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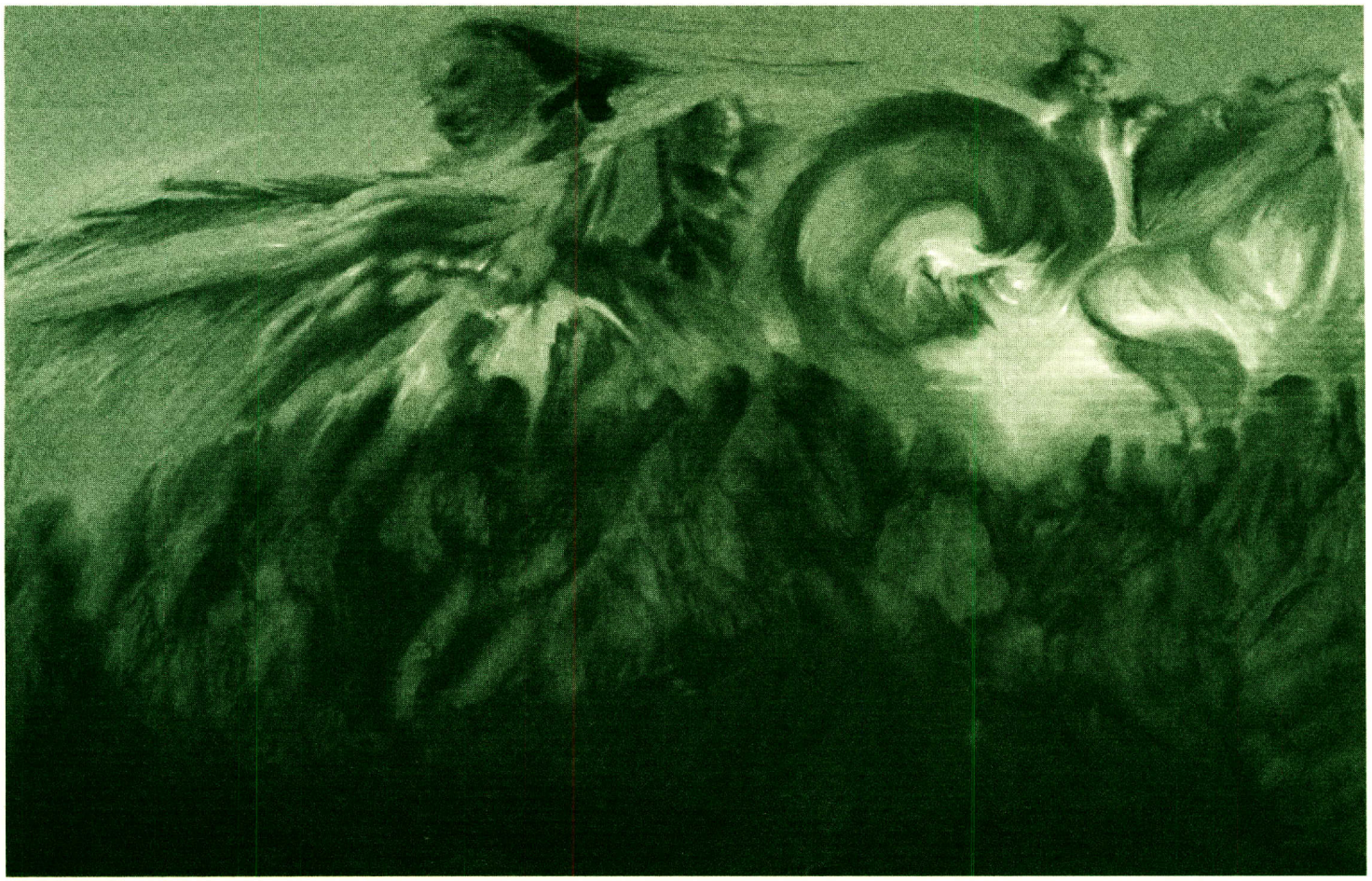

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E. Carson McGuire is a fine artist living in the Southwest. Carson was raised in Pittsburgh and was classically trained at Carnegie Mellon University, Tyler School of Art, and Heron School of Art. Carson is a diverse artist specializing in fine art, including sculpture painting, book arts, and digital graphics. His primary inspirations have come from fantasy, mythology, and cultural influences. Carson began his gallery career at age 16 and now at age 39, has an extensive portfolio. Carson has been working as a freelance artist for over 10 years in industries such as patent illustration, technical illustration book and album art, CD-ROM production, publishing and concept art for architecture and videogames.

Carson founded The Art Galaxy, southern New Mexico's only 501(c)(3) artist-operated gallery. The gallery was a wonderful resource for local artists for two years until it closed. Aside from his experience and talent, Carson is highly creative and exceedingly proficient at problem solving and thinking outside the box when presented with seemingly impossible projects.

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ARTICLE

TO INCLUDE OR EXCLUDE: A COMPARATIVE STUDY OF STATE LAWS ON IN-STATE TUITION FOR UNDOCUMENTED STUDENTS IN THE UNITED STATES

JULIE STEWART & THOMAS CHRISTIAN QUINN*

* Acknowledgements: Our deepest thanks go to Leonel Nieto for his work conducting the interviews with the students whose experiences we feature in this article. The authors would also like to thank the students, activists, administrators, and public officials who shared their views on the issue of undocumented students and higher education. We also appreciate the work of Orgy Clerge and Erica Jade Mullen for sharing their preliminary draft of a conference paper on a similar topic. Finally, we would like to acknowledge Jennifer Robinson (Director, Center for Public Policy & Administration at the University of Utah) and Kara Glaubitz (Research Associate, Center for Public Policy & Administration at the University of Utah), with whom we collaborated at an earlier stage of research on this issue.

INTRODUCTION

Because he came to the United States when he was only two years old, Luís remembers little of his life in Mexico. But his mother has described their life there:

> Many days, we didn't have any food to eat. During several months of the year, our only source of water was the rain we could collect. When we would go for a long time without food, my mom's sister would sometimes bring us some food. So my mother decided to bring us here so that we could have a better life.[1]

Gabi's situation was not so dire, but she nonetheless suffered from poverty and lack of opportunity. She came to the United States as a seven-year-old and remembers getting her first new outfit right before the border crossing. Gabi explained:

> I remember that just before we left, my mother bought us some new clothes and I was happy because I had never had a new outfit before. But as we started to say goodbye to everyone, I remember my mom was really sad because she was saying goodbye to my grandma and she knew it was the last time she would ever see her. So I remember the happiness and the sadness. But then as we were crossing, the only other thing I remember is that we crossed under a bridge and walked through this dirty water, and I ruined my clothes, the only new thing I had ever owned. Somehow I have never forgotten that.[2]

Edgar—who came to the United States from Argentina when he was eight years old—remembers that in Argentina, they always had food on the table:

> But we really struggled, because we lived in a neighborhood that was pretty dangerous; there was a lot of robbery and theft. And then we had reason to worry that my dad's life might be in danger. So he left first, came to the U.S. and worked three or four jobs at a time until he could bring us up.[3]

Together, these narratives highlight the range of motivations—poverty, lack of opportunity, danger and crime—that immigrants identify to explain their decision to emigrate to the United States. While the future is unknown and there are no givens in the emigration trajectory, they share the theme of a family leaving a place filled with problems in hopes of building a better life.

For the children of the adults who make this emigration decision, the landing is often

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1. Interview with "Luís," in Salt Lake City, Utah (May 23, 2010) (In order to protect their identities, all students interviewed identified with pseudonyms.)

2. Interview with "Gabi," in Salt Lake City, Utah (June 29, 2010).

3. Interview with "Edgar," in Salt Lake City, Utah (July 2, 2010).

neither easy nor quick, particularly the entrance into the United States educational system. Ana—who came to the United States from Mexico as a thirteen-year-old—describes a memorable experience from middle school:

> I was enrolled in an arts class and I was the only one that spoke Spanish; everybody was *gringito* [a little white person]. Then there was another kid that also spoke Spanish, but she was from here. And for some reason I thought that she was going to be very nice to me because we both spoke Spanish. But she didn't and so I was always by myself in that class. Once I tried to say something and nobody understood me and everybody laughed and so I started crying. I felt horrible. I was very affected by it. After that, I never wanted to express myself or ask questions.[4]

Mari was much younger when she emigrated and vividly remembers her first day of school in the United States:

> I remember I could not speak to anybody, because everybody spoke English and I didn't know a word of English. I had only been here a week. The thing I remember the most of that day was that I didn't even know how to go to the restroom and I really had to go. So I just walked out the door and the teacher started yelling at me. I got scared because I didn't know what she was saying or what to say to her. But one girl that was nearby translated for me. She told me what the teacher was saying and I told her that I needed to go to the restroom and the teacher understood and let me go. That experience stayed with me; it was awful.[5]

Other students recounted more long-term challenges. Pedro, for example, described how it took him over a year to be comfortable with English:

> After a year, I was able to speak and understand some English. Until then I had a lot of difficulty understanding my classes. I actually failed my first trimester just because I didn't understand anything. I didn't know when we had homework due, how to turn anything in, stuff like that. Little by little I started to get the hang of it, and how it works. More importantly, I learned how to communicate with teachers and peers, which till then was the hardest part.[6]

Rocio experienced a similarly difficult entry into the United States school system:

> It was just an awful experience. Pretty much they just come and sign you up for school and you're on your own for the first while. I mean, they do put you into an ESL [English as a Second Language] class, but that is

4. Interview with "Ana," Salt Lake City, Utah (July 3, 2010).

5. Interview with "Mari," in Salt Lake City, Utah (June 23, 2010).

6. Interview with "Pedro," Salt Lake City, Utah (June 17, 2010).

> only one class. You still had to go to the other classes. And I mean, I remember the professors were speaking and I was like, what are they saying? So it probably took me a year, a year and a half to get to where I felt confident speaking the language. When I was able to speak English, properly, and be able to sustain a conversation with somebody. That's when I got the biggest relief and it felt like, like a huge weight was lifted off me.[7]

The above quotations underscore the disadvantaged backgrounds and difficult early education experiences of many of the students we interviewed for our study. Yet, despite economic disadvantages, language barriers, and social exclusion, all of these students beat the odds. They went to college.

Every student experience is unique, but a common factor behind the college student experiences highlighted here is that the students are undocumented, brought here to the United States as children without legal authorization to be here. Though foreign-born, these children of undocumented immigrants grow up American. They enroll in public schools, learn to speak English fluently, and absorb American values. Yet, they have limited access to many mechanisms that promote upward mobility and social integration, such as education and good employment.

Nationwide, there are approximately 11 million undocumented people living in the United States.[8] Between one and two million of them are children, and each year, 50,000 to 65,000 undocumented students like those described above graduate from United States high schools.[9] While many will end their educational trajectories there, those who wish to continue on to college will face a series of obstacles. Primary amongst them is the cost of paying for higher education. As a partial remedy to this problem, twelve states currently have laws on the books that allow undocumented students to pay in-state tuition rather than the much more expensive out-of-state tuition. As advocates have explained, policymakers, educators, labor, and business groups in California, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, and Washington have all recognized the benefits of this type of law.[10]

This article seeks to shed further light on the immigration debate and the laws that surround this contentious issue. Against the backdrop of a national environment growing increasingly unwelcome to immigrants more generally—and undocumented residents in particular—we offer a study of one immigrant policy relevant to between one and two million people: in-state tuition laws

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7. Interview with "Rocio," in Salt Lake City, Utah (Aug. 19, 2010).

8. JEFFREY PASSEL & D'VERA COHN, PEW HISPANIC CTR., U.S. UNAUTHORIZED IMMIGRATION FLOWS ARE DOWN SHARPLY SINCE MID-DECADE (2010), *available at* http://pewhispanic.org/files/reports/126.pdf.

9. Katie Annand, *Still Waiting for the DREAM: The Injustice of Punishing Undocumented Immigrant Students*, 59 HASTINGS L.J. 683, 685 (2008).

10. NAT'L IMMIGRATION LAW CTR., STATE CAMPAIGNS ON EDUCATION FOR IMMIGRANT STUDENTS GAINED MOMENTUM IN 2011 (2011), *available at* http://www.nilc.org/ed-legislative-session-summary.html.

for undocumented students.[11]

In-state tuition laws have been hotly debated in every region of the country, in both traditional and new immigration destination states. This article closely analyzes the policy trajectory of the in-state tuition law in Utah, a new destination state with relatively little experience with immigration. This article argues that while the social science literature provides a useful framework to understand the politics of immigration more generally, we need more nuanced understandings of specific laws, as well as the particular contexts in which they emerge, are challenged, and are sometimes transformed. To translate this into social science language, we will argue that nomothetic explanations of immigration law are bound to "founder on the rock of inevitable particularities and the ever-changing character of human conduct."[12] Instead, given the wide array of state-level immigration laws across the country, we argue in favor of idiographic explanations of immigration law, those that closely study the origin, intent, and expected outcome of a particular law before positing an explanation. After doing this in the case of Utah, we highlight a trinity of factors —demographic flows, political identities, and civic coalitions—that help explain the state's somewhat unusual support for the extension of in-state tuition benefits for undocumented students.

Before delving into the Utah case, Part I outlines the national context—and the key changes in the migration milieu—in which policy makers have fashioned state-level laws around immigration. It then reviews the prominent social science explanations of state-level policy variation, with a particular focus on immigration. Part II explores the history and current status of Utah's House Bill 144 *Exemption from Nonresident Tuition* (H.B. 144),[13] explaining who has defended it, who has opposed it, and why. Part III places H.B. 144 in a national context, outlining the spectrum of in-state tuition laws across the nation and highlighting the policy status of the three most welcoming—and the three most punitive—states on this issue. To provide further context, Part III also provides more in-depth case studies of two states, Illinois—one of the nation's most welcoming states for undocumented students hoping to access higher education—and South Carolina. With its 2008 passage of House Bill 4400 (H.B. 4400), South Carolina became the first state in the nation to effectively bar undocumented students from accessing any public institution of higher education, thus becoming one of the most restrictive states in the nation regarding immigration and education.[14] Part IV turns the legislative focus to the federal arena and discusses the history and current legislative reality of the federal DREAM Act, a bill that would provide qualified adult children of undocumented residents the possibility of working legally and an eventual path toward citizenship. We close by summarizing some of the main policy findings from this analysis that help us to better understand H.B. 144 in Utah and perhaps in-state tuition laws in

11. Roberto G. Gonzalez, *Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood,* 76 AM. SOC. REV. 602, 602 (2011).

12. Lewis A. Coser, *Sociological Theory From the Chicago Dominance to 1965*, 2 ANN. REV. OF SOC. 145, 156 (1976).

13. H.B. 144, 2002 Leg., 50th Sess. (Utah 2002).

14. H.B. 4400, 2008 Leg., 117th Sess. (S.C. 2008).

other U.S. states. Our summary contention is that public understandings of the politics of immigration—and the state-level laws that govern official practices around immigration—have not paid sufficient attention to specific laws in particular contexts. Generalizations about immigration politics may satisfy some social scientists, but they do little to serve the people practicing immigration law on the ground. Accordingly, anyone hoping to advance a social justice agenda around immigration—or who may hope to defend a particular policy aimed toward immigrant integration—must not overlook the specifics of a law and the particulars of its state context.

I. STATE-LEVEL IMMIGRATION POLITICS IN A NATIONAL CONTEXT

Few other issues inspire such passion and controversy as immigration. Because it influences so many facets of life—jobs and the economy, language instruction in schools, the provision of public services, crime and law enforcement—everyone has an opinion on immigration. And the opinions diverge dramatically, both across and within political parties. Some groups favor more open borders and integrative immigration policies while others advocate the removal of undocumented immigrants and the closure of national borders. Policymakers are challenged to represent this diversity of views, such that one scholar terms immigration policy as the most "politically perilous" policy domain to date.[15]

Three recent immigration trends complicate the already complex job of fashioning immigration policy. First, the United States witnessed a surge in immigration in the last decade of the 20th century, largely in response to the nation's growing prosperity. Annual immigration grew throughout the 1990s and peaked in 1999–2000.[16] Immigration accounted for one-third of the United States population increase during the 1990s, as foreign born residents increased from 20 million to over 31 million.[17]

The second trend involves the changing geography of immigration destinations. While past migrants mostly settled in six states—California, New York, New Jersey, Illinois, Texas, and Florida—newer migrants have dispersed more widely to regions with little recent experience of foreign in-migration. These "new destinations" or "new gateways" include areas in the South, the Mid-West and the Inter-Mountain region.[18] Finally, there is a change in who migrates, with

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15. Daniel Tichenor, *Navigating an American Minefield: The Politics of Illegal Immigration*, 7 THE FORUM, 1 (2009).

16. JEFFREY S. PASSEL & ROBERTO SURO, PEW HISPANIC CTR., RISE, PEAK, AND DECLINE: TRENDS IN US IMMIGRATION 1992–2004 (2005), *available at* http://pewhispanic.org/files/reports/53.pdf.

17. Philip Martin & Elizabeth Midgley, *Immigration: Shaping and Reshaping America*, POPULATION BULL., Dec. 2006, at 3, 16, *available at* http://www.prb.org/pdf06/61.4USMigration.pdf.

18. DOUGLAS S. MASSEY, NEW FACES IN NEW PLACES: THE CHANGING GEOGRAPHY OF AMERICAN IMMIGRATION (Douglas S. Massey ed., Russell Sage Foundation 2008); AUDREY SINGER, THE RISE OF NEW IMMIGRANT GATEWAYS, BROOKINGS INSTITUTION (2004), *available at* http://www.brookings.edu/~/media/Files/rc/reports/2004/02demographics_singer/20040301_gateways.pdf.

undocumented or illegal migrants now outnumbering authorized migrants. Between 1992 and 1997, the level of annual unauthorized immigration was just over three-quarters of legal immigration. By 2000, it exceeded legal immigration by two percent, and by 2004, it was seven percent greater.[19]

While immigration has historically been under the purview of the federal government, its failure to pass comprehensive immigration reform has pushed policy to individual states, which have crafted new laws to grapple with the promise and problem of immigration.

In recent years, state governments have displayed an unprecedented level of activity around immigration. Between 2005 and 2011, the number of proposed state-level immigration laws increased from 300 to 1,607 bills annually, representing more than a five-fold increase in state-level activity on immigration, as Table One illustrates.[20]

Table One: State-Level Immigrant Bills Proposed, 2005–2011

Year	Total Immigrant Bills Proposed	Education Related Bills Enacted
2005	300	3
2006	570	3
2007	1,562	22
2008	1,305	12
2009	1,500	27
2010	1,400	17
2011	1,607	20

These bills range from the welcoming—such as education-related legislation providing in-state tuition benefits to the children of undocumented residents—to the repressive. Laws that deputize local law enforcement personnel to act as immigration agents, restrict the movement or housing of undocumented residents, require public officials to collect data on the citizenship status of students in public school, or mandate that employers ensure the employment eligibility of all workers, are examples of the latter.[21] Unfortunately for new migrants, the trend across states is

19. *See* PASSEL & SURO, supra note 16, at 2 (providing data on average annual immigration for 1992–2004 based on CPS, ACS, and Census 2000 data).

20. *2011 Immigration-Related Laws and Resolutions in the States (Jan. 1–Dec. 7, 2011)*, NAT'L CONF. ST. LEGIS., http://www.ncsl.org/issues-research/immig/state-immigration-legislation-report-dec-2011.aspx.

21. For example, laws around E-verify—an employment verification program that allows employers to confirm an employee's employment eligibility via the internet—have become more prominent in recent years, generating considerable

toward repressive policies.[22] Three examples of this trend are the 2008 passage of Utah's Senate Bill 81, Arizona's 2010 passage of Senate Bill 1070, and Alabama's recent upholding of House Bill 56, which was passed in 2011.[23] While they differ in their degree of severity, they represent variations on an anti-immigrant theme.

A. Social Science Theories of State-Level Legislation

Political scientists, policy analysts, and political sociologists have created an arsenal of concepts and theories to explain why some states welcome, protect, and integrate immigrants, while others seek to restrict or even expel them. The range of resulting theories revolves around racial/ethnic, political, economic, and social factors.[24] In this section, we summarize prominent theories, apply them to the case of in-state tuition benefits for undocumented immigrants, and seek to identify particular factors that help explain this variation across the states.

The broadest application of racial and ethnic explanations of policy variation around immigration is the so-called conflict and threat hypothesis; this hypothesis essentially views immigration policy as a function of the amount of time an immigrant population has been a part of a community, and the degree to which immigrants challenge the racial or ethnic composition of the receiving community. Accordingly, research suggests that the homogeneity of a given state's population will affect state-level immigration policy. States with long traditions of ethnic and cultural diversity will favor inclusive immigration policies. As Boushey and Luedtke succinctly explain, "the contact theory argues that increased and longer-term exposure to 'foreign' populations

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controversy and legal challenges. *See* Rachel Feller, *Pre-empting State E-Verify Regulations: A Case Study of Arizona's Improper Legislation in the Field of 'Immigration-Related Employment Practices,'* 84 WASH. L. REV. 289, 289–316 (2009); for an overview of anti-immigrant, state-level legislation more generally, *see* Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579, 579–600 (2009).

22. Laura Wides-Munoz, *Immigration proposals abound*, DESERET MORNING NEWS, March 9, 2008 at A10.

23. *See* H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011), *available at* http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011rs/bills/hb56.htm (requiring that school officials determine immigration status of students, police make a reasonable attempt to determine immigration status when there is reasonable suspicion at a legal stop, and also causing contracts in which one party knows the other lacks legal immigration status to be null and void, among other provisions); S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *available at* http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf (making it a misdemeanor for aliens to be in Arizona without carrying registration documents and requiring law enforcement to determine immigration status during any lawful stop when there is reasonable suspicion of being an illegal immigrant, and cracks down on sheltering, hiring, and transporting illegal aliens); S.B. 81, 57th Leg., Gen. Sess. (Utah 2008), *available at* http://le.utah.gov/~2008/bills/sbillamd/sb0081s01.htm (establishing various requirements for verifying immigration status and criminalizing transporting and concealing aliens known to be in the United states in violation of federal law).

24. For a discussion of the comparison between Utah's adoption of in-state tuition benefits for the children of undocumented residents and Colorado's failure to pass similar legislation, please *see* ORGY CLERGE & ERICA JADE MULLEN, THE STATE-LEVEL DREAM ACT: EXPLAINING THE PASSAGE AND REJECTION OF IN-STATE TUITION FOR UNDOCUMENTED STUDENTS IN UTAH AND COLORADO (2011) (prepared for the Annual Meeting of the Society for the Study of Social Problems).

reduces threat perception and facilitates peaceful coexistence.[25]

In contrast, Boushey and Luedtke found that a sudden, rapid influx of immigrants to a given area contributes to the perception of a threat to the existing culture and/or way of life. In these states, the authors argue, "a large subset of voters may react to immigration as a political or cultural 'threat.'" Interestingly, the authors argue that the "threat" posed by immigrants need not be "objective" (i.e. realistic) to tap into the fears of exclusion-minded residents. Nevertheless, they find that inflows of recent immigrant populations lead to more restrictive—or as they term it— "control laws."[26] In contrast, other prominent scholarship working under the same theoretical framework finds that the sudden influx of immigrants alone does not predict the direction that immigration policy will take. Instead, Hopkins finds that salient national rhetoric must reinforce the "threat" posed by new immigrants in order to see restrictive policies passed.[27]

Additional empirical support for the threat and conflict hypotheses is somewhat mixed and tends to vary from one part of the country to the next. Fernandez and Neiman, for example, argue that findings from one region are unlikely to be applicable to other areas and that "contextual effects cannot be understood without a better understanding of the larger environments in which these contexts are operating."[28] In other words, the relevance of the conflict and threat hypotheses to immigration policy depends on many additional variables and so single predictive explanations tend to have minimal explanatory power. For example, in the case of in-state tuition, we find that ethnically diverse states like California and Illinois have adopted in-state tuition laws, but so have relatively monochromatic states like Kansas and Washington.[29] In the case of Utah—as we will develop shortly—there is clear evidence of an immigrant influx, yet the policy direction went in favor of immigrants, rather than the reverse, which is what many would have predicted. Clearly, racial threat and conflict theories alone neither explain nor predict state-level variation in this policy; other considerations must play a role.

An oft-cited explanation for why some states welcome immigrants even as others seek to repel them revolves around partisan concentration and influence. A cursory survey of recent state-level immigration policy suggests that heavily Republican states such as Arizona, South Carolina,

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25. Graeme Boushey & Adam Luedtke, *Immigrants across the U.S. Federal Laboratory: Explaining State-Level Innovation in Immigration Policy,* 11 ST. POL. & POL'Y Q. 390, 396 (2011), *available at* http://spa.sagepub.com/content/11/4/390.

26. *Id.* at 407 ("[I]nflows of recent immigrant populations will lead to more control laws.").

27. Daniel J. Hopkins, *Politicized Places: Explaining Where and When Immigrants Provoke Local Opposition*, 104 AM. POL. SCI. REV. 40, 40 (2010) ("Hostile political reactions to neighboring immigrants are most likely when communities undergo sudden influxes of immigrants and when salient national rhetoric reinforces the threat.").

28. Kenneth Fernandez & Max Neiman, *Examining the Context of Attitudes Toward Immigrants: a Reanalysis of the Threat/Contact Hypotheses* Western Political Science Association Annual Meeting Paper (2010).

29. ANDREW THANGASAMY, STATE POLICIES FOR UNDOCUMENTED IMMIGRANTS: POLICY-MAKING AND OUTCOMES IN THE U.S., 1998–2005 (2010).

Alabama, and Georgia are less friendly to immigrants than are their liberal counterparts, i.e., California, New York, and Illinois.

But evidence supporting this thesis is somewhat mixed. On the one hand, studies have shown that Republican state legislators are more likely to sponsor bills designed to restrict immigration than are Democrats.[30] Similarly, recent research suggests that Democrats are more likely to resist public pressure to enact immigration control policies.[31] Finally, some researchers argue that Democrats often promote immigrant integration as a means of increasing their base, as minorities tend to vote left.[32]

Other studies have shown, however, that explanations of policy adoption may be more complex than the red state/blue state dichotomy suggests. While Republicans tend to be more vocal in their opposition to immigration, research has shown that many Democrats are similarly concerned about the potentially negative consequences of unchecked immigration.[33] Furthermore, existing policy does not always follow the pattern outlined above. Texas, Kansas and Utah, for example, are all traditionally red states that nevertheless allow undocumented students to pay in-state tuition at public universities. Finally, some immigration-centric bills have received strong bipartisan support, a fact that further underscores the inadequacy of partisanship as a stand-alone explanation.

Economic explanations of state-level variation on immigration policy are as controversial as political explanations are incomplete. In one vein, policy decisions come down to an economic cost-benefit analysis of immigration. For immigration issues, this generally encompasses three questions. First, how much does a given policy cost to implement or, conversely, how much revenue will it potentially generate? Second, how much does the presence of immigrants within a host state boost its economy through filling needed jobs, buying goods and services and paying taxes? Third, how much do immigrants detract from a state's economy through receiving services, utilizing public infrastructure, and receiving entitlements or other material assistance?

There are two main ways to answer the first question. As Boushey and Luedtke have noted, one of the advantages of states leaving immigration issues to the federal government is that

30. Shanna Pearson-Merkowitz & and Stephen Yoder, Legislative Minutemen: the Politics of Immigration Policy in the U.S. States 16 (May 8, 2009) (prepared for Spring Graduate Student Conference the University of Maryland) (on file with College of Behavioral and Social Sciences, University of Maryland).

31. *See* Boushey & Luedtke, *supra* note 25, at 397–98.

32. Jeanette Money, Defining Immigration Policy: Inventory, Quantitative Referents, and Empirical Regularities (presented at the annual meeting of the American Political Science Association, Atlanta 1999).

33. Shaun Bowler, Martin Johnson & Max Neiman, *Partisanship and Views About Immigration in Southern California: Just How Partisan an Issue Is Immigration?* 11 (Jan. 8–10, 2004) (presented at the annual meeting of the Southern Political Science Association).

taxpayers need only pay for one administrative apparatus and one enforcement agency.[34] Were each state to create and enforce its own immigration policy, fifty such agencies would be required. However, this logic clearly does not explain in-state tuition policies, as twelve states currently uphold them and in the past legislative session, an additional twelve states proposed them.[35] The other main way of answering this question is by examining the actual costs and benefits connected to in-state tuition policies. One would have to know how much it costs a state to offer reduced tuition to these students and conversely, how much a state benefits from those students acquiring a higher education and entering the labor-force as more highly qualified workers. However, it is doubtful that this would explain the variation in this policy, as it would be hard to imagine how the policy would benefit Utah but not Colorado, Illinois but not Indiana.

In answer to the second question, some research suggests that recent waves of immigrants tend to offer fewer marketable skills than did those who arrived in the post-World War II era. As a result, their wages are likely to remain lower than those of native workers, and the presence of a large number of immigrant laborers may even encourage wage stagnation and/or decline in some sectors of the economy.[36] While attributing the problem less to skill base and more to the contemporary decline of labor unions and the regulation of employment, Schlosser similarly argues that the growth of a pool of undocumented laborers in meatpacking, construction, and garment manufacturing—amongst many other economic sectors—has lowered wages, eliminated benefits, and reduced job security in those industries.[37]

Other evidence, however, suggests that immigrants are essential to the growth of the American labor market. Immigrants often take jobs that native-born Americans are unable or unwilling to perform, and the combination of declining birth rates and an aging populace will force the American economy to rely increasingly on an immigrant labor force.[38] More recent research suggests that this changing composition of the labor force confers general economic benefits. A new study of fifty years of data finds that for each percentage increase in the foreign-born proportion of the workforce, average statewide wages increase by 0.5%.[39]

There is also considerable evidence that immigrants contribute significantly to local economies through their consumer and tax-paying behaviors. While a full examination of this issue is beyond the scope of this article, a few summary points may illuminate this issue. First, even non-

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34. *See* Boushey & Luedtke, *supra* note 25, at 395.

35. NAT'L IMMIGRATION LAW CTR., *supra* note 10.

36. George J. Borjas, *The Economics of Immigration*, 23 J. OF ECON. LITERATURE 1667, 1667 (1994).

37. ERIC SCHLOSSER, REEFER MADNESS: SEX, DRUGS AND CHEAP LABOR IN THE AMERICAN BLACK MARKET 216–18 (2004).

38. *See, e.g.*, George J. Borjas et al., *How Much Do Immigration and Trade Affect Labor Market Outcomes?*, 28 BROOKINGS PAPERS ON ECON. ACTIVITY, no. 1, 1997, at 1.

39. *See* Giovanni Peri, *The Effect of Immigration on Productivity: Evidence from US States*, 94 REV. OF ECON. & STAT. 348 (2012).

citizens working under the table pay property taxes, user fees, and sales taxes.[40] Second, many immigrants use forged social security cards to acquire work. As a result, immigrants have contributed approximately $7 billion into the social security system each year that they will never receive back.[41] These findings may help explain why in a recent survey of prominent economists, seventy-four percent polled said that it had a positive effect, while eleven percent said it was neutral.[42] Finally, in the only in-depth study of the economic impact of undocumented immigrants on a state's budget and economy, a report commissioned by the Texas Comptroller of Public Accounts found that undocumented immigrants produced $1.58 billion in state revenue, which exceeded the $1.16 billion in state services that they received.[43]

Despite these compelling data, claims that immigration is an economic drain—and capable of producing a fiscal drought—continue, as evidenced by the recent publication of FAIR's (Federation for American Immigration Reform) 2010 report entitled *The Fiscal Burden of Illegal Immigration on United States Taxpayers*. Jack Martin, the report's lead author, contends that illegal immigration costs United States taxpayers about $113 billion a year at the federal, state, and local level.[44] The bulk of the costs—just over $84 billion—are absorbed by state and local governments. The report also argues that the federal government recoups about one-third of this outlay through tax collection, while state and local governments recoup an average of less than five percent.[45] The single greatest expense connected to these expenditures is educating the children of undocumented immigrants, most of who are born in the United States are citizens, and legally entitled to a K–12 public education. Though the report acknowledges this, it still claims that these students would not be here were it not for their parents, so the cost of their education should be included in the overall tally of the fiscal damage inflicted by illegal immigrants to United States taxpayers. As this discussion has made clear, the facts around the economic impacts of illegal immigration are often clouded by opinion and even prejudice, thus forging policy around these issues becomes all the more vulnerable to social pressures.

Accordingly, the final main explanation of state-level variation in immigration policy highlights social factors in shaping policy outcomes. One dominant approach revolves around issue

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40. Francine J. Lipman, *The Taxation of Illegal Immigrants: Separate, Unequal and Without Representation*, 9 HARV. LATINO L. REV. 1, 5 (2006).

41. Eduardo Porter, *Illegal Immigrants are Bolstering Social Security With Billions*, N.Y TIMES (Apr. 5, 2005), http://www.nytimes.com/2005/04/05/business/05immigration.html?scp=1&sq=illegal%20immigrants%20are%20bolstering%20social%20security%20with%20billions&st=cse.

42. Lipman, *supra* note 40.

43. CAROLE KEETON STRAYHORN, TEX. OFF. OF THE COMPTROLLER, UNDOCUMENTED IMMIGRANTS IN TEXAS: A FINANCIAL ANALYSIS OF THE IMPACT TO THE STATE BUDGET AND ECONOMY (2006), *available at* http://www.window.state.tx.us/specialrpt/undocumented/.

44. JACK MARTIN & ERIC A. RUARK, FED'N FOR AM. IMMIGRATION REFORM, THE FISCAL BURDEN OF ILLEGAL IMMIGRATION ON UNITED STATES TAXPAYERS 1 (2010), http://www.fairus.org/site/DocServer/USCostStudy_2010.pdf.

45. *Id.*

framing, or the extent to which supporters or opponents are able to shape and contextualize the issue in accordance with their preferred narrative of the issue at which the legislation is directed. Issue framing, per Reich and Mendoza, refers to "how conditions or events in society come to be understood by the public and political elites" and involves "the selective use of aspects of a perceived reality by actors in order to promote a particular problem definition, causal understanding and moral evaluation."[46] Smith demonstrated that legislators' decisions are less the result of objective assessments of the consequences of a given policy than they are the legislators' interpretations of said consequences.[47] With neither the time nor the expertise necessary to empirically analyze potential outcomes, policy makers instead rely on issue frames to inform their opinions.

One particularly relevant example of issue framing is the study of Kansas House Bill 2008, the 2004 law that allowed certain undocumented students to pay in-state tuition at Kansas universities. The authors argue that proponents of the bill were able to secure its passage in a traditionally anti-immigrant state by framing the debate in terms of educational access and fiscal responsibility, both of which appeal to the values of legislators and their constituents.[48]

Related to issue framing are explanations based on social-movement organizations and the political environments in which they operate. Theorists focusing on the intersection of social movements and public policy posit that "the strength of supportive social movement organizations can affect policy decisions at the state, local and national level."[49] The "access influence" model is a logical extension of this theory, essentially postulating that social movements can impact policy by using institutionalized tactics and acting within appropriate political channels. Such movements are thus able to exercise influence beyond merely rallying supporters. Work focusing on how different political climates shape social movement trajectories builds on this perspective and highlights the importance of elites in helping secure the resources and political access for movement activists to pursue their policy objectives.[50] In other words, as far as policy outcomes are concerned, some political opportunity theorists argue that the role of political elites—and their resources—is as important to a policy outcome as the social movement itself.[51]

This review of prominent social-science explanations of state-level variation on immigration-related policies suggests that no singular approach is adequate to explain why some

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46. Gary Reich & Alvar Ayala Mendoza, *'Educating Kids' versus 'Coddling Criminals': Framing the Debate over In-State Tuition for Undocumented Students in Kansas*, 8 St. Pol. & Pol'y Q. 177, 178 (2008).

47. Richard A. Smith, *Advocacy, Interpretation, and Influence in the US Congress*, 78 AM. POL. SCI. REV. 44 (1984).

48. NAT'L IMMIGRATION LAW CTR., *supra* note 10.

49. Sarah A. Soule & Susan Olzak, *When Do Movements Matter? The Politics of Contingency and the Equal Rights Amendment*, 69 AM. SOC. REV. 473, 478 (2004).

50. David S. Meyer, *Protest and Political Opportunities*, 30 ANN. REV. OF SOC. 125, 136–137 (2004).

51. Edwin Amenta & Yvonne Zylan, *It Happened Here: Political Opportunity, the New Institutionalism, and the Townsend Movement*, 56 AM. SOC. REV. 250, 250–51 (1991).

states welcome immigrants even as others seek to remove them. Neither demographic, political, nor economic factors can predict the general position a state may take, let alone a specific policy outcome. Clearly, broader social factors are key. But as we will argue, specific policies catalyze unique constituencies, and the particular context in which the policy debate takes place matters a great deal. Against the backdrop of a general social science framework, in the following case study, we engage in an inductive process that will highlight the key social factors that explain the case of Utah. Accordingly, we provide an idiographic account of the battle around extending in-state tuition benefits to undocumented students in Utah that may not apply to the universe of U.S. states, but may well help explain the policy trajectories of other new immigration destination states.

II. UTAH: A CLASSIC NEW IMMIGRATION DESTINATION

Before turning to the case of H.B. 144 and Utah, one might justifiably ask why this case is significant. Are immigration trends in Utah representative of larger national trends? In what ways is immigration politics in Utah similar to other states? What lessons learned about immigration policy in Utah might apply beyond the state's borders? In partial answer to these questions, we outline four reasons why Utah is an appropriate state to study immigration politics.

The first reason is that Utah—like Alabama, North Carolina, Minnesota, and Nebraska—qualifies as a new immigration destination. This designation is a result of the growth of ethnic diversity in the state. While outsiders continue to think of Utah as homogenous in nearly every way, demographers have documented the state's growing migration flows and pockets of ethnic diversity. For example, the foreign-born population of the state's largest metropolitan area grew by 174% during the 1990s.[52] Nationally, Utah had the sixth highest increase in the rate of foreign born residents in the 1990s.[53] And, up to fifty percent of these migrants were undocumented.[54] Accordingly, Utah mirrors prominent national immigration trends, as documented in Table Two.[55]

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52. Singer, *supra* note 18, at 21.

53. RAKESH KOCHHAR, PEW HISPANIC CENTER, GROWTH IN THE FOREIGN-BORN WORKFORCE AND EMPLOYMENT OF THE NATIVE-BORN (2006), *available at* http://pewhispanic.org/files/reports/69.pdf.

54. *See* Passel & Suro, *supra* note 16.

55. *See* JEFFREY PASSEL & D'VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS (2010), *available at* http://www.pewhispanic.org/files/reports/133.pdf (containing information on the numbers of undocumented residents living in the U.S. (both Utah and nationally) between 1990 and 2010). *See also* U.S. CENSUS BUREAU, RACE AND ETHNICITY IN UTAH (2000), *available at* http://www.governor.utah.gov/dea/census/census%20briefs/minorities.pdf; U.S. CENSUS BUREAU, UTAH: 2000 (2002), *available at* http://www.census.gov/prod/2002pubs/c2kprof00-ut.pdf; *Utah*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/49000.html (last visited Feb. 28, 2012).

Table Two: Immigrant and Latino Population Dynamics, Utah & the United States, 1990–2010

Year	UT Undoc'd	UT Latino	UT Population	UT % Latino	U.S. Undoc'd (millions)	U.S. Latino (millions)	U.S. % Latino	U.S. Pop (millions)
1990	15,000	84, 597	1,720,000	4.9	3.3	22.4	9	248.7
2000	65,000	201,559	2,233,169	9	8.4	35.3	13	281.4
2005	95,000	264,010	2,452,149	10.8	11.1	42.7	14	284.7
2007	120,000	306,000	2,645,330	12	12	45.4	15	301.6
2010	110,000	358,340	2,763,885	13	11.2	50.5	16	308.7

Utah also exemplifies broader state-level immigration policy trends, both in regard to the tremendous increase in legislation as well as the direction of its change. Between 1999—when the first state-level immigrant bill was passed—and the close of the 2011 legislative session, policy makers have discussed no fewer than 103 bills related to immigration.[56] Policy makers have debated —and sometimes passed—legislation to either facilitate immigrant integration or strengthen anti-illegal immigration measures.

Examples of legislation aiming to help immigrants integrate into society include House Bill 36 *Driver License Identification* (H.B. 36), which in 1999 allowed undocumented residents to acquire a legal driver license, provided they resided in Utah and could provide a legal, individual tax identification number, or ITIN.[57] The previously discussed House Bill 144—which in 2002 permitted the children of undocumented residents to attend college and pay in-state tuition rates, provided they had graduated from a Utah high school—is another example of this type of legislation.[58]

On the other side of the spectrum, we find measures such as Senate Bill 81 on *Illegal Immigration* (S.B. 81), passed in 2008. As discussed earlier, S.B. 81 is considered one of the most punitive state-level laws on immigration, as it increases the requirements for many employers to verify the legal status of their workers, enlists state and local law enforcement officers to carry out immigration law, and makes it a criminal offense to transport an undocumented immigrant more

56. Julie Stewart & Ken Jameson, *Interests Aren't Everything: An Exploration of Economic Explanations of Immigration Policy in Utah*, International Migration (forthcoming 2012).

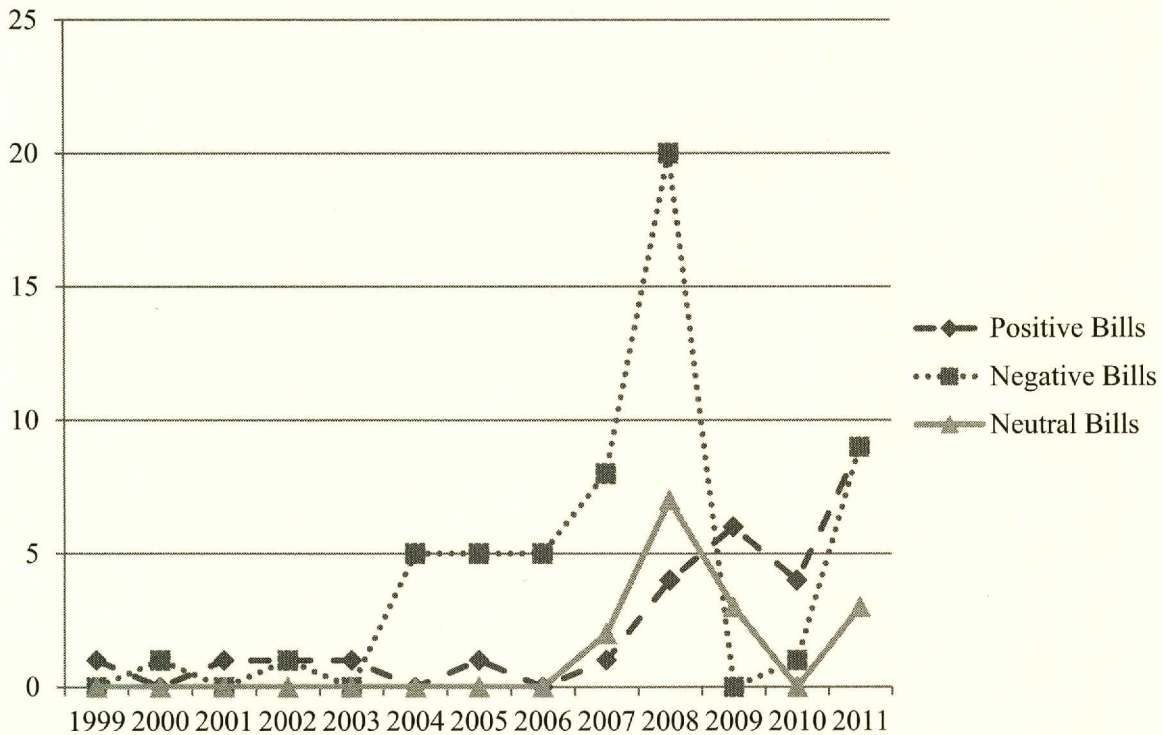
57. H.B. 36, 1999 Leg., 47th Gen. Sess. (Utah 1999), *available at* http://www.le.state.ut.us/~1999/htmdoc/Hbillhtm/HB0036.htm.

58. *See* NAT'L IMMIGRATION LAW CTR., *supra* note 10.

than 100 miles.[59] In 2011, the Utah legislature passed House Bill 497 *Utah Illegal Immigration Enforcement Act* (H.B. 497)—often referred to as Utah's Arizona-light bill—which requires that law enforcement personnel investigate a person's status after an arrest for a felony or misdemeanor.[60]

As Table Three indicates, more punitive policies have grown over this period, became numerically dominant in 2008, dropped precipitously in 2009, and reached parity with immigrant-friendly bills in 2011.[61] Even as Utah has become increasingly hostile toward immigrants, it still maintains a more welcoming stance toward immigrants than many states. This is particularly true when it comes to the issue of how the state educates immigrants.

Table Three: Immigration-Related Legislation in Utah, 1999–2011



59. *See* Passel & Cohn, *supra* note 8.

60. H.B. 497, 2011 Leg., 59th Sess. (Utah 2011), *available at* http://le.utah.gov/~2011/htmdoc/hbillhtm/hb0497s01.htm.

61. The authors constructed a database of all immigrant-related legislation discussed in Utah between 1999 and 2011. By accessing the public records of all bills proposed in the Utah Legislature, available at http://le.utah.gov/, we conducted an investigation using such search terms as immigrant and immigration. This resulted in the identification of 103 immigrant-related bills. More information on the individual bills is on file and available from the authors.

Nationwide, there are approximately eleven million undocumented people living in the United States Approximately two million of them are children.[62] As these national statistics pertain to Utah, there are about 110,000 undocumented residents, of which about 23,000 are students. Until recently, a vibrant economy and high demand for labor, along with immigrant friendly policies and growing immigrant networks, have attracted people, many of whom are undocumented, to the state. These residents often bring their young children with them or are later reunited with them once they have jobs and places to live. While in most ways, the children of undocumented immigrants grow up American—in the sense of enrolling in public schools, learning English, and absorbing American values—they still have limited access to the mechanisms that promote social mobility and integration. Education and good employment are two key mechanisms that often elude these young adults. In 2002 Utah enacted H.B. 144, a measure designed to make college more affordable to this sub-group of the state.

The remainder of the Utah case study seeks to answer the following questions:

- What does H.B. 144 substantively do?
- Why does H.B. 144 inspire such passion?
- Which people—or institutions—take sides on the issue of extending in-state tuition rates to undocumented youth and why?
- How do people and institutions make their views public and attempt to influence policy outcomes?

To answer these questions, this policy paper draws on a range of data and research methods, including primary data such as state-level legislation, census data, and semi-structured, in-depth interviews with members of the Utah Legislature, immigration activists, and undocumented students. It also incorporates a range of secondary data including policy papers, newspaper articles, and academic articles. Discussion now turns to H.B. 144.

A. Utah's H.B. 144: A Unique History and an Uncertain Future

In 2002, Utah became the fourth state (after Texas, California and New York) in the United States to pass legislation allowing undocumented students to pay resident tuition rates in public colleges and universities. Utah's in-state tuition law—like those of other states—is legally based on an important Supreme Court case, *Plyler v. Doe*. In 1982, the Supreme Court deliberated a Texas

62. Passel & Cohn, *supra* note 8.

state law that denied the children of illegal aliens the right to enroll in public schools at the K–12 level. By a vote of 5 to 4, it ruled that this law violated the Equal Protection Clause of the Fourteenth Amendment.[63] This ruling effectively nullified Texas state law and guaranteed a free public school education to undocumented youth across the nation, at least up to the end of high school. Carrying this logic forward, states began to pass laws to remove certain obstacles blocking these same protected students from pursuing a college education around the beginning of the twenty-first century. Utah soon followed. Its bill, House Bill 144 *Exemption from Nonresident Tuition* (H.B. 144) permits these students to qualify for in-state tuition rates if they meet four key requirements:

- Attend high school in Utah for three or more years;
- Graduate from a Utah high school or receive the equivalent of a high school diploma from the state;
- Register as an entering student at an institution of higher education no earlier than the fall of the 2002–2003 academic year;
- File an affidavit with the institution of higher education stating that they have filed an application to legalize their status or will file an application as soon as they are eligible to do so.[64]

Representative David Ure (R-Kamas) sponsored H.B. 144, while Senator Howard Stephenson (R-Draper) served as the Senate cosponsor. After emerging from committee with a vote of seven in favor, two opposed, and four abstaining or absent for the vote, the bill went to the full House of Representatives. It narrowly passed the House, with a vote of thirty-nine in favor, thirty-five opposed, and one absent or abstaining. H.B. 144 more easily passed the Senate, with twenty senators voting for the bill, six opposed, and three abstaining or absent.[65] On March 26, 2002 Governor Mike Leavitt signed H.B. 144 into law and it went into effect the next year.

From a fiscal perspective, the difference between paying in-state versus out-of-state tuition is significant. For example, for students attending the University of Utah—the state's flagship university—the tuition charged during the 2011–2012 academic year was $6,772.74 for residents versus $22,530 for nonresidents—more than triple the cost. For other public colleges and universities in the state, the in-state versus out-of-state tuition differential is between $2,472 at the lower end and $10,712 at the higher end. Table Four provides tuition information for all nine public

63. Plyler v. Doe, 457 U.S. 202 (1982).

64. State Office of Ethnic Affairs, Utah Dep't of Community and Culture, In-State Tuition, July 2005, *available at* http://utah.ptfs.com/awweb/awarchive?type=file&item=17153.

65. Bill Status of H.B. 144, Utah State Legislature, http://www.le.state.ut.us/~2002/status/hbillsta/hb0144.htm (last visited Oct. 13, 2011).

colleges and universities in the state for the 2011–2012 academic year.

Table Four: Resident vs. Nonresident Tuition Rates in Utah, 2011/2012

School	Resident	Nonresident
University of Utah	$6,772.74	$22,530.00
Utah State University	$5,563.08	$16,078.42
Southern Utah University	$5,198.00	$15,910.00
Weber State University	$5,192.17	$9,433.47
Utah Valley University	$4,288.00	$12,246.00
Salt Lake Community College	$3,052.00	$9,604.00
Dixie State College of Utah	$3,888.00	$13,560.00
College of Eastern Utah	$2,922.00	$5,394.00
Snow College	$2,910.00	$9,586.00

The above reflects the costs of tuition and fees based upon fifteen credit hours per semester for two semesters for the 2011–2012 academic year.[66]

66. The above data come from the following sources: *Undergraduate Tuition per Semester*, UNIVERSITY OF UTAH, http://fbs.admin.utah.edu/income/tuition/undergraduate-tuition-per-semester/ (last visited Feb. 15, 2012); *Tuition and Payment Overview*, UTAH STATE UNIVERSITY, http://www.usu.edu/registrar/htm/tuition/ (last visited Feb. 15, 2012); *Costs & Deadlines*, WEBER STATE UNIVERSITY, http://www.weber.edu/admissions/shared/costs.html (last visited Feb. 15, 2012); *Tuition*, SOUTHERN UTAH UNIVERSITY, http://www.suu.edu/ss/cashier/tuition.html (last visited Feb. 15, 2012); *Tuition and Fees*, SNOW COLLEGE, http://www.snow.edu/general/catalog/fees.pdf (last visited Feb. 15, 2012); *2011–2012 Tuition & Fee Schedule*, DIXIE STATE COLLEGE OF UTAH, http://www.dixie.edu/catalog/file/tuitionfees.pdf (last visited Feb. 15, 2012); *Tuition and Fees*, COLLEGE OF EASTERN UTAH, http://www.ceu.edu/htm/file41846/tuition-and-fees/ (last visited Feb. 15, 2012); *Tuition & Fees*, UTAH VALLEY UNIVERSITY, http://www.uvu.edu/tuition/tuitionFees11-12.pdf (last visited Feb. 15, 2012); *Cashier Services*, SALT LAKE COMMUNITY COLLEGE, http://www.slcc.edu/cashiering/tuitionfees.asp (last visited Feb. 15 2012).

Table Five: Enrollment of H.B. 144 Students in Utah Public Institutions of Higher Education

School	03-04	04-05	05-06	06-07	07-08	08-09	09-10	10-11
DSC	0	1	3	1	3	0	1	1
U of U	14	34	51	64	89	115	132	155
CEU	0	0	0	2	4	3	1	5
USU	3	5	40	114	59	53	21	26
SUU	2	5	6	15	11	11	3	4
SNOW	0	1	1	0	1	0	0	2
WSU	7	11	30	127	52	52	90	104
UVU	30	41	62	159	211	224	157	162
SLCC	31	62	112	142	157	185	238	257
SLCC-SC	0	0	0	1	0	0	0	0
Total	87	160	305	625	587	643	643	716

Since its implementation in the 2003–2004 academic year, the Utah System of Higher Education estimates that 3,548 students have benefitted from H.B.144, beginning with 87 students who enrolled the first year and ending with the 716 students who enrolled in the 2010–2011 academic year. As Table Five highlights, there was a doubling of the number of students enrolled between 2005 and 2007, followed by a small decline. According to the most recent available data, the 2010–2011 enrollments were the highest on record.[67]

For these students, the benefits of being able to apply for college and pay the much more affordable resident tuition have often meant the difference between attending and not attending college. As one H.B. 144 recipient explained:

> When I first started at SLCC, I didn't understand the difference between in-state and out-of-state tuition. I grew up here and Utah was the only home that I knew. But when I got my first statement, I knew something was wrong. There was no way I could pay it. I thought I would have to drop out of college in my first semester. But I talked to one of the counselors and explained my situation and she helped me do the

67. E-mail from Joseph A. Curtin, Dir., Institutional Research & Analysis, Utah Sys. of Higher Educ., to author (Mar. 31, 2011) (on file with author).

> paperwork to apply as a resident. That made college possible. Without it, there was no way I could go.[68]

His experience is not unusual. Most undocumented students come from lower-income households, and their families can rarely afford to contribute significantly to the costs of going to college.[69] Instead, some of these students rely on private financial aid and—much more commonly—working nearly full-time to pay their tuition costs.[70] Thus, the difference between resident and out-of-state tuition enormously impacts their ability to go to college. Simply put, H.B. 144 makes higher education affordable for undocumented students.

In addition to making college affordable for undocumented students, there are three reasons frequently cited in support of in-state tuition laws.

First, many who advocate for undocumented students have explained that without college as a goal to work toward, they are afraid these students would have to defer their educational dreams and settle for a place in society that is far below their capacity.

Representative David Ure cited this primary reason for sponsoring H.B. 144 when he outlined the genesis of this legislation:

> I was approached by people from the University of Utah. The statistics in the state of Utah were that Latinos were dropping out of school after their freshman year in high school. Many of these people were very smart. As a matter of fact, the four or five from Park City that I met were extremely bright young people, but they were not citizens of the U.S. because they had come across the border with their parents when they were two, three, four, five, or six years old. They all spoke very good English. They all had good grades. They just realized it was a dead end for them here in this state or anywhere else in the U.S. They might as well go get a job and go to work, because they couldn't go to college without paying the out-of-state tuition, which was very expensive. So they were dropping out very rapidly. So I agreed to introduce the legislation because it has always been my belief that you can't go wrong educating people, whether they're undocumented or what the story is. If you can educate people, society is better off.[71]

Research on undocumented students who attend college—and insights shared by educators who personally know these students—highlights a trinity of traits shared by these students: higher

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68. Interview with "Manuel," H.B. 144 student, in Salt Lake City, Utah (May 24, 2010).

69. Leisy Janet Abrego, *'I Can't Go To College Because I Don't Have Papers': Incorporation Patterns of Latino Undocumented Youth*, 4 LATINO STUD. 212 (2006).

70. Frances Contreras, *Sin Papeles y Rompiendo Barreras: Latino Students and the Challenges of Persisting in College*, 79 HARV. EDUC. REV. 610 (2009).

71. Telephone Interview with David Ure (R, Kamas), Congressman, Utah Legislature (Aug. 5, 2010).

than average intelligence, a dedication to long-term goals, and a high degree of perseverance.[72] As one university educator commented:

> Undocumented students are much more successful than many of their peers, in terms of retention rates and grades. This is partially because to get where they are, they have already had to overcome a great number of obstacles. They are probably low-income, chances are their parents do not speak English fluently, they probably did not benefit from college-prep classes, and they don't qualify for most scholarships. So that means that they have to be better than their peers. They have to work harder. And for the most part, they do.[73]

Students who have attended a Utah college or university through H.B. 144 mirror the assertion that they are more oriented toward long-term goals than the average college student, as the following two quotes illustrate:

> Ever since I was little, I wanted to be an elementary school teacher. I love everything about learning and I wanted to do that for my entire life. So I knew that if I wanted to be a teacher, I had to get a higher education. I knew I had to go to college and I have always wanted to go. I can't remember a time when I didn't think about going to college.[74]

> Well, education has always interested me. I have always been fascinated by what you can learn from books. From an early age, I would always just get home and start reading. My mom never had to make me. I've always been a good student. I got really good grades in elementary and high school and I always knew that I wanted to go to college. It has always been my goal.[75]

Perhaps one reason why these undocumented students typically display such a high level of commitment to education is because often their close family members have little education and struggle financially. Our interviews identified that for many students, the desire to escape a negative fate was a primary motivation behind their desire to go to college, as we illustrate in the following interview excerpts:

> Well, I looked at my parents. They work too much and just live paycheck to paycheck. And it was a life I didn't want. I also saw my cousins—many of whom are in jail for drug charges and other stuff—and I just looked at that and thought, I didn't want that for me. I knew that through

72. *See* Pearson-Merkowitz & Yoder, *supra* note 30.

73. Interview with University of Utah administrator in Salt Lake City, UT. (July 16, 2010). In order to protect the interviewee's identity, we use only a general position as identification.

74. Interview with "Victoria," H.B. 144 student, in Salt Lake City, Utah (June 17, 2010).

75. Interview with "Diego," H.B. 144 student, in West Valley City, Utah (June 8, 2010).

> education things could be better.[76]
>
> It [going to college] didn't even cross my mind until a couple of years after graduating from school. It was off the radar because it seemed too expensive of an idea and my family couldn't afford something like that. But two years after graduating from high school, I worked in a construction job and it was very heavy work; it was very demanding. And so it just hit me that I needed to go to college, that there's got to be something better than this.[77]

As these excerpts—and a larger body of research—suggest, undocumented students who qualify to go to college have much to offer society.[78] In-state tuition laws help make it possible for these students to develop their capabilities and then apply that potential to society. But there are also economic reasons for states to pass and implement in-state tuition laws. The research suggests that these students contribute to the fiscal health of the state through paying tuition, eventually getting better jobs—and thus paying higher taxes—and by reducing the likelihood that they will become a burden to the state down the road.

For states that feature in-state tuition laws, it has become clear that the cost of implementation has been negligible.[79] Resident tuition is a reduced tuition, but it is not free. Because most undocumented students would simply be unable to pay the considerably higher nonresident tuition rates, the tuition they do pay is revenue that would otherwise not be there. Thus, it increases a school's bottom line. And while current law bars many of these students from legal employment, there are many routes to achieving legal permanent residence and working status. For example, students who entered the United States with a visa but then over-stayed it can apply for an "adjustment of status," provided they have a sponsor—usually a citizen spouse or citizen employer —that can act on their behalf.[80] Alternatively, there is a visa family connected to law enforcement—including the so-called U-visa, T-visa, and S-visa—that provides a path to legal permanent residency and the right to work for qualified immigrants who can contribute to the legal justice system.[81] Having followed one of these paths, on average, adults with bachelor's degrees earn more

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76. Interview with "Ramón," H.B. 144 student, in West Valley City, Utah (Aug. 2, 2010).

77. Interview with "Cesar," H.B. 144 student, in Salt Lake City, Utah (May 26, 2010).

78. Annand, *supra* note 9; Sandy Baum & Stella M. Flores, *Higher Education and Children in Immigrant Families*, 21 FUTURE CHILD. 171 (2011); Gonzalez, *supra* note 11; Lindasy Perez Huber & Maria C. Malagon, *Silenced Struggles: The Experiences of Latina and Latino Undocumented College Students in California.* 7 NEV. L.J. 841 (2007).

79. NAT'L IMMIGRATION LAW CTR., BASIC FACTS ABOUT IN-STATE TUITION FOR UNDOCUMENTED IMMIGRANT STUDENTS (2011), *available at* http://www.nilc.org/basic-facts-instate.pdf.

80. Charles Morrow, *The Plight of the Highly Educated: Immigration Reform in the United States Post-September 11th*, 39 ARIZ. ST. L.J. 993, 1000–01 (2007).

81. There is considerable variation between these three visa types in terms of the role the undocumented resident must play in providing information on a crime and who can initiate the visa petition. *See* Anna Hanson, *The U-Visa: Immigration Law's Best Kept Secret*, 63 ARK. L. REV. 177, 188–204 (2010).

than fifty percent more than their counterparts with only a high school education.[82] Because of this, one could suggest that it is in the interests of states to support this higher-paying job trajectory, as this translates into higher tax revenue in the form of taxes on wages, property, and sales. Finally, jobs with higher wages and/or salaries tend to permit people to save more money for retirement or health emergencies—not to mention the higher probability of carrying some type of pension or retirement benefit—so there is a reduced likelihood that they will become dependents of state services.

Finally, advocates of undocumented students highlight that in-state tuition laws fully comply with federal law. Although immigration restrictionists suggest that states are violating immigration law with the passage and implementation of bills like H.B. 144, advocates for this constituency argue that federal law does not prohibit states from providing in-state tuition to undocumented students. Rather, the oft-cited section 505 of the Illegal Immigrant Reform and Immigrant Reconciliation Act of 1996 (IIRIRA) prohibits states from providing any higher education benefit linked to residence to undocumented students unless they provide the same benefit to United States citizens in the same circumstance, regardless of their residence. Utah—like the eleven other states that have implemented in-state tuition laws—has fully complied with this provision.[83] Together, supporters of these laws suggest that they make college affordable for a high-achieving segment of society, thus benefitting the students and the larger society in which they live without violating any laws.

However, despite these compelling reasons favoring H.B. 144 and laws like it in other states, in Utah—as elsewhere—stringent objections have developed around it. There are three frequently cited objections. The first is that H.B. 144—and in-state tuition laws like it across the country— provide false hope. Representative Glenn Donnelson (R, North Ogden) —who six times sponsored legislation to repeal H.B. 144—explained his perspective in an interview:

> What is really sad is that I feel for these people. My heart breaks for them because you give them an education and when they get their degree, they can't legally work. Unless they forge documents and now they are committing a felony. We give them an education, they participate in a dream and then we drop the ball and can't produce the dream. That's totally wrong, wrong, wrong, wrong for these people. So I'm saying, don't give them that dream if you can't produce that dream.[84]

The second major objection to in-state tuition laws is that they encourage further illegality by acting as a magnet for more undocumented people to come to the state or encouraging more laws

82. Baum & Flores, *supra* note 78 at 184; Alejandro Portes & Patricia Fernández-Kelly, *No Margin for Error: Educational and Occupational Achievement among Disadvantaged Children of Immigrants*, 620 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 17 (2008).

83. *See* National Immigration Law Center, *supra* note 79, at 1.

84. Interview with Glenn Donnelson, Representative, Utah State Legislature, in Ogden, UT (July 20, 2010).

to be broken, as argued by Representative Chris Herrod (R, Provo):

> Utah, by all definitions, is a sanctuary state. We are the only state in the West that gives driver privilege cards [to illegal immigrants]. There are only four states in the nation that do that. There are only 11 states in the nation that give in-state tuition and we do that. We have the fastest growing illegal alien population in the U.S. simply because there is a perception that we are soft on illegal immigration. Laws like our in-state tuition bill, or our driver license law, act like invitations saying, 'Come to Utah! We are open for business.' I'd like to see those things repealed. I'd like to see us join AZ and say, 'Hey, we are serious about cracking down on illegal immigration. We view it as a problem.' Everybody sees it as a victimless crime, but it's not. First, it is a crime to come here without legal authorization. And once you are here, to work, to live, often requires committing felonies. Identity theft, falsification of documents, it can even lead to human trafficking, which I think we can all agree is a very serious crime.[85]

Further, opponents to these laws—and any laws that might help the undocumented legally integrate into society—explain that these laws hurt citizens and those here legally by draining the public purse or displacing citizens. Again, we turn to an explanation provided by Representative Donnelson:

> Many of us believe that passing legislation that helps illegal immigrants really hurts the legal immigrant. Let's take education, for example. The law says that if you are here on a work visa, you have to pay out-of-state tuition. Illegal or undocumented aliens don't have to do that. Who gets hurt? The one who is keeping the law on a legalized visa. You can go through this example with so many other areas of public benefits. I'm sure we would find similar problems with Medicare and the provision of healthcare. We're in a society where we take care of people. So now the undocumented go to emergency rooms more than anything else to get treated. Why? Because they don't have insurance and we don't turn them away. Somebody who is here legally, where do they go? They go to a clinic where they can use their insurance. So does it hurt them? Does it hurt us? Yes, it hurts them very much. Because who do you think pays for all of this? It is the tax-paying citizens.[86]

Similarly, staunch immigration restrictionists such as Chris Herrod highlight the costs of educating the children of undocumented residents from kindergarten through high school. Given this, he is even more opposed to providing tuition benefits for these students once they reach college:

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85. Telephone Interview with Chris Herrod, Congressman, Utah State Legislature (July 16, 2010).

86. *See* Interview with Glenn Donnelson, *supra* note 84.

> We have to consider the costs that are being incurred by trying to educate these ESL [English as a Second Language] students. If you look at the budget, ESL students are 50% more expensive than regular students. We have budget woes. We are going to have these woes for at least the next two years. How are we going to afford it? You have to look at the practical parts of this. You have to bow to the budget.[87]

Finally, one of the newer proponents of tough immigration legislation—Representative Carl Wimmer (R, Herriman)—explains why he has taken up Donnelson's mantle in opposing in-state tuition laws. In his explanation, he merges the explanations that H.B. 144 drain the public purse while displacing citizens:

> Can you justify in your own minds redistributing $4.4 million from the taxpayers . . . and giv[ing] it to illegal immigrants to get discounted college tuition when you know that the majority of them [Utah taxpayers] don't support it? And is it fair that a citizen from another state—say Idaho—an actual citizen of this country, pays more to go to our universities than an illegal immigrant? Is that fair? I don't believe it is.[88]

Together, these arguments suggest that in-state tuition laws are unfair, inefficient, and exceedingly costly. Further, opponents argue that they promote illegality. While it is beyond the scope of this analysis to adjudicate all of these claims, it is important to point out how much time and energy has been devoted to either celebrating or denigrating a law that in the 2009–2010 academic year, applied to only 590 students out of a state enrollment of 164,862 students. This constituted less than four-tenths of one percent of students enrolled in Utah's higher education system at that time.[89] But such is the passion that surrounds the politics of immigration.

Over the years, legislators have channeled that passion by supporting or opposing H.B. 144. As Table Six elaborates, between its passage in 2002 and the 2011 legislative session, policy makers have introduced legislation on in-state tuition eleven times (including substitute bills). Between 2004 and 2008, Representative Glenn Donnelson introduced legislation to repeal this bill six times. Some years, for example in 2004 and 2005, the legislation never made it out of committee. In 2006, the repeal effort never received a committee vote. In 2007 and 2008, the bill made it to a full House vote but never advanced to the Senate. In 2008, Donnelson lost his bid for

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87. *See* Telephone Interview with Chris Herrod, *supra* note 85.

88. These quotations are drawn from two articles covering the in-state tuition law battles in Utah. Lee Davidson, *Panel Votes to End Tuition Break for Undocumented Students*, SALT LAKE TRIB. (Feb. 18. 2011), http://www.lexisnexis.com/hottopics/lnacademic/; David Montero, *In-State Tuition Bill Repeal Stalls in House*, SALT LAKE TRIB. (Feb. 24, 2011), http://www.lexisnexis.com/hottopics/lnacademic/.

89. For Fall 2010, total enrollments for all nine of Utah's public colleges and universities were 173,017. Of those, only 548 were H.B. 144-qualified students, accounting for an even smaller percentage of students enrolled. UTAH STATE BD. OF REGENTS, UTAH SYSTEM OF HIGHER EDUCATION: DATA BOOK 2010 (2010), *available at* http://higheredutah.org/wp-content/uploads/2009/07/Complete-Databook-2010.pdf.

re-election, but Richard A. Greenwood (R, Roy) took up Donnelson's mantle and in 2009 proposed H.B. 209, legislation requiring that students eligible to pay in-state tuition based on H.B. 144 sign an affidavit asserting they are not working during the year they are in college. It passed committee and passed in the House with a comfortable margin, but never made it to a Senate vote. In 2010, Greenwood supported a bill to again repeal H.B. 144, but the bill never made it out of committee. Finally, last year Carl Wimmer sponsored a bill (and an additional substitute bill) to again repeal H.B. 144. The original bill only made it out of committee; the substitute bill went to a House vote but never advanced to the Senate.[90]

Table Six: Legislative History of H.B. 144, 2002–2011

Year	Bill	Summary	Votes	Final Status
2002	H.B. 144	Allows qualified undocumented students to pay resident tuition	39-35-1 20-6-3	Governor signed
2004	H.B. 366	Would have repealed H.B. 144	8-3-4	Enacting clause struck
2005	H.B. 239	Would have repealed H.B. 144	8-6-1	Substituted
2005	H.B. 230 S-01	Would have repealed H.B. 144	8-6-1; 5-2-8	Enacting clause struck
2006	H.B. 007	Would have repealed H.B. 144	N/A	Substitute recommended
2007	H.B. 224	Would have repealed H.B. 144	37-37-1; 36-38-1	Died in House
2008	H.B. 241	Would have nullified H.B. 144 for those enrolling after May 1, 2008	40-35-0; 8-5-2	Died in Senate Committee
2009	H.B. 208	Would require H.B. 144 students to sign an affidavit saying that they're not working	34-40-1	House Filed
2010	H.B. 428	Would have repealed H.B. 144	N/A	Enacting clause struck
2011	H.B. 191	Would have repealed H.B. 144	10-5-1	Substituted
2011	H.B. 191 S-01	Would require proof that parents have paid taxes for 3 years in order to be eligible for H.B. 144	10-5-1	Enacting clause struck

90. Data on the Utah Legislature votes are publicly available at http://le.utah.gov/.

The civic participation around H.B. 144 provides another glimpse of how pro-immigration advocates and immigration restrictionists have battled over the terrain of immigration. This struggle has involved some of the most influential members of Utah society, including two presidents of the University of Utah, members of the United States Congress, and leaders of prominent civic organizations such as the Utah Eagle Forum and the United Way. However, our analysis of who has gone beyond merely expressing an opinion on this issues to actually *acting* on it—in the form of speaking at a public hearing, forming a coalition around the issue, or issuing a public statement on it—reveals stark differences between those advocating for in-state tuition for undocumented students and those opposing it.

During most years of H.B. 144's legislative lifespan, the Utah Legislature has permitted citizens to speak to the bill, usually during committee hearings. The public records of these hearings indicate a broad and diverse spectrum of supporters for H.B. 144. Even more importantly, the vast majority of individuals (approximately eighty-six percent) are affiliated with some type of institution. Educational institutions have played a prominent role, with individuals representing every level of education, from primary through post-secondary, including the Commission of Higher Education and the State Board of Regents. Partisan political groups, organized business, and an array of non-profit service delivery and advocacy organizations have also been well represented. Finally, there were a couple of institutions devoted to defending the interests of children in general—and undocumented children in particular—amongst the list of people who went on public record to support H.B. 144. In sum, of the thirty-seven individuals who contributed to the public hearings, only fourteen percent (N=5) of them did so representing solely their own views, without an institutional affiliation.

In contrast, a much smaller number of opponents—twenty-three individuals—went on record against H.B. 144 over this same time period. But there was a much larger number—relative to the universe of opponents—who did so simply as citizens, not necessarily representing a larger, institutional viewpoint or interest. These accounts amounted to approximately thirty-five percent (N=8) of the H.B. 144 public comments. The remaining sixty-five percent (N=15) were affiliated with some broader interest or institution. By far the most dominants institution were a constellation of anti-illegal immigrant organizations such as the Utah Minutemen Project (UMP) or Utahans For Immigration Reform and Enforcement (UFIRE). Partisan political groups also produced a showing, along with conservative political organizations and emerging Tea Party or 9/12 Project groups.

In summary comparison, the ratio between institutional affiliations and independent voices is 6:1 for H.B. 144 supporters. In contrast, the ratio is 2:1 for H.B. 144 opponents. This suggests that H.B. 144 enjoys broad support across many sub-sectors of Utah society, but perhaps that support is somewhat diffuse. It appears that opponents of H.B. 144—smaller in numbers and often lacking institutional ties—are relatively more focused on this particular issue or dedicated to the cause of restricting illegal immigration. See Table Seven in the appendix for a full listing of all who publicly provided comments on H.B. 144 to members of the Utah Legislature between 2002 and

2011.[91]

Moving beyond an analysis of participation in public hearings to other ways that individuals and institutions have sought to influence the in-state tuition debate, we can examine coalition formation and public statements on this issue. What is often referred to as Utah's DREAM Act has been a rallying point for two broad coalitions: the *Alliance for Unity* and the *Utah Compact.* The Alliance is a coalition of business, political, social, and religious elites who support policies to promote racial and ethnic harmony.[92] It explicitly endorsed H.B. 144 in 2008.[93] The more recent *Utah Compact*, issued in 2010, is a statement of principles around immigration which emphasizes empathy, highlights the economic contributions made by undocumented workers, criticizes the separation of families, and urges the federal government to create policy around immigration.[94] It has been endorsed by a broad coalition of business leaders, community advocates, law enforcement officials, church leaders of every faith, and politicians from both parties.[95] After its release, it received an official endorsement from the L.D.S. Church, the state's dominant faith and known to have considerable influence in state politics.[96] In the year after its unveiling, approximately 4,500

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91. For each bill that reaches debate in either the House of the Senate of the Utah Legislature, there is frequently an opportunity for public comment. Records of public comments are available at http://le.utah.gov/, and can easily be obtained by utilizing the 'quick bill search' function of the website and identifying the bill of interest by number.

92. Alliance for Unity members include Robert "Archie" Archuleta, Community Activist; Pamela J. Atkinson, Community Activist; Elder M. Russell Ballard, Church of Jesus Christ of Latter-day Saints; Cynthia Buckingham, Executive Director, Utah Humanities Council; Rev. France A. Davis, Calvary Baptist Church; Spencer F. Eccles, Chairman Emeritus, Wells Fargo Bank; Jon M. Huntsman, Chairman, Huntsman Corp.; Donna Land Maldonado, General Mgr., KRCL Community Radio' Norma Matheson, Former First Lady of Utah; Alexander B. Morrison, Executive Director Alliance for Unity; Karen Suzuki Okabe, Deputy Mayor, S.L. County; Dinesh Patel, vSpring Capital; Rabbi Tracee Rosen, Congregation Kol Ami; Harris H. Simmons, President, Zions Bancorporation; Dean Singleton, President, MediaNews Group, Inc.; Jim Wall, Deseret Morning News; Most Reverend John C. Wester, Bishop, Catholic Diocese of Salt Lake; Michael K. Young, President, University of Utah; Kilo Zamora, Executive Director Inclusion Center. VOICES FOR UTAH CHILDREN, IN-STATE TUITION FOR UNDOCUMENTED STUDENTS AND THE DREAM ACT (2009), *available at* http://www.aecf.org/~/media/Pubs/Topics/Special%20Interest%20Areas/Immigrants%20and%20Refugees/InStateTuitionforUndocumentedStudentsandtheDR/Instate%20Tuition%20for%20Undocumented%20Students.pdf.

93. Rob, *Alliance for Unity Speaks Out on In-State Tuition for Undocumented Students*, UTAH AMICUS AND FRIENDS, (Feb. 13, 2008, 5:21 PM), http://utahamicus.blogspot.com/2008/02/alliance-for-unity-speaks-out-on-in.html; *see* VOICES FOR UTAH CHILDREN, *supra* note 92.

94. UTAH COMPACT (2010), *available at* http://www.utahcompact.com/.

95. Editorial, *Giant Leap for Immigration in Utah*, DAILY HERALD (Feb. 27, 2011), http://www.heraldextra.com/news/opinion/article_4b7e00c3-ab76-57ee-bc1a-bff2f2bc666d.html; Editorial, *A Model for the Nation*, DESERET MORNING NEWS (Feb. 27, 2011), http://www.deseretnews.com/article/700113896/Editorial-A-model-for-the-nation.html.

96. Initial signatories included, but were not limited to: Governor Norm Bangerter; Deborah Bayle, United Way of Salt Lake; Lane R. Beattie, Salt Lake Chamber; Mayor Ralph Becker, Salt Lake City; Kenneth Bullock, Utah League of Cities and Towns; Mayor Wilford W. Clyde, Springville City; Mayor Peter Coroon, Salt Lake County; Karen Crompton, Voices for Utah Children; Wes Curtis, Utah Center for Rural Life; Southern Utah University; Jeff Edwards, Economic Development Corporation of Utah; U.S. Senator Jake Garn; Mayor Matthew R. Godfrey, Ogden City; U.S. Congressman James Hansen; The Right Rev. Bishop Scott Hayashi, Episcopal Church in Utah; Rev. Steven Klemz, Pastor, Zion Evangelical Lutheran; Paul Mero, Sutherland Institute; Mark Shurtleff, Attorney General; Dean Singleton, Publisher, The Salt Lake Tribune; Governor Olene S. Walker; The

people had signed the compact.[97] It also provided a template for other states to utilize as they sought to pursue alternatives to enforcement-only policies.[98] Since its release, it has inspired discussions in Arizona, Georgia, Indiana, and Maine to reject enforcement-only immigration policies in favor of more moderate and inclusive positions.[99] While Indiana and Maine developed their own state compacts on immigration, Arizona recently followed suit but went one step further. In an unprecedented vote, Arizona Senate President Russell Pearce—and chief architect of S.B. 1070—lost a recall election to Jerry Lewis. This is the first time in Arizona's electoral history that a standing candidate lost a recall election. His opponent attributed his victory—and Pearce's defeat—to the fact that people in Arizona are looking for "real solutions" to the problem of immigration that do "not just focus on law enforcement."[100]

In contrast, while organized anti-illegal immigration groups have opposed H.B. 144 and other legislation that seeks to integrate immigrants into Utah society, there is little evidence of successful coalition-building beyond these groups within the state. Further, these groups have produced no similarly influential policy positions that have inspired action in other states. This is not to say that there has not been a diffusion of enforcement-focused, immigration-related policies across the states—there has been.[101] But there is little evidence that there is widespread, inter-organizational support behind this legislative activity.

The policy milieu of every state is unique and nuanced, and Utah is no exception. This becomes even more apparent when considering the combustible issue of immigration. What factors describing its policy on instate tuition for undocumented residents might apply to other states? And considering those factors, what future predictions might we offer for in-state tuition here, and across the nation?

Most Rev. John C. Wester, Bishop of the Salt Lake City Catholic Diocese; Mark H. Willes, CEO/President, Deseret Management Corp. For more information on full listing, *see* VOICES FOR UTAH CHILDREN, *supra* note 92. Later it was endorsed by a wider group of individuals and institutions, including the L.D.S. Church. Church of Jesus Christ of Latter-Day Saints News Release, Church Supports Principles of Utah Compact on Immigration, Nov. 11, 2010, *available at* http://newsroom.lds.org/article/church-supports-principles-of-utah-compact-on-immigration.

97. Marjorie Cortez, *Utah Compact has had National Impact, Signers Say on Eve of Document's 1st Anniversary*, DESERET NEWS (Nov. 9, 2011), http://www.deseretnews.com/article/705394046/Utah-Compact-has-had-national-impact-signers-say-on-eve-of-documents-1st-anniversary.html?pg=1.

98. Editorial, *The Utah Compact*, N. Y. TIMES (Dec. 4, 2010), http://www.nytimes.com/2010/12/05/opinion/05sun1.html; Caitlin Earnest, *Utah Compact gets Traction in Other States*, Universe2 (2011), http://universe2.byu.edu/node/15941.

99. For example, the Indiana Compact was signed three months after the Utah Compact and has attracted 3,900 signatures since its launch. *See* David Montero, *Utah Compact had Big Impact on Immigration Debate*, SALT LAKE TRIB. (Nov. 9, 2011), http://www.sltrib.com/csp/cms/sites/sltrib/pages/printerfriendly.csp?id=52880133.

100. Marjorie Cortez, *Utah Compact Helped Turn Anti-Immigration Tide in Arizona*, DESERET NEWS (Nov. 11, 2011), http://www.deseretnews.com/article/705394066/Utah-Compact-helped-turn-anti-immigration-tide-in-Arizona.html.

101. According to the National Conference of State Legislatures, four states, in addition to Utah, have followed the model put forth by Arizona's S.B. 1070 and have passed enforcement-oriented bills. They include Alabama, Georgia, Indiana, and South Carolina. National, *Immigrant Policy Project*, CONFERENCE OF STATE LEGISLATURES (Aug. 27, 2012), http://www.ncsl.org/default.aspx?TabId=22529.

There are three factors that played an important role in Utah and may prove consequential in other states. The first factor is a demographic one. As demonstrated in Table Two, Utah experienced a tremendous surge in immigration flows in the 1990s and the first part of the twenty-first century. We argue that a sizeable immigrant population is necessary for citizens and legislators to take notice and take up legislative action. In Utah's case, this demographic trend was multi-faceted. First, in a twenty-year time span, Utah's undocumented population increased more than sevenfold, from about 15,000 to 110,000. Second, because the majority of these immigrants are from Latin America—combined with the natural growth of resident Latinos—in that same time period this ethnic group went from comprising approximately 4.9% of the population to 13%. This change in the state's profile made many take notice, supporters and opponents alike.

The second factor highlights the interests and identities of the legislators themselves. We argue that a direct and compelling interest in immigration issues is necessary to move from supporting or opposing legislation to actually sponsoring legislation. In the case of Representative Ure, for example, his family livelihood has long revolved around dairy farming. He has frequently noted that if not for immigrant labor, there would be no one to milk his cows. When speaking about people who oppose integrative immigration policies, he asked rhetorically in an interview:

> Are you guys willing to come and milk my cows? Are you willing to go to California and pick the lettuce that they pick there so people can really eat? They'll tell you, no I'm not. There are other people who will do it, though. I know why you gripe and complain about the people who are willing to do it. They just say you are taking jobs from my kids. I say, 'Send your kids up to my dairy at 4 in the morning and see if your kids are really willing to do the work.' I have yet to have any of them show up, I'll tell you that.[102]

In contrast, legislators that have sponsored anti-illegal immigrant legislation—such as Representative Herrod—have spent considerable time abroad and in some cases are married—or have other close ties—to legal immigrants. They argue that a large part of their passion around this issue stems from the fact that they personally know legal immigrants whose prospects are being damaged by illegal immigration. As Representative Herrod explained:

> I think tolerating illegal immigration is fundamentally unfair for the tens of millions of people who are around the world that are trying to come here legally. You know my business partner has lost three of his siblings. Most recently his sister and brother-in-law were assassinated on their front door step in Ethiopia. And if you want to talk with someone with a strong opinion on illegal immigration, talk to my wife about illegal immigration. She is from the Ukraine. We were actually married there. I've been outside the embassies around Moscow and have seen all of the parents who only wanted a better life for their kids. There are so many

102. Telephone Interview with David Ure, Congressman, Utah State Legislature (August 5, 2010).

> places where people struggle. Those people should have an equal opportunity to be here.[103]

Finally, the third factor that is fundamentally important to understanding the disappointments and victories around immigration legislation revolves around the composition and strength of civic coalitions. In-state tuition legislation in Utah has typically enjoyed broad and diffuse support. Nearly every prominent sector of society—religious, business, educational, and non-profit—has had some involvement in supporting this legislation. In contrast, in-state tuition opponents represent a narrower sector of society, but they are vigilant, well-organized, and focused. The small—but dense—sector opposing H.B. 144 has helped facilitate motions to repeal it on a nearly annual basis, while the broad—but diffuse—sector supporting it has kept H.B. 144 in place.

In conclusion, this detailed study of the battles around H.B. 144 in Utah suggest a triad of factors—demographic flows, political identities, and civic coalitions—may help us understand its rather unusual policy trajectory around extending in-state tuition to undocumented students. Discussion now moves from Utah and considers the recent national trends on this issue.

III. IN-STATE TUITION LAWS IN A NATIONAL CONTEXT

The policy terrain around tuition agreements for undocumented students is an ever-shifting one. The map below highlights that as of October 2011, nine states had introduced bills to improve access to higher education in 2011, while three states had enacted similar legislation to enhance access for undocumented students. Meanwhile, in one state—Maryland—an in-state tuition law was enacted, but was later threatened with a referendum. Also in one state—Montana—a referendum was placed on the 2012 docket to ban enrollment in institutions for higher education for all undocumented students. Twelve states across the country saw legislation introduced to restrict access to higher education, while in three states bills were enacted to restrict access to higher education in 2011.[104] In sum, the country appears to be evenly divided on the issue of providing access to higher education for undocumented students. Some states outright bar these students from access to public colleges and universities, while others not only permit access, but are also pursuing measures to provide additional support for these students to pursue a college education.

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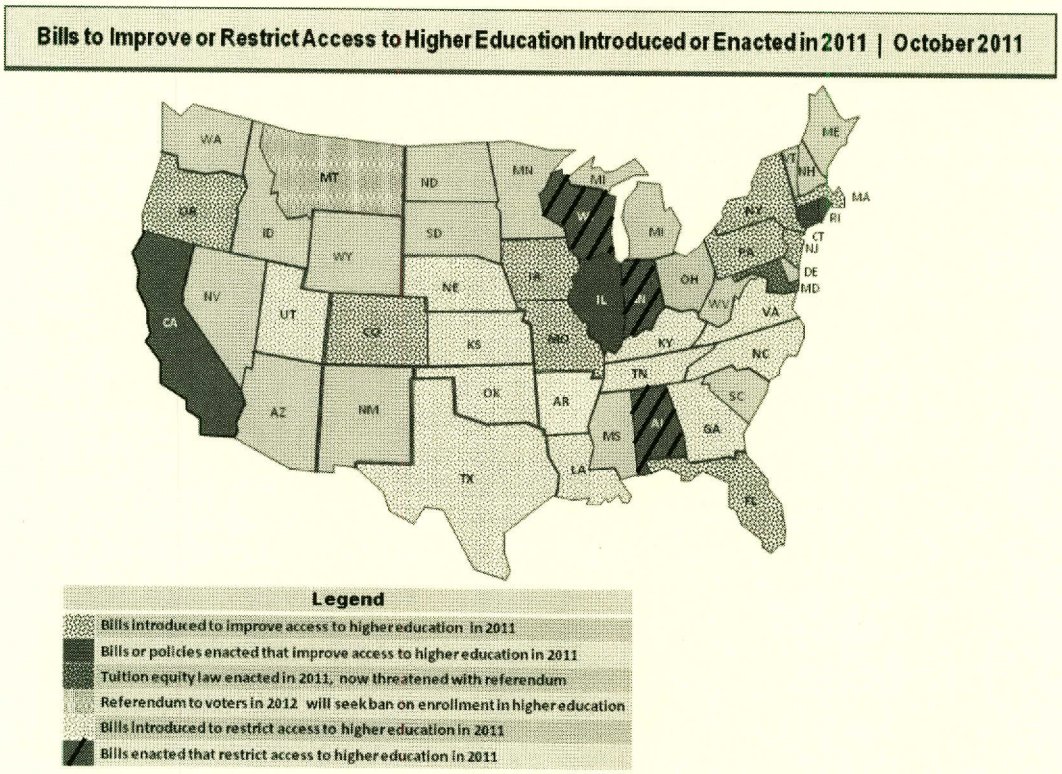
103. *See* Telephone Interview with Chris Herrod, *supra* note 85.

104. We would like the thank Tanya Broder and Alejandro Angarita, from the National Immigration Law Center, for permitting us to use this map. *See* NAT'L IMMIGRATION LAW CTR., *supra* note 10.



To provide a more detailed snapshot of the legislative status of bills directed toward efforts to either facilitate or block access to higher education for undocumented students, Table Seven highlights the legislation of the three most "welcoming" and the three most restrictive states in the country, as of 2011.

Table Seven: State Variation on In-State Tuition Benefits, 2011

State	Bill Name	Description	Overheard
Illinois	S.B. 2185	Illinois DREAM Act encourages undocumented students to pursue higher education and establishes DREAM Fund, a privately funded scholarship fund for undocumented students.[105]	Governor Pat Quinn: "All children have the right to a first-class education. [This law] creates more opportunities for the children of immigrants to achieve a fulfilling career, brighter future and better life."[106]
Connecticut	H.B. 6390	Extends in-state tuition benefits to postsecondary students without legal immigration status who reside in Connecticut and meet certain criteria.[107]	Senator John Fonfara: "This bill is for the students who are not content with a high school diploma alone, who would rather make their own way than take a handout. They deserve every opportunity to attend college, pay tuition, and live successful, productive lives."[108]
Maryland	S.B. 167	Permits certain undocumented students to pay in-state tuition.[109]	Suspended pending the outcome of a statewide referendum
Alabama	H.B. 56	Not only requires schools to verify the immigration status of their students, but also requires that schools file periodic reports detailing the number of "unlawfully present" students enrolled.[110]	Representative Micky Hammon (Sponsor): "This is a jobs-creation bill for Americans. We really want to prevent illegal immigrants from coming to Alabama and to prevent those

105 Full text available at http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=84&GA=97&DocTypeId=SB&DocNum=2185&GAID=11&LegID=&SpecSess=&Session=.

106 Press Release, Illinois Government News Network, Governor Quinn Signs Illinois DREAM Act (Aug. 1, 2011), http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=16&RecNum=9587.

107 Full text available at http://www.cga.ct.gov/2011/TOB/H/2011HB-06390-R00-HB.htm.

108 *CT Lawmakers Pass DREAM Act*, THE HARTFORD GUARDIAN (May 25, 2011), http://www.thehartfordguardian.com/2011/05/25/ct-lawmakers-pass-dream-act/.

109 Full text available at http://mlis.state.md.us/2011rs/bills/sb/sb0167f.pdf.

110 Full text available at http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011rs/bills/hb56.htm.

			who are here from putting down roots."[111]
Indiana	H.B. 1402	Provides that an individual who is not lawfully in the United States is not eligible to pay the resident tuition rate that is determined by the state educational institution.[112]	Senator Mike Delph (Sponsor): "The totality of the bill is to try to encourage self-deportation. Hoosier taxpayers didn't ask to import illegal immigrants, nor should they subsidize through tax dollars their being here."[113]
Wisconsin	Act 32	Part of Scott Walker's "Budget Repair Bill," eliminates nonresident tuition exemption for "aliens."[114]	Representative Don Pridemore: "It's not a question of how much money it'll save us. It's a question of principle. We shouldn't be giving any taxpayer-funded benefits to people who have come to this country illegally."[115]

This table hints at the range of social motivations behind in-state tuition policies across the country and the different constituencies policy-makers are targeting with these laws. For example, proponents of in-state tuition laws highlight the basic human rights of children as motivation behind their legislation, or the ideal that people should be able to support themselves rather than rely on public hand-outs. In contrast, opponents strategically identify job creation as the motivation behind their bill, or a desire to remove tax subsidies to an undeserving population. Embedded within these motivations are different constituencies, undocumented immigrants, citizens seeking jobs, and the tax-paying public.

As is becoming clear, there is a great deal of variation on state-level immigration laws; even when examining only one immigration-related law, we find a complex spectrum of approaches. Each law reflects a delicate balance of demographic, political, and social forces. The following two case studies illustrate this dynamic and were chosen because they reflect this spectrum of state-level policies toward undocumented students and higher education. We first highlight the state of Illinois, which currently has one of the most proactive, pro-immigrant set of higher education policies. We

111. Julia Preston, *In Alabama, a Harsh Bill for Residents Here Illegally*, N.Y. TIMES, June 3, 2011, at A10.

112. Full text available at http://www.in.gov/legislative/bills/2011/IN/IN1402.1.html.

113. Melanie Hayes, *200 Protest Senate Bill on Illegal Immigration*, INDEANAPOLIS STAR, March 16, 2011 at B1, available at http://www.mysecondpassport.com/2011/03/200-protest-senate-bill-illegal-immigration/.

114. Full text available at http://docs.legis.wisconsin.gov/2011/related/acts/32.pdf.

115. J.P. Cheng, *Immigrants will Lose Some Civil Benefits in Budget*, THE BADGER HERALD (March 27, 2011), http://badgerherald.com/news/2011/03/27/undocumented_immigra.php.

then explore the immigrant policies of South Carolina, a state which exhibits one of the more punitive positions toward immigrants in the United States.

A. The Case of Illinois

With the passage of an innovative new law designed to make higher education more accessible to undocumented students, Illinois effectively positioned itself as the most progressive voice in what has become an increasingly hostile national immigration debate. On August 1, 2011, Governor Pat Quinn signed Senate Bill 2185 *The Dream Fund Commission* (S.B. 2185), popularly known as the Illinois DREAM Act.[116] This legislation creates a private scholarship fund to be utilized exclusively by the estimated 95,000 undocumented students currently living in Illinois.[117] While its effectiveness is yet to be determined, its passage nonetheless represents a novel means of addressing the prohibitive cost of a college education.

Illinois has a history of pro-immigrant policies, a fact that has earned it the title of "most pro-illegal immigration state in the country" from NumbersUSA, a Virginia-based, nativist organization.[118] Undocumented students have been eligible to pay in-state tuition in Illinois since 2003. Depending on where they enroll, this annually saves students between $3,609 and $14,142, or an average of over $9,000 per year, as Table Seven illustrates.[119]

Illinois has long been proud of its immigrant heritage. In 1902, George Murray McConnell proudly claimed of Illinois, "in no State in the Union . . . is the population of so variously composite a character,"[120] a claim that may still be justifiable. Although the flow of immigrants to Illinois has slowed somewhat in recent years—the state added less than half as many immigrants from 2000 to 2009 as it did from 1990 to 1999—Illinois is nevertheless home to the sixth-largest foreign-born population in the United States. While a plurality (47.6%) of immigrants hail from Latin America, Asia and Europe are also well represented, comprising 25.8% and 22.7% of the foreign-born, respectively.[121]

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116. S.B. 2185, 97th Gen. Assemb., Reg. Sess. (Ill. 2011).

117. Alejandro Escalona, *State, City Helping Young Immigrants Realize Their Dreams*, CHI. SUN-TIMES, August 4, 2011, at 24.

118. Antonio Olivo, *Illinois Withdraws from Federal Immigration Program,* CHI. TRIB. (May 5, 2011), *available at* http://articles.chicagotribune.com/2011-05-05/news/ct-met-state-dream-act-0505-20110504_1_illegal-immigrants-numbersusa-dream-act.

119. Data available at http://nces.ed.gov/collegenavigator/.

120. ILLINOIS STATE HISTORICAL LIBRARY, PUB. NO. 19, TRANSACTIONS OF THE ILLINOIS STATE HISTORICAL SOCIETY (1913).

121. Migration Policy Institute, *2010 American Community Survey and Census Data on Foreign Born by State, available at* http://www.migrationinformation.org/datahub/state.cfm?ID=IL (last visited Feb. 15, 2012).

Table Eight: Resident vs. Nonresident Tuition Rates in Illinois, 2011–2012[122]

School	Resident	Nonresident
Chicago State	$8,752	$15,160
Eastern Illinois	$9,987	$25,227
Governor's State	$6,688	$14,220
Illinois State	$11,417	$17,957
Northeastern Illinois	$7,492	$13,732
Northern Illinois	$11,676	$20,156
SIU-Carbondale	$10,468	$21,403
SIU-Edwardsville	$8,401	$17,703
UI-Chicago	$12,056	$24,446
UI-Springfield	$8,101	$15,421
UI-Champaign	$13,096	$27,238
Western Illinois	$10,149	$13,758

Such diversity has doubtlessly shaped the course of local politics. In addition to championing the rights of undocumented students to access higher education, Illinois was among the first states to withdraw from Secure Communities, the Obama Administration's nationwide immigration enforcement program.[123] The state's status as an obvious outlier in terms of immigration policy provides an exceptional opportunity to analyze the social and political conditions that contribute to pro-immigration attitudes and legislation. In this section, we explore the argument that Illinois' pro-immigrant policies are a function of an immigrant-friendly political climate, a politically active immigrant population, and vocal representation in state government.

Many political observers would not be surprised by Illinois' stance on immigration given Democrats' control of virtually every statewide office. Partisan concentration, however, is not in itself a satisfactory explanation, especially when one considers that the DREAM Act enjoyed strong

122. All tuition figures provided by the National Center for Education Statistics, *available at* http://nces.ed.gov/collegenavigator/ (last visited Mar. 7, 2012).

123. Julia Preston, *Illinois: State Leaves Immigration Program,* N.Y. TIMES, May 5, 2011, at A24.

bipartisan support, passing the House and Senate by 61–53 and 45–11, respectively.[124] One possible contributing factor has to do with popular opinion. Illinois as a whole prides itself on its rich immigrant heritage, and a 2007 study by the University of Notre Dame found that more than seventy percent of Chicago-area residents view immigration in a positive light.[125] Republicans are thus able—and perhaps even required—to take a more pro-immigrant stance than their counterparts in other states. Furthermore, the fact that the privately funded DREAM Act has no effect on the state's bottom line doubtlessly made it more attractive to the state's fiscal conservatives.

While Illinois has not been immune to pro-enforcement proposals—fourteen such measures were introduced in the first half of this year alone—the sources of said proposals and the way in which they were received merit consideration.[126] In contrast to states like Arizona and South Carolina, where Senate Presidents Russell Pearce and Glenn McConnell have been heavily involved in drafting and promoting omnibus immigration legislation, Illinois' enforcement-only measures tend to come from less influential Republicans.[127] The most recent such proposal, House Bill 1969, *The Taxpayers Protection Act* (H.B. 1969) came from Representative Randy Ramey (R-Carol Stream), a small-government conservative whose most recent legislative success was a 2008 update to the Illinois Township Code. In contrast, Senator Bill Brady (R-Bloomington) is both a high-profile Republican and a supporter of the Illinois DREAM Act,[128] a position that might have angered Republican voters in a more conservative state.

In addition to the moderate political climate, undocumented immigrants in Illinois benefit from the state's politically active immigrant population. One of the most vocal pro-immigration groups is the Chicago-based Immigrant Youth Justice League, a collection of social media-savvy protesters who originally organized in support of the federal DREAM Act in November of 2010. Their national "Undocumented, Unafraid, and Unapologetic" campaign, which encourages undocumented youth to come forward and tell their stories, generated considerable media attention nationwide. [129] The groups' representatives went so far as to meet with state lawmakers in May to personally lobby for the passage of the Illinois DREAM Act.[130]

Another key player in the local immigration debate is the Illinois Coalition for Immigrant and Refugee Rights (ICIRR), a large group of approximately eighty neighborhood community

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124. *Votes: IL Senate Bill 2185: 97th General Assembly*, LEGISCAN, http://legiscan.com/IL/votes/SB2185/2011.

125. Roger Knight, *Attitudes Toward Immigration: Findings from the Chicago-Area Survey*, LATINO RES. AT NOTRE DAME, June 2007, at 1.

126. Stephen Di Benedetto, *Lawmaker Targets Illegal Immigrants; Carol Stream Rep's Legislation Would be Similar to Arizona's*, CHI. SUN-TIMES, March 12, 2011, at 9.

127. *Id.*

128. *See Illinois Senate Passes Their Own Version of the DREAM Act, Opts-Out of Secure Communities*, MARIOWIRE (May 6, 2011), http://www.mariowire.com/2011/05/06/illinois-dream-act-secure-communities/.

129. Information available at http://www.iyjl.org/.

130. Esther Cepeda, *DREAM Act Can Help Students Get Over the Top*, CHI. SUN-TIMES, May 9, 2011, at 26.

organizations dedicated to promoting immigrants' "full and equal participation in the civic, cultural, social, and political life of our diverse society."[131] In addition to promoting the Illinois DREAM Act, the ICIRR has partnered with local churches and law firms to set up the nation's first 24-hour hotline for families facing deportation.[132] Organizations like these are what help Illinois set the standard for pro-immigrant policy in the United States. Conversely, there is little evidence that national and well-known enforcement-oriented organizations—such as the American Immigration Control Foundation (AICF) or the Federation for American Immigration Reform (FAIR)—had successfully established local influence in state-level politics.

Instead, it appears that activists groups like the ICIRR intersect directly with state politics in the form of the Illinois Legislative Latino Caucus. The ILLC not only serves to represent the interests of Latinos in the state legislature, but also works with community and business leaders to distribute scholarships and promote Latino interests via the Illinois Legislative Latino Caucus Foundation (ILLCF). To see the influence of the ILLC, one need look no farther than Representative Edward Acevedo (D-Chicago), a member of its Board of Directors and the chief house sponsor of the Illinois DREAM Act.[133]

When one reflects on why Illinois' policy positions on immigrants have garnered so much admiration and condemnation, it is surely because it stands out—amongst a small handful of other states—as one of the most progressive states for immigrants. While many factors have contributed to this, we argue that its rich immigrant history has translated into a current immigrant-friendly reality, where the vast majority of Illinois residents see immigration as a source of state strength rather than weakness. Further, its immigrant population is politically active and this has directly contributed to a growing group of activist legislators who are willing to propose and defend legislation what welcomes and integrates immigrants into their state.

B. The Case of South Carolina

In stark contrast to the state of Illinois, South Carolina recently rejoined the increasingly hostile debate over the propriety of state-level immigration enforcement with the passage of Senate Bill 20 *Immigration Status and Enforcement Bill* (S.B. 20), an immigration omnibus bill that Governor Nikki Hailey signed into law on June 27, 2011.[134] In addition to requiring police to verify the immigration status of any individuals who have been stopped or detained, this Arizona-style

131. Information available at http://icirr.org/about-icirr.

132. Antonio Olivo, *New Hotline a Clearinghouse for Advice for Immigrants Facing Deportation*, CHI. TRIB. (September 19, 2011), *available at* ProQuest Newsstand 890627918.

133. Todd Wilson, *Lawmakers Send Illinois DREAM Act Bill to Quinn*, CHI. TRIB. (May 31, 2011), *available at* ProQuest Newsstand 869086580.

134. Jim Davenport, *Haley Signs Illegal Immigration Police Checks Law*, SPARTANBURG HERALD-J. (June 28, 2011), *available at* ProQuest Newsstand, 874049428.

enforcement measure bars undocumented immigrants from receiving any public benefits beyond emergency medical care. Furthermore, S.B. 20 prohibits undocumented immigrants from applying for work, requires employers to use the Federal E-Verify system, and criminalizes the harboring or otherwise assisting of known undocumented immigrants.[135]

Although the issues surrounding state-level immigration reform have only recently risen to national prominence, South Carolina has been searching for ways to slow the influx of undocumented immigrants for several years. House Bill 4400, the *Immigration Reform Act* (H.B. 4400), which former Governor Mark Sanford signed in 2008, made South Carolina the first state to bar undocumented students from enrolling at any of its public colleges and universities.[136] The law also established draconian penalties for employers who fail to verify the immigration status of job applicants.

That a non-border state with a relatively small—and declining—undocumented population should spend so much time and energy dealing with immigration suggests that such laws are less a matter of need than they are a function of the recent arrival of South Carolina's immigrant population and the state's enforcement-minded legislature. Also of note are South Carolina's prominent Tea Party activists, many of whom are eager to assert the state's right to address illegal immigration without interference from the federal government.

While research by the Pew Hispanic Center shows South Carolina's undocumented population has declined by as much as twenty-one percent since its peak in 2007,[137] census estimates show that the state's Latino population—legal and otherwise—has been among the fastest growing in the United States over the last ten years.[138] According to an analysis by the University of South Carolina's Consortium for Latino Immigration Studies, South Carolina's Latino population increased from approximately 30,000 in 1990 to somewhere between 400,000 and 500,000 in 2010.[139] This inrush of new arrivals peaked from 2006 to 2007, when South Carolina's migrant populace grew faster than that of any other state.[140]

Concerned over what it saw as a mounting problem, the state legislature debated dozens of immigration-centric bills, including Senate President Pro Tem Glenn McConnell's call for a national constitutional convention on the topic.[141] While McConnell admitted at the time that such

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135. Full text of the law is available at http://www.scstatehouse.gov/sess119_2011-2012/bills/20.htm.

136. Yvonne Wenger, *Sanford Signs Broad Illegal Immigration Law*, POST & COURIER, June 5, 2008, at A1.

137. Yvonne Wenger, *Reforms to Target Illegals in S.C.; Proposal Raises Questions for Local Law Enforcement*, POST & COURIER, May 23, 2011, at A1.

138. All data is provided by the University of South Carolina's Consortium for Immigration Studies, *available at* http://www.sph.sc.edu/cli/SCdatafacts.htm.

139. *Id.*

140. *Id.*

141. Yvonne Wenger, *S.C. Senate Aims to Spur Congress to Act on Immigration*, POST &COURIER, January 31, 2008, at

a radical proposal was unlikely to elicit much national support, he felt that the state had no other options. "I don't know where else to go," McConnell told the *Post Courier* in 2008. "It's really an act of frustration. The state is bearing the burden because of the power failure in Washington."[142]

Although McConnell failed in his attempt to spur the federal government to action, H.B. 4400 nevertheless represented a bold attempt to address immigration at the local level. Such a measure, however, would not have gotten off the ground were it not for the members of South Carolina's staunchly conservative Republican Party, an organization that has been known to support positions that are more enforcement-oriented than those of its national counterpart. Consider, for example, Buddy Witherspoon, the former Executive Committeeman of South Carolina's Republican Party who challenged incumbent Lindsey Graham in the 2008 senate primary. Witherspoon made immigration the central issue of his campaign, essentially arguing that Graham, a well-known and nationally respected conservative, was too soft on so-called "illegals."[143] "There's a lot of unrest in South Carolina," Witherspoon told the *New Yorker* in 2008. "And people are concerned that the Senator no longer represents the views of mainstream South Carolinians in a lot of ways. Immigration is the number one issue, no question there."[144]

Two years later, the rest of the local leadership very much agrees with Witherspoon. Prior to the 2011 legislative session, the House Republican Caucus issued a press release in which it promised to use its expanded majority to "build on the successes of our 2008 legislation" and "push through an Arizona-style immigration bill."[145] Considering the GOP's pro-enforcement stance and numerical advantage, it's little wonder that the 2011 bill breezed through the House and Senate by votes of 69–43 and 34–9, respectively.[146]

South Carolina's status as a Tea Party stronghold is also significant, as at least a portion of the state's anti-immigrant sentiment seems to be tied to a general wariness of federal government overreach.[147] The Charleston Tea Party devoted considerable effort to promoting the 2011 bill, and backers of enforcement measures frequently cite the ineffectiveness of federal immigration policy to justify their support for state-level legislation.[148] Given the fact that the state legislature recently came out in support of a "Repeal Amendment" that would have given states the ability to overturn

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B3.

142. *Id.*

143. Ryan Lizza, *Return of the Nativist*, N. YORKER (December 17, 2007), *available at* http://www.newyorker.com/reporting/2007/12/17/071217fa_fact_lizza?currentPage=all.

144. *Id.*

145. Press Release, The S.C. H. Republican Caucus, House GOP Unveils 2011–2012 Agenda (Jan 6. 2011), *available at* http://www.schousegop.com/pressreleases/53.

146. Vote details available at http://www.scstatehouse.gov/php/web_bh10.php.

147. David Quick, *Issuing of Mexican IDs Draws Protest*, POST & COURIER, April 17, 2011, at B1.

148. Yvonne Wenger, *Activists Push Immigration Bill*, POST & COURIER, May 12, 2011, at B1.

unpopular federal legislation with a two-thirds vote,[149] it stands to reason that at least some politicians have rallied behind the immigration banner in part because of the chance it affords them to limit Washington's influence in what is seen as a local matter. According to Representative Jim Harrison, a Columbia Republican and chairman of the House Judiciary Committee, Congress' failure to address immigration on the national level has forced states to act on their own. "Until the federal government does what it should do and takes action, I think that the states have got to protect their interest," Harrison told the *Post and Courier.*[150]

Conspicuously absent from the immigration debate in South Carolina are vocal pro-immigration activists often seen in other parts of the country. While the odd activist association pops up occasionally in media coverage of immigration-centric issues, such organizations lack both the high profiles and the deep pockets of their counterparts in other states. The Latino Association of Charleston,[151] for example, is frequently mentioned by the *Post and Courier* as a foil for the state legislature, yet it lacks any online presence beyond a Yahoo group that hasn't been updated since 2009. The Church World Service and A United South Carolina have taken up the cause to an extent, but the former is primarily concerned with national matters,[152] and the latter has only managed to collect fifty-one signatures on its five-month-old online petition.[153] With no significant organizations to lobby on behalf of immigrants, it stands to reason that South Carolina's policies should fall on the pro-enforcement side of the spectrum. At the same time, our research did not uncover extensive organizing on behalf of pro-enforcement organizations. FAIR ran some promotional ads in South Carolina in 1994 but there is little evidence of more recent activity. The South Carolina Minutemen exists, but nearly a year has passed with no updates posted on its website, so its presence does not seem that powerful.

With little evidence of popular organizations coming together to either support or oppose immigrants in their state, South Carolina's approach to illegal immigration seems to be a function of three separate but related factors: a recent spike in the flow of immigrants to the state, a right-leaning state legislature, and a widespread belief that the federal government has failed to address the problem. While the rise of the Tea Party has helped energize pro-enforcement sentiment, organized opposition to—or defense of—immigrants' rights seems to be less important in this state than in either Utah or Illinois.

Taken together, the cases of Illinois and South Carolina—against a national backdrop of wide variation on the issue of extending in-state tuition benefits to undocumented students—suggest that broad and general explanations of immigration policy give us little traction. While not arguing

149. Yvonne Wenger & Robert Behre, *Lawmakers' Goals for 2011*, POST & COURIER, January 9, 2011, at B6.

150. Yvonne Wenger, *supra* note 148.

151. Information available at http://groups.yahoo.com/group/AL-Charleston/.

152. Information available at http://www.churchworldservice.org/site/PageServer?pagename=action_who_main.

153. Petition available at http://www.thepetitionsite.com/1/a-united-south-carolina-believes/.

that we should discount the importance of economic and partisan influences, we have also uncovered the specific roles that civic coalitions, political identities, and demographic flows have played in the policy trajectories described here. We also suggest that place-specific explanations are crucial to a full understanding of this policy milieu. This is certainly true for anyone hoping to influence the political process—or advocate for a particular law—in a given state.

IV. THE FEDERAL DREAM ACT

There is little doubt that until there is comprehensive immigration reform, these passionate state-level legislative battles will continue. Another avenue would be less comprehensive, but still federal, the United States DREAM Act.

On August 1, 2001, Utah Senator Orrin Hatch (R) and Illinois Senator Richard Durbin (D) introduced S. 1291, the *Development, Relief and Education for Alien Minors Act*, popularly known as the DREAM Act. This bill would have amended Section 505 of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) to permit states to determine State residency for higher education purposes and to permit college-bound students who had long-term residency in the United States an eventual path to citizenship. The DREAM Act failed to pass during the 107th Congress and was reintroduced with only minor variations during the 108th, 109th, and the 110th Congresses. While Senator Hatch remained as the bill's cosponsor during the 2003–2004 legislative session, he subsequently stopped sponsoring the bill. In contrast, Illinois Senator Durbin has remained a staunch supporter and sponsor of the bill. For the first three legislative sessions, the DREAM Act never reached a full vote, but it nearly reached passage in 2007 during the 110th Congress. That year, S. 2205—a revised DREAM Act—fell eight votes short of bypassing a filibuster.[154]

On March 26, 2009, during the 111th Congress, Senator Durbin re-introduced the DREAM Act—under the legislation S. 729—while Representative Howard L. Berman (D-CA) introduced its sister legislation in the House, under the title H.R.1751. This year, the DREAM Act enjoyed a wide range of sponsorship throughout the states and across the partisan divide, as the Senate bill had 40 cosponsors while the House will had 139 cosponsors. Despite this, neither bill made it out of committee, respectively the Senate Committee on the Judiciary and the House Subcommittee on Higher Education, Lifelong Learning, and Competitiveness.[155]

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154 *See* VOICES FOR UTAH CHILDREN, *supra* note 92.

155 *See Bill Summary & Status of S.729 for the 111th Congress,* LIBRARY OF CONG., (2009–10), http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN0729:@@@P (last visited Nov. 14, 2011); *Bill Summary & Status of H.R.1751 for the 111th Congress*, LIBRARY OF CONG. (2009–10), http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR01751:@@@P (last visited Nov. 14, 2011).

Those committed to either passing or blocking the DREAM Act anticipated the end of the 111th Congress with either great enthusiasm or great dread, for by 2010 the legislation received key endorsements from President Obama, members of his cabinet, many leaders within the business community, organized labor, and educators, amongst many other groups. At this point, it was estimated that as many as two million people would have benefitted from the DREAM Act's passage.[156] In December 2010, H.R. 6497 passed in the United States House of Representatives by a vote of 216 to 198. H.R. 6497's main legislative intent was to protect these students from deportation and allow them access to lawful work. More specifically, it would provide a path to citizenship for the adult children of undocumented immigrants if they met the following criteria:

- Entered the country before his or her sixteenth birthday
- Graduated from high school or received a GED diploma
- Passed a criminal background check
- Are no older than twenty-nine years at the time of application
- Attended either two years of college or served two years in the military

On December 18, 2010, a group of Senators blocked the DREAM Act from being considered in the Senate, by rejecting a motion to end a filibuster, by a vote of 55 to 41. Because 60 votes were needed to prevent a filibuster, this action ended the DREAM Act's legislative trajectory for 2010.[157] As one of his last legislative acts, Senator Bob Bennett (R-UT) voted to end the filibuster, while Senator Orrin Hatch (R-UT) was absent for the vote.[158]

There is a substantial group of elected officials within the United States Congress who are committed to protecting the futures of undocumented students. On May 11, 2011, the newest version of the DREAM Act was introduced in both chambers of Congress, respectively as bills S. 952 in the Senate and H.R. 1842 in the House. Currently joining Durbin in the Senate are thirty-two cosponsors, while in the House, Berman has lined up fifty-eight cosponsors.[159] It remains to be seen

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156 Roberto G. Gonzales, *We Cannot Afford Not to Pass the DREAM Act: A Plea from Immigration Scholars*, HUFFINGTON POST (December 8, 2010), *available at* http://www.huffingtonpost.com/roberto-g-gonzales/we-can-not-afford-not-to-_1_b_793702.html.

157 *The DREAM Act in the 111th Congress*, NAT'L IMMIGRATION FORUM, http://www.immigrationforum.org/policy/legislation/the-dream-act-in-the-111th-congress (last visited Nov. 14, 2011).

158 *U.S. Senate Roll Call Votes 111th Congress - 2nd Session,* U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00278 (last visited Nov. 14, 2011).

159 *S. 952 Bill Summary & Status 112th Congress*, LIBRARY OF CONG., (2011–12), http://thomas.loc.gov/cgi-bin/bdquery/z?d112:S952:@@@P *(last visited Nov. 14, 2011); H.R.1842 Bill Summary & Status 112th Congress*, LIBRARY OF CONG., (2011–12), http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR1842:@@@P (last visited Nov. 14, 2011).

if this year's legislative effort will mature into enacted legislation, given the tremendous passion and energy devoted to derailing the federal DREAM Act.

Undoubtedly, we will see the battles continue around policies granting access to post-secondary education for undocumented students. Until a more comprehensive solution emerges, skirmishes will take place in state legislatures and within the United States Congress.

CONCLUSION

The debate around whether to provide in-state tuition benefits to the children of undocumented residents recently reached a political apex. In the Republican debates to choose the next presidential candidate to run against Barack Obama in 2012, Texas Governor Rick Perry came out firmly in favor of this state law. In contrast, top contenders for the nomination such as Mitt Romney and Rick Santorum pilloried Perry as someone willing to let immigrants destroy our higher education system, and by extension, the American Dream.[160]

This article has aimed to better understand the passion and politics behind state laws providing in-state tuition rates to foreign-born students, by exploring this law on the national and local level. We considered several explanations for the national variation around this law, including the potential role played by racial contact or threat, partisan concentration, and economic influence. While all three theoretical frameworks offer parsimonious explanations for the generation of state-level immigration policy, no single theory is sufficient to explain the diversity of policy outcomes exemplified by our three case studies. As we have shown, policy results from a complex interaction of population demographics, narratives, and targeted advocacy, all of which are subject to the opportunities and constraints of a specific place and time. Accordingly, we urge those individuals and organizations that are interested in influencing policy to remember the limitations of nomothetic legal explanations. Instead, we find that idiographic explanations of policy struggles provide more traction in understanding the origin and evolution of laws. The uproar over illegal immigration is likely to get worse before it gets better, and the activists, attorneys, and lawmakers who are better able to understand the formation of immigration policy will almost certainly have the upper hand going forward.

160 Brad Jackson, *Rick Perry Is Right on In-State Tuition for Immigrants in Texas,* REDSTATE (Sep. 23, 2011), *available at* http://www.redstate.com/tex_whitley/2011/09/23/rick-perry-is-right-on-in-state-tuition-for-immigrants-in-texas/

Appendix 1: A Comparison of Institutional Affiliation of H.B. 144 Supporters and Opponents

H.B. 144 SUPPORTERS (Individuals & Institutions)	H.B. 144 OPPONENTS (Individuals & Institutions)
Bernie Machen, President, University of Utah	Danny Soderholm
Ashley Maak, Park City School District	Mike Sizer, Utah County, UFIRE (Utahns for Immigration Reform & Enforcements)
Kristen Schaub, ESL Teacher, Park City High School	Darren Davis, Highland Resident, UFIRE
Jose, Student	Matt Throckmorton, UFIRE
Suzanne Espinosa, Director of Student Recruiting, University of Utah	Anna Jane Arroyo, Image de Utah-NUCHAC
Richard Kendall, Commissioner of Higher Education	Kris Kobach, Professor of Law, University of Missouri
Mark O. Diaz, Utah Chair, Hispanic Assembly	Alex Segura, UMP (Utah Minuteman Project)
Brad Mortenson, Office of the Commissioner of Higher Education (Informational)	Congressman Merrill Cook, U.S. House of Representatives
Fred Esplin, Vice President of University Relations, University of Utah (Informational)	Dr. Ronald Mortensen, CCII (Citizens Council on Illegal Immigration)
Robert Gallegos, RAZ/PAC	Michelle Seegmiller, Citizen
Rich Kendall, Commission of Higher Education (Informational)	Gayle Reizecka & Karianne Lisonbee, Utah Eagle Forum
William Evans, Attorney General's Office (Informational)	Eli Cawley, UMP
Mr. Patrick Reimherr, President, Associated Students of The University of Utah	Dave Morgan, Citizen
Mr. Jonathon Hayes,Vice President, Associated Students of The University of Utah	Barry Hatch, Citizen
Jose Rodriguez, Citizen	Representative Chris Herrod, Utah House of Representatives
Ryan Prows, Salt Lake Chamber of Commerce	Nellie Morgan, Citizen
Dr. David Doty, Utah State Board of Regents	Spencer Hatch, Citizen
Dr. Theresa Martinez, Professor, University of Utah	Barbara Whitely, Citizen

Michael Clara, State Chairman, Utah Republican Hispanic Assembly
Lee Gardner, Salt Lake County Assessor

Tony Yapias, Proyecto Latino

Dr. Octavio Villalpando, Chief Diversity Officer, University of Utah
Pat Shea, Citizen

John Spillman, Utah Organization of Chinese Americans
Sandra Carpio & Julia Valenzuela, students, University of Utah
Chris Gambroulas, Ivory Homes

Jennifer Smith, United Way

Amanda Covington, Utah State Higher Education
Denise Castaneda, Utahns for the American Dream
Wesley Smith, Salt Lake Chamber of Commerce

Marina Lowe, American Civil Liberties Union

Steven Harper, Granite School Teacher

Paula Green Johnson, United Way of Salt Lake

Jennifer Sanchez, United Way of Salt Lake (distributed written comments)
Daniel Reyna, Citizen

Karen Crompton, Director, Voices for Utah Children
Yamila Martinez, Citizen

Betty Watkin, Parent

Charlene Booth, Citizen Construction Coordinator
Keith Kuder, Utah Young Republicans

Dan Deuel, Weber County 9/12 Organization

Clark Turner, Citizen

Robert Wren, Chairman, UFire

ARTICLE

THE BIRTHRIGHT CITIZENSHIP CONTROVERSY: A STUDY OF CONSERVATIVE SUBSTANCE AND RHETORIC

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This essay is a critique of the conservative rhetoric used in attack of birthright citizenship—as granted by Clause One of the Fourteenth Amendment, which states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[1] The rhetoric of that attack violates the traditional canons of conservative argumentation and interpretation, such as original intent and textualism.[2] As such, conservatives' arguments call into question the seriousness of their allegiance to these canons.

This article will not discuss the pros and cons of what we should do if we were writing on a blank slate. The immigration problems of the United States are real and, I argue, do not admit a simple solution. This article simply advances the argument that the conservative position of opposing birthright citizenship is inconsistent with conservative values.

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1. U.S. CONST. amend. XIV, § 1.

2. Three points in clarification. First, in this paper I am not investigating whether someone not a "natural born Citizen" can be president; that is the section of the Constitution about the qualifications to be president: "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States." U.S. CONST. art. II, § 1. Second, I do not have a precise definition of the term "conservative;" in fact, I do not think there is any precise definition. By "conservative" I mean those who are identified or self-identify as conservatives. Third, I do not mean that all "conservatives," however defined, ascribe to what I call "the conservative canons of interpretation." I am saying that these canons are commonly espoused by conservatives.

I. AMERICAN BIRTHRIGHT CITIZENSHIP: A HISTORY

Clause One's plain meaning is that all people, including the children of illegal aliens, who are born within the United States are American citizens. For years, the meaning of this provision has been noncontroversial. The clause has been assumed without discussion by the Supreme Court to cover anyone born within the United States.[3] In *Plyler v. Doe*, the Supreme Court held that Mexican school children, whether here legally or not, were entitled to constitutional protections.[4] This assumption, however, is now under attack.[5] George F. Will[6] picked up this argument in an opinion piece,[7] and several members of Congress want to pass legislation or a constitutional amendment to abolish birthright citizenship.[8]

The push to abolish birthright citizenship comes from the concern over the number of illegal immigrants in the United States. "Congress has heard testimony estimating that more than two-thirds of all births in Los Angeles public hospitals, and more than half of all births in that city, and nearly ten percent of all births in the nation in recent years, have been to mothers who are here illegally."[9] American-born children of illegal immigrants lead to the problem of the so-called "anchor child."[10] Once the child, an American citizen, turns twenty-one, his citizenship status can be used by his parents to give them a preference for legal admission to the United States.[11]

This article briefly discusses the history of American citizenship before and after *Dred Scott*, and then critiques the anti-birthright citizenship arguments. It concludes that the anti-

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3. Except for children of foreign diplomats. *See infra* text accompanying note 51.

4. Plyler v. Doe, 457 U.S. 202, 215 (1982) ("[T]he protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who *is* subject to the laws of a State, and reaches into every corner of a State's territory.").

5. For example, Lino Graglia, a conservative law professor, argues that children born of illegal aliens should not be citizens. Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1 (2009).

6. George Will is a television commentator, op-ed writer, and author. He is also a baseball maven. http://www.washingtonpost.com/george-f-will/2011/02/24/ABVZKXN_page.html.

7. George F. Will, Op-Ed., *An Argument to Be Made About Immigrant Babies and Citizenship*, WASH. POST, Mar. 28, 2010, at A15, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032603077.html.

8. *E.g.*, H.R. 140, 112th Cong. (2011). *See also* MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., RL33079, BIRTHRIGHT CITIZENSHIP UNDER THE 14TH AMENDMENT OF PERSONS BORN IN THE UNITED STATES TO ALIEN PARENTS 9 n.67 (2010).

9. Will, *supra* note 7.

10. Graglia, *supra* note 5, at 3.

11. *See, e.g.*, Immigration and Nationality Act (INA) § 201(b), 8 U.S.C. §1151(b) (2009) (noting that this family-based immigration preference only applies to "immediate relatives," which includes the parents of citizens 21 years or older, but does not apply to siblings of the United States citizen. Siblings (of a United States citizen 21 years or older) still enjoy a "preference" in that they legally qualify for immigration into the United States, but the number of such other non-"immediate relatives" are subject to a yearly quota. It is worth emphasizing here that these are mere preferences for legal admission to the United States, not a guarantee of automatic citizenship.).

birthright arguments are founded neither on textual analysis, historical context, nor intent.[12] This is followed by a discussion on how these conservative arguments use a rhetoric that violates all the conservative canons of interpretation.

A. Understanding of American Citizenship before Dred Scott

Prior to *Scott v. Sandford*,[13] there was little discussion of what American citizenship was, how to get it, or what it meant. In *Murray v. Charming Betsy*, the Supreme Court dealt with the claim of a person born in the United States but living on a Danish island; the Court assumed the plaintiff to be an American citizen despite his being subject to a foreign power.[14] The Supreme Court, in *Inglis v. Sailor's Snug Harbour*,[15] explained that the United States inherited English common law's principle that "all persons born within the colonies of North America, whilst subject to the crown of Great Britain, were natural born British subjects."[16] Explaining this general principle, the Court stated that:

> Two things usually concur to create citizenship; first, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience, or in other words, within the ligenance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to the sovereign, as such, de facto.[17]

In *Shanks v. Dupont*, the Court again stated the principle of birthright citizenship; for the Court, birth in the United States was prima facie evidence of United States citizenship.[18] In a case concerning the inheritance of land in the state of Maryland, the Court in *McCreery's Lessee v. Somerville* assumed that three girls born in the United States were citizens, although their father was an alien born in Ireland and never naturalized in the United States.[19] In *Levy's Lessee v. McCartee*, the Court again cited the English common law principle that children born of an alien in England were subjects of England.[20]

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12. What follows is general review of the law on birthright citizenship. It does not claim originality, but it is to help in understanding my critique of the conservative rhetoric.

13. Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393 (1856).

14. Murray v. Charming Betsy, 6 U.S. (2 Cranch) 64, 64 (1804).

15. Inglis v. Sailor's Snug Harbour, 28 U.S. (3 Pet.) 99 (1830).

16. *Id.* at 120.

17. *Id.* at 155 (Story, J., dissenting). Although Justice Story dissented from the majority opinion, all justices were in agreement as to the American inheritance of the English law of citizenship by birth. *See* United States v. Wong Kim Ark, 169 U.S. 649, 659 (1898).

18. Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 245 (1830). This case was decided on the same day as *Inglis*.

19. McCreery's Lessee v. Somerville, 22 U.S. (9 Wheat.) 354, 354 (1824).

20. Levy's Lessee v. McCartee, 31 U.S. (6 Pet.) 102, 113 (1832).

In 1856, as tension between northern and southern states increased over the issue of slavery, the Supreme Court decided the infamous *Dred Scott* case. Dred Scott—a slave—was born in Missouri, taken by his master John Sandford to Illinois—a state that did not recognize slavery—then returned to Missouri.[21] Upon his return to Missouri, Dred Scott sued for his freedom in a federal diversity jurisdiction suit, because Sandford was a resident of New York.[22] However, the Supreme Court ruled that a person whose ancestors were imported into the United States as slaves could not become a citizen of the United States, and because Scott was not a citizen, he was not entitled to any of the right and privileges granted in the Constitution, including the right to sue in federal court.[23] Chief Justice Taney, in a stunning example of originalism, looked to the Declaration of Independence and, citing the provision "that all men are created equal," concluded "it is too clear for dispute, that the enslaved African race were not intended to be included."[24]

B. Citizenship After Dred Scott

Although the Court in *Dred Scott* declared rather decisively that African-Americans were not citizens of the United States, that position was, and still is, highly criticized. The November 29, 1862 opinion of then-Attorney General Edward Bates specifically limited the holding of *Dred Scott*, explaining that the Court's decision was mostly dicta, and the actual holding was nothing more than a dismissal for lack of jurisdiction.[25] The Bates opinion offers further evidence that the principle of citizenship by birth was widely accepted in the early years of the United States.[26] In response to an inquiry from the then-Secretary of the Treasury Salmon P. Chase on whether free black sailors, former slaves, were citizens of the United States and thus fit to command American vessels in the pursuit of coastal trade, Attorney General Bates responded:

> [E]very person born in the country is, at the moment of birth, *prima facie* a citizen; and he who would deny it must take upon himself the burden of proving some great disfranchisement strong enough to override the '*natural-born*' right as recognized by the Constitution in terms the most simple and comprehensive, and without any reference to race or color, or any other accidental circumstance.[27]

Following the end of the Civil War, Congress enacted, and the states ratified, the Thirteenth Amendment to the Constitution, which abolished slavery but did *not* make African-Americans,

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21. Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393, 398 (1856).

22. *Id.*

23. *Id.* at 404. My students in Civil Procedure are always surprised that *Dred Scott* is a federal subject matter jurisdiction case.

24. *Id.* at 410.

25. Citizenship, 10 Op. Att'y Gen. 382, 412 (1862).

26. *See id.* at 394.

27. *Id.*; Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 60 AM. U.L. REV. 331, 380 (2010).

whether former slaves or not, citizens.[28]

In fact, their status was problematic. Many whites thought that the races would never be able to live together and advocated voluntary or involuntary emigration of emancipated slaves.[29] Lincoln at first advocated voluntary emigration because he felt the races could not live together.[30] Members of Lincoln's cabinet, for example Attorney General Edward Bates, also promoted the idea of black colonization.[31] Unlike Bates, however, Lincoln always maintained that any emigration be voluntary.[32] Most black Americans, however, rejected voluntary colonization or involuntary deportation.[33]

Various locations, such as Brazil, St. Croix, and Colombia, were proposed, but few African-Americans wanted to emigrate.[34] The American Colonization Society offered assistance to voluntary emigrants, and found only one volunteer.[35] President Lincoln authorized Bernard Kock to establish a colony on the Ile à Vache, an island off Haiti, but Kock quickly stole all the emigrants' money and declared himself governor; living conditions were so bad and abusive that Lincoln, less than a year later, sent boats to bring the settlers home.[36] After this fiasco and increased opposition from the black community, Lincoln modified his views and, along with many others, gave up on emigration.[37]

The Civil Rights Act of 1866 made African-Americans citizens by stating "[t]hat all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[38]

The Fourteenth Amendment, passed by Congress the next year, dealt with the problem of citizenship in its first sentence: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[39] Note that the phrase in the Civil Rights Act language "and not subject to any foreign power" was

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28. *See* U.S. CONST. amend. XIII.

29. *See* ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 17 (2010).

30. *Id.* at 224 ("Because of white prejudice, [Lincoln told a black delegation:] 'even when you cease to be slaves, you are yet far removed from being placed on an equality with the white race. . . . It is better for us both, therefore, to be separated.'").

31. *Id.* at 184.

32. *Id.* at 224.

33. *Id.* at 19, 223.

34. *Id.* at 223.

35. *Id.* at 200–01.

36. *Id.* at 239–40, 259.

37. *Id.* at 223–24, 258–61, and 312.

38. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870)) (codified as amended at 42 U.S.C. §§ 1981, 1982 (1987)).

39. U.S. CONST. amend. XIV, § 1.

replaced by "subject to the jurisdiction thereof" in the Fourteenth Amendment, and the Civil Rights Act language excluding "Indians not taxed" was eliminated in the Fourteenth Amendment.

The first case (out of only two) to address citizenship under the Fourteenth Amendment was *Elk v. Wilkins*, brought by a Native American who had left his tribe, seeking the right to vote.[40] The Court ruled that he was not a citizen, stating that Section One of the Fourteenth Amendment did not apply to Native Americans.[41] The Court stated that a person cannot become a citizen by his "own will without the action or assent of the United States."[42]

The other Supreme Court case addressing citizenship under the Fourteenth Amendment is *United States v. Wong Kim Ark*.[43] The plaintiff was born in San Francisco of Chinese subjects who were residents there.[44] Wong Kim Ark traveled to China, but upon his return was detained by the Solicitor of Customs, on the ground that he was not a citizen of the United States.[45] The Court stated the issue as follows:

> The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth, are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States by virtue of the first clause of the Fourteenth Amendment of the Constitution . . . .[46]

The Court noted that nowhere does the Constitution explicitly define the meaning of the words of the Fourteenth Amendment, so the language, "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution [sic]."[47] The Court then explained the law of English nationality, which was birth within the allegiance of the king and being subject to his protection:

> The fundamental principle of the common law with regard to English nationality was birth within the allegiance—also called 'ligealty,' 'obedience,' 'faith,' or 'power'—of the king. The principle embraced all

40. Elk v. Wilkins, 112 U.S. 94, 94 (1884).

41. *Id.* at 109.

42. *Id.* at 100. Conservative commentators have seized this phrase, using it to mean that United States citizenship "is a consensual relationship, requiring the consent of the United States. *See infra* Part II.A and Graglia, *supra* note 5, at 9.

43. United States v. Wong Kim Ark, 169 U.S. 649 (1898). Note that Justice Gray, who wrote the majority opinion in *Elk*, also wrote the majority opinion in *Ark*.

44. *Id.* at 653, 701.

45. *Id.* at 649.

46. *Id.* at 653.

47. *Id.* at 654.

> persons born within the king's allegiance, and subject to his protection. Such allegiance and protection were . . . not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king.[48]

The Court described the primary purpose of Section One of the Fourteenth Amendment:

> Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Scott v. Sandford* . . . and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States.[49]

Next, the Court came to the difficult task of reconciling inconsistent language from prior cases, namely, the *Slaughter-House Cases*.[50] Those cases dealt with the Privileges and Immunities Clause, but the majority opinion had stated with regard to Section One of the Fourteenth Amendment, "[t]he phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States."[51] The Court in *Ark* declared that statement to be dicta, noting that the statement was not supported by any authorities and was completely separate from the issue in question in that case.[52] The Court also noted that Justice Miller was wrong in classifying consuls and foreign ambassadors together, because consuls are subject to the jurisdiction to the country in which they reside whereas ambassadors are not.[53] The Court found additional support for its interpretation of Section One by citing the dissenting opinions in the *Slaughter-House Cases*, which disagreed with the majority's interpretation.[54]

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48. *Id.* at 655. The first statute codifying these standards into law was enacted during the reign of King Edward III. *See id.* at 668.

49. *Id.* at 676. Many scholars, however, disagree, stating that the Citizenship Clause was intended to do much more than override *Dred Scott*. *See, e.g.,* Garrett Epps, *Interpreting the Fourteenth Amendment: Two Don'ts and Three Dos*, 16 WM. & MARY BILL RTS. J. 433 (2007); LEE, *supra* note 8.

50. The Slaughter-House cases were three consolidated cases dealing with rights to conduct the slaughter-house business in New Orleans.

51. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1872).

52. *Ark*, 169 U.S. at 678.

53. *Id.*

54. Justice Field stated that the amendment "recognizes in express terms, if it does not create, citizens of the United

The *Ark* court went on to distinguish *Elk v. Wilkins*, which denied citizenship to Native Americans born within the boundaries of the United States. Distinguishing *Elk* was crucial to the holding in *Ark*, because the earlier case could be interpreted to deny citizenship to those born of non-citizens. The Court stated that *Elk* was based on the principle that "subject to the jurisdiction of the United States" meant not partially subject to the jurisdiction, but completely subject, "owing [the United States] direct and immediate allegiance."[55] While the Constitution provided that "Indians not taxed" were not counted for congressional representation, it did give Congress the power to regulate commerce with Indian tribes.[56] The tribes were quasi-sovereigns, "alien nations, distinct political communities, the members of which owed immediate allegiance to their several tribes, and were not part of the people of the United States."[57] As mentioned above, the Court in *Ark* restricted *Elk* to apply only to members of Indian tribes within the United States, stating the case did not deny citizenship to others born within the jurisdiction of the United States:

> The decision in *Elk v. Wilkins* concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country.[58]

Therefore, except for three classes of children, those born members of Indian tribes, to alien enemies in hostile occupation, or to diplomats, all those born under United States jurisdiction are citizens by virtue of birth.[59]

Professor Graglia uses the language of the Civil Rights Act of 1866, which includes the qualifier "not subject to any foreign power,"[60] to argue that the Fourteenth Amendment also

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States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry." *Slaughter-House Cases*, 83 U.S. at 95 (Field, J., dissenting). Justice Swayne pointed out that the majority had no authority to create an exception to birthright citizenship:

> There is no exception in its terms, and there can be properly none in their application. By the language 'citizens of the United States' was meant all such citizens; and by 'any person' was meant all persons within the jurisdiction of the State. No distinction is intimated on account of race or color. This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it.

Id. at 128 (Swayne, J., dissenting).

55. *Ark*, 169 U.S. at 680–81.

56. *Id.*

57. *Id.* at 681.

58. *Id.* at 682.

59. *See id.* at 657–58, 681.

60. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144

includes this restriction.[61] *Ark*, however, specifically rejects that argument.[62]

One can play the law school game of distinguishing and reconciling *Elk* and *Ark* on their facts. If *Elk* is interpreted broadly as meaning that anyone with any allegiance to another sovereign cannot be a citizen by birth, then *Ark* is wrong. But *Ark* is the later case, and it limits *Elk*'s subject matter to only the citizenship of Native Americans. For more than a century, *Ark* seems to have settled the issue.

After *Wong Kim Ark*, courts assumed that everyone born within the United States was a citizen. For example, the Supreme Court assumed that children of illegal aliens were citizens in a 1982 case dealing with a right to public education.[63] But more recently many conservative commentators have argued that children born of illegal aliens are not citizens. The argument seems to have started in a book published in 1985 called *Citizenship Without Consent: Illegal Aliens in the American Polity*, by Peter Schuck and Rogers Smith.[64] Professor Eastman[65]then wrote an article adopting the arguments of Schuck and Smith.[66] Professor Graglia later wrote his article, arguing that the Citizenship Clause does not apply to children of illegal aliens.[67] Graglia's article does not discuss *Ark* other than to say it is wrong,[68] but he does use *Elk* to conclude that the United States has to consent to citizenship, and the United States has never consented to the presence of illegal

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(1870)) (codified as amended at 42 U.S.C. §§ 1981, 1982 (1987)).

61. Graglia, *supra* note 5, at 7.

62. *Ark* states:

> In the light of the law as previously established, and of the history of the times, it can hardly be doubted that the words of [the Civil Rights A]ct, 'not subject to any foreign power,' were not intended to exclude any children born in this country from the citizenship which would theretofore have been their birthright; or, for instance, for the first time in our history, to deny the right of citizenship to native-born children [of] foreign white parents not in the diplomatic service of their own country, nor in hostile occupation of part of our territory. But any possible doubt in this regard was removed when the negative words of the civil rights act, 'not subject to any foreign power,' gave way, in the fourteenth amendment of the constitution, to the affirmative words, 'subject to the jurisdiction of the United States.

Ark, 169 U.S. at 680–81.

63. Plyler v. Doe, 457 U.S. 202 (1982). This case was severely criticized by Professor Graglia for, among other things, being authored by Justice Brennan. *See* Graglia, *supra* note 5, at 11.

64. *See* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985).

65. Professor John C. Eastman was Dean and teaches at Claremont University School of Law. He clerked for Justice Thomas. *See John C. Eastman*, CLAREMONT INST., http://www.claremont.org/scholars/scholarID.380/scholar.asp..

66. John C. Eastman, *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment Over* Bush v. Gore*?*, 94 GEO. L.J. 1475, 1484–91 (2006) (contending *Ark* was wrongly decided and *Elk* should be prevailing law).

67. *See* Graglia, *supra* note 5.

68. *Id.* at 9–10.

aliens.[69] Furthermore, Graglia goes on to say that the drafters of the Fourteenth Amendment could never have intended to bestow such citizenship upon children of illegal aliens, because there were no illegal aliens at the time of drafting.[70] In a piece published by the Heritage Foundation, Matthew Spalding argues that the Constitution does not require citizenship for such children.[71]

Conservative press and commentators, such as George Will and the National Review, have treated the Heritage Foundation piece and Graglia's article as dispositive.[72] Several Congressmen, including the chair of the House Judiciary Committee, have come out against birthright citizenship.[73]

II. THE CONSERVATIVE ARGUMENTS AGAINST BIRTHRIGHT CITIZENSHIP ARE WITHOUT FOUNDATION AND VIOLATE THE CONSERVATIVE CANONS OF INTERPRETATION

The anti-birthright citizenship argument can be summarized in seven points:

(A) The United States, as sovereign, must consent to citizenship, but it has not consented to the citizenship of children of illegal aliens.

(B) "[S]ubject to the jurisdiction thereof" means allegiance to the United States, with no allegiance to any other sovereign.

(C) From a public policy standpoint, birthright citizenship rewards illegal immigration.

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69. *Id.* at 9.

70. *Id.* at 12; SCHUCK & SMITH, *supra* note 64, at 95. *But see* Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499 (2008) (claiming the drafters of the Fourteenth Amendment did not intend to limit birthright citizenship); Epps, *supra* note 27, (arguing that the framers of the Fourteenth Amendment *were* concerned with immigrant rights).

71. Matthew Spalding, *Should the Children of Illegal Aliens Be U.S. Citizens?*, HERITAGE FOUND. (August 30, 2010), http://origin.heritage.org/Research/Commentary/2010/08/Should-the-Children-of-Illegal-Aliens-Be-US-Citizens.

72. Conservative commentators ignore research by liberal authors and instead treat Graglia's and Eastman's work as gospel, not acknowledging the contrary arguments and findings, while other, more liberal authors like Epps have responded to and attempted to discredit conservative arguments.

73. Note that the House Judiciary Committee has a major role in shaping our immigration policy. *See* H.R. 1868, 111th Cong. (2009) (bill to grant birthright citizenship only to children of a United States citizen, lawful permanent resident alien, or alien serving in Armed Forces). *See also* Daniel B. Wood, *Illegal Immigration: Can states win fight against 'birthright citizenship'?*, CHRISTIAN SCI. MONITOR (Jan. 7, 2011), http://www.csmonitor.com/USA/Politics/2011/0107/Illegal-immigration-Can-states-win-fight-against-birthright-citizenship; Peter Grier, *14th Amendment: Is birthright citizenship really in the Constitution?*, CHRISTIAN SCI. MONITOR (Aug. 11, 2010), http://www.csmonitor.com/USA/Politics/2010/0811/14th-Amendment-Is-birthright-citizenship-really-in-the-Constitution.

(D) The legislative history of the Fourteenth Amendment shows that those born in the United States must have complete allegiance to the United States in order to become a citizen by birth.

(E) Judges should faithfully uphold precedent.

(F) The United States is one of the few countries to allow citizenship by birth.

(G) The drafters of the Fourteenth Amendment never intended the amendment to grant citizenship to a massive number of illegal aliens.

A. The United States, as Sovereign, Must Consent to Citizenship, but it Has Not Consented to the Citizenship of Children of Illegal Aliens

1. The Requirement of Consent Cannot Be Found in the Constitution

The concept of consent derives from a sentence in *Elk v. Wilkins* that was picked up by Schuck and Smith, who argue that consent is the only legitimate foundation of citizenship.[74] Native Americans were considered not to be citizens because "they had never chosen or been chosen to be United States citizens"; rather, their allegiances were with their individual tribal nations.[75] *Elk*, however, can easily be limited to the peculiar status of Native Americans, and it was so limited by *Ark.*

Schuck and Smith argue that the "existence of full and reciprocal obligations of individual allegiance and governmental power and protection in this strong sense was the crucial element needed to satisfy the [phrase, 'subject to the jurisdiction thereof']."[76] This argument makes the text of the Constitution meaningless. In fact, Schuck and Smith spare little time discussing the intent of the drafters of the Citizenship Clause. Their argument is that basing citizenship on birth, rather than consent, makes no philosophical or utilitarian sense.[77] They rely on philosophers such as John Locke,[78] who are more relevant to the intent of eighteenth century drafters of the Constitution, rather than the nineteenth century drafters of the Citizenship Clause.[79] Considering the philosophical background of the drafters of the Citizenship Clause, it seems clear that they did understand the implications of outright citizenship by birth:

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74. *See* SCHUCK & SMITH, *supra* note 64, at 76.

75. *Id.* at 83.

76. *Id.*

77. *See id.* at 90–92.

78. *See id.* at 30–31.

79. *See* Epps, *supra* note 27, at 381.

> A proper consideration of nineteenth century political thought—the thought that formed the real background of the Framing of the Citizenship Clause—furnishes strong evidence that the restrictive thesis, based on Locke and other Enlightenment thinkers, is at best implausible. Readily available evidence suggests that the thinkers who guided the Framing saw birthright citizenship as the norm, with the sole exception being children of diplomats—that they saw this as the state of affairs before the ratification of the Amendment, which made explicit a fact they believed to be already present in the Constitution.[80]

Looking at the text and the context of the Fourteenth Amendment, the concept of mutual consent cannot be found. Rather, the absence of a consent requirement and the totality of the statement, "all persons born . . . in the United States," strongly suggest that the drafters of the Amendment were attempting to reverse the *Dred Scott* decision, which was based on the premise that the nation could *not* consent to citizenship. Thus the Amendment not only reversed the decision in *Dred Scott*, but, moreover, it eliminated any presumed power of the nation to not consent to citizenship.

2. Reading a Lockean "Consent Theory" into the Law Runs Counter to the Conservative Antipathy Towards Philosophic Arguments

Conservatives do not like philosophical arguments; they dislike theoretical, ideological, and abstract beliefs.[81] They prefer practices that have withstood "the test of time."[82]

Russell Kirk states that one of the basic principles of conservatism is "[f]aith in prescription and distrust of 'sophisters, calculators, and economists' who would reconstruct society upon abstract designs. Custom, convention, and old prescription are checks both upon man's anarchic impulse and upon the innovator's lust for power."[83] He contrasts the conservative view with that of radicalism, which is "[c]ontempt for tradition. Reason, impulse, and materialistic determinism are severally preferred as guides to social welfare, trustier than the wisdom of our ancestors. Formal religion is rejected and various ideologies are presented as substitutes."[84] The first conservative of the modern age, Edward Burke,[85] explained the conservative reliance on tradition:

> We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and

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80. *Id.*

81. TED HONDERICH, CONSERVATISM 26 (1990).

82. *See id.* at 24.

83. RUSSELL KIRK, THE CONSERVATIVE MIND: FROM BURKE TO ELIOT 9 (7th rev. ed. 1985).

84. *Id.* at 10.

85. *Id.* at 6 ("Conscious conservatism, in the modern sense, did not manifest itself until 1790, with the publication of *Reflections on the Revolution in France*.").

> that the individuals would do better to avail themselves of the general bank and capital of nations, and of ages.[86]

Schuck and Smith's reliance on Locke, then, contradicts the conservative premise of rejecting ideological arguments. The conservative position of opposing birthright citizenship violates conservative reliance on tradition because birthright citizenship, as explained by the Supreme Court numerous times, is a concept inherited from English common law, with roots tracing back at least to the time of Edward III.[87]

B. "[S]ubject to the Jurisdiction Thereof" Means Allegiance to the United States, with No Allegiance to Any Other Sovereign

1. This Argument, from *Elk v. Wilkins*, Where the Plaintiff Owed Loyalty to His Tribe, and from the Dissent in *United States v. Wong Kim Ark*, Has No Basis in Law and Is Radical in its Scope

Conservatives argue that the term "jurisdiction" in the Fourteenth Amendment must mean something other than geographical jurisdiction. They picked up this argument from *Elk v. Wilkins*, in which the Supreme Court found that a Native American, although born within the geographical jurisdiction of the United States, was not a citizen because he did not owe direct allegiance to the government of the United States, but rather to the sovereignty of his tribe.[88] And, as the Court pointed out, children of diplomats who are born within the geographical jurisdiction of the United States are not citizens because their parents owe allegiance to a different sovereign.[89] Here Professor Garret Epps, who has written extensively on the Fourteenth Amendment, writes that the conservatives are misinterpreting the meaning of "jurisdiction."[90] As used in the Fourteenth Amendment, "subject to the jurisdiction" does not mean personally owing allegiance to another sovereign, but being within the geographical area of a sovereign's control. If we required every child born in the United States to have two parents who owed complete political allegiance to the United States government, then President Barack Obama may not be a citizen, and could therefore not be president.[91] No doubt this would satisfy many conservative critics; however, the fact that

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86. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 251 (J.C.D. Clark ed., Stanford Univ. Press 2001) (1790).

87. United States v. Wing Kim Ark, 169 U.S. 649, 668 (1898).

88. See Graglia, *supra* note 5, at 9.

89. *Id.*

90. *See* Epps, *supra* note 27, at 333–34. One case, known to all civil procedure teachers and students (including a beggar in Washington Square, New York City, who had attended Harvard Law School), explains the contemporary meaning of "subject to the jurisdiction." That case is, of course, Pennoyer v. Neff, 95 U.S. 714 (1878). *See* Linda Silberman, Shaffer v. Heitner: *The End of an Era,* 53 N.Y.U. L. REV. 33 (1978) (describing her encounter with a vagabond who recited the facts and holding of *Pennoyer*).

91. President Obama was born in the state of Hawaii, but his mother and father were born in Kansas and Kenya,

Barack Obama is president confirms that jurisdiction is a geographic, rather than political term.

2. The Conservative Argument that "Subject to the Jurisdiction" Actually Means "Owing Complete Allegiance" Conflicts with the Conservative Canon of Textualism

Justice Antonin Scalia's essay on interpretation lays out the basic conservative canon that a judge must stick to the text of any statute.[92] Justice Scalia states that his job is textual interpretation; "[e]very issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution."[93] Justice Scalia maintains that "when the text of a statute is clear, that is the end of the matter."[94] Why? Because we should look for objective—not subjective—intent, "the intent that a reasonable person would gather from the text of the law."[95] The reason for considering the objective—not the subjective—intent is that relying on objective intent is the only method of interpretation compatible with democracy.[96] A law focusing on what was meant is tyrannical.[97] "It is the *law* that governs, not the intent of the lawgiver."[98]

Justice Scalia criticizes Judge Guido Calabresi and Professor William Eskridge's position that statutes should be reinterpreted to fit modern conditions.[99] Professor Eskridge argues "that it is proper for the judge who applies a statute to consider 'not only what the statute means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society.'"[100] To Scalia, the problem with Eskridge's interpretative theory is that "[i]t is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is. . . . The text is the law, and it is the text that must be observed."[101]

The text of the Fourteenth Amendment is clear and unambiguous: any person born within

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respectively; many conservatives have questioned the legitimacy of his presidency on this basis. *See* Michael D. Shear, *With Document, Obama Seeks to End 'Birther' Issue*, N.Y. TIMES (Apr. 27, 2011), http://www.nytimes.com/2011/04/28/us/politics/28obama.html. Only a "natural born Citizen" is eligible to be president. U.S. CONST. art. II, § 1.

92. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3 (Amy Gutmann ed., 1997).

93. *Id.* at 13.

94. *Id.* at 16.

95. *Id.* at 17.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 22.

100. *Id.* (quoting WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 50 (1994) (quoting Arthur Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456, 469 (1950))).

101. *Id.*

the jurisdiction of the United States is a citizen. Professor Gerard M. Magliocca writes:

> All of the confident assertions that the word "jurisdiction" in the Citizenship Clause means "allegiance or consent" run up against the problem that this is not how the term is usually defined. Justice Holmes gave the standard explanation that "[j]urisdiction is power," by which he meant that the willingness of party to be hailed before a court is irrelevant. For example, it would be strange if a criminal defendant could assert a defense based on his lack of consent to the State's prosecutorial authority. Likewise, illegal aliens in deportation proceedings would not get far by asserting that the tribunal lacked jurisdiction because they did not consent.[102]

The revisionists base their restrictive reading of the term "jurisdiction" on the wording of the Citizenship Clause of the Civil Rights Act of 1866.[103] The argument is that we should read the 1866 Civil Rights Act language, "all persons born . . . in the United States and not subject to any foreign power," into the Fourteenth Amendment.[104] Professor Magliocca explains that "[t]he word jurisdiction has various meanings in American law, but it has never been defined in terms remotely resembling the elaborate construct on which the revisionist argument depends."[105]

The revisionist argument ignores the difference in language—compare "not subject to any foreign power" with "subject to the jurisdiction thereof." Even granting that the 1866 Act and the Amendment were intended subjectively to mean the same thing,[106] the language is just not the same. Professor Epps concludes that the Amendment and the Act are just two different enactments:

> In fact, the meaning that matters in this context is that of the Citizenship Clause, which was framed by Congress two months after the final passage of the Civil Rights Act and ratified over the ensuing two years by the state legislatures. It has different wording; it emerged from a different political

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102. Magliocca, *supra* note 70, at 512–13 (quoting Cordova v. Grant, 248 U.S. 413, 419 (1919)).

103. Eastman, *supra* note 66, at 1485–86.

104. As Magliocca explains:

> [T]he language of the 1866 Civil Rights Act, from which the Citizenship Clause of the Fourteenth Amendment (like the rest of Section One of the Fourteenth Amendment) was derived...makes clear, any child born on U.S. soil to parents who were temporary visitors to this country and who, as a result of the foreign citizenship of the child's parents, remained a citizen or subject of the parents' home country, was not entitled to claim the birthright citizenship provided in the 1866 Act.

Magliocca, *supra* note 70, at 513.

105. *Id.* at 512 n.66 (quoting GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW 171 (1996)).

106. The argument that they were intended to mean the same thing is highly debatable. *See* Epps, *supra* note 27, at 349–53.

> situation; it was adopted under different procedures and had different authors, and it was approved by different voting bodies. Its meaning must stand on its own. If its broad wording, which makes no mention of "foreign powers," is to be read restrictively, it must be because of something in its text or adoption, not because it is viewed as a coded re-enactment of the Civil Rights Act.[107]

When conservatives argue that jurisdiction means something other than geographical jurisdiction, they ignore the plain text of the Fourteenth Amendment and violate their own textualist canon. Justice Scalia, the ultimate textualist, is himself guilty of this inconsistency—in *Hamdi v. Rumsfeld*, he questioned whether an arrested suspected terrorist who was an American-born child of non-citizens was a citizen.[108]

C. From a Public Policy Standpoint, Birthright Citizenship Rewards Illegal Immigration

Originalism, another interpretive method lauded by Justice Scalia, "suggests that in seeking to understand the words of the Constitution we should ask how they were understood at the time they were written, not what modern readers might think."[109] In his book, *How to Read the Constitution,* Christopher Wolfe advances the originalist position.[110] Those who oppose originalism, Wolfe states, view the "major considerations shaping a judge's decisions a[s] notions of what is good public policy, in the broad sense of 'sorting out the enduring values of society.'"[111] To Wolfe, the problem with this approach is that it does more than change the application of a constitutional clause, it changes its meaning. This destroys constitutionalism: "If the very meaning of a provision can be varied, it would therefore seem to be possible to take the constitution out of constitutional law."[112]

Still, conservatives who oppose birthright citizenship based on the Fourteenth Amendment ignore the original context of the clause in order to reach a conclusion that better serves their policy goals: protecting American borders. Conservatives use policy consequences—such as a nation filled with illegal immigrants—to justify their conclusion that the Fourteenth Amendment could not possibly grant birthright citizenship.

Professor Graglia rejects birthright citizenship because illegal entry into the United States can result in a lifetime of welfare benefits.[113] This argument relies on the policy consequences of

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107. *Id.* at 353.

108. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

109. Kermit Roosevelt, *Justice Scalia's Constitution—and Ours,* 8 J. L. & SOC. CHANGE 27, 27 (2005).

110. CHRISTOPHER WOLFE, HOW TO READ THE CONSTITUTION (1996).

111. *Id.* at 20 (quoting ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 26 (1962)).

112. *Id.* at 89.

113. Graglia, *supra* note 5, at 3. ("A parent can hardly do more for a child than make him or her an American citizen,

birthright citizenship, not any misunderstood meaning of the original clause. Professor Eastman supports his argument by pointing out the negative policy consequences of the *Ark* decision: suspected terrorists like Yaser Hamdi, who was born in the United States to parents merely visiting on a travel visa, escaped prison at Guantanamo Bay because of his supposed citizenship.[114]

Conservative columnists in the *National Review* also argue against birthright citizenship on policy grounds. Reihan Salam states that birthright citizenship produces less redistribution of wealth, makes countries resistant to economic migrants, produces anchor babies, rewards law breakers, and is simply unfair.[115] "We've collectively decided," he writes, "that we have a special interest in our fellow citizens, and that we will give them precedence over those who suffer from grinding poverty in other countries."[116] Similarly, the first sentence of George Will's op-ed piece focuses on solving a present-day policy problem: "A simple reform would drain some scalding steam from immigration arguments that may soon again be at a rolling boil."[117]

Conservative critics of birthright citizenship oppose the matter on policy grounds: the United States should not reward illegal immigration, illegal immigrants should not be entitled to welfare benefits, and so on. But these conservative critics seek a change in the understanding of the Fourteenth Amendment because of the policy consequences interpretation of the amendment has produced. The rejection of policy is a necessary corollary of the exclusive focus on original intent and the text. If one only looks at these, one cannot consider policy.

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entitled to all the advantages of the American welfare state. . . . Illegal immigrant parents also benefit, of course, from the welfare and other benefits to which their citizen child is entitled.").

114. Eastman, *supra* note 66, at 1484, 1490.

115. Reihan Salam, *On Birthright Citizenship*, NAT'L REV. ONLINE (Aug. 4, 2010, 5:05 PM), http://www.nationalreview.com/agenda/242513/birthright-citizenship-reihan-salam.

116. *Id.*; *see also*, Mark Krikorian, *Children of Diplomats*, NAT'L REV. ONLINE (Aug. 13, 2010, 10:20 AM), http://www.nationalreview.com/corner/243187/children-diplomats-mark-krikorian (The United States is "lax about citizenship matters."); John Derbyshire, *Birthright Citizenship*, NAT'L REV. ONLINE (Aug.10, 2010, 12:07 PM), http://www.nationalreview.com/corner/242906/birthright-citizenship-john-derbyshire ("Birthright citizenship is an obviously lousy idea – other countries have been revoking it at a fair clip this [sic] past few years."); Jake Morphonios, *Ron Paul: Arrest and Deport Illegal Immigrants*, NOLAN CHART (Aug. 6, 2010), http://www.nolanchart.com/article7907-ron-paul-arrest-and-deport-illegal-immigrants.html (arguing in support of the candidacy of Ron Paul, "Today, when an illegal immigrant sneaks across the border and has a child, that child is automatically granted all the rights and privileges of any other U.S. citizen, including access to social welfare programs such as food stamps, housing benefits, free education and medical care. [Here birthright citizenship intersects with another conservative position—hatred of welfare.] Ron Paul opposes birthright citizenship for illegal immigrants as is permitted under the 14th Amendment.").

117. Will, *supra* note 7.

D. The Legislative History of the Fourteenth Amendment Shows that Those Born in the United States Must Have Complete Allegiance to the United States in Order to Become a Citizen by Birth

The conservatives violate the conservative canon of not using legislative history in arguing against birthright citizenship. Some revisionists, such as Professor Eastman, make an argument based on original intent *as shown by the legislative history*. The argument goes:

> [T]he legislative debates and (to a lesser extent) the overall history of American citizenship and political theory show a "clear intent" that birthright citizenship should extend only to children of American citizens and perhaps of lawful permanent residents, but not reach the children of foreign nationals temporarily resident in the United States, whether legally or illegally.[118]

1. The Revisionists Cite Legislative History that is Taken Out of Context and Ignore Contrary Legislative Statements

The revisionists rely on speeches made by Senator Lyman Trumbull.[119] Schuck and Smith rely on Trumbull's statements during debate over the Fourteenth Amendment.[120] Professor Eastman picks up on Schuck and Smith's use of Trumbull's remarks, calling Trumbull "a key figure in the drafting and adoption of the Fourteenth Amendment."[121] Eastman relies on Trumbull's statement that "subject to the jurisdiction" means "[n]ot owing allegiance to anybody else."[122] George Will then picked up Eastman's use of Trumbull's comment, and used it in his op-ed piece, arguing that we should "correct the misinterpretation of [the Fourteenth A]mendment's first sentence."[123]

Epps points out that the revisionists take Trumbull's statement "subject to the complete jurisdiction thereof" out of its context, which was the discussion of the citizenship of Native Americans:

> What do we mean by "subject to the jurisdiction of the United States?" Not owing allegiance to anybody else. That is what it means. Can you sue a Navajoe [sic] Indian in court? Are they in any sense subject to the

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118. *See* Epps, *supra* note 27, at 342 (explaining the "originalist" argument which he then discredits).

119. Lyman Trumbull was a Senator representing Illinois from 1855 to 1873 and Chairman of the Judiciary Committee from 1861 to 1872. He co-wrote the Thirteenth Amendment.

120. SCHUCK & SMITH, *supra* note 64, at 81–82 ("Senator Trumbull . . . maintained that 'subject to the jurisdiction' of the United States meant subject to its 'complete' jurisdiction; this meant '[n]ot owing allegiance to anybody else,' . . . . This view prevailed.").

121. Eastman, *supra* note 66, at 1486.

122. *Id.* at 1484.

123. Will, *supra* note 7.

> complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction. If they were, we would not make treaties with them. If we want to control the Navajoes, [sic] or any other Indians of which the Senator from Wisconsin has spoken, how do we do it? Do we pass a law to control them? Are they subject to our jurisdiction in that sense? Is it not understood that if we want to make arrangements with the Indians to whom he refers we do it by means of a treaty?[124]

Furthermore, Schuck and Smith misinterpret the language "subject to the complete jurisdiction," which was to apply only to the peculiar situation of American Indians, many of whom lived in reservations, and therefore were not "subject to the complete jurisdiction."[125] Professor Epps is critical of Professor Eastman's use of legislative history; "[he] distorts the tenor of (or

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124. Epps, *supra* note 27, at 358–59 (quoting Sen. Trumbull, CONG. GLOBE, 39TH CONG., 1ST SESS. 2890–91 (1866)).

125. *See id.* at 359. Epps quotes from the Senate debates on the Fourteenth Amendment, which restrict the "subject to the complete jurisdiction" issue to the status of Native Americans:

> They are not subject to our jurisdiction in the sense of owing allegiance solely to the United States; and the Senator from Maryland, if he will look into our statutes, will search in vain for any means of trying these wild Indians. A person can only be tried for a criminal offense in pursuance of laws, and he must be tried in a district which must have been fixed by law before the crime was committed. We have had in this country and have to-day, a large region of country within the territorial limits of the United States, unorganized, over which we do not pretend to exercise any civil or criminal jurisdiction, where wild tribes of Indians roam at pleasure, subject to their own laws and regulations, and we do not pretend to interfere with them. They would not be embraced by this provision.

> Senator Thomas Hendricks of Indiana, a Democrat who had been a persistent foe of the Civil Rights Act, then suggested that Congress had the legal authority, if it chose, to extend its laws to the "wild Indians," even if it lacked the physical power to enforce them at present. Trumbull replied rather tartly that Congress would have "the same power that it has to extend the laws of the United States over Mexico."

> Senator Jacob Howard, the Senate sponsor of the proposed constitutional amendment, then weighed in:

> > I concur entirely with the honorable Senator from Illinois, in holding that the word 'jurisdiction,' as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now. Certainly, gentlemen cannot contend that an Indian belonging to a tribe, although born within the limits of a State, is subject to this full and complete jurisdiction. . . . The United States courts have no power to punish an Indian who is connected with a tribe for a crime committed by him upon another member of the same tribe.

> *Id.* at 360.

simply neglects to quote) the legislative debates around the Clause itself."[126] The revisionists use language from Sen. Trumbull's debates on the Civil Rights Act, not the Fourteenth Amendment, to interpret the Fourteenth Amendment.[127] Moreover, the revisionists fail to mention the legislative history that contradicts their view. Senators Benjamin Wade, Jacob Howard, and John Conness stated that anyone, except children of diplomats, born within the United States was or would be an American citizen.[128]

2. The Revisionists' Legislative History Argument Contradicts the Conservative Position that Judges Should Never Look at Legislative History when Determining the Meaning of the Text

Justice Scalia is particularly scathing in his dismissal of legislative history; "[r]esort to legislative history has become so common that lawyerly wags have popularized a humorous quip . . . : 'One should consult the text of the statute,' the joke goes, 'only when the legislative history is ambiguous.' Alas, that is no longer funny."[129] To Justice Scalia, the use of legislative history enables courts to decide cases based on policy preferences:

> Since there are no rules as to how much weight an element of legislative history is entitled to, it can usually be either relied upon or dismissed with equal plausibility . . . . In any major piece of legislation, the legislative history is extensive, and there is something for everybody.[130]

Scalia's warnings have been ignored by the revisionists. None of the conservative writers, Schuck and Smith, Eastman, nor Will, mention anything about Scalia's warnings against using legislative history. Professor Epps points out that these revisionists in fact do what Scalia says

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126. *Id.* at 349.

127. *See id.* at 352–53. Epps explains:

> As originally written, Trumbull's Civil Rights Bill proclaimed that all persons of 'African descent' resident in the United States were citizens. However, on January 30, Trumbull withdrew this language and offered an amendment to insert this language: '[A]ll persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States . . . .'
>
> It is this Civil Rights Bill language that the proponents of a restrictive reading of the Clause regard as indicating the Fourteenth Amendment Framers' 'intent' to limit birthright citizenship to, in essence, children whose parents had no other citizenship status elsewhere in the world.

Id. at 350–51.

128. *Id.* at 354–61.

129. Scalia, *supra* note 92, at 31.

130. *Id.* at 35–36.

should not be done—use random quotes out of context:

> As legislative history goes, then, the Schuck and Smith argument is a fairly unusual one. It slights the actual language of the measure and the debates of the body that framed it, and insists on the primacy of (1) the language of and debates about a different measure (the Civil Rights Act) and (2) the unstated intentions of a different body (the Fortieth Congress).[131]

E. Judges Should Faithfully Uphold Precedent

Conservatives love (or are at least supposed to love) precedent. Justices O'Connor, Kennedy, and Souter take a classically conservative approach (often the basis for criticizing the Warren Court) that adherence to prior constitutional values breeds stability, certainty, and predictability in constitutional law; disrupts constitutional doctrine as little as possible and only when necessary; and permits incremental decision-making building on the judgment of prior Justices and the lessons of experience.[132]

Conservatives' love of precedent is rooted in their love for the past. "In this mode of belief, one does not look back to the past to understand the process of social and political change or to grasp the way men have faced their problems in order to understand where we are and what new things we must invent for the future."[133] The common law is also thought to embody accumulated wisdom: "information about conflicts and their resolution, about the sense of justice in action, and about human expectations, which is dispersed through the record of the law and is never available when legislation is the sole legal authority."[134]

A respect for precedent, then, was a key principle of conservatism:

> There is a paradox here. A couple of generations ago, many people would have thought it obvious, true almost by definition, that both judicial restraint and conservatism mean adherence to precedent. Precedent keeps judges from going off in a direction of their own choosing; cut judges loose from precedent, and you invite unrestrained adjudication. As for conservatism, precedent is a matter of adhering to what has gone before, of conserving what has been done in the past. So, according to a common definition of conservatism, adherence to precedent should be a core

131. Epps, *supra* note 27, at 346.

132. Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENT. 67 (1993), *available at* http://scholarship.law.wm.edu/facpubs/991.

133. WILLIAM J. NEWMAN, THE FUTILITARIAN SOCIETY 322 (1961).

134. ROGER SCRUTON, *Rousseau and the Origins of Liberalism*, *in* THE ROGER SCRUTON READER 43, 48 (Mark Dooley ed., 2009).

> conservative view.[135]

Furthermore, following precedent avoids the morass of policy:

> A judiciary that stood firm with a strong theory of precedent would rechannel our nation back toward democratic institutions and away from using the courts to make social policy. This in turn would put a premium on legal knowledge and skills, rather than political preferences, in selecting future judges and Justices. The prospect of such a reorientation is reason enough to endorse the strong theory of precedent in constitutional law.[136]

There is a conflict, however, between precedent and that other controlling legal conservative principle, originalism: "To a large extent, originalism and precedent reside in parallel universes that do not intersect. The case for originalism starts with legal positivism, the idea that only enacted law is the law of the land."[137] On the other hand, "if one starts from the universe of precedent, that universe is founded in the Holmesian observation that the law is, ultimately, the judgment of the courts . . . what predicts the judgments of the courts is the precedents of the courts, and therefore precedent is the law."[138]

Thus there is a dichotomy between following precedent and going back to the original intent and the text, a basic one in interpretation. The legal dilemma between precedent and originalism has an analogy in the split between the Catholic and Protestant churches, in which Catholics emphasize the traditions of the church while Protestants emphasize the Biblical text.[139] Justice Scalia seems to be firmly committed to originalism, but—according to the Cato Institute—he "blinked" when "faced with a golden opportunity to advance originalism" in *McDonald v. Chicago* because "following a different—and clearly incorrect—line of precedent was 'easier.'"[140]

The anti-birthright advocates seek to combine a selective view of original intent with a selective view of precedent to justify their position. We have seen that these advocates use selective out-of-context citations of legislative history to find that the original intent of the Citizenship Clause is different than the plain meaning of the text. A similar process is used for the precedent. Professor Graglia cites to the dicta in the *Slaughter-House Cases,*[141] emphasizes *Elk v. Wilkins*,[142] and then

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135. David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL'Y 137, 138 (2011).

136. Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL'Y 977, 981 (2008).

137. *Id.* at 977–78.

138. *Id.* at 978.

139. *See* Allen Kamp, *The Counter-Revolutionary Nature of Justice Scalia's "Traditionalism,"* 27 PAC. L.J. 99, 110 (1995).

140. Josh Blackman & Ilya Shapiro, *Is Justice Scalia Abandoning Originalism?*, CATO INST. (March 9, 2010) http://www.cato.org/pub_display.php?pub_id=11431.

141. *See* Graglia, *supra* note 5, at 8–9.

attacks *United States v. Wong Kim Ark*,[143] a case that has been the controlling law for more than one hundred years.

Those debating birthright citizenship have ignored the classic case on personal jurisdiction, *Pennoyer v. Neff*.[144] Decided not that long after the drafting of the Fourteenth Amendment, and just six years before *Elk v. Wilkins*, the Court saw jurisdiction over persons and property within the territory of the sovereign as axiomatic:

> One of [the principles of public law] is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil *status* and capacities of its inhabitants; to prescribe the subjects upon which they may contract . . . .[145]

Pennoyer's basing personal jurisdiction on presence was reaffirmed by the Court, in an opinion written by Justice Scalia, in *Burnham v. Superior Court of California*.[146] Justice Scalia there upheld the tradition of jurisdiction based on presence:

> Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State. The view developed early that each State had the power to hale before its courts any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the State could retain jurisdiction to enter judgment against him, no matter how fleeting his visit.[147]

Therefore, such jurisdiction satisfies the Fourteenth Amendment.[148]

Conservatives (including Justice Scalia) ignore these principles and traditions when it

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142. *See id.* at 9.

143. *See id.* at 9–11.

144. Pennoyer v. Neff, 95 U.S. 714 (1878).

145. *Id.* at 722.

146. Burnham v. Super. Ct. of Cal., 495 U.S. 604 (1990).

147. *Id.* at 610–11.

148. For new procedures, hitherto unknown, the Due Process Clause requires analysis to determine whether "traditional notions of fair play and substantial justice" have been offended. But a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.

Id. at 622 (quoting Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945)).

comes to birthright citizenship. In *Hamdi v. Rumsfeld*,[149] a habeas petition was brought on behalf of an American citizen seized in Afghanistan as an enemy combatant; Justice Scalia (joined by Justice Rehnquist) described Hamdi as a "presumed American citizen."[150]

Professors Schuck, Smith, Eastman, and Graglia all base their rejection of birthright citizenship on *Elk*, reading it to require the consent of the sovereign and allegiance.[151] In so doing, they ignore *Ark*, the later precedent.

Although conservatives claim to uphold precedent faithfully, in the case of birthright citizenship, they expand the scope of the precedents they like and refuse to follow the ones they do not; in fact, these conservatives are advocating for a pre-established opinion, not adhering to precedent.

F. The United States Is One of the Few Countries to Allow Citizenship by Birth

Conservatives believe that the United States should not be influenced at all by foreign law. Their attitude has been long standing; certainly, nationalism and conservatism have gone together.

In his book *The Meaning of Conservatism*, Roger Scruton emphasizes the centrality of a particular society:

> While conservatism is founded in a universal philosophy of human nature, and hence a generalized view of social well-being, it recognizes no single 'international' politics, no unique constitution or body of laws which can be imposed irrespective of the traditions of the society which is to be subsumed under them.[152]

Justices Scalia and Thomas continually criticize the Supreme Court's use of foreign law. Justice Scalia warned "this Court[] . . . should not impose foreign moods, fads, or fashions on Americans."[153] In *Roper v. Simmons*, Justice Scalia rejected "the views of foreign courts and legislatures. . . ."[154]

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149. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

150. *Id.* at 554 (Scalia, J., dissenting) (casting doubt on Hamdi's citizenship status because he was born to foreign nationals who were visiting the United States at the time, but not explicitly dealing with the issue in a case regarding Hamdi's right to due process).

151. *See* SCHUCK & SMITH, *supra* note 64, at 83–84; Eastman, *supra* note 66, at 1484–90; Graglia, *supra* note 5, at 9–11.

152. ROGER SCRUTON, THE MEANING OF CONSERVATISM 68 (1980).

153. Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (quoting Foster v. Florida, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari)).

154. Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting). Scalia writes:

In his blog, Jim Kelly, a conservative commentator, decries the use of foreign law and opinion, and thus celebrates the Court's opinion in *Graham v. Florida*, which stated that judgments of other nations are not dispositive.[155]

Matthew Shaffer, in his blog, discussed the internationalism of Christiane Amanpour, then the hostess of ABC's Sunday morning political talk show, *This Week*.[156] His article exemplifies how a clearly knowledgeable political commentator is actually valued *less* by conservatives when it comes to national discussions, because of her international influences. Shaffer notes that she sees issues from an international perspective; "[d]espite her physical relocation to Washington, D.C., Amanpour still seems to be observing American politics from overseas."[157] The problem is that her internationalism makes her parochial: her talking only to a "cosmopolitan clique," whose "new international voice has never conversed with, and cannot sympathize with, the policemen, firefighters, veterans, and Teamsters who protested at Ground Zero on Sunday morning during Amanpour's broadcast."[158] The bottom line is that "her distance from American concerns disables her from being a fair moderator of American debates."[159]

But when it comes to birthright citizenship, conservatives use the fact that many foreign states have rejected it to advocate its rejection in this country: Reihan Salam writes in his *National*

> The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

Id.

155. Jim Kelly, Human Rights, Law & Justice, *U.S. Supreme Court Clarifies Limits on Its Use of International Law*, GLOBAL GOVERNANCE WATCH, (May 19, 2010), http://www.globalgovernancewatch.org/spotlight_on_sovereignty/recent.asp?id=152&css=. Kelly writes:

> The Court explained that the judgments of other nations and the international community are not dispositive and are used only for support for the Court's own independent conclusion on the matter. No doubt, this evolution in the Court's approach disappoints those transnational progressives who had petitioned the Court to use international laws and practices to guide the Court's Eighth Amendment analysis, rather than to merely support a decision of the court based exclusively on domestic laws and practices.

Id.

156. Matthew Shaffer, This Week *with Amanpour: International and Parochial*, NAT'L REV. ONLINE (August 10, 2010), http://www.nationalreview.com/articles/244447/i-week-i-amanpour-international-and-parochial-matthew-shaffer?page=1.

157. *Id.*

158. *Id.*

159. *Id.*

Review Online blog, *The Agenda*, that "[i]n response to agitation over a growing population of Turkish guest workers, Germany changed its rules to grant citizenship to Germany-born children of Germany-born children [sic] of resident foreigners."[160] John Derbyshire, another National Review Online blogger, comments: "[b]irthright citizenship is an obviously lousy idea—other countries have been revoking it at a fair clip this [sic] past few years—but . . . a Constitutional amendment probably *is* necessary."[161] Although claiming to reject the use of foreign law, conservatives do just that to argue against birthright citizenship.

G. The Drafters of the Fourteenth Amendment Never Intended the Amendment to Grant Citizenship to a Massive Number of Illegal Aliens

The contradiction between conservatism and the arguments in favor of rejecting birthright citizenship are, however, nothing compared to Professor Graglia's argument based on intent—or rather the absence of intent:

> Like any writing, or at least any law, [the Citizenship Clause] should be interpreted to mean what it was intended or understood to mean by those who adopted it—the ratifiers of the Fourteenth Amendment. They could not have considered the question of granting birthright citizenship to children of illegal aliens because, for one thing, there were no illegal aliens in 1868, when the amendment was ratified, because there were no restrictions on immigration.[162]

This argument was picked up by George Will[163] and since then has gone viral—if one does a Google search for "never intended children illegal immigrants" one finds innumerable cites to the conservative blogosphere.

The argument, however, is too good. If the Constitution's text does not apply to new situations, those not contemplated by the drafters, its text applies to and controls very little. Professor Graglia's logic destroys the principle of original intent. A law should be interpreted according to the adopters' intent or understanding, but since they had no intent—indeed could not have had an intent—regarding children of illegal aliens, we are free to read the law the way we want to. An interpretative technique whose claimed virtue lies in preventing subjective judgments has been turned into one that does just that. If one can ignore the Constitution if the drafter did not foresee the issue in question, why have a written constitution?

1. The Argument that There Were No Illegal Immigrants When the Fourteenth Amendment

160. Salam, *supra* note 115.

161. Derbyshire, *supra* note 116.

162. Graglia, *supra* note 5, at 5–6.

163. *See* Will, *supra* note 7.

Was Drafted Is Historically Incorrect

Because states regulated immigration before the Civil War, there were illegal aliens. The importation of slaves was banned as of 1807, but many were imported illegally.[164] If the Citizenship Clause does not apply to illegal aliens, then such illegally imported slaves—and their children—were not made citizens by the amendment, which was clearly not its purpose. There were many other immigrants at the time of the Fourteenth Amendment, many of them unwanted. Professor Epps points out that the Senate debates were concerned with the Chinese and Gypsies who were not citizens and whose presence was not wanted.[165]

There was also a huge population of non-citizens then living in the United States—the African Americans who had been freed by the Thirteenth Amendment. Their right to citizenship was problematic. The controlling case, *Dred Scott,* had authoritatively declared that they were not citizens.[166] Their right to live in the United States was in dispute—many proposed that all those of African descent be deported involuntarily.[167]

In 1860, 13.2% of the population in the United States was foreign-born.[168] Comparing that to the 12% reported by the most recent census,[169] the logical conclusion is that the citizens of 1860s America were no doubt aware of the issue of immigration, as we understand the term today.[170] The United States' immigration circumstances have not changed:

> America in 1866 was a nation as profoundly transformed by immigration as it is in 2010. Issues of language, culture, religion, social mores and other aspects of the American identity were as salient then as they were now. We would be making a profound historical error to imagine that the generation that framed the Clause was unaware that migration was a transformative and often destabilizing force in American society.[171]

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164. *See* Epps, *supra* note 27.

165. *See id.* at 351–52, 383–84, 386; CONG. GLOBE, 39th CONG., 1ST SESS. 498 (1866); *see also* Elk v. Wilkins, 112 U.S. 94, 114 (1884).

166. *See* Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393 (1856).

167. *See* FONER, *supra* note 29, at 17; *see* discussion *supra* Part I.B (The Fourteenth Amendment was designed to resolve their citizenship problem).

168. *See id.* at 385.

169. *Nation's Foreign-Born Population Nears 37 Million*, U.S. CENSUS BUREAU NEWSROOM (Oct. 19, 2010), http://www.census.gov/newsroom/releases/archives/foreignborn_population/cb10-159.html.

170. *See* Epps, *supra* note 27, at 385–86.

171. *Id.* at 385; *see supra* text accompanying notes 25–27. Attorney General Bates's comment that "every person born in the country is, at the moment of birth, *prima facie* a citizen . . . as recognized by the Constitution," constitutes perhaps the most damning piece of evidence against the anti-birthrighters. *See* Epps, *supra* note 27, at 380. Moreover, any discussion of legislative intent violates the fundamental conservative canon of textualism.

2. The Constitution Is Destroyed by the Argument that We May Ignore the Words of the Amendment Because the Drafters Could Never Have Contemplated Today's Illegal Immigration

The conservative argument is that the Constitution should be interpreted according to original intent.[172] The argument is that the drafters of the Amendment had no intent to grant citizenship to illegal aliens because they never could have conceived of the present immigration situation, where the United Stated is a rich country sharing with a long border with a poor one, Mexico. Conservatives argue that we must follow original intent because that is the only way to apply what the Constitution actually means; if the drafters had no intent, then we may erase the text and start over, doing the right (no pun intended) thing.

The Constitution, unfortunately, gives us no guidelines as to how to deal with unanticipated social changes. Still, the Supreme Court has recognized that constitutional rights can still apply, even in unanticipated circumstances. For instance, the Constitution grants the executive the power to "be Commander in Chief of the Army and Navy," and our society has accepted that this power extends to the Air Force as well, even though the constitutional drafters could not have anticipated a national air force.[173] The First Amendment protects the freedom of the press, and that freedom has been extended to digital publications, including television news shows and websites, which surely our forefathers could not have intended. The Second Amendment protects the right to bear arms but was adopted at a time when handguns were capable of firing only one or two bullets before reloading. Constitutional protections have extended to modern automatic weapons, such as the semi-automatic pistol used in Arizona to shoot Congresswoman Gabrielle Giffords, among others.[174] Large, multi-state corporations, which did not exist at the time of the ratification of the Constitution,[175] are now accepted as having many of the same rights as people.[176] A unanimous court in *Brown v. Board of Education*[177] overruled the older, conservative argument that there was

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172. But it seems as if the conservative argument is more that the Constitution's drafters did not intend to grant a right, rather than having a positive intent. *See, e.g.*, Graglia, *supra* note 5, at 6 ("It is hard to believe, moreover, that if [the drafters of the Fourteenth Amendment] had considered [the question of granting birthright citizenship to children of illegal aliens], they would have intended to provide violators of the United States immigration law be given the award of American citizenship for their children born in the United States.").

173. *See* Epps, *supra* note 27, at 382.

174. *See Gun Used in Ariz. Shooting Purchased Legally: 9mm Glock Used in Shooting That Killed 6 and Injured 13 Was Purchased at Sportsman's Warehouse in Tucson*, CBS NEWS (Jan. 98, 2011, 12:53 PM), http://www.cbsnews.com/stories/2011/01/08/national/main7226879.shtml.

175. *See* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 579 (1990). The Framers certainly were aware of corporations. In that era, most corporations were chartered by state legislatures for specific purposes, including banks, canal companies, railroads, toll bridge companies, and trading companies.

176. *See* Citizens United v. FEC, 130 U.S. 876 (U.S. 2010); Philip Rucker, *Mitt Romney says 'corporations are people' at Iowa State Fair*, WASH. POST (Aug. 11, 2011), http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html.

177. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

no constitutional right to desegregated education.[178] These examples show how our society, including conservatives, has accepted the application of constitutional rights to people and circumstances unanticipated by the framers of the Constitution.

We now return to the conservative argument based on negative intent regarding the unforeseen consequences of birthright citizenship. The real problem with this argument is that it makes a large part of the Constitution useless. If constitutional rights only extend to things that existed at the time of the drafting of the Constitution, the document would be worthless because it would apply to almost nothing in our society; taken seriously, the argument against unforeseen consequences is an argument against a written constitution.

III. CONCLUSION

The conservatives whom I have discussed reveal themselves to be arguing for a substantive goal, not for following a formal set of interpretive procedures. While attacking liberals for not following rigorous methods of construction, they are all too willing to jettison formalism, originalism, and textualism to argue that the law should be interpreted to solve what they see as a social problem. These arguments that we should reconsider the Fourteenth Amendment may be persuasive, but I do not find them so persuasive. When a nation has the power to decide who may be citizens and who must be relegated to a second-class status, we see such deplorable human rights violations as the expulsion of the Jews from Spain,[179] *Dred Scott*,[180] and the Nuremberg laws.[181]

The Constitution may not be perfect; there are policy choices within the Constitution with which many, including myself, disagree, such as the Electoral College or the Second Amendment.

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178. Some conservatives, however, remained unconvinced:

> [T]he federal Constitution does *not* require the States to maintain racially mixed schools. Despite the recent holding of the Supreme Court, I am firmly convinced—not only that integrated schools are not required—but that the Constitution does not permit any interference whatsoever by the federal government in the field of education. It may be just or wise or expedient for negro children to attend the same schools as white children, but they do not have a civil right to do so which is protected by the federal constitution, or which is enforceable by the federal government.

BARRY GOLDWATER, THE CONSCIENCE OF A CONSERVATIVE 35 (1990).

179. *See, e.g.*, Edward Peters, *The Edict of Expulsion of the Jews*, THE FOUNDATION FOR THE ADVANCEMENT OF SEPHARDIC STUDIES AND CULTURE (Sept. 2002), http://www.sephardicstudies.org/decree.html (expelling all Jews from Spain by royal decree).

180. Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393 (1856) (holding African-Americans were not citizens).

181. *See, e.g., Nazi Laws on Jews Put into Effect*, JEWISH TELEGRAPHIC AGENCY (Sept. 17, 1935), http://archive.jta.org/article/1935/09/17/2831819/nazi-laws-on-jews-put-into-effect (describing laws depriving Jews of citizenship, among other things, in Nazi Germany).

However, the Constitution is our governing document, and, until it is amended, we all must abide by the law of our nation.

NOTE

THE FUTURE OF ENGLISH LANGUAGE LEARNER EDUCATION: THE NEED FOR DEDICATED ADVOCACY THROUGH LITIGATION AND LEGISLATION

Elizabeth Fenner

I. INTRODUCTION

Traditionally, education has been one policy area that politicians in the United States have tried to isolate from partisan bickering and political posturing. At the local, state, and federal levels, our elected leaders have tried to do what is best for children. They have tried to prevent partisanship from slowing down the political process as it often does in other policy-making areas. Or at least they have claimed to try to avoid those consequences.[1] Their attempts have not always succeeded, as evidenced in the failed 2007 attempt to reauthorize the Elementary and Secondary Education Act (ESEA), the most current version of which President George W. Bush titled No Child Left Behind (NCLB).[2]

While some areas of education policy have remained relatively free of partisan stalemate, one area that has been plagued by it, especially in the last thirty years, has been the education of English Language Learners (ELLs). The development of ELL education in the last thirty years has suffered from an increasingly hostile political environment that treats it as a hot-button issue inextricably linked to issues like illegal immigration and the movement to declare English the official language of the United States.[3] It has been challenging for attorneys in this area of education law to construct a framework from which successful legal challenges can be made to enlist the aid of the courts in improving educational outcomes for ELLs.[4] This paper will focus on education of ELLs whose native language is Spanish. The choice of focus on that group is based on numbers. According to the National Center for Education Statistics 2010 Condition of Education report, "In 2008, some 21 percent of children ages 5-17 (or 10.9 million) spoke a language other than English at home, and 5 percent (or 2.7 million) spoke English with difficulty. Seventy-five percent of those who spoke English with difficulty spoke Spanish."[5]

Because of the unique cultural and political position that Spanish-speaking ELLs occupy in the United States, the group has also functioned as an interesting model in terms of the process

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1. *See, e.g., Hearing on Bilingual Education: Hearing on H.R. 11 and H.R. 5231 Before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the H. Comm. on Educ. and Labor*, 98th Cong. 58 (1984) [hereinafter *Hearing on Bilingual Education*].

2. *See, e.g.*, Sam Dillon, *Education Secretary Arne Duncan Rethinks His Goals*, N.Y. TIMES, Dec. 11, 2010, *available at* http://www.nytimes.com/2010/12/12/us/politics/12education.html?_r=1 ("The No Child Left Behind law is the latest version of the 1965 Elementary and Secondary Education Act, which channels federal money to disadvantaged schools. It has been updated several times in a process known as reauthorization.").

This paper will refer to the reauthorization of the ESEA, because the Obama Administration has indicated a desire to return to that title, and to remove the "No Child Left Behind" title imposed by the George W. Bush Administration. *See* U.S. DEPT. OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 2 (2010), *available at* http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf.

3. *See, e.g., Hearing on Bilingual Education*, *supra* note 1, at 65.

4. *See* Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 911, 915–16 (2010).

5. DEPT. OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2010 44 (2010).

toward educational equity.[6] One of the first problems faced by advocates working toward educational equity for this population was the challenge of how to fit them into the civil rights advocacy framework that was largely organized around two racial categories: black and white.[7] Since that model seemed an ill fit, a logical alternative was the immigrant model, and the possibility of treating Spanish-speaking ELLs the same way as European immigrants had been treated throughout history.[8] However, that model was equally insufficient for various reasons.[9] Activists involved in litigation geared toward educational equity for Spanish-speaking ELLs have achieved significant progress in carving a new and unique place for those students in civil rights litigation and have thus secured some improvements in the abilities of educational institutions to fulfill their needs.[10]

Despite these successes, new problems have emerged in recent decades, and these challenges require advocates of bilingual education to reinvent the legal framework they are using to pursue improvements in educational equity.[11] Because recent cases have signaled reluctance on the part of courts to require improved ELL or other programs as remedies in civil rights and school finance litigation cases, the new framework must include both litigation and policy initiatives.[12] Additionally, advocates must face the current political environment. Since the 1980s, several policymakers have made evident their goal to bind bilingual education to the contentious issues of illegal immigration and a movement advocating that English be declared the nation's official language.[13] The resulting political atmosphere complicates this progress.

Advocates must also address the changing demographics of the Spanish-speaking ELL population, and above all, the movement of these students into areas where their population has been previously non-existent or at least much smaller.[14] For that reason, the legal framework for pursuing educational equity for these students faces a new challenge: It must no longer be one boiler-plate approach, but must be attentive to the differing roles ELLs play in different regions of our country.

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6. *See* Bowman, *supra* note 4, at 913–14.

7. *Id.* at 915.

8. *See id.* at 915 (discussing the possibility that the immigration/assimilation paradigm would be a better fit).

9. *See id.* at 916 (finding the immigration paradigm inadequate because Latino's frequently have a presumption of foreignness that does not attach to ethnic Europeans).

10. *Id.* at 923 (describing the shift from submersion techniques to education using the native language to help teach English).

11. *See id.* at 916.

12. *See id.* at 918.

13. *See, e.g., Hearing on Bilingual Education*, *supra* note 1, at 65, 88; Bethany Li, *From Bilingual Education to OELALEAALEPS: How the No Child Left Behind Act Has Undermined English Language Learners' Access to A Meaningful Education*, 14 GEO. J. ON POVERTY L. & POL'Y 539, 541, 543–44 (2007).

14. *See* Bowman, *supra* note 4, at 935.

This paper will look at the ways in which ELL education has been and may continue to be influenced by different litigation and policy initiatives. Before beginning the conversation, it is important to understand a frequently used term in ELL education, "bilingual education." In her reference handbook on bilingual education, Rosa Castro Feinberg defines that term as "the use of English and another language for instructional purposes."[15] It is mostly used to educate ELLs, and has been expanded in scope in recent years. Bilingual education originally consisted of two-way immersion programs and programs that use both the native language and English, but has grown to include programs that use English exclusively, such as English-immersion.[16] Feinberg points out that inclusion of the second type of program under the rubric of "bilingual education" is imprecise because it does not educate students to be bilingual, but to be monolingual English-speakers.[17]

As scholar Bethany Li describes in her law review article on ELL education, the three primary bilingual education models used today are transitional, developmental, and two-way bilingual education.[18] The goal of transitional programs "is to enable ELLs to phase into mainstream all-English classes by providing initial content instruction in the native language and gradually switching to English content instruction."[19] Developmental programs, or maintenance programs, have a different goal of maintaining and continuing to develop "a high level of proficiency in both the native language and English."[20] These programs seek bilingualism and multiculturalism among ELLs and are a type of dual-language program because they make significant use of both languages in their instruction.[21] A two-way bilingual program is a type of dual-language program that has the same goal of developmental programs, but works toward achieving that goal for two language groups.[22] The term "two-way" refers to the native languages of the students enrolled, whereas "dual-language" refers to the concept of using more than one language for instruction.[23] For example, in two-way immersion programs English-speaking and Spanish-speaking students would be in the same classroom, each working to acquire the other's native language and to maintain their own.[24]

Li also points out that two other methods of "bilingual education," are on the rise.[25] These two methods are those that Feinberg would argue do not belong within the rubric of "bilingual

15. ROSA CASTRO FEINBERG, BILINGUAL EDUCATION: A REFERENCE HANDBOOK 1 (2002).
16. *See, e.g., id.*
17. *See id.*
18. Li, *supra* note 13, at 544.
19. *Id.*
20. *Id.*
21. *See id.* at 539, 544 (describing approaches and goals of bilingual education).
22. *See* FEINBERG, *supra* note 15, at 22, 93.
23. *See* FEINBERG, *supra* note 15, at 22.
24. *See id.* at 22–23.
25. Li, *supra* note 13, at 544–45.

education" because they use English predominantly or exclusively.[26] The English immersion model, as described by Li, is "sometimes known as the 'sink or swim' method because it provides little or no instruction in the students' native language."[27] The other type, English as a Second Language (ESL) classes are supplementary classes to teach students English outside of their regular curriculum and classroom time with their peers,[28] in which materials are taught "in modified English for easier comprehension by [ELL] students."[29]

Although recent years have seen a trend toward the latter types of programs that do not focus on native-language maintenance, Li points out the many benefits of traditional bilingual education programs that include instruction in both languages and an emphasis on bilingualism.[30] First, by developing stronger language skills in their native language, students are able to learn English more quickly by transferring those skills to English.[31] Second, students can continue to advance their knowledge of all content areas, rather than having their learning of other subjects interrupted by the need to transition to English.[32] Third, students can be tested and challenged in their native language in a way that is appropriate for their grade level, rather than being held back in their assessments by the language barrier.[33] Finally, students experience emotional advantages when they continue to learn their native language and culture, including increased pride and self-confidence.[34] These benefits make students who maintain their native language more motivated to attend and to succeed in school.[35]

As this paper will explain, the choice between these models is a matter of government and school-district policy, usually at the state and local level.[36] However, federal law has recently gained in influence over these decisions, necessitating a look at whether ELL students are getting what they deserve out of their education, and how advocates, through litigation and policy initiatives, might work to ensure that they are.[37] As part of that inquiry, this paper suggests that such advocacy be focused on securing changes to federal law that would be more encouraging of developmental or dual-language programs, and that would remove the current bias toward transitional programs. It also suggests broader, more practical changes that have proven successful in some districts and may be more politically palatable than changes based on native-language

26. *See* FEINBERG, *supra* note 15, at 1.
27. Li, *supra* note 13, at 545.
28. *Id.*
29. United States v. Texas, 601 F.3d 354, 360 (5th Cir. 2010).
30. Li, *supra* note 13, at 546–8.
31. *Id.* at 546.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *See* Bowman, *supra* note 4, at 918.
37. *See, e.g., id.* at 929–31.

maintenance.

II. PURPOSE

The last fifty years have seen various efforts to improve educational outcomes for ELLs through litigation and legislation.[38] While advances have been made, the models used previously have proven ineffective to seek continued advances.[39] We are at a critical moment in terms of what lawyers and policy advocates can do to help this significant population of our country's students. Advocates seeking to create a new framework to systematically address the need for improved bilingual education through litigation and policy initiatives must understand the context affecting today's struggle, including the history of bilingual education in this country and the hostile political climate of today.

After briefly exploring bilingual education's history and its position in today's political picture, this paper will address the continued viability of the litigation strategies that have been employed to this point. My analysis of the progress made by litigation movements until the present day will focus on the state of Texas, where much of such litigation has originated, and where there has been at least one recent successful case. That analysis will shape my conclusion about the approach that should be taken in states and districts with long-established, large populations of Spanish-speaking ELLs. In terms of states with ELL populations that have only recently developed, I will argue that they present the greatest opportunity for continued litigation, and that policy initiatives can be successful there as well, as demonstrated by advances made in one city in particular, Saint Paul, Minnesota.[40]

While I will argue that advocates should continue to pursue litigation strategies, I recognize that the greatest likelihood for progress lies within the policy realm. Advocates should work toward changes in federal policy as a way to affect the current legal framework by raising awareness and concern regarding education of Spanish-speaking ELLs. That way they can gradually carve a greater opportunity for legal success for these students.

Fortunately, a major policy opportunity is on the horizon. Obama Administration leaders as

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38. *See id.* at 922–33 (summarizing legislation and litigation related to ELL education from the 1960s to the present).

39. *Id.* at 929–33.

40. *See* COUNCIL OF THE GREAT CITY SCHOOLS, SUCCEEDING WITH ENGLISH LANGUAGE LEARNERS: LESSONS LEARNED FROM THE GREAT CITY SCHOOLS (2009) [hereinafter *Lessons Learned*]. The Council of the Great City Schools "is a coalition of 66 of the nation's largest urban public school systems.... [T]he Council is located in Washington, D.C., where it works to promote urban education through legislation, research, media relations, instruction, management, technology, and other special projects designed to improve the quality of urban education. The Council serves as the national voice for urban educators, providing ways to share promising practices and address common concerns." COUNCIL OF THE GREAT CITY SCHOOLS, http://www.cgcs.org/about/ (last visited January 3, 2011).

well as congressional Republicans have indicated their desire to overhaul NCLB by reauthorizing the ESEA in the near future.[41] Since it was enacted in 1965, the ESEA has been frequently revised, and prior to its most recent reauthorization in 2001, had gone no more than six years without congressional action.[42] After more than a decade without a revision, the next reauthorization's timing is still uncertain, but it is indisputably long overdue. This paper will therefore consider the future of the ESEA, and lay out several goals that should be pursued in its reauthorization. I will do so with the views of current political leaders in mind, by looking at various indications of what the Democrats in the Obama Administration and congressional Republicans might advance when approaching the subject of ELL education in the context of the upcoming ESEA reauthorization.

III. A SUCCESSFUL ADVOCATE MUST UNDERSTAND THE HISTORY OF BILINGUAL EDUCATION IN THIS COUNTRY INCLUDING BOTH LITIGATION AND POLICY PERSPECTIVES

A. Brief General History of Bilingual Education of Spanish-Speakers

While most of the history of bilingual education for Spanish-speaking ELLs has taken place since the 1960s, it is relevant to begin a study of the history of bilingual education in the nineteenth century by looking at the nation's approach to education of European immigrants who did not speak English. During that first period, many immigrants continued to use their native languages and were successful to some extent in demanding accommodations within the United States education system.[43] For example, various public schools had bilingual instruction in German, French, and Spanish during the period between 1839 and 1880 (although the second two were only used in Louisiana and New Mexico respectively).[44] Additionally, between 1800 and 1917, there were programs teaching students both German and English in Cincinnati, Indianapolis, and Baltimore as well as other rural locations like New Ulm, Minnesota.[45] Various private schools also had bilingual programs or taught entirely in German during that period.[46]

The existence of those programs, especially those in public schools, demonstrate that at the time there was a certain level of political and societal acceptance of immigrants and their desire to maintain their native language.[47] However, those students were soon to feel the profound effect that

41. *See, e.g.*, Dillon, *supra* note 2.

42. *See, e.g.*, NATIONAL CLEARINGHOUSE FOR ENGLISH LANGUAGE ACQUISITION & LANGUAGE INSTRUCTION EDUCATIONAL PROGRAMS, ESEA REAUTHORIZATION, http://www.ncela.gwu.edu/content/2_esea_reauthorization.

43. *See* James Crawford, *Hold Your Tongue*, *in* THE LATINO/A CONDITION 560 (Richard Delgado & Jean Stefancic eds., 1998).

44. *See* THEODORE ANDERSSON & MILDRED BOYER, BILINGUAL SCHOOLING IN THE UNITED STATES 17–18 (1970).

45. *See id.*

46. *See id.*

47. *See* Juan F. Perea, *Demography and Distrust: An Essay On American Languages, Cultural Pluralism, and Official*

a change in political climate could have on bilingual education policy. During World War I, nationalism was deemed so important to military success that during the first half of the twentieth century the United States' education system stopped providing instruction in other languages.[48] Since World War I, strong nationalistic agendas in the United States have hindered the progress of developmental models of bilingual education.[49]

That end to German–English bilingual programs precipitated by World War I demonstrates a nationalistic reaction to a perceived threat by a particular language group.[50] The United States' opposition to Germany in the war engendered hostility toward German speakers in the United States and reduced support for education programs allowing German-speaking students to maintain their native language.[51] Although the current situation in the United States is not perfectly analogous in that the country is not at war with any Spanish-speaking country, other perceived threats like illegal immigration have tainted the current political climate against achieving progress for developmental bilingual education for Spanish-speaking ELLs.[52] This paper will further explore that parallel development between German–English and Spanish–English bilingual education. In order to proceed as history developed, however, it will leave that comparison aside for now, and move on to the next, more encouraging period for ELLs.

The second half of the twentieth century was a renewed period of support for bilingual education.[53] Indeed, bilingual education was praised as an educational necessity following the Russian success with Sputnik in 1957.[54] Americans began to consider bilingualism of increased value to prepare United States citizens to participate at a high level in an increasingly global society.[55] It was in the midst of this peak in support for bilingual education that there was the first real push for Spanish–English developmental bilingual education.[56] This push followed the entry of a large number of Cuban refugees in 1959.[57] Fleeing the Cuban Revolution, those immigrants came

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English, 77 Minn. L. Rev. 269, 314–15 (1992) (describing the rise in state support for public education in both English and German).

48. *See* FEINBERG, *supra* note 15, at 45.

49. *See* Perea, *supra* note 47, at 329–31 (describing the effects of anti-German nationalism that arose during World War I); Li, *supra* note 13, at 541 (describing the detrimental impact of current immigration and national security issues on the development of bilingual education pedagogy).

50. *See* Perea, *supra* note 47, at 329–31.

51. *See id.* (reporting state efforts to restrict teaching of foreign languages, especially German).

52. *See* Li, *supra* note 13, at 541.

53. *See, e.g.*, FEINBERG, *supra* note 15, at 45.

54. *See id.* at 49.

55. *See id.* at 45–46.

56. *See id.*

57. *See* Cristy Lopez et al., *Cultural Variation within Hispanic American Families, in* COMPREHENSIVE HANDBOOK OF MULTICULTURAL SCHOOL PSYCHOLOGY, 238–39 (Craig L. Frisby & Cecil R. Reynolds eds., 2005).

to the United States for political reasons, and initially hoped to return to Cuba.[58] Two scholars of bilingual education, Theodore Andersson and Mildred Boyer, suggest that 1963 marked a rebirth of bilingual education, starting the second phase of bilingual education history.[59]

Unfortunately for most Spanish-speaking ELLs today, Cuban immigrants who provided the support for bilingual education in the 1960s received a different level of social and political acceptance and support than most of their modern counterparts.[60] The government had a lot of sympathy for the Cuban immigrants because it saw them as refugees who were supporting democracy by fleeing an unjust regime.[61] Thus, bilingual programs re-emerged in this second period of bilingual education history to allow those refugees who intended to return to their Spanish-speaking homeland to maintain their native language abilities.[62] One example was the Coral Way School in Miami, Florida.[63] Seeing the success of Coral Way's two-way immersion model, similar programs emerged in Texas, New Mexico, Arizona, California, and New Jersey.[64] Bilingual education received support on the federal level as well, with the passage of the Bilingual Education Act in 1968 and formation of the National Association for Bilingual Education in 1975.[65]

That relatively supportive period for bilingual education ended abruptly in the 1980s. In that decade, President Reagan declared from the start of his administration that he would not support bilingual education.[66] Additionally, the 1980s saw the formation of several initiatives against bilingual education and other issues affecting the Spanish-speaking community in this country.[67] The "English Only" movement emerged, and its proponents advocated declaration of English as this country's official language, and exclusive use of English in public places like schools and government offices.[68]

While support for developmental bilingual education did re-emerge in the 1994 reauthorization of the Bilingual Education Act, it again declined in the late 1990s and after the turn

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58. *Id.* at 239.

59. ANDERSSON, *supra* note 44, at 18–20.

60. *See* Lopez, *supra* note 57, at 239 (describing greater governmental hospitality given Cuban immigrants because of their refugee status).

61. *See id.*

62. ANDERSSON, *supra* note 44, at 18.

63. *Id.*

64. *Id.* at 18–20.

65. *See id.*; Salvador Hector Ochoa, *The Effectiveness of Bilingual Education Programs in the United States: A Review of the Empirical Literature*, *in* COMPREHENSIVE HANDBOOK OF MULTICULTURAL SCHOOL PSYCHOLOGY 335 (Craig L. Frisby & Cecil R. Reynolds eds., 2005).

66. *See* Suzanne Daley, *Panel Asks Stress on English Studies*, N.Y. TIMES, May 6, 1983, at A1; FEINBERG, *supra* note 15, at 58.

67. *See* FEINBERG, *supra* note 15, at 57–58.

68. *Id.* at 57.

of the century. The 1994 reauthorization highlighted the goal of developing students' native-language skills so as to promote bilingualism and multiculturalism.[69] However, soon thereafter the most direct hit to bilingual education occurred with California's Proposition 227 in 1998.[70] By passing that ballot initiative, voters in California ended all bilingual education programs in the state, and enforced a system of English immersion for Spanish-speaking ELLs.[71] Furthermore, in 2002, the George W. Bush Administration, together with Congress, altered and incorporated the provisions that had comprised the Bilingual Education Act into the ESEA, and changed the focus of those provisions in a way that scholars have argued has limited options for bilingual education and hurts ELLs.[72]

This brief history of the political and social developments in ELL education ends at a low point for bilingual education, but yields some potential hope for the future. Just as the nationalism engendered by World War I had a chilling effect on bilingual education in the early twentieth century, the illegal immigration and English Only debates have engendered a hostile nationalistic attitude in this country that works against bilingual education.[73] For social and political reasons, society has placed a greater premium on the English-learning part of education for Spanish-speaking ELLs than on what approaches work best for those students' overall education.[74] What this trend has ignored and what is repeatedly found in studies by education scholars is that developmental bilingual education models, by allowing ELLs to maintain and grow their skills and pride in their native languages and cultures, allows them to be more successful in obtaining a general as well as an English-language education.[75]

As we saw following World War I, such a period of nationalism does not necessarily sound a death knell for bilingual education.[76] Once the threat is removed, the climate in this country can return to being a hospitable one for bilingual education, as it did in the 1990s. It appears, therefore, that the best thing that could happen for bilingual education would be for the government to reduce the focus on the issue of illegal immigration by enacting comprehensive immigration reform, so as to remove the source of the current nationalistic reaction. In the meantime, however, advocates of bilingual education should look to litigation and policy initiatives that focus on the needs of these students and their status as a pressing national concern as their population continues to grow in various geographical regions.

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69. *See* Li, *supra* note 13, at 553.

70. *See* FEINBERG, *supra* note 15, at 64.

71. *See id.*

72. Li, *supra* note 13, at 540.

73. *See* discussion *supra* p. 9–10; *Hearing on Bilingual Education*, *supra* note 1, at 65, 88; Li, *supra* note 13, at 541, 543–44.

74. *See* Li, *supra* note 13, at 545–46.

75. *See id.* at 546.

76. *See supra* notes 50–55 and accompanying text.

B. Litigation Movements and Their Continued Viability

Attorneys advocating for Hispanic-American students, including ELLs, have used several major litigation platforms over the last several decades. These have included civil rights litigation under the Equal Educational Opportunities Act (EEOA), school finance litigation, and desegregation litigation.[77] It is important to evaluate recent lawsuits under these models to understand which have continued viability to advance bilingual education, and to what extent. However, the results of these litigation models have been largely unsatisfying.[78] While it is important to continue to pursue some, it is also important to recognize their limitations.

Texas is an obvious choice for a state in which to focus an analysis of the progress of various litigation challenges to unequal education for Latino children and Spanish-speaking ELLs. Texas is one of six states with the heaviest concentration of ELLs overall, and has been involved in litigation following each of the three models throughout its historic struggle with how to best educate Latino children and Spanish-speaking ELLs.[79] *Cisneros v. Corpus Christi Independent School District*, one of the cases that launched the wave of desegregation litigation as a strategy for improving educational outcomes for Spanish-speaking ELLs, originated in the federal district court for the Southern District of Texas.[80] In 1970, that court held that "Mexican American students are an identifiable, ethnic-minority class."[81] The holding marked progress for advocates of those students, as courts began to recognize them as a group distinct from African Americans or other immigrant groups.[82]

Before addressing some of the more recent Texas cases demonstrating the viability of various litigation strategies for advancing bilingual education, it is important to look more closely at some of the specific legislative and administrative measures not addressed above that happened in the 1970s and 1980s. Those measures first bolstered and then limited the chances for success for Spanish-speaking ELLs through litigation. The same year as the Southern District of Texas ruled on *Cisneros*, ELLs received a boost on an administrative level as well. The Department of Health, Education, and Welfare issued a memorandum to school districts announcing its interpretation of Title VI of the Civil Rights Act as protecting ELLs.[83] The foundation for use of school desegregation and civil rights litigation to advocate for equal outcomes for ELLs further solidified with a triad of developments in 1974, which Bowman acknowledges in her article.[84] First, the

77. Bowman, *supra* note 4, at 948–49.

78. *See id.* at 915–16, 968.

79. *See* discussion *infra* Part III.B.

80. Cisneros v. Corpus Christi Indep. Sch. Dist., 324 F. Supp. 599 (S.D. Tex. 1970).

81. *Id.* at 607.

82. *See id.*

83. Bowman, *supra* note 4, at 926.

84. *See id.* at 927 (relating the three significant events; 1) Lau v. Nichols; 2) the reauthorization of the Bilingual Education Act; and 3) Congress passing the Equal Educational Opportunities Act).

United States Supreme Court upheld the 1970 interpretation of the Civil Rights Act in *Lau v. Nichols*.[85] That interpretation requires that a district "take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."[86] Second, "Congress reauthorized and amended the Bilingual Education Act, for the first time explicitly permitting English-proficient students to enroll in bilingual classes in order to advance cultural understanding and to reconcile the goals of desegregation and bilingual education."[87] Third, the same bill that reauthorized the Bilingual Education Act included the EEOA, which codified *Lau*'s "affirmative steps" holding.[88] The Office of Civil Rights went further a year later, issuing "guidelines interpreting *Lau* as favoring bilingual programs which included native-language instruction."[89]

However, as quickly as those improvements were made, Congress took a step back, when, in its 1978 reauthorization of the Bilingual Education Act, it "emphasized that the purpose of bilingual education should be transitioning non-native-English speakers into English language instruction."[90] As evidenced in the historical summary above, the 1980s then saw the political and social climate quickly turn sour against bilingual education.[91] Administrative and congressional developments were no different. As Bowman explains, "in the early 1980s, the U.S. Department of Education withdrew the *Lau* guidelines."[92] Additionally, Congress soon added Structured English Immersion as a program accepted under the Bilingual Education Act.[93] That change endorsed a form of ELL education with little use of the students' native languages and no encouragement that they maintain or continue to develop their proficiencies in them.[94] Finally, Congress put a three-year limit on the amount of time students could be enrolled in bilingual education programs.[95]

i. Civil Rights Litigation Under the EEOA

Those developments set the stage for *Castañeda v. Pickard*, a Fifth Circuit case originating in Raymondville, Texas.[96] Because that case followed so closely from those developments and because for a time, the EEOA presented the most positive hope for successful litigation in

85. *See id.* (citing Lau v. Nichols, 414 U.S. 563 (1974)).

86. Lau v. Nichols, 414 U.S. 563, 568 (1974).

87. Bowman, *supra* note 4, at 927 (citing Education Amendments of 1974, Pub. L. 93-380, §§702(a), 703(a)(6), 88 Stat. 474, 503, 505 (codified as amended in scattered sections of 20 U.S.C.)).

88. *See id.* (citing Equal Educational Opportunities Act of 1974, Pub. L. 93-380, §259, 88 Stat. 514, 521 (1974) (codified at 20 U.S.C. § 1232g (2006)).

89. *Id.* at 927–28.

90. *Id.* at 928.

91. *See supra* notes 56–68 and accompanying text.

92. Bowman, *supra* note 4, at 930.

93. *Id.*

94. *See id.*

95. *See id.* at 930.

96. Castañeda v. Pickard, 648 F.2d 989, 992 (5th Cir. 1981).

promotion of bilingual education, I will address *Castañeda* and that litigation model first. In *Castañeda*, one of the arguments of the Mexican-American student plaintiffs was that "the school district unlawfully discriminated against them . . . by failing to implement adequate bilingual education to overcome the linguistic barriers that impede the plaintiffs' equal participation in the educational program of the district."[97] The case came to the Fifth Circuit on appeal by the plaintiffs from a district court judgment for the defendants.[98] In assessing the district's bilingual program, the court considered that the district operated a bilingual education program for students in kindergarten to third grade, and that:

> The language ability of each student entering the Raymondville program is assessed when he or she enters school. The language dominance test currently employed by the district is approved for this purpose by the T[exas] E[ducation] A[gency]. The program of bilingual instruction offered students in the Raymondville schools has been developed with the assistance of expert consultants retained by the TEA and employs a group of materials developed by a regional educational center operated by the TEA. The articulated goal of the program is to teach students fundamental reading and writing skills in both Spanish and English by the end of third grade.
>
> Although the program's emphasis is on the development of language skills in the two languages, other cognitive and substantive areas are addressed, e.g., mathematics skills are taught and tested in Spanish as well as English during these years. All of the teachers employed in the bilingual education program of the district have met the minimum state requirements to teach bilingual classes. However, only about half of these teachers are Mexican-American and native Spanish speakers; the other teachers in the program have been certified to teach bilingual classes.[99]

The plaintiffs' claims were based on the allegation that the programs were educationally deficient, and thus in violation of Title VI of the Civil Rights Act and the EEOA because of failure to comply with the *Lau* guidelines.[100] However, the court declined to enforce the *Lau* guidelines as it might an administrative rule promulgated under the traditional procedures, stating that because of the way in which the *Lau* guidelines were promulgated, they did not require great deference by courts.[101] The court explained that the *Lau* guidelines were not developed through normal administrative procedures and were not published in the Federal Register.[102] Additionally, the court expressed "serious doubts . . . about the continuing rationale of the Supreme Court's opinion in *Lau*

97. *Id.*
98. *Id.*
99. *Id.* at 1005.
100. *See id.* at 1006.
101. *See id.* at 1007.
102. *See id.*

v. Nichols which gave rise to those guidelines."[103]

Although the court in *Castañeda* did acknowledge that Congress chose to act following *Lau* by requiring school districts to take "appropriate action" to address language barriers, the court's decision was discouraging toward bilingual education overall, as demonstrated in the following statement:

> We think Congress' use of the less specific term, "appropriate action," rather than "bilingual education," indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA.[104]

Accordingly, the court developed a discretionary test, requiring federal district courts, when faced with a challenge like this, to assess "the soundness of the educational theory or principles upon which the challenged program is based," "whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school," and even if the program meets the above criteria, if it "fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting the students are actually being overcome."[105] While the first two factors suggest that the approach is "appropriate action," the last factor, if found to be true, may establish that the program may no longer be "appropriate action" in light of its failure.[106]

Over the following years, courts across the nation applied the *Castañeda* test, and most importantly, the United States Supreme Court applied it in the case that now governs this area of litigation, *Horne v. Flores*.[107] That case began in 1992 when parents and students in an Arizona school district claimed that the district's programs violated the EEOA by failing to address their children's language barriers.[108] A complicated legal process followed in which the Federal District Court for the District of Arizona entered an order against the school district and extended it statewide in 2000. The order required that school districts change their funding for ELLs which before the lawsuit were "arbitrary" and "not related to the actual funding needed to cover the costs of ELL instruction."[109] The response to the Arizona order took the form of Arizona House Bill 2064.[110] The bill increased incremental ELL funding, limited the per-student funding to two years

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103. *Id.*
104. *Id.* at 1009.
105. *Id.*
106. *See id.* at 1010.
107. Horne v. Flores, 129 S. Ct. 2579 (2009).
108. *See id.* at 2588.
109. *Id.* at 2589.
110. *See id.* at 2590.

per student, and created two new funds to support ELL instruction, a "structured English immersion fund and a compensatory instruction fund to cover additional costs of ELL programming."[111] Once H.B. 2064 became law in Arizona, the state sought relief from the 2000 order for changed circumstances. Instead the District Court found three flaws in the newly enacted H.B. 2064:

> First, while HB 2064 increased ELL incremental funding by approximately $80 per student, the court held that this increase was not rationally related to effective ELL programming. Second, the court concluded that imposing a 2-year limit on funding for each ELL student was irrational. Third, according to the court, HB 2064 violated federal law by using federal funds to "supplant" rather than "supplement" state funds.[112]

After an appeal and remand in which the district court held that "HB 2064 did not establish 'a funding system that rationally relates funding available to the actual costs of all elements of ELL instruction,'" the Ninth Circuit affirmed.[113] The appeals court acknowledged the state's progress, but found that the state could only receive relief from the original District Court order on a showing of discontinued incremental costs of ELL programs or a change in Arizona's funding model, neither of which had been shown.[114]

The United States Supreme Court reversed the Ninth Circuit's decision through the lens of the FRCP 60(b)(5) motion the state had used in its attempt to obtain relief from the earlier order.[115] That rule allows a court to grant relief from an order "if a significant change either in factual conditions or in the law renders continued enforcement detrimental to the public interest."[116] After acknowledging that "[f]ederalism concerns are heightened when . . . a federal court decree has the effect of dictating state or local budget priorities," the Supreme Court noted that "the EEOA itself limits court-ordered remedies to those that 'are *essential* to correct particular denials of equal education opportunity or equal protection of the laws.'"[117] Given those considerations, the Ninth Circuit's approach was inappropriate due to its failure to apply "a flexible standard that seeks to return control to state and local officials as soon as a violation of federal law has been remedied," and its use of "a heightened standard that paid insufficient attention to federalism concerns."[118] Additionally, the lower courts had assessed the state's compliance with the original order, when they should have inquired into whether the current state of the law and the current funding method

111. *Id.*
112. *Id.* at 2591.
113. *Id.*
114. *Id.* at 2591–92, (citing Flores v. Arizona, 516 F.3d 1140, 1169 (9th Cir. 2008)).
115. *Id.*
116. *Id.* at 2593 (quoting Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 384 (1992)).
117. *Id.* at 2593–95 (citing 20 U.S.C. §1712).
118. *Id.* at 2595.

complied with the EEOA itself.[119] Even the lower courts' EEOA inquiry was conducted incorrectly because it was not sufficiently flexible: "[B]y requiring petitioners to demonstrate appropriate action through a particular funding mechanism, the [Ninth Circuit] Court of Appeals improperly substituted its own educational and budgetary policy judgments for those of the state and local officials to whom such decisions are properly entrusted."[120]

The Supreme Court's opinion in *Horne* evidences the requirement that courts should give great deference to states and school districts when evaluating whether those entities have taken "appropriate action" under the EEOA. Deference is especially required when assessing funding methods because of the implication of state budgetary considerations.[121] *Horne* also weighs in favor of giving deference to other policy decisions within the province of the state, like educational programming.[122]

In the aftermath of *Horne*, courts find themselves without much leverage in promoting particular models of bilingual education within schools.[123] Although *Horne* has sometimes been touted as a positive decision for bilingual education because it held that merely meeting the requirements under the No Child Left Behind Act does not fulfill the requirements of the EEOA (and thus that more attention to ELLs might be required than under the NCLB alone), courts are still limited in the orders they can make by the deference required by the EEOA.[124] Binding precedent has made EEOA litigation an option that is no longer viable for courts advocating a certain type or quality of bilingual education, and so those advocating bilingual education through litigation must turn to other options.[125] Since the EEOA litigation "has been the mainstay of ELL advocacy for the past thirty-five years," this development requires attorneys to get creative using the remaining two types, school finance litigation and school desegregation litigation.[126]

ii. School Finance Litigation

The school finance litigation strategy has emerged over the last fifty years as a common tool of those challenging the education status quo, but has failed to realize the potential originally envisioned.[127] Unsurprisingly, the transformation in judicial use of the Equal Protection Clause in

119. *See id.*

120. *Id.* at 2597.

121. *See id.* at 2595–97.

122. *See id.*

123. *See id.*

124. *See id.* at 2602.

125. *See* Bowman, *supra* note 4, at 949.

126. *See id.*

127. *See id.* at 965 ("Considering the 'money matters' language from *Horne*, school finance plaintiffs in general may be right to think their chances for ultimate success are more limited.").

the 1950s and 1960s excited critics of property wealth as a basis for school funding.[128] *Brown v. Board* demanded racial equality in education while other cases required that unequal financial resources not lead to unequal opportunities in several areas including protections of the criminal justice system, access to divorce, and ability to exercise the right to vote.[129] The hopes for application of the Equal Protection Clause to the education realm took the form of the first "wave" of school finance litigation in the 1960s to the 1980s.[130] Plaintiffs brought Equal Protection Clause claims alleging unequal education on a race/ethnicity-neutral basis.[131] Hopes for success with the first wave were dashed by a 1973 case that began in Texas, *San Antonio v. Rodriguez*.[132] After that, a second and a third wave emerged, challenging funding systems based on state constitutional provisions, first on the basis of unequal education, and second on the basis of inadequate education.[133]

The original optimism for the possibilities of school finance litigation was quickly overshadowed by *Rodriguez*.[134] The plaintiffs in that case were parents of Mexican-American school children residing in a low-income school district in San Antonio.[135] They brought suit on behalf of all minority children and parents residing in low-income districts across the state against the State Board of Education, the Attorney General, and other public bodies.[136] In 1971, the district court found Texas's education finance system unconstitutional, but the Supreme Court reversed that decision in 1973, sounding a death knell to federal race/ethnicity-blind education finance challenges.[137] The disputed education finance system was a complex one, designed in 1947.[138] As the Court noted, the state had been working to improve inequalities since that time, but the comparison drawn in this case, between the state's wealthiest and lowest income school districts, painted a stark picture of persisting disparities, despite the state's continuous increases in funding since the program's inception.[139] The disparities that remained, and that prompted the district court to find the system unconstitutional, were largely attributable to the differences in the amounts low-income school districts were able to raise from property taxes versus wealthy school districts.[140]

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128. *See id.* at 955–56.

129. *See* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 117–18 (1995) (citing Griffin v. Illinois, 351 U.S. 12, 19 (1956); Douglas v. California, 371 U.S. 353, 357–358 (1963); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966); Boddie v. Connecticut, 401 U.S. 371, 374 (1971)).

130. *See id.*; Bowman, *supra* note 4, at 956.

131. Bowman, *supra* note 4, at 956.

132. *See id.*; San Antonio v. Rodriguez, 411 U.S. 1 (1973).

133. *See* Bowman, *supra* note 4, at 956; Enrich, *supra* note 129, at 107.

134. *See Rodriguez*, 411 U.S. 1; Enrich, *supra* note 129, at 107.

135. *Rodriguez*, 411 U.S. at 4–5.

136. *Id.* at 5.

137. *See id.* at 6.

138. *See id.* at 6–7.

139. *See id.* at 11.

140. *Id.* at 15–16.

The district court found that wealth was a suspect classification and education a fundamental interest, so strict scrutiny should be applied to the funding system, and it could only be sustained if the state could show it was based on a compelling state interest.[141] Not only did the district court feel that the system failed that strict test, but it also declared that the state did not even have a reasonable basis for the funding system.[142] The Supreme Court rejected that view, and distinguished school finance cases and the wealth discrimination alleged in them from the earlier precedents applying equal protection to cases alleging wealth discrimination, which had given hope to advocates of school finance reform.[143] Unlike the previous cases, the Court said, this case did not present a situation in which "lack of personal resources" has "occasioned an absolute deprivation of the desired benefit."[144] There was no proof at trial to refute the state's argument that even without any property tax funds for schools, the state's Minimum Foundation Program provided enough for at least an adequate program of twelve years of free public education.[145] Additionally, unlike other situations in which the Equal Protection Clause functioned to require strict scrutiny, the Court found that the funding system did not discriminate "against any 'definable' category of poor people."[146] The Court instead felt that the group alleging discrimination here was "a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts."[147]

After determining that the *Rodriguez* case did not involve a suspect class, the Supreme Court held that education was not a fundamental right guaranteed by the Constitution, and thus that the funding system did not interfere with a fundamental right.[148] The Court explained that it lacks the power to declare particular fundamental rights based on "relative societal significance," and that the only fundamental rights for which strict scrutiny is guaranteed under the Equal Protection Clause are those which, unlike education, are "explicitly or implicitly guaranteed by the Constitution."[149]

Therefore the Supreme Court gave deference to the state's position in that case for several reasons. First, it found that the plaintiff's challenge did not meet the suspect class or fundamental right burden to bring it within strict scrutiny.[150] Second, the Texas system had made progress toward reform and was based on a state decision in an area traditionally within the ambit of state

141. *Id.* at 18–19.
142. *Id.*
143. *See id.*
144. *Id.* at 23.
145. *See id.* at 24.
146. *Id.* at 22.
147. *Id.* at 28.
148. *See id.* at 28.
149. *Id.* at 33–34.
150. *See id.* at 38–40.

decision-making and that had a large impact on the state budget and possible uses of public revenues.[151] Furthermore, the system passed muster under that standard because Texas's approach in crafting the system was rational, and was not hurried or ill conceived.[152] The system was the culmination of a long process of working to balance the interests of local participation and equalizing differences in funding.[153] Legitimate studies formed the basis for the system, and it mirrored what many educators have long considered an appropriate approach to a complicated problem.[154]

The Supreme Court in *Rodriguez* thus showed great deference to state determinations of an appropriate education funding scheme, and frustrated hopes of education reformers who desired to see change through requirements that funding systems be crafted in such a way that a district's low property wealth not result in less funds for education.[155] Not wanting to give up on school finance litigation as a means of reform, however, advocates moved into the second and third waves of cases, which involved cases brought in state courts challenging either the equality of education or the adequacy of education respectively.[156]

In Texas, the primary line of cases challenged the funding system's impact on the Edgewood Independent School District. The first decision in that line of cases, *Edgewood I*, found a violation of a provision of the Texas state constitution, the "efficient system" education clause, which, according to the Texas Supreme Court, requires substantially equal access to education funding.[157] The following decisions then invalidated various legislative attempts to bring the funding system in line with that constitutional provision.[158] That line of cases demonstrates that although the Texas Constitution may provide additional requirements for equalization of education funding across districts than does the United States Constitution, all legislative attempts to remedy the state's incompliance have failed on other grounds, so in a practical sense, the first decision has not resulted in the desired improvements.[159] *Edgewood II* invalidated legislative reforms on the basis that they did not achieve sufficient equalization because the plan preserved the status quo for the wealthiest districts.[160] *Edgewood III* invalidated a subsequent reform, which created consolidated tax districts to pool property wealth and thus equalize tax capacity, on the basis that it

151. *See id.* at 40–41.
152. *See id.* at 55.
153. *See id.*
154. *See id.*
155. *See id.* at 55.
156. *See* Bowman, *supra* note 4, at 956; Enrich, *supra* note 129, at 107.
157. *See* Enrich, *supra* note 129, at 164–65.
158. *See id.*
159. *See id.*
160. *See id.*

constituted a property tax imposed on the state level.[161] Some commentators have highlighted the fact that these decisions seem to be a departure from previous precedent, which largely relied on deference to legislative decision-making to accept reforms, showing more willingness to interfere with unfair state funding systems.[162] However, while the original, pre-*Rodriguez* hope for school finance litigation was that judicial intervention would force improvements in equality between funding for different districts, the Texas Supreme Court's rejection of the various attempted reforms has not achieved that goal because although it is judicial intervention, it has invalidated changes, rather than forcing them.[163]

Even when the court finally approved a reform in 1995 in *Edgewood IV*, it did so only because of a lack of evidence.[164] As the court said, "the challenge to the school finance law based on inadequate provision for facilities fails only because of an evidentiary void. Our judgment in this case should not be interpreted as a signal that the school finance crisis in Texas has ended."[165] That statement foreshadowed the court's holding ten years later in *Neely v. West Orange–Cove Consolidated Independent School District*, which stated that the tax structure set by the finance system was an unconstitutional state property tax.[166] Although the evidence adduced in that case was not sufficient to hold that the finance system failed the efficiency requirement of the Texas Constitution, as the court stated, "the defects in the structure of the public school finance system expose the system to constitutional challenge."[167] As it stands in Texas then, school finance litigation has failed to be an effective tool to advance and approve improvements in the equality among school districts or students receiving unequal funds for their education.

As demonstrated above, Texas school finance litigation is far from having a precedent that could allow it to be a useful tool to directly advance bilingual education. As a very preliminary step in that direction, advocates would need successful precedent requiring equal education funding and upholding a successful reform to that end. Advocates of bilingual education should seek such a ruling, and then seek to secure judicial approval of a narrower requirement involving ELLs, continuing to work toward narrowing the framework to focus on how school finance impacts the equality or adequacy of ELL education. Given the precedent, such a development seems unlikely in the short term.

Scholar Kristi L. Bowman has advanced a theory that a fourth wave of school finance

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161. *See id.*

162. *See* William E. Throw, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision As A Model*, 35 B.C. L. REV. 597, 604 (1994).

163. *See* Enrich, *supra* note 129, at 164–65.

164. *See* Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 725 (Tex. 1995).

165. *Id.*

166. Neely v. W. Orange–Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 754 (Tex. 2005).

167. *Id.*

litigation has begun and should be continued.[168] This wave is important because it begins to move toward accomplishing the narrower goals of ELLs. It is a step in that direction because in these cases, advocates argue that when school districts are formed in a way that minority students are disproportionately hurt by having less funding than white students, the students' state constitutional rights to equal education may be violated.[169] This strategy has not been tested in Texas, but has had some limited success in Connecticut and Kansas.[170] Advocates for equalizing educational opportunities for ELLs should study the cases from those states and try to emulate and build upon those limited successes.

iii. School Desegregation Litigation

School desegregation litigation has been a third litigation strategy pursued by advocates of equalizing educational opportunities for minority students.[171] Unfortunately for those advocates, a consensus has emerged among scholars that the school desegregation strategy is largely dead in terms of its potential to improve opportunities in the future.[172] As Bowman explains, that status is the result of judicial decisions that have developed the doctrine such that "de facto segregation is beyond the reach of the courts, inter-district remedies are forbidden, and now even voluntary integration and the race/ethnicity-conscious pursuit of diversity are largely disallowed."[173] The impact of that doctrine in Texas is illustrated by *United States v. Texas*, which states that:

> [t]his court has repeatedly acknowledged the historical and statewide *de jure* segregation of black and white students in Texas, but has held that at no time 'ha[s] Texas segregated Anglo students from Mexican-American ones by law.' . . . The trial court made no factual findings with regard to statewide *de jure* segregation of Mexican-Americans, nor would the record here support such a finding. Because there is no showing of statewide *de jure* segregation of Mexican-Americans, the trial court cannot enforce Section G under the facts and claims present.[174]

Unless circumstances were to change, a statewide desegregation remedy in Texas appears highly unlikely under *United States v. Texas*.

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168. *See* Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 DUKE F. FOR L. & SOC. CHANGE 47, 58 (2009).

169. *See id.*

170. *See id.* at 59–60 (citing Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1966); Montoy v. State (Montoy II), 120 P.3d 306, (Kan. 2005)).

171. *See id.* at 49–50.

172. *See id.*

173. *Id.* at 50. (citing Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 195–96 (1973); Milliken v. Bradley, 418 U.S. 717, 757 (1974); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007)).

174. United States v. Texas, 601 F.3d 354, 363 (5th Cir. 2010).

One case from the last five years demonstrates that there may be a lingering role for desegregation litigation in ensuring educational equity for Hispanic-American students in Texas. In *Santamaria v. Dallas Independent School District,* the district court found that students at Preston Hollow Elementary School were being unlawfully segregated in violation of their Fourteenth Amendment rights.[175] Defendants in the case were unable to demonstrate an appropriate basis for suspect student assignments.[176] Plaintiffs brought evidence to prove that defendants had "channel[ed] and segregate[d] certain Latino students into English as a Second Language ("ESL") classes, even though the school ha[d] already determined that these particular Latino students [we]re English-proficient, and therefore not in need of Bilingual or ESL instruction under state law."[177] As evidence, the plaintiffs produced an email written by the school's Parent Teacher Association (PTA) president, which revealed the school's desire to market to the school's "immediate neighborhood families that live in big, expensive houses" and to get them to "reconsider those private tuitions and send their kids to us."[178] In order to accomplish that objective, the school hoped to reduce its diversity from view: "[w]hile our demographics lean much more Hispanic, we try not to focus on that for this brochure. A big question that neighborhood parents have is about the ethnic breakdowns of our school population."[179] In her testimony, the PTA president also revealed that "she was vocal in her effort to stop white flight by attracting Anglos back to Preston Hollow," and that "her Anglo neighbors did not want to send their children to Preston Hollow because their children would be a minority."[180] The court found that the strategy was directly related to the students' assignments to ESL classes, as the school therefore attempted to create a space for the more affluent white students, in which they could be educated apart from their Hispanic-American neighbors.[181] Accordingly, the court stated that: "[i]n reserving certain classrooms for Anglo students, Principal Parker was, in effect, operating, at taxpayer's expense, a private school for Anglo children within a public school that was predominantly minority."[182]

Santamaria is particularly important in highlighting the continued importance of litigation strategies in areas with recently established and growing Hispanic-American populations. As Bowman points out:

> [a]lthough Texas has been home to a substantial Latino/a population for many years, it appears that this particular school had not. This school's enrollment changed in a way that large and small communities across the country are experiencing: it had a relatively sudden influx of Latinos/as,

175. Santamaria v. Dall. Indep. Sch. Dist., No. 3:06-CV-692-L, 2006 WL 3350194 at *39 (N.D. Tex. Nov. 16, 2006).
176. *See id.*
177. *Id.* at *2.
178. *Id.* at *19.
179. *Id. at *17*
180. *Id.*
181. *See id.* at *39.
182. *Id.*

some of whom were ELL students.[183]

Advocates of educational equity for these students should monitor the development of similar situations in other areas that have not traditionally had a large population of ELLs. Advocates should then employ the desegregation litigation strategy at least in situations as clear-cut as the one in Dallas. As Bowman explains, several factors make those areas ripe for discrimination, including the fact that districts in those areas may not understand the needs of the new student population, and the fact that severe financial constraints currently influence the pedagogical and policy decisions of almost all school districts.[184] Accordingly, the financial support of students with wealthier parents, who might prefer a racially isolated education for their children, may influence some districts similarly to the influence seen in Dallas.[185]

This history of the three predominant litigation initiatives demonstrates their limited viability in today's legal context. Therefore policy strategies must be pursued as well. Advocates should still be on the lookout for litigation opportunities, especially in areas of recently developing Hispanic-American populations, but policy initiatives are likely to be the more successful route, particularly in areas where ELL populations are well established. However, litigation still has an important role even if advocates are unsuccessful in achieving a judicial mandate for improved practices, for its data collection benefits. One study has found that the data collection required for litigation has had positive impacts on districts and states involved in various suits.[186] Attentive districts will review that data and use it to make improvements even if not mandated to do so by the judiciary or legislature.[187]

C. The Political Climate and Policy Strategies

As the above analysis of the history of bilingual education concludes, political and societal support has been in a downturn during the past two decades.[188] The development of bilingual education is being plagued, much like during World War I, by a perceived threat from a particular language group, namely, illegal, Spanish-speaking immigrants, and resulting in nationalist feelings against that language group.[189] This sentiment is coupled with the promotion of acquisition of the English language without support for native-language maintenance.[190] The relationship between bilingual education and the negative feelings toward illegal immigration is an unfair one. It is

183. Bowman, *supra* note 4, at 952.

184. *See id.* at 952.

185. *See id.* at 952–53.

186. *Lessons Learned*, *supra* note 40, at 19.

187. *See id.*

188. *See supra* notes 69–76 and accompanying text.

189. *See id.*

190. *See id.*

unfair to hold back the education of many ELLs with no tie to illegal immigration on the basis of that hostility. A trend that has persisted since the late 1990s and has roots in the conservative period of the 1980s is not likely to reverse itself without a major change. Accordingly, perhaps bilingual education advocates' best hope is for the government to address the illegal immigration problem and find a solution or way to improve the situation so that the concern and hostility that has arisen around it may dissipate. But bilingual-education advocates cannot afford to wait for comprehensive immigration reform. They must look to policy initiatives that have the potential to be successful in the meantime.

Although much bilingual education policy is determined on a state and local level, it is constrained by federal policies. One recent study highlights the fact that although some state-level programs have achieved impressive success in improving education of ELLs, "[t]he lack of a coherent national standard for ELL identification and assessment has led to varying levels of exclusion in assessment of ELLs, and has limited the ability of districts to track ELL progress and evaluate program effectiveness."[191] This section will examine the current policies in place on a federal level, the impact they have had on state choices for bilingual education, and the policy changes that might happen with the forthcoming reauthorization of the ESEA. In analyzing those possibilities, I will look at indications of what policies the Obama Administration and congressional Republicans favor to assess what the likely changes might be. I will also recommend some changes that would be especially favorable to educational equity for Spanish-speaking ELLs.

i. The Impact of No Child Left Behind

The federal policies currently in place are a part of NCLB, the name President George W. Bush gave to his reauthorization of the ESEA.[192] In the 2002 reauthorization, NCLB's Title VII assumed the prior role of the ESEA's Title VII, more commonly known as the Bilingual Education Act, which was allowed to expire as it was now incorporated into NCLB.[193] The immediately apparent change resulting from the transition was the removal of "bilingual education" from statutory and congressional vocabulary.[194] Not only was the term removed from the law, but new guidance for the education of ELLs emerged under the Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited-English-Proficient Students.[195] That office's title indicated a shift in focus away from developmental models of bilingual education that advanced the goal of native-language maintenance resulting in bilingualism, and toward a focus on an English-only approach advancing the goal of transitioning ELLs from their native language to

191. *Lessons Learned*, *supra* note 40, at 29.

192. *See* Li, *supra* note 13, at 554.

193. *Id.* at 540.

194. *See id.*

195. *Id.*

English.[196]

NCLB's failure to establish an efficient and successful system of ELL education is a critical problem as we face projections that by the 2030s, ELLs are expected to make up forty percent of school-age children.[197] ELL education advocates and politicians must seriously consider the need for improvements to the current framework under NCLB as they look toward reauthorizing the ESEA. As many scholars acknowledge, and the history outlined above indicates, "often, the broader debate over national security and immigration issues overpowers the discussion of pedagogy."[198] Several of NCLB's requirements inhibit educators' choices regarding pedagogy for ELLs, and therefore need to be relaxed to leave room for the debate of what pedagogy is most effective, and what factors have been successful in schools that have showed improvement in ELL education.[199]

The biggest limitation NCLB has posed on bilingual education programs has been on those models that use and maintain the students' native languages.[200] According to Li,

> [s]ome of the most comprehensive, recent studies have concluded that bilingual education programs, using students' native languages for a significant portion of instruction over a period of several years, provides ELL students with the most effective means for learning English and maintaining their studies at the appropriate grade level.[201]

Prior to NCLB, that understanding had gained the recognition of many states.[202] For example, in 1971 the Massachusetts state legislature mandated bilingual education for the purpose of increasing school attendance of ELLs, nearly fifty percent of whom were discovered to be missing school.[203]

While support for bilingual education at the federal level ebbed and flowed in subsequent years, it hit a peak in 1994. That year's reauthorization of the Bilingual Education Act stated as its purpose, "to educate limited English proficient children . . . to meet the same standards of all children by, among other things, 'developing bilingual skills and multicultural understanding' and 'developing the English of such children and youth and, . . . the native language skills of such

196. *See id.* at 541.
197. *See id.* at 539–40.
198. *Id.* at 541.
199. *See id.*
200. *See id.* at 571.
201. *Id.* at 542.
202. *Id.*
203. *Id.*

children and youth.'"[204]

The goal stated in NCLB in 2002 evidenced a subtle departure from that emphasis, as the legislature crafted the legislation around its goal "to help ensure that children who are limited English proficient . . . attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging . . . standards as all children are expected to meet."[205] That statement was subtle, and did not go so far as to demand an end to all programs seeking to maintain students' native languages as a few states had mandated at that time. However, when comparing the goal from the Bilingual Education Act with this new goal, the change is not so subtle. The new focus of NCLB is English proficiency, and it manifests itself in many ways. According to Li, "Congress' seemingly incognito decision to focus ELL students' education almost solely on English acquisition rather than content-based learning highlight[s] NCLB's unstated goal: squashing federal support for bilingual education."[206] Although NCLB states that it allows flexibility for state and local bodies in choosing their types of ELL instructional models, the purposes it enumerates demonstrate its preference for programs emphasizing English acquisition rather than promoting bilingualism or multiculturalism.[207] Whereas past reauthorizations of the Bilingual Education Act had listed findings regarding the importance of linguistic and cultural pride and understanding in educating ELLs, the current version of NCLB contained in Title III, lists nine purposes that fail to "explicitly mention the use of native language instruction or its educational and cultural benefits in a multilingual society."[208]

NCLB's requirements and goals evidence a significant change, making it harder for state and local officials to promote programs that prioritize native-language maintenance along with and in furtherance of English acquisition. In both the changes it makes to funding and to assessment and accountability, the NCLB demonstrates its preference that the primary focus of ELL programs be English proficiency as soon as possible, even at the expense of the students' native languages.[209] Although the new formula state grant program provides funding to more states with growing ELL populations, the reports that it requires of school districts and other local bodies impose a preference for programs focusing on rapid English acquisition and transition to education in that language only.[210] As Li explains, "[l]ocal education agencies that receive Title III funds must submit evaluations to states every two years documenting the percentage of ELL children who have attained English language proficiency, transitioned into mainstream English classes, and have met

204. *Id.* at 553.

205. No Child Left Behind Act of 2002 § 6812, 20 USC § 6812(1) (2002).

206. Li, *supra* note 13, at 554–55.

207. *See id.*

208. *Id.* at 555 (citing 20 U.S.C. § 6812 (2002)).

209. *See id.* at 555–56.

210. *See id.* at 556.

the academic achievement standards required of all students."[211] Additionally, that information is collected through assessments, which under NCLB, must be conducted in English after an ELL's third grade year.[212] Such a requirement puts pressure on schools to utilize rapid English acquisition programs, even if school officials feel students would be more successful in a truly bilingual program that allows students to keep up with their peers in content areas through continued instruction in their native language as they learn English. Although NCLB explicitly purports not to restrict any pedagogical method, after scrutinizing the statute, its stated goals and requirements evidence a clear reduction in the emphasis on native-language maintenance to promote bilingualism and multiculturalism, and a heavy focus on English-language acquisition and transition to education in that language as quickly as possible.

ii. Indications of How ELLs Might Fare in the Current Political Climate

Now is a critical time for review of the failings of NCLB and the plans of politicians for its revision, as both the Obama Administration and Republican congressional leadership have indicated support for overhauling the statute. Although from different political parties, both groups have expressed frustration with the statute, and understand the need to work on changing it, and the difficulty of that task in the wake of a failed attempt in 2007.[213] It is therefore important to evaluate the indications that the Administration and congressional Republicans have made regarding their views on ELL education in order to understand what might happen in the forthcoming reauthorization. This paper focuses on the views of these two groups because they are the views currently available that are most likely to bear the closest resemblance to the views of their respective parties when they finally undertake the over-due ESEA reauthorization.[214] Of course a lot could change in President Obama's second term, and advocates will need to monitor the priorities of the political bodies that result. In this paper, however, I will focus on the expressed opinions of the Obama Administration and congressional Republicans as those bodies have thus far had the strongest voice for their respective parties in declaring their positions on ELL education.

As Diane Ravitch pointed out in a recent *Wall Street Journal* editorial, the Republicans' typical position on education is that the federal government should have less control, leaving more for state and local bodies.[215] In fact, a main objection Republicans have to NCLB is the strong federal force it has grown into, and the increasing hold it has over state education agencies.[216] Perhaps that Republican desire to decrease federal control can combine with Democratic interest in promoting bilingualism and multiculturalism to remove some of the stringent regulations NCLB

211. *Id.*

212. *Id.*

213. *See, e.g.*, Dillon, *supra* note 2.

214. *See supra* notes 41–42 and accompanying text.

215. *See, e.g.*, Diane Ravitch, *The GOP's Education Dilemma*, WALL ST. J., Nov. 29, 2010, at A17.

216. *See id.*

imposed to pressure states toward transitional programs.

1. The Obama Administration's Approach

Although the current administration has not taken a position on which form of education it prefers for ELLs, its proposals for the reauthorization of the Elementary and Secondary Education Act (ESEA) indicate its support for dual-language programs. The Department of Education website enumerates the goals for the ESEA, listing the types of programs schools may implement to improve outcomes for ELLs.[217] First on that list is "dual-language programs."[218] Simply listing that type of program first might not alone signify any meaningful support, but the Administration has made a further indication of preference for dual-language programs. In a recent publication describing the Department of Education's plans for the reauthorization of the Education and Secondary Education Act, the Department touted Saint Paul, Minnesota's reforms in ELL education, which included widening the school district's dual-language programs.[219] While most of the publication focused on statistics, including those that underline the importance of addressing and improving bilingual education in this country, it also had one section promoting a possible policy solution: more programs like the one in Saint Paul.[220] The description of the Saint Paul program was featured prominently in its own shaded text box, set out from the rest of the publication to signal its importance.[221]

The report's section highlighting the successes of the Saint Paul Public School District explains the transition Saint Paul undertook between different ELL programs:

> In the late 1990s, EL programs in Saint Paul began to move away from the "pull-out" model for EL services toward a content-based model. The content-based programs promote students' mastery of academic content while they become proficient in English as subject areas are integrated with language objectives. Pull-out programs focus solely on developing the students' English language proficiency.
>
> As EL programs moved from pull-out to instructional collaboration models, the Teaching English as a Second Language (TESOL) classes that served newcomer students were transitioned to the Language Academy program. . . . EL students in the TESOL classes had few opportunities to interact with English speakers, and did not always have

217. *See* U.S. Dept. of Educ., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 20 (2010), *available at* http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf.

218. *Id.*

219. *See* U.S. Dept. of Educ., MEETING THE NEEDS OF ENGLISH LEARNERS AND OTHER DIVERSE LEARNERS (2010), *available at* http://www2.ed.gov/policy/elsec/leg/blueprint/english-learners-diverse-learners.pdf.

220. *See id.*

221. *See id.*

> access to the same school services (gym, library, etc.) as other students. The implementation of the Language Academy model started in 1999 and addressed what the TESOL classes lacked. In Language Academy classrooms, students interact with both native English-speaking peers and fellow English Learners.[222]

The Administration's summary of the Saint Paul reforms goes on to explain that not only has this change in instruction occurred, but "the district has significantly expanded its dual-language programs over the past five years."[223] In support of that expansion, the report explains the growing body of education research suggesting that development of a student's first language allows greater success in developing a second language, and that dual-language programs have found success in educating students to be bilingual.[224] Furthermore, the new content-based model has allowed the district to improve more than just the curriculum. According to the report: "the district has also developed cultural components and parent outreach efforts for EL students and families."[225] Not only does the transition sound like a positive one for the students, but the numbers have also backed it up. Between 2002 and 2005, the percentage of ELLs who achieved proficiency on the state's third-grade reading test rose from thirty to fifty-two.[226] The ELLs in that district have also outperformed their counterparts around the state on many tests.[227]

2. The Conservative Approach

While the Administration seems to favor the developmental programs that NCLB discourages, conservatives may tout programs that follow the NCLB status quo with regard to ELL education. No definite indications of congressional Republicans' policy priorities for the reauthorization have yet emerged as Congress has not yet made a commitment to tackle the ESEA, nor has it formed steering committees to formulate a position on the issue.[228] Advocates will need to closely monitor all developments out of that caucus as they arise. For now, the best window into the congressional Republicans' views on ELL education is through various research bodies upon which the party traditionally relies.[229] An investigation of many of those organizations' websites yielded few results; many lacked any published documents focusing on ELLs.[230] Those documents that were available were dated, and the subject had seemingly not been approached by many

222. *Id.*

223. *Id.*

224. *See id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. Interview with Andy Hardy, Legislative Assistant, Office of Congressman Patrick J. Tiberi (Nov. 30, 2010).

229. *See, e.g.*, HERITAGE FOUND., http://www.heritage.org/; CENTER FOR EQUAL OPPORTUNITY, http://www.ceousa.org/; GOP.GOV – THE WEBSITE FOR REPUBLICANS IN CONGRESS, http://www.gop.gov/.

230. *See id.*

research and policy groups since 2007, when the last attempt was made to overhaul NCLB.[231] Advocates should continue to check these sites for updates as the reauthorization moves forward.

For now, one pattern did emerge, which was praise for education programs in Florida, particularly the advances among Hispanic-American ELLs in that state.[232] While the Administration, and possibly other Democrats, are likely to focus on the programs implemented in Saint Paul and the other school districts highlighted in the Council of the Great City Schools report, Republicans are likely to advocate changes that incentivize the factors for success they observe in Florida through the results of the 2009 National Assessment of Educational Progress reading-assessment results. In a recent blog entry the Heritage Foundation highlighted the improvements in reading scores for students in Florida, which were above the national average, and even more impressive among minority students.[233] The study cited lumped ELL students in with "Hispanic students" as a group, making it unclear what the specific gains were among ELLs, but as the post states, "Hispanic students in Florida now outpace or tie the statewide average of all students in 30 states."[234] The blog entry goes on to identify the education reforms introduced by Governor Jeb Bush and implemented just before the state began to see its improvements.[235] The blog even goes so far as to say that Florida's reforms are more reasonable as factors to guide the reauthorization of NCLB, and should be advocated by lawmakers over the provisions in the current Administration's blueprint.[236]

Unfortunately, none of the factors explicitly cited in the Heritage Foundation are specific changes to ELL education. However, a closer look at Florida's approach to ELLs reveals the approach that congressional Republicans might likely promote given their overall preference for Florida's education policy.[237] A cornerstone of Florida's approach is Rule 6A-6.0904, entitled Equal Access to Appropriate Instruction for ELLs.[238] The provision seems to mirror NCLB's focus on rapid English acquisition.[239] It gives local districts some flexibility, but prefers basic English for Speakers of Other Languages (ESOL) instruction.[240] The Florida rule states its goal is that

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231. *See id.*

232. *See, e.g.*, Lindsey Burke, *Florida Students—and Education Policies—Shine in New NAEP Reading Results*, THE FOUNDRY (Mar. 25, 2010, 10:22 AM), http://blog.heritage.org/?p=29760.

233. *Id.*; *See* DEPT. OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, NAEP READING ASSESSMENT, http://nces.ed.gov/nationsreportcard/reading/moreabout.asp (explaining the NAEP Reading study including how it was developed and conducted).

234. *Id.*

235. *Id.*

236. *See id.*

237. *See* Burke, *supra* note 232 (touting school-choice policies enacted in Florida for yielding the most impressive gains in ELL reading scores).

238. FLA. ADMIN. CODE ANN. r. 6A-6.0904(1) (2009).

239. *See id.*

240. *See id.*

programs should "seek to develop each student's English language proficiency and academic potential."[241] Under the rule, basic ESOL programs include "instruction to develop sufficient skills in speaking, listening, reading and writing English to enable the student to be English proficient."[242] Additionally, the rule requires that ELLs be classified according to their level of English proficiency, and that school districts establish a minimum number of hours per day or week that each student is entitled to ESOL instruction.[243] That number should be based on the amount "necessary to attain parity of participation with English proficient students in language arts."[244] Schools are also supposed to reclassify students as soon as they have become proficient in English and prepare for the student's exit from the program.[245] Each of these provisions, like NCLB, emphasizes the goal of English proficiency achievement and transitioning out of native language instruction as quickly as possible.

D. What Should ELL Education Advocates Be Asking For?

Advocates of changes to NCLB to equalize education for ELL students must seek to understand the positions on each side of the debate, and craft their arguments in a way that will appeal to both sides. Although the above indications regarding Democrats' and Republicans' views on ELL education in the ESEA reauthorization clearly diverge, some strategies might be successful in advocating for common ground.

When working with congressional Republicans, advocates should emphasize a desire to return control to state and local bodies, point out that federal restrictions on the way ELL education may be administered run counter to traditional Republican views that state and local bodies know what is best for their students, and that the country benefits from experimentation with different educational models in different areas. Additionally, advocates should cite the long history of bilingual education in this country, and refer to the German and Cuban immigrants in showing that native-language maintenance has seen support in this country.

When talking to Democrats, advocates should emphasize the desirability of a return to the 1990s focus on bilingualism and multiculturalism, and should advocate a detailed look at the Council of the Great City Schools report. Looking closely at that report, which the Administration has already highlighted in its blueprint, can point lawmakers toward several factors apart from pedagogy that have been proven to increase efficacy of ELL programs. Those factors, which focus on broader issues than simply whether students should be allowed to maintain and develop their

241. *Id.*
242. 6A-6.0904(2)(a).
243. 6A-6.0904(2)(c).
244. *Id.*
245. *See* 6A-6.0904(2)(d).

native languages, may not incite as much partisan debate, and would likely yield positive results.[246] ELL students would benefit from an ESEA reauthorization that incentivizes use of the strategies outlined in that report.

The Saint Paul schools story highlights the potential success of dual-language programs, and programs that integrate ELLs into the community with their native English-speaking peers and provide for native-language maintenance and development. For the last decade, however, federal, state, and local politics have stood in the way of any increase in those programs in many locations.[247] Therefore in formulating an approach to seeking improvements for ELL education, advocates must take a broader approach, and need to keep in mind the above predilections of the different political caucuses.

In that vein, it is helpful to look more broadly at the promising practices the Council of the Great Schools found that were shared characteristics between the different school district programs it studied. In other words, it is helpful to look at changes that have proven successful, but that are not as controversial as dual-language programs. For example, the study pointed out that in each of the school districts that showed improvement in education for ELLs, "there was a particularly effective, vocal advocate for improvement of ELL instruction and services who helped shape and advance the reform agenda."[248] In order to be so effective, those leaders rallied support for their reform plans by establishing collaboration between administrators, directors of different subject areas, and schools.[249] The leaders also set high standards for achievement and ensured that there was sufficient oversight to measure those achievements, accomplished largely through research and data collection.[250]

Another notable factor was integration of the ELL program into school district policies as a whole, both at the level of ensuring that ELL students are integrated with their native English-speaking peers, and at the level of incorporating ELL reforms into a larger district-wide program for reform. ELL students who were integrated with their peers in Saint Paul showed improvements because of greater access to the full curriculum.[251] Integrated programs are preferable to pull-out programs, even if the pull-out programs remove students from the classroom for as little as thirty minutes per day, because of the core curriculum instruction they miss, and because there is no guarantee that instruction missed is made up.[252]

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246. *See supra* notes 219–227 and accompanying text.

247. *See, e.g.*, Li, *supra* note 13, at 541, 553–54.

248. *Lessons Learned*, *supra* note 40, at 18.

249. *See id.*

250. *See id.*

251. *See id.* at 24.

252. *See id.*

School districts that were working comprehensively to improve reading and literacy among all students were more likely to yield improvements in ELL achievements.[253] Additionally, districts were more successful when they made "concerted efforts to understand the demographics and needs of their ELLs and to address these needs via a coherent plan for ELL instructional improvement."[254] That comprehensive approach often included outreach to parents and the community, as well as continued education for teachers and other professionals working with those students.[255] Successful programs focused on academic language development as a gateway to further improvements in English.[256] Students who learned academic vocabulary first were more successfully integrated with other students in the rest of the curriculum, while continuing to develop their language skills.[257] Focusing on practices like these should be a priority of any forthcoming policy initiatives, and ELLs would benefit from a bill that outlined and incentivized such practices.

IV. CONCLUSION

The history of ELL education in this country is complicated and fraught with political battles and inconsistencies. As this student population continues to grow in our country, we cannot afford to repeat that history in the future. Advocates for increased educational equity for ELLs must study the past to build a better future. They must understand the successes and failures of past litigation and policy initiatives and continue to pursue both routes in working toward reform.

The traditional litigation approaches to education reform have been largely stymied, but may still play a key role in some places.[258] A fourth wave of school finance litigation based on inequities disproportionately plaguing minority students may eventually gain traction and should continue to be pursued. Additionally, school desegregation litigation continues to have a particular value in areas with recently developed ELL populations, especially where minority students are clearly being segregated purportedly due to language barriers.

We are at a critical juncture for ELL education policy on a federal level, and advocates must develop a strategy to ensure that the upcoming ESEA authorization is beneficial to those students. In order to minimize the potential of a political roadblock, advocates should be taking a broader view and seeking revisions that incentivize factors proven to improve ELL outcomes, but that avoid the heated debate over native-language maintenance. The focus on several more practical variables, as outlined in the recent Council of the Great City Schools report, should be both less

253. *See id.*
254. *Id.* at 20.
255. *Id.*
256. *Id.*
257. *See id.*
258. *See* discussion *supra* Part III.B.

controversial and more successful than the traditional focus on educational models and extent of native-language retention. However, advocates who are well versed in the arguments of the different political caucuses may also find success in removing some of the road-blocks to developmental programs from NCLB, in line with the Administration's emphasis on dual-language programs, and the traditional conservative preference for state and local control over education.

Advocates must also remember a positive effect of NCLB. While the statute as a whole was not ideal for ELLs, and would benefit from an overhaul in the ESEA reauthorization, it did effectively motivate schools to be concerned with their ELL populations.[259] As the Council of the Great City Schools report highlights:

> NCLB, with its emphasis on assessment and accountability for subgroups, required schools and districts across the country to report the achievement levels of the ELL subgroup. In some districts, the low achievement of ELLs spurred intense scrutiny of ELL programs as the academic needs of ELLs were brought into the spotlight.[260]

In the cases of the districts studied in the report, the incentive provided by NCLB spurred system-wide fundamental change that has seen positive results.[261] While the reauthorization of the ESEA will hopefully see several changes from NCLB, to some extent its focus on assessment and accountability should be maintained so that this positive impact will persist.

Finally, further research is needed in order to equip advocates with the strongest ammunition possible in the form of consistent data. Our current understanding of the needs of ELLs is still inhibited by several inconsistencies between states and districts in their data collection.[262] Much of the data available is limited by the fact that definitions of what classifies a student as an ELL varies significantly from place to place.[263] In order to be more efficient, districts need to be more vigilant in their data collection, and need to collect data in a disaggregated way. Also, that data will help the accuracy of further research that is still needed on the best pedagogical tactics for instruction of ELLs. Although in the short term it may be more politically expedient to focus on less controversial variables to ensure that these students see some quicker improvements in their education, the extent of native-language use will at some point need to re-enter the conversation, as it can be used strategically with positive effects on ELL outcomes.[264] When that time comes, advocates will need to be armed with accurate research showing the superiority of developmental programs over their English-only counterparts.

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259. *See Lessons Learned*, *supra* note 40, at 20.

260. *Id.*

261. *See id.*

262. *See id.* at iv.

263. *See id.*

264. *See id.* at v.