dec. 17, 2007, at 46 (reviewing political views on immigration)

[FN65]. See supra note 19 and accompanying text.

[FN66]. See, e.g., Kobach, Lawbreaking, supra note 2; Kobach, Nightmare, supra note 2.

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

[FN67]. Kobach, Quintessential Force Multiplier, supra note 1, at 233-35; Kobach, Lawmakers, supra note 2, at 498-503.

[FN68]. See The Races for the House, N.Y. Times, Nov. 4, 2004, at P12 (showing district results from Kansas congressional race in 2004). Professor Kobach litigated both the Day case in Kansas federal court and the Martinez case in California state court. Day v. Sebelius, 376 F. Supp. 2d 1022 (D. Kan. 2005), aff'd sub nom. Day v. Bond, 500 F.3d 1127 (10th Cir. 2007); Martinez v. Regents of the Univ. of Cal., No. CV-05-2064, 2006 WL 2974303 (Cal. Sup. Ct. Oct. 4, 2006). I assisted state legislative staff in drafting the Kansas statute, was the state's witness in the Day federal case, and assisted with the defendant discussions and brief-writing for both the district court and Tenth Circuit matters.

[FN69]. Kobach, The Quintessential Force Multiplier, supra note 1.

[FN70]. Id. at 183.

[FN71]. Huyen Pham, The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power, 74 U. Cin. L. Rev. 1373, 1374 n.4, 1406-07 (2006); Michael J. Wishnie, Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism, 76 N.Y.U. L. Rev. 493, 527-58 (2001); see also Hannah Gladstein, Annie Lai, Jennifer Wagner & Michael Wishnie, Blurring the Lines: A Profile of State and Local Police Enforcement of Immigration law Using the National Crime Information Center Database, 2002-04, at 9-13 (Dec. 2005); Alicia Triche, Local Enforcement and Federal Preemption, 11-24 Immigr. Bull. (MB) 2, 3 (Dec. 15, 2006) (critiquing role of local law enforcement in immigration in terms of “conflict preemption” and “field preemption”).

[FN72]. 8 U.S.C. § 1324 (2005 & Supp. 2007).

[FN73]. Id. § 1105.

[FN74]. Id. § 1357(g).

[FN75]. There is a full bookcase of scholarship on this subject, but I have profited from the work by Professor Stephen Legomsky in this and other immigration areas. See, e.g., Legomsky, Immigration Law, supra note 18, at 296-303. My own take on this subject is best exemplified by Olivas, Preempting Preemption, supra note 18.

[FN76]. Pham, The Constitutional Right Not to Cooperate, supra note 71, at 1374; Kobach, Quintessential Force Multiplier, supra note 1, at 197. The Houston Police Department revised its procedures following the murder of a police officer who had arrested a once-deported criminal felon alien who had entered a second time without inspection. The alien was patted down and handcuffed in the back of the police vehicle, but apparently the officer missed the handgun tucked in the alien's waistband. I watched in horror as this story occurred, and then cringed as the issue dominated Houston news and politics for several weeks in the month leading up to the 2006 elections. See, e.g., Anne Marie Kilday et al., Shooting Raises Issue of Policing Immigrants, Houston Chron., Sept. 23, 2006, at A1; Matt Stile, HPD Revising Its Immigration Policy, Houston Chron., Oct. 1, 2006, at A1; Alexis Grant & Kristen Mack, Court to Decide: Does Deportation Fit Crime?, Houston Chron., Oct. 1, 2006, at A1. According to Mexican American Bar Association officials in Houston, as soon as this policy was announced, the criminal courts in Harris County began requiring Spanish-speakers who needed court-appointed translators to be fingerprinted and interviewed by sheriff's deputies about citizenship prior to providing the services, and for fingerprinting. According to these lawyers, the District Attorney's office is now transmitting the fingerprints to U.S. Immigration and Customs Enforcement (“ICE”), even as cases are pending.

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

[FN77]. In 2007, Massachusetts withdrew from its cooperative arrangement. The state's Governor-elect declared he would rescind and did rescind, the Memorandum of Understanding with the Department of Homeland Security as one of his first acts in office. Katie Zezima, New Governor to Drop Pact on Immigrants, N.Y. Times, Dec. 22, 2006, at A24; Jonathan Saltzman, Governor Rescinds Immigration Order, Frees State Police from Arrest Pact, Boston Globe, Jan. 12, 2007, available at http:// www.boston.com/news/local/politics/candidates/articles/2007/01/12/governor_ rescinds_immigration_order.

[FN78]. Peter J. Spiro, The States and Immigration in an Era of Demi-Sovereignties, 35 Va. J. Int'l L. 121 (1994). But see Olivas, Preempting Preemption, supra note 18 (responding to Spiro's thesis in a three-part analysis).

[FN79]. Huyen Pham, The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution, 31 Fla. St. U. L. Rev. 965, 965 (2004).

[FN80]. Michael J. Wishnie, State and Local Police Enforcement of Immigration Laws, 6 U. Pa. J. Const. L. 1084, 1115 (2004).

[FN81]. Id. (citing President George W. Bush, New Temporary Worker Program: Remarks on Immigration Policy (Jan. 7, 2004) (transcript available at http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html)).

[FN82]. Comprehensive Immigration Reform: The Future of Undocumented Immigrant Students: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary, 110th Cong. 42 (2007) (statement of Kris W. Kobach, Ph.D., Professor of Law, University of Missouri, Kansas City School of Law) [hereinafter Comprehensive Immigration Reform].

[FN83]. Kobach, Lawmakers, supra note 2, at 517-30; Kobach, Lawbreaking, supra note 2, at 2.

[FN84]. Comprehensive Immigration Reform, supra note 82, at 44.

[FN85]. Kobach, Lawmakers, supra note 2, at 477; Kobach, Lawbreaking, supra note 2, at 2.

[FN86]. Kobach, Lawmakers, supra note 2, at 477.

[FN87]. See id. at 507-14.

[FN88]. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (internal references omitted).

[FN89]. Stein, Why Illegal Immigrants Should Not Receive In-State Tuition Subsidies, supra note 44, at 64. But see Olivas, Rebuttal to FAIR, supra note 44, at 72.

[FN90]. 8 U.S.C. § 1623 (2005).

[FN91]. Id. § 1621 (2005).

[FN92]. Id.

[FN93]. Id. In addition, this date is confirmed internally by reference to section 1623's Effective Date: "This section shall apply to benefits provided on or after July 1, 1998." Id. § 1623(b).

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

[FN94]. Thus, in the one post-IIRIRA case challenging the right of states to withhold this benefit (the converse of the Kansas federal case and the California state case), Virginia's law not extending the benefit was upheld. Doe v. Merten, 219 F.R.D. 387, 396 (E.D. Va. 2004) (holding that case concerning undocumented students cannot be styled anonymously); Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 603, 614 (E.D. Va. 2004) (holding that state could enact laws denying resident tuition), dismissed by 325 F. Supp. 2d 655, 660, 673 (E.D. Va. 2004) (granting defendants' motion for summary judgment, finding that students do not have standing absent evidence that they were denied admission due to immigration status). These MALDEF cases were undertaken before I joined the MALDEF Board, but I consulted with the attorneys bringing the MALDEF case against the state. See also Cortez, supra note 51.

[FN95]. See generally, Olivas, Postsecondary Admissions, supra note 36; Michael A. Olivas, Administering Intentions: Law, Theory, and Practice in Postsecondary Residency Requirements, 59 J. Higher Educ. 263 (1988).

[FN96]. Elkins v. Moreno, 435 U.S. 647, 651 (1978).

[FN97]. Id. at 668-69.

[FN98]. Id. at 651.

[FN99]. These distinctions can be quite confusing. For example, the Virginia Legislature recently established in-state tuition eligibility for those holding an immigration visa or those classified as political refugees in the same manner as any other resident student. Under these new provisions, students with temporary or student visa status are ineligible for Virginia resident status and thus, also ineligible for in-state tuition. Va. Code. Ann. § 23-7.4 (2006 & Supp. 2007).

[FN100]. 8 U.S.C. § 1623 (2005) (emphasis added).

[FN101]. Elkins, 435 U.S. at 651.

[FN102]. 8 U.S.C. § 1623 (2005).

[FN103]. N.M. Stat. § 21-1-4.6 (2005). I consulted with the state senator bringing this case and legislative counsel involved in drafting the statute; I also testified before the senate committee holding hearings on the legislation. I also was involved in discussions with the governor who signed it into law and his staff. Press Release, Gov. Bill Richardson, Governor Richardson Signs Bill Prohibiting Discrimination in Admission and Tuition Policy of New Mexico Post Secondary Educational Institutions Based on student's Immigration Status (Apr. 8, 2005), available at http://www.governor.state.nm.us/press/2005/april/040805_ 4.pdf.

[FN104]. 8 U.S.C. § 1623.

[FN105]. Id.

[FN106]. In April, 1993, a bill was introduced in the Texas Legislature to address the problems of intending permanent residence or persons permanently residing under color of law ("PRUCOL"). It died in committee. See H.B. 2510 73d Leg., Reg. Sess. (Apr. 28, 1993) (introduced) (on file with author). During this time, Texas did not even spend all of its federal dollars allocated for alien support and returned $90 million unspent to the government. Editorial, Blame the Newcomers, Tex. Observer, Aug. 19, 1994, at 2, 3. For excellent studies of PRUCOL aliens, see John W. Guendelsberger, Equal Protection and Resident Alien Access to Public Benefits in France and the

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

United States, 67 Tul. L. Rev. 669, 720 (1992) (discussing federal public assistance programs which aid undocumented aliens); Peter L. Reich, Public Benefits for Undocumented Aliens: State Law into the Breach Once More, 21 N.M. L. Rev. 219, 237 (1991) (same). See generally Robert Rubin, Walking a Gray Line: The "Color of Law" Test Governing Noncitizen Eligibility for Public Benefits, 24 San Diego L. Rev. 411 (1987).

[FN107]. Kobach, Lawmakers, supra note 2, at 51-14. See also Memorandum from Allison P. Landry, Assistant Att'y Gen., Commonwealth of Va., to Executive Director, State Council for Higher Educ. in Va. 5 (Sept. 5, 2002), available at http://www.schev.edu/AdminFaculty/ImmigrationMemo9-5-02APL.pdf [hereinafter Virginia Attorney General Memorandum] (opining that a state senate amendment to grant in-state status to certain aliens was preempted by IIRIRA). Although the Virginia legislature passed a bill to grant in-state assistance, the governor vetoed the legislation on April 30, 2003. As Table Three notes, subsequent bills have been introduced. Mary Shaffrey, Changes in the Cards: IRS Eyeing Tax Payer ID Numbers to Stem Use by Illegal Immigrants, Wash. Times, Sept. 6, 2003, at 1A.

[FN108]. 8 U.S.C. § 1621 (2005). A California appellate court had made a similar error in differentiating between status and benefit in a case involving the application of the Immigration Reform and Control Act of 1986 on the California tuition matter before it. Regents of Univ. of Cal. v. Sup. Ct., 276 Cal. Rptr. 197, 201 (Cal. Ct. App. 1990). See also Olivas, Storytelling, supra note 4, at 1062-63.

[FN109]. 8 U.S.C. § 1621.

[FN110]. Id.

[FN111]. Contra Kobach, Lawmakers, supra note 2, at 510-14.

[FN112]. Kobach, Lawbreaking, supra note 2, at 3.

[FN113]. 8 U.S.C. § 1621.

[FN114]. See e.g., Cal. Educ. Code § 68130.5 (West 2003); Tex. Educ. Code Ann. § 54.052 (Vernon 2005). See generally, Sara Hebel, States Take Diverging Approaches on Tuition Rates for Illegal Immigrants, Chron. Higher Educ., Nov. 30, 2001, at 22.

[FN115]. Florida is the only major immigrant receiver state that has not enacted such state legislation, although it has had initiatives to do so in recent legislative sessions. The National Association of College Admissions Counselors ("NACAC"), a major higher education organization, has made this effort a high priority, and has aggressively advocated for such a law. See, e.g., Letter from National Association for College Admissions Counseling, to the Florida State Legislature (Sept. 19, 2005), available at http://www.nacacnet.org/NR/rdonlyres/C5EE68C2-98A7-457A-980A-2FF22F34B292/0/letter_ FLAleg.pdf. Of course, this does not mean that passing the legislation in other states is not desirable. I have had extensive personal experience with advocacy groups, legislators, and their staffs in North Carolina, Massachusetts, Connecticut, and several other states with smaller undocumented populations. This is one of a number of reasons that the federal DREAM Act should be enacted into law, as doing this on a state-by-state basis consumes enormous legal and political resources. See Raphael Lewis, In-State Tuition Not a Draw for Many Immigrants, Boston Globe, Nov. 9, 2005, at A1 (mentioning use of status in Massachusetts and Washington Legal Foundation's challenge in New York).

[FN116]. Doe v. Merten, 219 F.R.D. 387, 388 (E.D. Va. 2004) (holding that case concerning undocumented students cannot be styled anonymously); Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 608, 614 (E.D. Va. 2004) (holding that state could enact laws denying resident tuition), dismissed by 325 F. Supp. 2d 655, 660, 693

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

(E.D. Va. 2004) (granting defendants' motion for summary judgment, finding that students do not have standing absent evidence that they were denied admission due to immigration status).

[FN117]. Day v. Sebelius, 376 F. Supp. 2d 1022, 1025 (D. Kan. 2005) (upholding residency requirement that allows undocumented aliens to establish residency). Because the trial judge removed Governor Kathleen Sebelius as a defendant, the case at the Tenth Circuit Court of Appeals was styled as Day v. Bond, 500 F.3d 1127 (10th Cir. 2007). The California state court case is Martinez v. Regents of the University of California, No. CV-05-2064, 2006 WL 2974303 (Cal. Super. Ct., Oct. 4, 2006) (Order on Demurrers, Motion to Strike, and Motions by Proposed Intervenors) (dismissing challenge to state residency statute). The California action was the state equivalent of the Day v. Sebelius federal case in Kansas.

[FN118]. Kan. Stat. Ann. § 76-731a (Supp. 2006).

[FN119]. Day v. Sebelius, 376 F. Supp. 2d at 1025.

[FN120]. In the interests of full disclosure: I served as the Kansas expert witness in this litigation.

[FN121]. Day v. Sebelius, 376 F. Supp. 2d at 1033.

[FN122]. Id. at 1040.

[FN123]. Day v. Bond, 500 F.3d 1127 (10th Cir. 2007) (argued September 2006).

[FN124]. Equal Access Educ. v. Merten, 325 F. Supp. 2d 655 (E.D. Va. 2004). The Virginia Attorney General opined--incorrectly, in my view--that granting assistance would be inconsistent with IRRIRA. Virginia Attorney General Memorandum, supra note 107, at 5. Although the Virginia legislature passed a bill to grant assistance, the governor vetoed the legislation on April 30, 2003. As Table Three notes, subsequent bills have been introduced. Shaffrey, Changes in the Cards, supra note 107.

[FN125]. Kobach, Lawbreaking, supra note 2, at 3; see also Kobach, Lawmakers, supra note 2, at 506-07.

[FN126]. Kobach, Lawbreaking, supra note 2, at 3.

[FN127]. See note 117.

[FN128]. Press Release, Washington Legal Foundation, WLF Files Civil Rights Complaint Against State of Texas Regarding Benefits for Illegal Aliens, (Aug. 2005), available at http://www.wlf.org/upload/080905RS.pdf.

[FN129]. The Texas statute was the first to address this problem. It was signed into law by Governor Rick Perry, the Republican who succeeded Governor George W. Bush's term and was then elected to his own term. Clay Robison, Budget Hits Include Judges' Pay Hike, Houston Chron., June 18, 2001, at 1A (describing 2001 legislative session tuition revenue and the expected economic impact of the statute). In January, 2007, Governor Perry (then re-elected to his second full term) indicated that he would not support any bills that overturned this legislation, including the revised version, S.B. 158. Matthew Tresaugue & R.G. Radcliffe, The Legislature: Illegal Immigrants May See Tuition Hike, Houston Chron., Jan. 11, 2007, at B1; Clay Robison & R.G. Ratcliffe, Perry to Stick By Law Giving Tuition Breaks to Illegal Immigrants, Houston Chron., Jan. 12, 2007, at B4. The State of Texas recently released a major report concerning the costs and benefits of the undocumented to the Texas economy:

This is the first time any state has done a comprehensive financial analysis of the impact of undocumented immigrants on a state's budget and economy, looking at gross state product, revenues generated, taxes paid and the

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

cost of state services.

The absence of the estimated 1.4 million undocumented immigrants in Texas in fiscal 2005 would have been a loss to our gross state product of $17.7 billion. Undocumented immigrants produced $1.58 billion in state revenues, which exceeded the $1.16 billion in state services they received. However, local governments bore the burden of $1.44 billion in uncompensated health care costs and local law enforcement costs not paid for by the state.

Texas Office of Comptroller of Public Accounts, Undocumented Immigrants in Texas: A Financial Analysis of the Impact to the State Budge and Economy 1 (Dec. 2006), available at http:// www.cpa.state.tx.us/specialrpt/undocumented/undocumented.pdf.

[FN130]. Press Release, WLF Files Civil Rights Complaint, supra note 128. Discussions I had with DHS press officials on a not-for-attribution basis indicated that DHS staff feel that they have no authority to enforce this subject matter and that the Department will take no action on this request.

[FN131]. Tex. Educ. Code Ann. § 54.053 (Vernon 2005) (enacted by S.B. 158). As an adviser to Texas State Representative Rick Noriega of Houston, who successfully sponsored the Texas law that accorded in-state residency status to eligible undocumented students, I helped draft the original bill which included two provisions that have become models for both state and federal legislation that has followed: the three-year requirement and the provision that the students promise to seek regularization of their status once they are eligible. Both of these provisions arose in the heat of legislative battle that occurred after our original bill, which contained neither provision, was introduced. I credit Representative Noriega for the courage and tenacity that started this bill rolling. Texas Legislature Online: History, http:// www.legis.state.tx.us/BillLookup/History.aspx?LegSess=77RLBill=HB1403 (last visited Jan. 8, 2008).

[FN132]. "More than 5,400 students benefited from the tuition law last spring, up from 393 in 2001, according to the Texas Higher Education Coordinating Board." Tresaugue & Radcliffe, Illegal Immigrants May See Tuition Hike, supra note 129. See also Ashley Eldridge, Array of Students Pay In-State Costs Under 2001 Bill; Undocumented Immigrants are Not Only Students Who Benefit, Daily Texan, Aug. 1, 2005, at 1. My own regular discussions with the Coordinating Board staff have suggested that nearly 10,000 different students have employed this provision since it was enacted.

[FN133]. Roberts had a particularly offensive time of it, referring in his Department of Justice memo to "illegal amigos," which he later explained to have been akin to ethnic politicking, such as candidates speaking Spanish to Latino voters. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 260 (2005) (statement of Sen. Schumer) (questioning about reference to "illegal amigos" in earlier memo); id. at 390 (statement of Sen. Durbin) (questioning about views about Plyler as precedent); id. at 596 (same); id. at 1042 (MALDEF Report on and Statement in Opposition to the Confirmation of John G. Roberts to the United States Supreme Court). See also Confirmation Hearings on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 787 (2006) (immigration cases and 1986 memo), id. at 1268 (statement of Ms. Ann Marie Tallman, President and General Counsel MALDEF). See also James G. Lakely, Roberts Memo Faulted Justice over Failure to Back Texas in '82 Case, Wash. Times, Aug. 12, 2005, at A4; David D. Kirkpatrick, '85 Document Opens Window to Alito Views, N.Y. Times, Nov. 15, 2005, at A1.

[FN134]. In a fascinating study of Justice Brennan's notes, taken by the Justice in conference over many years on the U.S. Supreme Court, Jim Newton has published a number of them online. In Part IV, The Colleagues, he relates this story, in the case following the time that John Roberts clerked for then-Justice Rehnquist. See Jim Newton, Brennan Dishes on His Colleagues, Slate, Jan. 11, 2007, available at http://www.slate.com/id/2156940/.

[FN135]. For example, advocates of the DREAM Act organized a highly visible Summer, 2003 "Freedom March" to Washington, while FAIR and other opponents have organized a write-in campaign to throw sand in the gears. See Steven Greenhouse, Riding Across America for Immigrant Workers, N.Y. Times, Sept. 17, 2003, at A20. For the

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

FAIR position, see Press Release, Federation for American Immigration Reform, The "DREAM Act": Watching Expensive New Amnesty for Illegal Aliens, supra note 55. The California State Legislature passed a non-binding resolution (AJR-9) in Summer, 2003, urging Congress to pass the DREAM Act.

[FN136]. Melanie Scarborough, The Logical Successor to Mark Warner, Wash. Post, Oct. 23, 2005, at B8. In the 2007-08 U.S. presidential debates, this very issue also surfaced. Sara Hebel, Educational Benefits for Illegal Immigrants Are a Hot Presidential Campaign Topic, Chron. Higher Educ., Dec. 14, 2007, at A24 (summarizing views).

[FN137]. A revised version of the DREAM Act of 2005 was introduced by Richard Durbin (D-IL), and the lead Republican co-sponsors were Chuck Hagel (R-NE) and Richard Lugar (R-IN). The other original co-sponsors are Norm Coleman (R-MN), Larry Craig (R-ID), Mike Crapo (R-ID), Mike DeWine (R-OH), Russ Feingold (D-WI), Edward Kennedy (D-MA), Patrick Leahy (D-VT), Joseph Lieberman (D-CT), John McCain (R-AZ), and Barack Obama (D-IL). The features of the DREAM Act of 2005 were nearly identical to the version that passed the Senate Judiciary Committee in 2004 by a 16-3 vote. See supra note 55. Because all pending legislation is a constantly moving target, observers may wish to consult a website that can help track legislation, http://thomas.loc.gov, a website I find enormously helpful. The Senate roll call vote is at http:// thomas.loc.gov, a website I find enormously helpful. The Senate roll call vote is at

[FN138]. Of the many such unlawful and prejudicial practices, one example will do. Without any legal authority, a Madison County, Alabama tax assessor refused to issue homestead tax exemptions to eligible naturalized U.S. citizens whom he perceived to be non-native English speakers, explaining that they could not take the required oath. The suit brought by the Southern Poverty Law Center was settled when the tax assessor agreed to discontinue the practice, to make restitution, and to stop making public remarks about "foreigners ... coming over here and taking ours." Telleria v. Cooley, No. 96-2220 (Cir. Ct. Ala., filed Dec. 31, 1996) (settled, Nov. 23, 1999), available at http:// www.splcenter.org/legal/docket/files.jsp?cdrID=39&sortID=4.

For an excellent critical analysis of housing discrimination, widespread in the immigration context, see Guadalupe T. Luna, Immigrants, Cops and Slumlords in the Midwest, 29 S. Ill. U. L.J. 61, 66-77 (2005). For evidence of the positive effect that immigrants can have on housing markets, see Damon Darlin, The Immigration Equation, N.Y. Times, Sept. 10, 2006, § 6 (Magazine), at 32-34 (reporting analysis of residential housing sales demographics).

[FN139]. The first person arrested in Georgia when a township enacted a comprehensive immigration ban in 1999 was a Spanish-language Christian minister, who was prosecuted under the English-only provisions for posting signs for church services in the language of his congregation. Guevara v. City of Norcross, 52 F. App'x 486 (11th Cir. 2002) ['Table of Decisions Without Reported Opinions' affirming N.D. Ga., No 00-00190-CV-CAP-1] (dismissing of criminal charges against Spanish-language minister for posting signs in Spanish announcing religious services in violation of city ordinance restricting the use of a language other than English for any displayed sign serving a non-residential purpose); MALDEF: Immigration and Citizenship, http:// www.maldef.org/immigration (last visited Nov. 13, 2007). While this was a MALDEF case, I was not on the MALDEF Board at the time the action was undertaken.

[FN140]. Gaiutra Bahadur, Latinos Lead Rally Opposing Ordinance, Phila. Inquirer, Sept. 4, 2006, at B1 (concerning local immigration ordinance in Hazelton, Pennsylvania); Gretel C. Kovach, Dallas Suburb Amends Its Ban on Renting to Illegal Immigrants, N.Y. Times, Jan. 25, 2007, A22. There have also been recent developments and reconsiderations of restrictions on the driver's license issue, as in New York State. Anthony Faiola, States' Immigrant Policies Diverge; In Differences, Some See Obstacles for a National Law, Wash. Post, Oct. 15, 2007, at A1.

[FN141]. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (striking down anti-Chinese ordinances). See Bill Ong Hing, Making and Remaking Asian America Through Immigration Policy, 1850-1990 (1993). In a story about the

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

recent University of Chicago immigration conference that led to a series of papers in the University of Chicago Legal Forum, I remarked on this feature of anti-Mexican prejudice, which I have not yet fully documented, but I stand by it; I also acknowledge the lutefisk remark and stand by it. Rick Perlstein, Fenced Out: A Post-9/11 Boom in Immigration Legislation Hasn't Stemmed the Border Flow, But It Has Created a Flood of New Approaches--Most with Built-in Paradoxes, U. Chi. Mag., Jan.-Feb. 2007, at 32-37, available at http://magazine.uchicago.edu/0712/features/fenced.shtml. Additional evidence of this phenomenon is growing. See, e.g., Rene Galindo & Jami Vigil, Are Anti-Immigrant Statements Racist or Nativist? What Difference Does it Make? 4 Latino Stud. 419, 420 (2006) (compiling a study of immigrants in editorials and press coverage); Ediberto Roman, The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism, 26 Fla. St. U. L. Rev. 1 (1998); Thomas Korosec, Hispanic Exodus From Irving Hurts Businesses, Houston Chron., Oct. 14, 2007, at B1, B6 (discussing cities being hurt by anti-alien ordinances). And some of these are so silly that I urge readers to read the cites carefully; I could not make them up: Steve Friess, Stars and Strife: Flag Rule Splits Town, N.Y. Times, Dec. 18, 2006, at A20 (reporting on Pahrump, Nevada enacting English Language and Patriot Reaffirmation Ordinance, banning use of languages other than English and flying flags other than U.S. flag); Warren St. John, Refugees Find Hostility and Hope on Soccer Field, N.Y. Times, Jan. 21, 2007, at A1, A18-19 (discussing how Clarkston, Georgia mayor refused to let refugee children use park for soccer: “There will be nothing but baseball down there as long as I am mayor”); Paul Vitello, Rift Over Illegal Immigration Leads to Talk of Secession, N.Y. Times, Dec. 16, 2006, at B12 (discussing proposal to divide Farmingville, New York into two Long Island villages, due to illegal immigration).

61 SMU L. Rev. 99

END OF DOCUMENT

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.