COMMENTARY

TO REPEAL OR NOT TO REPEAL: THE FEDERAL PROHIBITION ON IN–STATE TUITION FOR UNDOCUMENTED IMMIGRANTS REVISITED*

by

BETH PETERS, J.D. AND MARSHALL FITZ, J.D.**

Pro-immigration forces of all stripes and colors were on a roll in the year preceding September 11, 2001. Big business convinced Congress to expand and modify the H–1B program to increase the availability of temporary work visas for individuals employed in specialty occupations and to render the program more flexible for employers and employees alike.[1] Congress extended the sunset date on a statutory provision, Section 245(i) of the Immigration and Nationality Act ("INA"), which enables individuals who have fallen out of status but who had been sponsored based on a qualifying employment or familial relationship, to nonetheless apply for permanent residence.[2] Moreover, it appeared that another extension of this immigrant-friendly provision in some form was imminent. Perhaps most significantly, in the week before September 11, President Bush and Mexico's President Vicente Fox were negotiating an amnesty of sorts for several million undocumented Mexican workers living in the United States.

September 11 triggered a sea of change in immigration policy discourse as isolationists and immigration restrictionists assumed control over the direction of the debate. To cite but a few examples of the dramatic shift in focus: the extension of Section 245(i) now appears exceedingly unlikely;[3] negotiations for a possible amnesty have dropped from the top to the bottom of the Bush administration's priority list; opponents of the H–1B program have added numbers to their coalition and stepped up calls for a rollback of the program;[4] legislation strengthening federal oversight of the student visa program and imposing additional obligations on educational institutions has

* The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 168 Ed.Law Rep. [565] (Oct. 24, 2002).

** Beth Peters is a Partner with the Washington, D.C. based law firm of Hogan & Hartson, L.L.P., whose legal practice focuses on immigration and international trade; Marshall Fitz is an Associate with Hogan & Hartson, L.L.P., whose practice focuses exclusively on immigration.

1. *See* American Competitiveness in the Twenty-first Century Act of 2000 (Pub. L. 106–313, Title I, Oct. 17, 2000, 114 Stat. 1251).

2. *See* Legal Immigration Family Equity Act (LIFE Act) (Pub. L. 106–553, § 1(a)(2) [Title XI], Dec. 21, 2000, 114 Stat. 2762, 2762A–142).

3. We note, however, that Representative Richard Gephardt recently announced that he would be introducing amnesty legislation that could affect large numbers of undocumented immigrants if enacted.

4. Of course, the faltering economy and concomitant rise in unemployment has also contributed to the changed tenor of the policy debate.

been enacted with support from even stalwart immigration proponents;[5] and Congress has significantly expanded INS's authority to detain immigrants through passage of the PATRIOT Act.[6]

This article focuses on yet another issue that was prominent on the House and Senate immigration agendas prior to September 11, but which has languished until recently: whether to repeal the federal prohibition on post-secondary education benefits for undocumented immigrants. [7] Despite the pendulum swing away from pro-immigrant policy initiatives, the debate over this prohibition should not be derailed because the question presented is broader than simply whether to increase or decrease immigration levels (or any subset of that debate). Rather, the issue is one of federalism: whether federal authority to regulate immigration should trump traditional state authority over residency determinations and resource allocations.

This article examines state responses to the federal prohibition and analyzes several bipartisan bills calling for a repeal of the prohibition. It identifies potential drawbacks to a simple repeal of the prohibition and concludes by proposing two alternative solutions to minimize the tension between federal policy and local circumstance.[8]

I. Background

During a wave of anti-immigrant sentiment in 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA") and the Personal Responsibility and the Work Opportunity Reconciliation Act of 1996 ("PRA"). Section 505 of IIRAIRA, entitled "Limitation on Eligibility for Preferential Treatment of Aliens Not Lawfully Present On Basis of Residence For Higher Education Benefits", aimed to prohibit states from offering in-state tuition rates to undocumented immigrants.[9] This provision prohibited post-secondary education benefits (including in-state tuition rates) for undocumented immigrants unless all U.S. citizens or nationals also would be eligible for such benefits, irrespective of their residence. In effect, this provision rendered it impossible for an institution of higher education to preserve a two-tiered tuition system for in-

5. *See* Enhanced Border Security and Visa Entry Reform Act of 2002 (Public L. 107–173).

6. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (Pub. L. 107–56, Oct. 26, 2001, 115 Stat. 272).

7. We define undocumented immigrants as foreign nationals who: (1) entered the United States without inspection or with fraudulent documents, or (2) entered legally as nonimmigrants but then violated the terms of their status and remained in the United States without authorization.

8. *See* Part IV cataloguing the various bills.

9. The text of this provision reads as follows: "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 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." 8 U.S.C. § 1623.

state and out-of-state students if it wanted to treat undocumented immigrants in the community as residents.

Most state-sponsored college and university systems link tuition levels to domicile. Students domiciled outside a state typically pay tuition at higher levels than students who can establish domicile within the state.[10] Residency and domiciliary determinations traditionally have been a matter of state law [11] and, with some minor variations, generally have been guided by reference to two concepts: physical presence and intent to remain in the state indefinitely. [12] Undocumented immigrants with substantial roots in a community thus could satisfy the traditional threshold requirements for domicile.

Therein lies the paradox. On the one hand, these individuals are unlawfully present in the United States and thereby subject to the specter of deportation. On the other hand, their long-term presence belies the likelihood of deportation and demonstrates a level of immersion in the community warranting classification as domiciliaries.

II. Conflicting Mandates

The federal government's abstract interest in regulating the composition of this country's membership is often divorced from the practical interests states and municipalities have in assimilating local residents into the economic, social, and political fabric of their communities.[13] A clear example of the disjunction between federal and state interests is presented in the area of post-secondary education for undocumented immigrants.[14]

10. In some cases there are further tuition gradations based on, for example, county residency.

11. Such determinations have been left to State law in our federalist system on the theory that states are better positioned to determine what contributions and commitments from its population should be required to justify basic resource allocations. *See Elkins v. Moreno*, 435 U.S. 647, 662 n. 16, 98 S.Ct. 1338, 55 L.Ed.2d 614 (1978) (question of who can become a domiciliary of a State is one in which state governments have the highest interest because "the definition of domicile determines who is a full-fledged member of the polity of the state").

12. *See, e.g., Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989); *Valentin v. Hospital Bella Vista*, 254 F.3d 358, 366 (1st Cir. 2001).

13. *See generally*, Peter J. Spiro, *The States and Immigration in an Era of Demi–Sovereignties*, 35 Va. J. Int'l L. 121, 134–35 (1994) (discussing how immigration has become largely a state-level concern although immigration law, policy, and enforcement remain exclusively within the federal domain).

14. When federal and state interests collide in the immigration arena, the federal interest will virtually always prevail. A series of Supreme Court decisions in the late 19th century recognized the federal government's exclusive authority over immigration matters. *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 724, 730, 13 S.Ct. 1016, 37 L.Ed. 905 (1892) (upholding congressional act excluding Chinese immigrants); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659, 12 S.Ct. 336, 35 L.Ed. 1146 (1891) (same, as to deportation of "morally suspect" persons); *Chae Chan Ping v. United States* ('Chinese Exclusion Case'), 130 U.S. 581, 32 L.Ed. 1068 (1889) (same, as to exclusion of Chinese laborers). While certain states have played important roles in shaping national immigration policies, *see* Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 Conn. L. Rev. 1627, 1630 (Summer 1997) (arguing that the suppression of state preferences in regulating immigration at the state level "may actually prompt the effectuation of anti-alien measures at the federal level"), state attempts at classifying on the basis of alienage have almost always been nullified. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed.2d 220 (1886) (striking down measure regulating commercial laundries in manner discriminatory to Chinese nationals); *Chy Lung v. Freeman*, 92 U.S. 275, 23 L.Ed. 550 (1875) (striking down state statute limiting types of immigrants allowed into U.S.); *but see Cabell v. Chavez–Salido*, 454 U.S. 432, 102 S.Ct. 735, 70 L.Ed.2d 677

In *Plyler v. Doe*, the Supreme Court ruled that states may not prohibit children from attending public primary and secondary schools due to their immigration status.[15] The *Plyler* ruling thus divested states of the authority to make membership decisions in schools based on a prospective student's immigration status. The practical import of the decision is that the federal government can swoop in and remove such children from the community and the country as it pleases, but until the federal government does so, the states must treat these children as members of the community who are entitled to a public education.

By enacting Section 505 and the prohibition on post-secondary education benefits to such children, Congress effectively created a cut-off date for this community spirit. Once the undocumented immigrant students graduate from high school, the states are obligated to treat them as non-residents.

The cognitive dissonance resulting from these conflicting federal mandates puts states in a difficult bind; initially the states are required to welcome these students into their classrooms and communities, but, at a federally designated time, they are required to cast them off. Because many of these undocumented immigrant children come from low-income backgrounds, denying them in-state tuition is tantamount to denying them a post-secondary education and the opportunity to advance their skill sets. This policy, which effectively bars advancement to high-skilled or professional careers, creates an array of potentially undesirable effects.

For one, the prospect of a bar on advancement likely contributes to decisions by these students to leave secondary school (*i.e.*, high school) prior to graduating. Latinos, who constitute the majority of undocumented immigrants in the U.S., have the highest drop-out rates of any ethnic group.[16] Likewise, this ceiling on opportunity may increase reliance on state benefits (to the extent that such benefits are available after IIRAIRA) and engender a cycle of dependence.

Limiting opportunities for undocumented immigrant children to develop advanced skills also circumscribes their capacity to contribute to the growth of the local/regional economy.[17] It preserves the status quo by cementing in place a class of low-skilled laborers. The resulting underclass meanwhile will be distributed unevenly throughout the nation. Some states therefore will bear the consequences of these conflicting mandates more heavily than others.

III. State Responses

As sketched above, the derivative effects of the prohibition on post-secondary education benefits seem generally unpalatable. Nevertheless, it is

(1982) (creating functional exception for classifications based on alienage when restriction serves a political function).

15. 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 [4 Ed.Law Rep. [953]] (1982). Justice Brennan's majority opinion in *Plyler* held that Texas's policy of denying undocumented children an elementary education violated the Fourteenth Amendment's equal protection clause.

16. A 1999 Census Bureau Report found that the drop-out rate for U.S. residents of Hispanic ethnicity was 28.6%, more than twice the rate of blacks (12.6%), who had the next highest drop-out rate.

17. *See* Steven A. Camarota, "The Slowing Progress of Immigrants: An Examination of Income, Home Ownership, and Citizenship, 1970–2000," Center for Immigration Studies Backgrounder (March 2001).

certainly possible to conjure legitimate local policy rationales in favor of the prohibition. For example, an oversupply of resident students in a state will reduce profit margins and therefore may lead some states to cultivate actively the pool of applicants paying out-of-state tuition. A state also could embrace the denial of such benefits because of actual or perceived local shortages in low-skilled labor based on the economic presumption that suppressing the vertical mobility of undocumented immigrants will augment the supply of low-skilled laborers. All things being equal, some states therefore might elect to restrict post-secondary education benefits on the basis of federal immigration status. In contrast, other states may consider the risk of propagating an underclass too ominous for social, political, and economic stability in the state. Such states may desire a level playing field for all of their inhabitants.[18]

Texas and California, which have large numbers of undocumented immigrants, fall into the latter camp. Feeling the pinch of the conflicting mandates discussed above, these states sought ways to circumvent the prohibitions of Section 505. The approach adopted by Texas and subsequently pursued by other states, was to uncouple the determination of in-state tuition benefits from residency per se, and tie the provision of such benefits to other, more general policies. Under the Texas statute, a child is eligible for in-state tuition if he or she graduated from a high school in Texas, lived in the state for 3 years, and signed an affidavit pledging to apply for permanent residency when eligible to do so.[19]

California has come full circle on the issue since 1994 when it enacted, through a ballot referendum, Proposition 187. Proposition 187 was an extreme measure designed to foreclose virtually all benefits to undocumented immigrants, including the provision of primary and secondary education to undocumented children. The basic argument behind the referendum's backers was that undocumented immigrants were a drain on the economy and should not receive benefits that would encourage them to remain in the state. Although much of Proposition 187 was subsequently invalidated as unconstitutional in federal court,[20] it was a catalyst for many of the policies enacted into federal law by IIRAIRA, including Section 505.[21]

In an ironic political twist, California reversed the stance it had adopted in Proposition 187 and recently enacted a measure designed to navigate around the prohibition of Section 505. California's statute, like Texas's, hinges entitlement to in-state tuition rates at certain state universities and community colleges on, among other things, graduation from high school in the state. Although California's enactment did not apply directly to the University of California (UC) system (which is governed by an independent

18. We note that the various states utilize different mechanisms for establishing policies on tuition decisions. Some state legislatures regulate the policies for all of their state universities. Some state university systems are regulated by a board of regents that establishes such policies. Some states, like California, have multiple university systems that are regulated by different entities. *See* text *infra*.

19. V.T.C.A., Education Code § 54.052(j).

20. *See League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755 (C.D. Cal. 1995) (invalidating much of Proposition 187 on ground that the state regulations were preempted by federal immigration law).

21. *See* Spiro, "Learning to Live With Immigration Federalism," 29 Conn. L. Rev. at 1632–33.

board of regents, not the state legislature), on January 17, 2002, the Board of Regents voted to adopt a similar policy.[22]

In the wake of the September 11 attacks, the City University of New York ("CUNY") reversed a twelve-year-old policy of allowing undocumented immigrants to pay in-state tuition. Lawyers for CUNY also concluded that the policy contravenes Section 505. The New York State Legislature, however, has responded to a public outcry about this policy reversal by passing legislation similar to that of Texas and California. Governor George Pataki is expected to sign the legislation shortly.

Other states, including Washington, Hawaii, Maryland, and Illinois, are considering similar measures to circumvent the bar on in-state tuition for undocumented aliens created by Section 505.[23] In addition, Georgia's Governor, Roy Barnes, has encouraged state college presidents to invoke, on behalf of undocumented immigrant students, a long-standing policy which empowers school presidents to exempt up to 2 percent of the entering class from paying nonresident tuition.[24] In August 2001, Wisconsin's Governor, Scott McCallum, considered, but ultimately vetoed, a bill similar to California's on the ground that it impermissibly conflicted with Section 505 of IIRAIRA. State legislators in Utah also have proposed measures similar to the California and Texas laws.[25]

These state responses to Section 505 highlight the tension between federal and state interests created by the prohibition on postsecondary education benefits to undocumented immigrants.[26] Invoking its far-reaching powers over the domain of immigration, the federal government invaded a traditional sphere of State authority, residency determinations. And confronted with conflicting mandates on the education of undocumented immigrants, the states have initiated evasive maneuvers.

IV. Issues Raised by a Potential Repeal

The undesirable effects of these discordant policies generated media attention in the spring of 2001. Numerous stories circulated of successful high-schoolers who could not afford the non-resident tuition rates they were required to pay at their local colleges due to their undocumented status. As a result of this attention, a number of bills to repeal Section 505 were

22. The regents apparently were persuaded to vote in favor of the policy change after receiving assurances that the state would absorb any potential liability incurred by the UC system for transgressing the prohibitions of Section 505. *See* Sara Hebel, "University of California Regents Approve In–State Tuition for Illegal Immigrants," *The Chronicle of Higher Education* (January 18, 2002).

23. *See* "Bill Would Give Illegal Immigrants Tuition Break," 14 *Community College Week* 25 (July 22, 2002).

24. *See* Sara Hebel, "States Take Diverging Approaches on Tuition Rates for Illegal Immigrants," *The Chronicle of Higher Education* (Nov. 30, 2001).

25. *See* Heather May, "Bill to Seek Immigrant Tuition Aid," *The Salt Lake Tribune* (January 2, 2002).

26. Neither the Department of Education nor the INS has promulgated regulations on Section 505 and the provision contains no self-executing enforcement mechanism. California and Texas appear in little jeopardy of a federal government challenge to these policies. The more likely vehicle for a challenge to this policy would be from a non-resident student who files a lawsuit claiming that he or she should be eligible for in-state tuition if undocumented immigrants are receiving them.

introduced in Congress prior to September 11.[27] The proposed repeal legislation would have restored to the states ultimate decision-making authority over post-secondary education benefit decisions for undocumented immigrants. A simple repeal of the prohibition, however, could raise additional issues.

First, a repeal of Section 505 would leave intact the basic incongruence inherent in the federal and state governments making conflicting membership decisions. States would be permitted to treat undocumented immigrants as residents despite their unlawful presence in the country. The bill sponsors addressed this issue to some extent in other sections of their proposed legislation. In addition to repealing Section 505, each of the bills would have enabled students meeting certain criteria to apply for permanent residency despite their undocumented status. Many students, however, would be unable to satisfy all of the criteria.

For example, all of the bills require the application for permanent residency to be submitted prior to attaining the age of 21 and *after accruing* five years of continuous physical presence. While many students will satisfy these criteria, individuals who arrived any time after their sixteenth birthday would not qualify. Moreover, although the opportunity to apply for permanent residency is an obvious benefit, it would not be mandatory and if an individual unwittingly failed to file by age 21, he or she would be precluded from normalizing status. As such, where an individual cannot satisfy this criteria or fails to make a timely application, the disconnect between federal immigration status and state residency status would persist.

Second, a mere repeal of Section 505 would allow states to confer benefits on individuals *unlawfully* present in the U.S., while prohibiting such treatment for individuals in certain lawful nonimmigrant statuses. For example, an individual who has entered the country lawfully from Canada or Mexico on a Trade Nafta (TN) visa, would still be *prohibited* from receiving in-state tuition.[28] To obtain TN status, the foreign national must demonstrate the intent to return to his or her home country after a temporary period in the United States. Hence, such individuals are precluded from establishing the intent to remain in the U.S. permanently, *i.e.*, the intent required to establish domicile and eligibility for in-state tuition. In contrast, an individual who crosses the border illegally and later applies to college in Texas, for

27. The various bills were introduced by legislators from both parties and had garnered fairly large bi-partisan support. The bills that were introduced are as follows: Senators Durbin (D), Kennedy (D), Reid (D), Dodd (D), Wellstone (D), Corzine (D), and Feingold (D) introduced S. 1265, the "Children's Adjustment, Relief, and Education Act"; Senators Hatch (R), Cantwell (R), and others introduced S. 1291, the "Development, Relief, and Education for Alien Minors Act"; Representative Gutierrez introduced H.R. 1582, "Immigrant Children's Educational Advancement and Dropout Prevention Act of 2001"; Representatives Cannon (R), Berman (D), and Roybal–Allard (D) introduced H.R. 1918, "Student Adjustment Act of 2001"; and Representatives Jackson–Lee (D) and Serrano (D) introduced H.R. 1563, "Preserving Educational Opportunities for Immigrant Children Act of 2001".

28. *See, e.g., Carlson v. Reed*, 249 F.3d 876 [153 Ed.Law Rep. [610]] (9th Cir. 2001) (upholding California's denial of in-state residency to nonimmigrants in TN/TD status based on their inability to form the requisite intent to remain in the state indefinitely due to the conditions of their federal immigration status).

example, could be *eligible* for in-state tuition. Such an inconsistency raises significant questions about fairness and our commitment to the rule of law.

Third, state determinations to award or deny such benefits to undocumented immigrants would still be subject to constitutional limitations on discrimination. While the federal government's authority to regulate in this area has been deemed sufficiently broad to permit even discriminatory classifications,[29] state legislation discriminating based on alienage has typically been subjected to strict judicial scrutiny. [30] Even though a repeal of Section 505 would ensure that states are permitted to accord such benefits, it would not insulate states that choose to restrict such benefits from legal challenges. In other words, a repeal of Section 505 does not guarantee that states will be completely free to make these policy decisions.

V. Alternatives to a Simple Repeal

Instead of simply repealing Section 505, Congress could enact replacement legislation affirmatively making the award of post-secondary education benefits to undocumented immigrants and all foreign nationals in the U.S. a matter of state discretion. This approach would provide the federal imprimatur necessary for states to defend against discrimination challenges.[31] By affirmatively giving states discretion to provide in-state benefits to *all foreign nationals*, it also would reduce the tension manifest in conferring a benefit on individuals unlawfully in the country while denying benefits to individuals lawfully, but only temporarily, present in the country. This approach thus would provide each state with maximum flexibility to allocate its resources in a fair and equitable manner.

Alternatively, Congress could reverse course entirely and *require* states to ignore immigration status in determining who is eligible for in-state residency benefits. In the past, some states have denied such benefits to undocumented immigrants or other nonimmigrants on the theory that they cannot satisfy the necessary residency requirements. The basic premise of this theory is that such individuals are unable to establish the requisite intent to reside in the state indefinitely.[32] As the reasoning goes, unlawful presence or the nonimmigrant intent attached to certain visas amounts to a federal legal disability preventing them from forming the requisite intent to establish residency. Congressional action explicitly removing that disability would negate those arguments.

29. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 766, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972) (utilizing rational basis standard to review congressional alienage classifications).

30. *See, e.g., Foley v. Connellie*, 435 U.S. 291, 294–95, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978) (applying "heightened judicial solicitude" to state alienage classifications).

31. *But see*, Wishnie, Michael J., *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 NYU Law Review 493 (May 2001) (arguing that devolution of power to states to regulate in the immigration arena is unauthorized so any state action in this area should be subject to strict scrutiny judicial review).

32. *See, e.g., Toll v. Moreno*, 458 U.S. 1, 102 S.Ct. 2977, 73 L.Ed.2d 563 [5 Ed.Law Rep. [8]] (1982) (invalidating Maryland policy denying in-state residency to certain nonimmigrants on supremacy clause grounds; Maryland's rationale for denying residency was based on nonimmigrants' inability to establish the requisite intent to remain in the state indefinitely).

This more radical alternative also would minimize the incongruence between state and national membership decisions because the federal government would be saying that regardless of the ultimate outcome of its membership decisions, all individuals who are present in a state should be treated equally. Likewise, by making immigration status irrelevant for these purposes, undocumented immigrants would receive no advantage over certain lawfully present nonimmigrants.

The drawback to a policy reversal of this nature is that it could, of course, lead to the same tension between state and federal interests caused by Section 505. By requiring states to treat undocumented immigrants on a par with all other residents for post-secondary benefit purposes, the federal government would be limiting the states' flexibility in making decisions concerning the allocation of scarce resources. Nonetheless, a policy shift in this direction would at least be consistent with anti-discrimination principles. Federal legislation to prevent the creation and perpetuation of a low-skilled subclass in our country carries a degree of moral authority absent from the policy of Section 505 and is, moreover, supported by important historical precedent.