# The Community College and Undocumented Students

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Among the traits that most profoundly distinguish American community colleges from four-year institutions is that of open access. In serving their general education and developmental education functions (and to an admittedly lesser extent, in their applied science and workforce development programs) community colleges characteristically admit virtually any person of traditional college age or older who wants to attend. Consequently, community colleges hold to the view that enrolling many populations traditionally underserved in postsecondary education is an essential part of their mission. One effect of this—intended or otherwise—has been to enroll students who are present in the United States illegally.

In recent years, however, education leaders and public policy makers have debated whether scarce public education resources should be spent in serving alien students. The exchange is more contentious when it focuses on alien students whose presence in this country is unlawful. While it would be a mistake to conclude that the debate began after September 11, 2001, the events of that date have undoubtedly added an emotional element as well.

The issue of serving undocumented students, then, is of special importance for community colleges. Moreover, it poses legal and policy questions that have been both legislated and litigated, but which will probably be left for college leaders to address.

## I. Undocumented students and the Constitution

Any consideration of the Constitutionality of state mandates that would curtail the educational opportunities of undocumented students necessarily begins with the U.S. Supreme Court's decision in *Plyler v. Doe*, 457 US 202 (1982). While *Plyler*'s applicability is no doubt limited to state laws that might limit admission of undocumented students to public K-12 institutions, its public policy statements are significant.

*Plyler* addressed a 1975 Texas statute that required the withholding of state funds from local school districts for the education of children who were not "legally admitted" into the U.S. The statute also authorized those districts to refuse to admit students who

were not "legally admitted" to the country. In a 5-4 decision, the Court struck down the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

On behalf of the majority, Justice Brennan conceded first that, while the Fourteenth Amendment protects even persons present in the country illegally, those persons' presence in the US in violation of federal law would not make them members of a "suspect class" under the Fourteenth Amendment. He also acknowledged that education is not a fundamental right under the Constitution. Nevertheless, Justice Brennan stated that as far as the Fourteenth Amendment to the U.S. Constitution is concerned, Texas would be required to demonstrate that a statute discriminating against undocumented persons is "reasonably adapted to 'the purposes for which the state desires to use it.'" 457 US at 226.

Justice Brennan based the determination that the Texas statute violated the Equal Protection Clause on public policy grounds. While he agreed that adults who remain in the U.S. illegally must be prepared to face the consequences of deportation, "the children of those illegal entrants are not comparably situated. Their 'parents have the ability to conform their conduct to societal norms' . . . but the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status." 457 US at 221. Moreover, while education is not a fundamental right under the Constitution, it "has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." 457 US at 221.

Writing for the four dissenting justices, Chief Justice Burger refused to recognize a distinction between public education and other governmental benefits: "The fact that the distinction is drawn in legislation affecting access to public education--as opposed to legislation allocating other important governmental benefits, such as public assistance, health care, or housing--cannot make a difference in the level of scrutiny applied." 457 US at 248.

The Court would support the rights of foreign students in subsequent cases such as *Toll v. Moreno,* 458 US 1 (1982), which invalidated the University of Maryland's policy of denying in-state tuition to nonimmigrant aliens who were lawfully present in

the U.S. No court, however, has held that *Plyler* would invalidate provisions denying undocumented students access to public higher education. In fact, one California court summarily rejected the prospect of *Plyler*'s applicability in a public postsecondary context: "There is, of course, a significant difference between an elementary education and a university education." *Regents of the University of California v. Superior Court*, 225 Cal.App.3d 972, 276 Cal.Rptr. 197, 202 (1990).

Still, policy implications of Justice Brennan's reasoning should not be ignored in a higher education context. Denying education to all students who--despite law enforcement efforts--are likely to remain in the U.S. for some time certainly will have an adverse effect on the "fabric" of society. This fact elevates even postsecondary education to a level of importance superior to that of other governmental services (albeit to a limited extent), despite the claims to the contrary by the *Plyler* dissenters. Whether the rationale can convincingly support a challenge under the Fourteenth Amendment to measures restricting access to public postsecondary institutions, however, remains to be seen.

## II. The Supremacy Clause

Recent cases show that the legal issues underlying the question of undocumented students' access to public education are based in the doctrine of pre-emption: whether states can take measures affecting undocumented persons without offending the Supremacy Clause (Article VI, clause 2) of the U.S. Constitution. The Supremacy Clause holds that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Laws of any State to the Contrary notwithstanding."

The extent to which a state may enact laws, or whether an institution may promulgate policies, with the intent or effect of discriminating against undocumented students will inevitably raise an issue of pre-emption. The lynchpin holding on the pre-emption doctrine as it applies to undocumented citizens is *De Canas v. Bica*, 424 US 351 (1976).

Under consideration in *De Canas* was a California statute prohibiting any employer from knowingly employing "an alien who is not entitled to lawful residence in

the United States if such employment would have an adverse effect on lawful resident workers." The Court rejected the claim that the state law was pre-empted by the Supremacy Clause. In so holding, however, the Court--again through Justice Brennan--articulated a three-prong test as to whether a state law or provision targeted at undocumented persons is pre-empted.

The first prong of the *De Canas* test looks at whether the mandate in question constitutes an attempt to regulate immigration--"unquestionably exclusively a federal power," according to Justice Brennan. 424 US at 355. Second, the state measure is pre-empted--even if it not an attempt to regulate immigration--if the complete ouster of state power (including state power to enact laws that do not conflict with federal laws) is "the clear and manifest purpose of Congress." 424 US at 357. Finally, the state law will be pre-empted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 424 US at 364. If a state law or policy fails any of the three prongs of the *De Canas* test, it will violate the Supremacy Clause.

## III. Access to public higher education

Congress, state legislatures, and both state and federal courts have been active players in efforts to formulate policy regarding undocumented students' access to public colleges and universities. Taken together, the results of these efforts show vastly disparate views--at both the state and federal level--as to how accessible those resources should be to persons who are present in this country unlawfully. Moreover, the application of the key legal factor in this dance--the pre-emption doctrine--has proven to be anything but dispositive.

### *A. Residency status and tuition*

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Under Section 505 of the Act, an "alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary benefit" unless a citizen or national of the United States is eligible for such a benefit without regard to whether the citizen or national is a state resident. 8 U.S.C. 1623. Notwithstanding the law's clumsy language, Congressional supporters of Section 505 flatly assert that the statute means "illegal aliens are not eligible for in-State tuition at public colleges, universities, technical and vocational

schools." Note, *California Extends In-state Tuition Benefits to Undocumented Aliens*, 115 Harv.L.Rev. 1548, 1549 (2002).

Congress has since considered federal measures at repealing Section 505. The most conspicuous was the introduction several years ago of the Development, Relief and Education for Alien Minors (DREAM) Act. To date, however, the DREAM Act has not made it out of Congress. Moreover, several states have enacted legislation clearly aimed at circumventing Section 505. California, for example, now exempts nonresidents from paying resident tuition in the California State University and community college (but not University of California) systems if they attended high school in California for three years or more and graduated from a California high school. California Educ. Code §68130.5. Texas has enacted a similar provision. Tex. Educ. Code Ann. §54.052. Both laws tiptoe around Section 505's attempt to outlaw undocumented students qualifying for in-state tuition; rather, these state measures are couched in terms of exemption from nonresident tuition.

The question remains, however, whether such indirect efforts by states at undermining Section 505 are pre-empted by federal law under the Supremacy Clause. An even bolder question is whether, despite the presence of Section 505, a direct attempt by a state to legislate undocumented students' eligibility for in-state tuition would be pre-empted as well. One author contends that *De Canas* would in fact not pre-empt states from such actions. These state laws arguably do not purport to regulate immigration, *i.e.* the influx of noncitizens to and from the state; they only address access to education once those noncitizens are present. Furthermore, there exists no compelling evidence that Congress has intended to occupy the narrow field of undocumented students' access to postsecondary education. Finally, such laws do not hinder Congressional objectives--namely, to ensure that undocumented citizens are not treated preferentially to citizens and legal residents. *See* Jessica Salsbury, Comment, *Evading "Residence": Undocumented Students, Higher Education, and the States*, 53 Am.U.L.Rev. 459 (2003).

*B. Admission of undocumented students*

The malleability of the *De Canas* test is highlighted by the squarely contradictory holdings of two recent federal district court decisions on the larger issue of barring undocumented students from even enrolling into public colleges and universities. Those cases may also serve to demonstrate to decision makers the various means potentially at their disposal by which such policies may be enacted.

*League of United Latin American Citizens v. Wilson*, 997 F.Supp. 1244 (C.D. Cal 1997) was a challenge to Proposition 187, California's notorious 1994 ballot initiative whose stated purpose (in part) was to "establish a system of required notification by and between [state and local] agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California." The federal court struck down, however, the portion of Prop. 187 that would have denied public postsecondary education to anyone not a "citizen of the United States, an alien lawfully admitted as a permanent resident, in the United States, or a person who is otherwise authorized under federal law to be present in the United States." The court found this provision preempted under the second prong of the *De Canas* test, and pointed to Section 505 of IIRIRA in support of its conclusion. The federal statute, according to the court, "regulates alien eligibility for postsecondary education benefits on the basis of residence within a state." Consequently, such federal legislation "manifests Congress's intent to occupy this field." 997 F.Supp. at 1256.

On the other hand, several years later, public colleges and universities in Virginia implemented policies denying admission to undocumented students on the basis of a memorandum by the state's Attorney General. The memorandum "strongly encourage[d] school officials and all public employees in higher education to report [to the Immigration and Naturalization Service] facts and circumstances that may indicate that a student on campus is not lawfully present in the United States."

Shortly after the Attorney General's memorandum issued, groups and individuals representing "minority and immigrant individuals" in Virginia challenged the resulting institutional admissions policies as, among other things, a violation of the Supremacy Clause. In *Equal Access Education v. Merte*, 305 F.Supp.2d 585 (E.D. Va. 2004),

however, the court upheld the policies, finding that they satisfied all three requirements of the *De Canas* test. As to the first prong of the test, the court determined that the policies prompted by the Attorney General's memorandum did not constitute an attempt to regulate immigration. The policies did not, according to the court, attempt to change federal standards as to whether an individual is present in the country unlawfully; rather, those standards were the basis of the admissions policies themselves. Furthermore--and squarely at odds with the California federal court decision--it rejected the notion that Section 505 of the IIRIRA manifested a Congressional intent to occupy the field of alien's access to public postsecondary education. The mere "recognition," the court held, "that some public institutions admit illegal aliens does not mean that Congress by failing to act to stop this, has precluded other public institutions from denying admission to such aliens." 305 F.Supp.2d at 606-607. Finally, under the third prong of *De Canas*, Congress--in enacting Section 505--addressed only whether an undocumented student could qualify for in-state tuition, and not admission to the institution. Consequently, the policies enacted in accordance with the Attorney General's admonitions would not serve to frustrate Congressional purposes and objectives.

## IV. Conclusion

Whether community colleges should serve the undocumented student population will ultimately be an issue left for those community colleges, as well as the state governance systems under which they operate, to resolve. Decision makers at the federal level have thus far been unsuccessful in devising a consistent and binding policy approach to the issue of undocumented students' eligibility to pay in-state tuition. Section 505 of the IIRIRA has not kept several state legislatures from frustrating the underlying purpose of the statute, and Congress has made little progress in mitigating its impact. Moreover, the federal courts have applied the same pre-emption doctrine to the issue of precluding access altogether, but the results could not be more inconsistent. Questions that are at the center of a nationwide debate will, at least for now, be addressed at the state and local level.