Access to public higher education is an American success story. According to the U.S. Department of Education, National Center for Education Statistics (2010), nearly 14 million students enrolled in public colleges and universities in fall 2008, which represents a gain of approximately 25% since 1998. The role of the federal government has figured prominently throughout the history of higher education's expansion. The Morrill Acts of 1862 and 1890 established public land grant institutions, broadened access, and emphasized professional education. The legislation offered relevant educational opportunities to thousands of students who may not have otherwise attended a college or university. After World War II, the Servicemen's Readjustment Act of 1944, termed the GI Bill, further transformed public higher education by opening the doors of education to millions of veterans. Later, the Higher Education Act of 1965 expanded access through federal financial aid, which put higher education within the reach of many never thought to be college bound. During the contemporary era, when higher education is required for the majority of available jobs, an emerging challenge to higher education access has revolved around the topic of state and federal policy related to the enrollment of undocumented students.

In the last two decades, state and federal budget crises and escalated growth in mandated costs, especially Medicaid costs, have forced state governments to reduce discretionary spending on higher education. Beginning with the recession in the early 1990s, states began to feel budget pressures, especially those states with large numbers of undocumented residents. In response, Congress passed two laws that changed the landscape of college enrollment eligibility. The first, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), did not allow public institutions to offer undocumented students in-state tuition unless out-of-state students were offered the same rate. Unlike earlier initiatives by the federal government, this intrusion into the affairs of higher education was not necessarily embraced by every state. For states with large numbers of undocumented residents, for example, New York, California, and Texas, enacting barriers to postsecondary attendance for undocumented students was not a tenable course of action. For states with conservative approaches to inclusion, such as South Carolina, Alabama, and North Carolina, the federal government's actions justified these states' decisions to limit access (U.S. Constitution, Article VI, clause 2).

The second law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), set forth a comprehensive statutory scheme for determining eligibility for federal, state, and local benefits and services. It categorized all so-called aliens as qualified or not qualified and then assigned public benefits based on those categorizations. This act became the federal standard on which the courts and the executive relied to determine eligibility for public services and benefits, including enrollment in state institutions.

This article examines the interplay between federal and state policy regarding the admission of undocumented students to colleges and universities. The article concludes with a brief discussion of the Development, Relief, and Education for Alien Minors Act of 2009 (DREAM) and what its imminent consideration by Congress means for the balance between the federal government and the states on this current frontier of higher education access policy.
Undocumented students, defined as students attending school under the age of 21 years and who were born outside the United States and are not citizens or legal residents, may have either entered the United States illegally or entered legally and overstayed their visas. Minor children who are in the country illegally are entitled to free education from kindergarten through high school, according to a U.S. Supreme Court decision, *Plyler v. Doe* (1982). However, once these individuals graduate from high school or reach the age of 18 years, undocumented residents of any age are ineligible to work in the United States, in accordance with the Immigration Reform and Control Act of 1986. Estimates in 2008 suggest that each year, 65,000 undocumented students graduate from high school, having lived in the United States 5 years or longer (Passel, 2003).

Interestingly, whether undocumented students can enroll in an institution of higher education depends on state and institutional laws and not on federal legislation. As a result, laws and policies vary among states, with a recent trend toward greater restriction.

**Closing the Open Door in South Carolina**

The South Carolina Illegal Immigration Reform Act of 2008 strictly prohibits the enrollment of undocumented students at state institutions of higher education. Whereas the initial intention of the act was to bar the employment of so-called illegal aliens, section 59-101-430 of the act applies specifically to higher education and the enrollment of students:

> An alien unlawfully present in the United States is not eligible to attend a public institution of higher learning. . . . The trustees of a public institution of higher learning in this State shall develop and institute a process by which lawful presence in the United States is verified. . . . An alien unlawfully present in the United States is not eligible on the basis of residence for a public higher education benefit including, but not limited to, scholarships, financial aid, grants, or resident tuition.

The implementation of the act has spawned several unanticipated issues. First, the law inadvertently targets foreign students who were already enrolled in South Carolina's state technical colleges and universities. Second, undocumented students who graduated from South Carolina high schools are effectively locked out of higher education in the state, although they could attend institutions in neighboring states. Third, the legislation places the burden of developing a legal verification process on the state's colleges and universities.

This movement to prohibit access seems counterintuitive to South Carolina's initiatives that aim to stop the state's high school graduates from leaving the state to pursue higher education, including state scholarships and tuition benefits. In an attempt to explain the lack of apparent fine-tuning in the law, one state representative stated that the purpose of the legislation was "to keep immigrants who enter the country illegally from receiving tuition breaks or other benefits, . . . not to bar from college their children who graduate from local high schools and pay out of state tuition" (Morris, 2008, paras. 17-18). It appears that perhaps even some responsible for the legislation were unaware of its consequences.

In the same year, two other southern states initiated policies to ban undocumented students from attending 2-year colleges and other institutions. The Alabama State Board of Education (2008) passed a policy that denied admission for undocumented students to state-supported 2-year colleges. Similarly, North Carolina's State Board of Community Colleges had approved a policy that refused admission of undocumented students to the state's 2-year colleges; however, in 2009, the board voted to allow undocumented students to attend if they graduated from a high school in the United States and pay out-of-state tuition (North Carolina Community College System, 2009). More recently, the University System of Georgia announced the prohibition of undocumented student enrollment at those institutions where
qualified legal residents are denied admission. This policy currently affects five institutions in the university system (University System of Georgia, 2010).

**Federal Supremacy and State Autonomy Cases**

In California, the case of allowing undocumented students to be educated in institutions of higher learning is an important one because California is the state with the largest number of undocumented students and the earliest legal challenge to the matter. In 1994, voters in California approved Proposition 187 to stop all so-called illegal immigrants from receiving public benefits or services, including K-12 education and higher education (Alfred, 2003). A suit heard in the U.S. District Court (*League of United Latin American Citizens v. Wilson*, 1997) found that the ban on undocumented students attending institutions of higher education was preempted by PRWORA and IIRIRA, which were both passed by Congress during the litigation. By using a state definition to classify persons ineligible to receive a public benefit and requiring state officials to determine status, Proposition 187 interfered with duties specifically reserved to the federal government by Congress. Since the decision in Wilson, California has not tried to statutorily prohibit the enrollment of undocumented students in public institutions of higher learning. In fact, since 2001, California has allowed undocumented students to attend public colleges and universities.

In Virginia, a legal challenge to undocumented students gaining admission to institutions of higher education occurred when two students and one nonprofit association, Equal Access Education, brought suit against seven public institutions. In the case, *Equal Access Education, et al. v. Merten* (2004), the students alleged that by prohibiting undocumented students from attending Virginia public colleges and universities, the state was violating the supremacy clause (U.S. Constitution, Article VI, clause 2). The court ruled in favor of the universities. Since the Merten decision, most of Virginia's higher education institutions still operate under the recommendations of the 2002 attorney general's opinion to prohibit the enrollment of undocumented students. However, some colleges have decided to ignore this advice, such as some of the state's 2-year colleges, by accepting illegal immigrants as students (Hebel, 2007a). Up to this point, no legislation has passed limiting the enrollment of undocumented students in Virginia.

**Questions Facing the Higher Education Community**

South Carolina's action appears to avert many of the federal-state supremacy questions raised in other states. Unlike those in California, state officials in South Carolina are not charged with independently verifying the immigration status of students. Instead, the act specifically prohibits independent verification and requires verification pursuant to 8 U.S.C. § 1373 (c). Even though the drafters of the act may have managed to avoid many of the problems debated in the past, there are still significant issues raised by the legislation.

The courts' decisions in *Wilson* and *Merten* are clear: The state cannot step over into areas of the law already controlled by the federal government. Owing to several congressional enactments, the enrollment of undocumented students is one such area. On one hand, as the *Merten* court made clear, states do have a legitimate interest in keeping illegal immigrants from enrolling in public institutions. However, students currently enrolled may counter this by arguing that the state has created undue hardship and should act proscriptively.

**The DREAM Act and Implications for State Policy**

Since its initial introduction in 2001, the DREAM Act has been discussed as a federal remedy to the illegal immigrant higher education problem. Although the bill has yet to pass Congress, supporters believe it will
solve many of the problems states face with regard to illegal immigrants attending public higher education institutions and providing a pathway to legal residency.

If passed in its current form, the DREAM Act would result in the following:

1. It would repeal Section 505 of IIRIRA to restore the options of states to determine residency for the purposes of higher education.
2. It would offer conditional permanent residency status to those who (a) have been in the United States for more than 5 years and arrived in the country before age 16 years, (b) are of good moral character, (c) have earned a high school diploma or GED or have gained admission to an institution of higher education, and (d) are under the age of 35 years.
3. It would provide a pathway to permanent residency if, within 6 years, the student (a) completes a college degree, including a 2-year associate degree or 2 years toward a baccalaureate degree, or (b) serves for 2 years in the military.

Batalova and McHugh (2010) estimate that up to 2.1 million youths and young adults may qualify for conditional legal status under the DREAM Act, and it is predicted that nearly 40% of those who qualify may earn permanent legal residency.

Although many states are awaiting comprehensive immigration reform out of Washington, the passage of the DREAM Act in its current form would mark Congress's desire to occupy this area of the law as it relates to conditional residency for students and as it forms a pathway to permanent residency through higher education or military service.

The final DREAM Act language would need to be analyzed in light of federal supremacy and existing state policy, but at the least, it would require an evaluation of state action that currently limits the enrollment of undocumented students in state institutions of higher education. For example, while South Carolina could consider amending the section of its Illegal Immigration Reform Act that affects undocumented students, it may be determined that no such changes are required. Those who qualify for conditional permanent (legal) residency under the DREAM Act may be eligible for enrollment in a state technical college or university because they would no longer be considered "an alien unlawfully present in the United States." Essentially, those who enter the country before age 16 years and who earn a high school credential would no longer be penalized by limited access to higher education. One of the questions that South Carolina may consider is whether the administrative burden of verifying legal residency would be an appropriate use of resources.

Though each state must consider DREAM Act provisions in terms of current policy, the greatest impact of federal legislation may be to preempt continued state-by-state approaches by dealing with immigration and higher education enrollment through federal legislation. Also, states should begin considering how the legislation would impact the different sectors of higher education. Based on a survey of state community college directors, Katsinas and Tollefson (2009) reported that 45% of respondents believed that DREAM Act passage would impact community colleges more than other public colleges and universities.

Although this article addresses the issues surrounding higher education enrollment, tuition policy is a related topic that continues to be at the forefront of state policy discussions. Since 2001, 10 states (California, Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, and Washington) have passed their own versions of the DREAM Act through legislation allowing undocumented immigrants to pay in-state tuition. Approximately 30 states have at least considered such legislation (Russell, 2007). Stateremedies to the problem, no matter the provisions in allowing the enrollment and in-state tuition, do not provide as much as the federal DREAM Act, which may lead to a path to citizenship (Olivas, 2009a; Olivas, 2009b). It should be noted that Oklahoma has since repealed its in-state tuition provision for undocumented students (Hebel, 2007b).
In addition, recent literature has discussed the link between tuition policy and undocumented student enrollment. Flores (2010) found that state policy allowing undocumented students to pay in-state tuition increased the likelihood of enrollment among Latino foreign-born noncitizens, and Flores and Chapa (2008) found that the greatest impact on enrollment occurred with in-state tuition policies in the states with traditional migration of undocumented students (California, New Mexico, Texas, New York, and Illinois).

Continued state activity in the area of undocumented college student enrollment demonstrates the absence of clear federal policy in this area. It is yet to be determined whether the legislation will pass soon, if ever, and its impact, though predicted by some, is largely unknown. Perhaps the true measure of the bill’s impact will be whether future discussions of major policy affecting higher education access will include the Morrill Land Grant Acts, the GI Bill, the Higher Education Act of 1965, and the DREAM Act.

References


