

NOTE

Higher Education's Great Divide: Tuition Discrimination and the Dormant Commerce Clause

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ABSTRACT

The pursuit of higher education has long been ingrained in the fabric of our nation. However, due to a decrease in government spending on public schooling over the last sixty years, colleges and universities have had to make up financial ground through raising the cost of tuition, creating a roadblock for many to attain this so-called “American Dream.” Students are now left with the responsibility of closing the financial gap by paying increased tuition and fees.

Yet no group has been expected to bear the burden of decreased school funding more than out-of-state students at public universities. Compared with their in-state counterparts, out-of-state students often pay at least two times—and sometimes up to four times—as much in tuition for the same education. This discriminatory behavior not only impermissibly favors in-state residents but also creates an incentive for universities to admit out-of-state students from high-income families over their equally achieving, low-income peers. To hold universities accountable, courts should examine out-of-state tuition practices

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under the Dormant Commerce Clause doctrine to force Congress's hand to act to protect the free flow of knowledge as well as address an education system that increasingly accommodates the wealthy at the expense of the disadvantaged.

TABLE OF CONTENTS

INTRODUCTION	411
I. A HISTORY OF EDUCATION IN AMERICA	415
A. <i>The Importance of an Educated Citizenry</i>	415
B. <i>Historical Tuition Differences: Past to Present</i>	417
C. <i>The "Price" of a College Education</i>	420
II. INEQUITIES ABOUND: A HISTORY IN THE COURT	423
A. <i>The Dormant Commerce Clause</i>	423
B. <i>Out-of-State Tuition Litigation and Privileges and Immunities</i>	428
III. CONSTITUTIONAL IMPLICATIONS	430
A. <i>Facial Discrimination in the Name of Education</i>	432
B. <i>The Pike Test: Impermissible Burdens on the Education Market</i>	434
IV. BRINGING THE PROBLEM TO THE COURTS AND CONGRESSIONAL ACTION	436
A. <i>Making a Case</i>	437
B. <i>Market Participant and Compelling State Interests</i>	439
C. <i>Congressional Action</i>	441
CONCLUSION	444

INTRODUCTION

Choosing where to go to college is often an exciting first step into adulthood for the American teenager. They explore school websites and catalogs, searching for programs or extracurriculars that fit their interests. They tour college campuses, trying to picture themselves fitting into the school's culture. And they begin to imagine what it will be like to be on their own, no more house rules or curfews to hold them back. Although it is easy to be swept up in the thrill of a new life chapter, with nearly 4,000 degree-granting institutions across the country, choosing a college can quickly become a daunting task.¹ When a student has so many schools to choose from, knowing which one is the "right" fit feels impossible. Thus, students turn to the most important question: how much does this university cost?

¹ *Fast Facts, Educational Institutions*, NAT'L CTR FOR EDUC. STAT., <https://nces.ed.gov/fast-facts/display.asp?id=1122> [<https://perma.cc/REU8-X6AE>] ("There were a total of 3,931 Title IV degree-granting institutions in 2020–21 . . .").

America's college affordability crisis is no secret: as of January 2025, the country's student loan debt stood at \$1.773 trillion.² With the recent adverse ruling on Former President Biden's loan cancellation plans in *Biden v. Nebraska*,³ that amount is unlikely to decrease significantly any time soon. For the last forty years, college costs have been steadily rising: between 1980 and 2020, the cost of attendance at a four-year college increased by 180%.⁴ But while tuition costs have soared,⁵ the median household income has failed to keep pace, growing only 29% in that same time frame.⁶ Although the government has provided students with some federal aid and tax credits to help mitigate cost burdens, on average, they have not been enough to meet tuition increases.⁷ The result is a vicious cycle in which tuition increases but average household income does not, forcing students to turn to loans to meet their college financial needs, further contributing to the student debt crisis.⁸

In-state and out-of-state tuition at public universities have both been rising consistently over the past few decades, but the rate at which out-of-state tuition is increasing—especially at flagship state universities—tends to be much higher, exacerbating an already stark

² Melanie Hanson, *Student Loan Debt Statistics*, EDUC. DATA INITIATIVE (Jan. 15, 2025), <https://educationdata.org/student-loan-debt-statistics> [<https://perma.cc/JD63-Y85E>].

³ 143 S. Ct. 2355 (2023); see also Amy Howe, *Supreme Court Strikes Down Biden Student-Loan Forgiveness Program*, SCOTUSBLOG (June 30, 2023, 12:31 PM), <https://www.scotusblog.com/2023/06/supreme-court-strikes-down-biden-student-loan-forgiveness-program> [<https://perma.cc/LCM6-WDTX>].

⁴ Brianna McGurran, *College Tuition Inflation: Compare the Cost of College Over Time*, FORBES (May 9, 2023, 1:46 PM), <https://www.forbes.com/advisor/student-loans/college-tuition-inflation> [<https://perma.cc/D9MT-QFL8>].

⁵ Melanie Hanson, *College Tuition Inflation Rate*, EDUC. DATA INITIATIVE (Sept. 9, 2024), <https://educationdata.org/college-tuition-inflation-rate> [<https://perma.cc/BZ57-F3FK>] (“After adjusting for currency inflation, college tuition has increased 197.4% since 1963.”).

⁶ *Real Median Household Income in the United States*, FED. RSRV. BANK OF ST. LOUIS (Sept. 11, 2024, 9:45 AM), <https://fred.stlouisfed.org/series/MEHOINUSA672N> [<https://perma.cc/4Z76-8PTY>] (table showing real median household income in 1985 as \$60,050 compared to \$77,540 in 2022).

⁷ See *Two Decades of Change in Federal and State Higher Education Funding*, PEW CHARITABLE TRS. (Oct. 15, 2019), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/10/two-decades-of-change-in-federal-and-state-higher-education-funding> [<https://perma.cc/5YRC-95AK>]; see also MICHAEL MITCHELL, MICHAEL LEACHMAN & KATHLEEN MASTERS, CTR. ON BUDGET & POL'Y PRIORITIES, *FUNDING DOWN, TUITION UP: STATE CUTS TO HIGHER EDUCATION THREATEN QUALITY AND AFFORDABILITY AT PUBLIC COLLEGES* (2016).

⁸ See MITCHELL ET AL., *supra* note 7, at 15–16, 20; see also Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CALIF. L. REV. 1561, 1578 (2015) (“Not surprisingly, in response to the rising cost of higher education and the lack of growth in earnings, the amount borrowed by students has increased, as has the number of borrowers.”). See generally Richard J. Cebula & James V. Koch, *The Crisis in Public Higher Education: A New Perspective*, 80 AM. J. ECON. & SOCIO. 113, 119 (2021) (discussing how a typical student takes out loans to address the rising costs of higher education).

price difference.⁹ This increase is due in part to the overall decline in state and local funding, causing schools to pass their higher costs onto students to compensate for lost revenue.¹⁰ As institutions that rely heavily on state and federal funding to temper costs, public universities have been hit especially hard by budget cuts, forcing them to scramble to find ways to close their growing funding deficits.¹¹ Although state policies exist to limit the growth of resident tuition, institutions maintain autonomy over setting their out-of-state rates.¹² This creates an incentive for public universities to raise not only out-of-state tuition but also nonresident enrollment in order to increase their revenue.¹³ Increased out-of-state tuition is thus creating a system that, in theory, is meant to benefit in-state students to the detriment of the nonresidents who are forced to pay exorbitant amounts to receive the same education.¹⁴ For example, the University of Michigan, Ann Arbor charges \$18,848 for in-state tuition but \$63,081 for out-of-state; the University of North Carolina at Chapel Hill's disparity is even greater, charging \$9,003 for in-state and \$41,211 for out-of-state, which is over four times as much.¹⁵ The result is a system that, at best, punishes nonresident students for their choice to attend an out-of-state school and, at worst, constrains students—especially those from low- and moderate-income backgrounds—to eschew college altogether.¹⁶

⁹ Aaron Klein, *The Great Student Swap*, BROOKINGS INST.: ECON. STUD. (Sept. 7, 2022), <https://www.brookings.edu/articles/the-great-student-swap> [<https://perma.cc/RGY7-2N2T>].

¹⁰ Douglas Webber, *Higher Ed, Lower Spending: As States Cut Back, Where Has the Money Gone?*, 18 EDUC. NEXT 51, 51 (2018), <https://www.educationnext.org/higher-ed-lower-spending-as-states-cut-back-where-has-money-gone> [<https://perma.cc/VEF6-JVNU>] (“Since 1987, the typical student at a public college or university has seen the government subsidy for her education drop by \$2,337, or roughly one quarter.”); *see also* MITCHELL ET AL., *supra* note 7.

¹¹ MITCHELL ET AL., *supra* note 7, at 1–3. Tuition prices are also increasing at private universities, which should raise concerns about the state of affordability of education in America in general. JENNIFER MA & MATEA PENDER, COLL. BD., TRENDS IN COLLEGE PRICING AND STUDENT AID 2022, at 12 (2022), <https://research.collegeboard.org/media/pdf/trends-in-college-pricing-student-aid-2022.pdf> [<https://perma.cc/8CRK-DRFP>] (“In 2022–23, the average published tuition and fee price is . . . 2.25 times as high as it was 30 years ago at public four-year institutions, and 1.8 times as high as it was 30 years ago at private nonprofit four-year institutions, after adjusting for inflation.”).

¹² Ozan Jaquette & Bradley R. Curs, *Creating the Out-of-State University: Do Public Universities Increase Nonresident Freshman Enrollment in Response to Declining State Appropriations?*, 56 RSCH. HIGHER EDUC. 535, 539 (2015).

¹³ *Id.* at 535, 558. *See generally* Mikyong Minsun Kim & Jangwan Ko, *The Impacts of State Control Policies on College Tuition Increase*, 29 EDUC. POL’Y 815 (2015); Klein, *supra* note 9.

¹⁴ The list of the 2025 top-ranked public colleges and universities reveals that the difference in tuition prices for in- and out-of-state students is severe. *See Top Public Schools*, U.S. NEWS, <https://www.usnews.com/best-colleges/rankings/national-universities/top-public> [<https://perma.cc/ZH6A-6XH6>]. Published out-of-state tuition and fees are at least two times that of in-state prices, with some schools charging up to or even more than four times as much. *See id.*

¹⁵ *Id.* These numbers reflect the cost of tuition for a full school year for a full-time student.

¹⁶ *See* MITCHELL ET AL., *supra* note 7, at 2, 6.

The Commerce Clause, outlined in Article 1, section 8, clause 3 of the United States Constitution, endows Congress with the power to “regulate commerce . . . among the several states.”¹⁷ In contrast to its explicit parent, the Dormant Commerce Clause is a judicially created doctrine whose inclusion with the Commerce Clause has been inferred.¹⁸ The Dormant Commerce Clause prohibits states from interfering with Congress’s plenary power of commerce and enacting laws that discriminate against or excessively burden interstate commerce.¹⁹ Policies that *do* disrupt commerce are, therefore, unconstitutional.²⁰ And yet state university tuition policies across the country are doing just that: by charging out-of-state students significantly higher prices than their in-state peers, universities influence not only where students go to school but also the types of students that ultimately matriculate.

This Note argues that the vast difference in tuition prices at public universities places an impermissible burden on interstate commerce in violation of the Dormant Commerce Clause and that Congress must limit these differences to ensure education equity in the United States. The scope of this Note focuses on public institutions with an emphasis on four-year universities. This is because four-year universities tend to have the highest in- and out-of-state tuitions, including the largest price disparities.²¹

Part I explains the current landscape regarding in- and out-of-state tuition prices and the general history of increasing costs to illustrate the overall effect it has on the education market and student outcomes. Part II explores the history of the Dormant Commerce Clause doctrine, providing a lens through which to view and analyze the out-of-state tuition crisis. This Part further touches on the history of previous litigation regarding out-of-state tuitions under the Privileges and Immunities Clause, highlighting the limitations the latter has on effectively redressing the in- and out-of-state tuition gap. Part III discusses the practical implications of imposing large out-of-state tuition prices on nonresident students, including deterring student enrollment and shifting the makeup of the student bodies at some of the nation’s flagship state schools. It then highlights how these effects implicate the Dormant Commerce Clause. Lastly, Part IV explores how nonresident students can bring their case to the courts to enjoin universities from charging higher rates. It also explains how Congress can protect out-of-state students at public universities by utilizing their powers under the Commerce and Tax and Spending clauses.

¹⁷ U.S. CONST. art. 1, § 8, cl. 3.

¹⁸ See *infra* Section II.A.

¹⁹ See *infra* Part II.

²⁰ See *infra* Part II.

²¹ See *Trends in College Pricing: Highlights*, COLLEGE BOARD, <https://research.collegeboard.org/trends/college-pricing/highlights> [<https://perma.cc/K254-5DAQ>].

I. A HISTORY OF EDUCATION IN AMERICA

Today, public institutions represent an invaluable fixture in America's higher education system: as of December 2024, public colleges and universities enrolled 13.49 million undergraduate and graduate students, accounting for 72.63% of all postsecondary students.²² By comparison, only 50% of all higher education students enrolled in public institutions in 1950.²³ This nearly 25% bump reveals both the importance of public education for American society and how decisions regarding tuition costs at public institutions could have an immense effect on the majority of students in America.

A. *The Importance of an Educated Citizenry*

The importance of education has a longstanding history in the founding of our country. Before the Constitution, the federal government enacted the Northwest Ordinance of 1787,²⁴ which was adopted after the eastern states ceded the Northwest Territory to the federal government.²⁵ The Ordinance outlined the terms of governance for the territory, provided guidelines for admitting new states to the Union, and laid out a bill of rights guaranteed therein.²⁶ In that bill of rights, the Ordinance explicitly stated that “knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”²⁷ This provision not only established a federal interest in education but also laid the groundwork for the territory's commitment to public education.²⁸

²² Melanie Hanson, *College Enrollment & Student Demographic Statistics*, EDUC. DATA INITIATIVE (Dec. 21, 2024), <https://educationdata.org/college-enrollment-statistics> [<https://perma.cc/U2EP-6NCK>].

²³ *Id.*

²⁴ An Act to Provide for the Government of the Territory Northwest of the River Ohio (Northwest Ordinance), ch. 8, 1 Stat. 50 (1789).

²⁵ See *The Northwest Ordinance of 1787*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/Historical-Highlights/1700s/Northwest-Ordinance-1787> [<https://perma.cc/74KP-Q5KM>]; see also Reginald Horsman, *The Northwest Ordinance and the Shaping of an Expanding Republic*, WIS. MAG. HIST, Autumn 1989, at 21, 22 (“In October of [1780] Congress agreed, in principle, that the landed states would cede their western claims to the central government . . .”). The Northwest Territory included lands that are now the states of Illinois, Indiana, Ohio, Michigan, Minnesota, and Wisconsin. See *The Northwest and the Ordinances, 1783–1858*, LIBR. OF CONG., <https://www.loc.gov/collections/pioneering-the-upper-midwest/articles-and-essays/history-of-the-upper-midwest-overview/northwest-and-ordinances> [<https://perma.cc/6GWM-95QY>].

²⁶ See LIBR. OF CONG., *supra* note 25; see also Denis P. Duffey, Note, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 929–30 (1995).

²⁷ Northwest Ordinance, ch. 8, 1 Stat. 50, 52 (1789) (laying out guidelines for admitting new states into the Union).

²⁸ See HAROLD M. HYMAN, AMERICAN SINGULARITY: THE 1787 NORTHWEST ORDINANCE AND THE 1862 HOMESTEAD AND MORRILL ACTS 7–13 (2012), <http://www.minnesotallegalhistoryproject>.

The government's interest in education became more apparent in the mid-19th century with the passage of the Morrill Act of 1862,²⁹ which donated large tracts of public land “to the several States and Territories” to establish colleges “for the Benefit of Agriculture and Mechanic arts.”³⁰ Several private and public institutions had already existed for decades (e.g., Yale, Harvard, the College of William & Mary, and the University of Virginia),³¹ but the scope of their curriculums was relatively limited, and the wealthy, privileged few were often the only ones who would attend.³² Most Americans were unwilling or unable to afford the lost income that came with a child attending school instead of choosing to work, especially to study seemingly impractical subjects like philosophy and religion.³³ Recognizing this deterrent, the Morrill Act helped states establish “land-grant” institutions.³⁴ These colleges were meant to encourage attendance by offering a broader curriculum

org/assets/H.%20Hyman%20Book.pdf [https://perma.cc/KC4M-2VBP]; see also LIBR. OF CONG., *supra* note 25. Congress had previously enacted the Land Ordinance of 1785, which provided for a systematic subdivision of the territory's lands. *Id.* This included setting aside plots of land specifically for schools, another indication of the government's desire to foster an educated citizenry. *Id.*

²⁹ Morrill Act of 1862, ch. 130, 12 Stat. 503 (codified as amended at 7 U.S.C. §§ 301–328).

³⁰ *Id.*; see also JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 75–78 (3d ed. 2019).

³¹ E.g., *Traditions & History*, YALE UNIV., <https://www.yale.edu/about-yale/traditions-history> [https://perma.cc/MF46-SE82]; *The History of Harvard*, HARVARD UNIV., <https://www.harvard.edu/about/history> [https://perma.cc/QD23-MJG8]; *History & Traditions*, COLL. OF WM. & MARY, <https://www.wm.edu/about/history> [https://perma.cc/49BW-VZZ6]; *About the University*, UNIV. OF VA., <https://www.virginia.edu/aboutuva> [https://perma.cc/9U9D-ZG3S].

³² See THELIN, *supra* note 30, at 18–26. Thelin describes the traditional colonial curriculums, including their emphasis on religious studies, philosophy, and oration, often without regard to actual completion of a degree. Thelin also stressed that, although tuitions were not initially prohibitive, “in the seventeenth and early eighteenth centuries . . . [f]ew families could afford the loss of an able-bodied young man from the family farm or business,” perpetuating an idea that college was only for the elite. *Id.*; see also Jeremy Anderberg, *Is College for Everyone? An Introduction and Timeline of College in America*, ART OF MANLINESS (May 30, 2021), <https://www.artofmanliness.com/career-wealth/career/is-college-for-everyone-an-introduction-and-timeline-of-college-in-america> [https://perma.cc/2322-J7FQ] (referencing THELIN, *supra* note 30).

³³ See THELIN, *supra* note 30, at 108. See generally Mary J. Bowman, *The Land-Grant Colleges and Universities in Human-Resource Development*, 22 J. ECON. HIST. 523, 525–27 (1962) (discussing how land-grant institutions attracted students through its practical curriculum offerings).

³⁴ Morrill Act of 1862, ch. 130, 12 Stat. 503 (codified as amended at 7 U.S.C. §§ 301–328); see also GENEVIEVE K. CROFT, CONG. RSCH. SERV., R45897, THE U.S. LAND-GRANT UNIVERSITY SYSTEM: OVERVIEW AND ROLE IN AGRICULTURAL RESEARCH 2 (2022). Many of the largest state schools in the midwest are land-grant institutions, including the University of Illinois-Urbana, the University of Minnesota, Michigan State University, and the University of Wisconsin-Madison. NIFA Land-Grant Colleges and Universities, U.S. DEP'T OF AGRIC.: NAT'L INST. OF FOOD AND AGRIC., https://www.nifa.usda.gov/sites/default/files/2023-04/NIFALGUs_MapREV_AI0522_508.pdf [https://perma.cc/D3TL-VAB5].

of more practical “industrial” topics like agriculture.³⁵ Thus, in many ways, the Morrill Act helped pave the way for the establishment of a nationwide public higher education system and began expansion of educational access for all classes of Americans.³⁶

B. *Historical Tuition Differences: Past to Present*

Charging tuition has historically been an accepted practice within the American higher education system,³⁷ but most public universities sought to make their tuition free or relatively inexpensive when they were first established.³⁸ University systems like the University of California and the City University of New York were founded on no-tuition policies in the mid-1800s and maintained these policies for decades.³⁹ Although many state university no-tuition policies were geared at in-state students, not out-of-state,⁴⁰ the fees charged to out-of-state students remained minimal.⁴¹ However, by 1960, most public universities charged a nonresident fee more than twice the resident fee.⁴² With the historical decrease in state funding,⁴³ this trend has continued to this

³⁵ CROFT, *supra* note 34, at 5; *see also* THELIN, *supra* note 30, at 103–08; Bowman, *supra* note 33, at 525–27.

³⁶ Since the first Morrill Act of 1862, Congress has expanded the land-grant institution system several times, including in 1890 to establish the first Black colleges and universities throughout the South and in 1994 to establish the tribal colleges and universities. *See* CROFT, *supra* note 34, at 1. For a discussion of land-grant institutions’ expansive reach, *see id.* at 3 (“In 2020, 2.0 million students were enrolled across 111 land-grant colleges and universities . . .”).

³⁷ It is no secret that state tax revenue helps fund public benefits, including education. It follows that universities, therefore, have an interest in providing discounted tuition to their in-state students. *See* *Vlandis v. Kline*, 412 U.S. 441, 452–53 (“We fully recognize . . . the right of [a State’s] own bona fide residents to attend [colleges and universities] on a preferential tuition basis.”). This Note, however, does not argue that states do not have a legitimate interest but rather that the egregious difference in prices—and the extreme “discount” given to in-state students—undermines this interest and leads to constitutional problems. This is exacerbated by the state policies in place that fix in-state prices, letting out-of-state tuitions rise unchecked. *See* Jaquette & Curs, *supra* note 12.

³⁸ M.M. Chambers, *The Genesis of Tuition Fee Policy in Higher Education*, 8 *EDUC. STUD.* 123, 124 (1977); *see also* THELIN, *supra* note 30, at 99, 251. For further analysis on state college financing histories, *see generally* ALLAN NEVINS, *THE STATE UNIVERSITIES AND DEMOCRACY* (1962).

³⁹ Jennifer M. Nations, *How Austerity Politics Led to Tuition Charges at the University of California and City University of New York*, 61 *HIST. EDUC. Q.* 273, 273–74 (2021).

⁴⁰ Amy Sherman, *Was College Once Free in United States, as Bernie Sanders Says?*, *POLITIFACT* (Feb. 9, 2016), <https://www.politifact.com/factchecks/2016/feb/09/bernie-sanders/was-college-once-free-united-states-and-it-oversea> [<https://perma.cc/M7YA-S2DP>].

⁴¹ *See id.*; *see also* THELIN, *supra* note 30, at 99, 251.

⁴² *See* Edward C. Moore, *Higher Education and the Low-Tuition Policy: Should the Student Pay His Way?*, 33 *J. HIGHER EDUC.* 252, 256–57 (1962) (“A survey of undergraduate college costs at twenty large public institutions in 1960 showed an average resident fee of \$248 and an average non-resident fee of \$574.”).

⁴³ *See* Douglas A. Webber, *A Growing Divide: The Promise and Pitfalls of Higher Education for the Working Class*, 695 *ANNALS AM. ACAD. POL. & SOC. SCI.* 94, 99–100 (2021).

day, with the difference between resident and nonresident tuition only increasing over the last seventy years. According to one survey, the average gap in tuition prices at the twenty largest public schools in 1960 was about \$325, which would only be about \$3,500 in today's dollars.⁴⁴ Today, that average gap is just over \$13,000.⁴⁵ Yet the difference in tuition prices at many top-ranked public universities is even greater, totaling multiple tens of thousands of dollars and revealing an extreme burden on out-of-state students.⁴⁶

TABLE 1: IN-STATE VERSUS OUT-OF-STATE TUITION⁴⁷

School	In-State	Out-of-State	Difference (%)
University of North Carolina at Chapel Hill	\$9,003	\$41,211	457.75%
University of Florida	\$6,381	\$28,658	449.11%
University of Texas at Austin	\$11,678	\$42,778	366.31%
University of Michigan—Ann Arbor	\$18,848	\$63,081	334.68%
University of California, Los Angeles	\$14,208	\$46,503	327.30%
University of California, San Diego	\$16,815	\$51,015	303.39%
University of California, Berkeley	\$16,832	\$51,032	303.18%
University of California, Davis	\$15,794	\$47,682	301.90%
Georgia Institute of Technology	\$12,058	\$34,484	285.98%
University of Virginia	\$23,118	\$60,907	263.46%

Table 1 indicates the differences between in-state and out-of-state tuition and fees for the 2024–25 school year at *U.S. News*' top ten public universities in the United States.⁴⁸ These numbers generally do not reflect the actual price that many students pay due to receiving

⁴⁴ *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/7Q2G-BP2M>] (calculating that \$325 in January 1960 had a purchasing power of \$3,523.65 in January 2025); see also Moore, *supra* note 42.

⁴⁵ See Sarah Wood, *See the Average College Tuition in 2024–2025*, U.S. NEWS (Sept. 26, 2024), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/paying-for-college-infographic> [<https://perma.cc/92SC-9RNZ>]. According to the *U.S. News*' annual survey of ranked, four-year colleges, the average in-state tuition at public institutions was \$11,011 versus \$24,513 for out-of-state. *Id.* This means out-of-state tuition costs an average 223% more than in-state. See *id.*; see also Melanie Hanson, *Average In-State vs. Out-of-State Tuition*, EDUC. DATA INITIATIVE (June 28, 2024), <https://educationdata.org/average-in-state-vs-out-of-state-tuition> [<https://perma.cc/9KEW-7DAC>]; *How Much Does College Cost?*, COLLEGEDATA.ORG, <https://www.college-data.com/resources/pay-your-way/whats-the-price-tag-for-a-college-education> [<https://perma.cc/E6KV-C9KN>].

⁴⁶ See *infra* Table 1.

⁴⁷ U.S. NEWS, *supra* note 14. The schools are ordered from largest to smallest difference in tuition costs. The percentages were calculated by dividing the out-of-state tuition cost by the in-state tuition cost.

⁴⁸ U.S. NEWS, *supra* note 14. This table reflects the extreme price differences in obtaining a public education at some of the nation's top public universities for nonresident students.

scholarships and grants.⁴⁹ Nonetheless, they reveal a sticker price that can deter out-of-state individuals from pursuing an education at these institutions.⁵⁰ As the cost of tuition at four-year public universities continues to climb,⁵¹ without intervention, this trend will likely persist.

A number of public universities have taken action to temper the consequences of the large tuition differences for in- and out-of-state students. This includes reciprocity agreements, an arrangement in which a state offers reduced tuition costs at specified public institutions to students from nearby or adjacent states.⁵² Reciprocity agreements—which allow out-of-state students to pay discounted tuition rates at a designated state's school—originally emerged in the 1950s as a means to help reduce costs for nonresident students from neighboring states.⁵³ Many of these agreements remain today and can save out-of-state students and their families thousands of dollars a year.⁵⁴ However, some of the larger, more prestigious public universities, such as the University of Michigan and the University of Wisconsin-Madison, are missing from the list of participating institutions.⁵⁵ Consequentially, although students are able

⁴⁹ Phillip Levine, *College Prices Aren't Skyrocketing—But They're Still Too High for Some*, BROOKINGS INST. (Apr. 24, 2023), <https://www.brookings.edu/articles/college-prices-arent-skyrocketing-but-theyre-still-too-high-for-some> [<https://perma.cc/DBV8-6WSC>]; see Sandy Baum, Charles Kurose & Michael McPherson, *An Overview of American Higher Education*, 23 FUTURE CHILD. 17, 27 (2013) (“The wedge between the published prices and the actual prices students pay comes in the form of grant aid and, to an increasing extent, tuition tax credits.”).

⁵⁰ Phillip B. Levine, Jennifer Ma & Lauren C. Russell, *Do College Applicants Respond to Changes in Sticker Prices Even When They Don't Matter?*, 18 EDUC. FIN. & POL'Y 365, 387 (2023); see also Chris Burt, *Sticker Shock: More Than 80% of Recent H.S. Grads Didn't Even Look at High-Priced Colleges*, UNIV. BUS. (Sept. 9, 2022), <https://universitybusiness.com/sticker-shock-more-than-80-of-recent-h-s-grads-didnt-look-at-high-priced-colleges> [<https://perma.cc/9PPV-RQAH>]; MICHAEL MITCHELL ET AL., *supra* note 7, at 17.

⁵¹ See Melanie Hanson, *College Tuition Inflation Rate*, EDUC. DATA INITIATIVE (Sept. 9, 2024), <https://educationdata.org/college-tuition-inflation-rate> [<https://perma.cc/9GKM-D2K6>].

⁵² See Cathy Portele, *Tuition Reciprocity Programs—Can You Get a Better Deal Out of State?*, COLL. AID PRO (May 15, 2023), <https://collegeaidpro.com/tuition-reciprocity-programs> [<https://perma.cc/JE33-ZPMG>]; see also Garret Andrews & Brenna Swanston, *What Is Tuition Reciprocity? How to Pay In-State Tuition at Out-of-State Schools*, FORBES (Mar. 18, 2024, 12:38 PM), <https://www.forbes.com/advisor/education/student-resources/what-is-tuition-reciprocity> [<https://perma.cc/V46P-L8G9>].

⁵³ See generally Gregory Stewart, Diane Brown Wright & Angelica Kennedy, *Tuition Reciprocity in the United States*, 84 COLL. & UNIV. 65, 68 (2008) (discussing the establishment dates of different tuition reciprocity programs across the country, the longest-running being the New England Regional Student Program, founded in 1957); Hanson, *supra* note 45.

⁵⁴ See Andrews & Swanston, *supra* note 52. See generally *State & Regional College Tuition Discounts*, NAT'L ASS'N OF STUDENT FIN. AID ADM'RS, https://www.nasfaa.org/State_Regional_Tuition_Exchanges [<https://perma.cc/7X32-3CUH>] (describing the different regional reciprocity programs that exist and providing links to their respective websites).

⁵⁵ See *Institutions*, MIDWEST STUDENT EXCH. PROGRAM, <https://msep.mhec.org/institutions> [<https://perma.cc/F7HN-JWEF>]; *WUE Handout*, W. INTERSTATE COMM'N FOR HIGHER EDUC., <https://www.wiche.edu/resources/wue-handout> [<https://perma.cc/4LVA-UW3E>]; *College and University*

to obtain a discount on tuition at smaller, lesser-known schools in a neighboring state, access to the higher-ranked public schools may be limited by their price tag, which in turn could affect student outcomes.⁵⁶

C. *The “Price” of a College Education*

In the United States, obtaining a four-year degree can result in 75% more lifetime earnings as compared to someone with only a high school diploma, a difference equating to more than one million dollars over the span of a median career.⁵⁷ More than mere dollars, those with at least a bachelor’s degree are shown to live, on average, eight years longer than those without one.⁵⁸ Families’ lifestyles and chances at upward mobility can thus hinge on college degrees.⁵⁹

Outside of lifetime achievements, there are other practical implications related to where a student chooses to earn their degree, including the amount of debt incurred. The average public university student—either in- or out-of-state—borrows \$31,960 in federal funding

List, NEW ENGLAND BD. OF HIGHER ED., <https://nebhe.org/tuitionbreak/find-a-program/schoollink> [<https://perma.cc/9RZL-6LTM>]. Although the University of Wisconsin-Madison does not participate in any formal reciprocity programs, it has an individual reciprocity agreement with the state of Minnesota. *Reduced Out-of-State Tuition Options*, MINN. OFF. OF HIGHER EDUC., <https://www.ohe.state.mn.us/mPg.cfm?pageID=97> [<https://perma.cc/6ZWW-CK64>].

⁵⁶ See *supra* note 54; see also *infra* Section I.C. Reciprocity agreements have their advantages, but only if they are actually in place. In 2021, Illinois officially became an inactive member of the Midwest Student Exchange Program due to lack of participating institutions. See Maggie Prosser, *Illinois Ends Participation in Midwest Student Exchange Program, Which Saved Students Millions in College Tuition*, CHI. TRIB. (July 8, 2021, 10:00 AM), <https://www.chicagotribune.com/news/breaking/ct-state-midwest-student-exchange-program-inactive-20210708-i6ltzaq2ibbexndh-b6cle5lnfy-story.html> [<https://perma.cc/G5NZ-BDNX>]. This raised concerns for some neighboring states like Wisconsin, where Illinois students are among its largest sources of nonresident enrollees. Rich Kremer, *UW System Creates Midwest Tuition Rate to Maintain Flow of Students into UW Schools*, WIS. PUB. RADIO (Dec. 9, 2022), <https://www.wpr.org/education/uw-system-midwest-tuition-rate-uw-schools-college-enrollment-msep> [<https://perma.cc/S2RC-JX3K>]. To address this, at least one Wisconsin school, University of Wisconsin-Milwaukee, sought to offer a temporary tuition discount for Illinois residents, acknowledging that without this potential incentive, their enrollment rates of nonresidents would likely severely decline. *Id.*

⁵⁷ ANTHONY P. CARNEVALE, STEPHEN J. ROSE & BAN CHEAH, GEORGETOWN UNIV. CTR. ON EDUC. & THE WORKFORCE, *THE COLLEGE PAYOFF: EDUCATION, OCCUPATIONS, LIFETIME EARNINGS* 1, 3 (2011), <https://cew.georgetown.edu/cew-reports/the-college-payoff> [<https://perma.cc/24UV-4XFQ>]; ANTHONY P. CARNEVALE, BAN CHEAH & EMMA WENZINGER, GEORGETOWN UNIV. CTR. ON EDUC. & THE WORKFORCE, *THE COLLEGE PAYOFF: MORE EDUCATION DOESN’T ALWAYS MEAN MORE EARNINGS* 3 (2021), <https://cew.georgetown.edu/cew-reports/collegepayoff2021> [<https://perma.cc/5KKL-5KDB>].

⁵⁸ Anne Case & Angus Deaton, *Accounting for the Widening Mortality Gap Between American Adults With and Without a BA*, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2023, at 10, <https://www.brookings.edu/articles/accounting-for-the-widening-mortality-gap-between-american-adults-with-and-without-a-ba> [<https://perma.cc/28GH-ZW7T>].

⁵⁹ See *id.*

to attain their bachelor's degree.⁶⁰ This number does not include the potential private loans that a student might borrow to supplement their federal financial aid packages.⁶¹ This means that a student who attends an out-of-state public school may generally accrue significantly more debt than their in-state counterparts.⁶²

Nearly half of borrowers are still paying off their student loans 20 years later.⁶³ Carrying such debt can significantly affect an individual's post-graduate plans—upwards of 81% of people with student loans reported a delay of at least one key life milestone due to their debt.⁶⁴ A high amount of debt can not only affect where an individual takes their first job and how much they earn, but it could also influence where and when they decide to settle down or whether to have a family.⁶⁵ To put

⁶⁰ Hanson, *supra* note 2. To put that into perspective, the average 1996 college graduate left school with only \$12,750 in debt. Melanie Hanson, *Average Student Loan Debt by Year*, EDUC. DATA INITIATIVE (Aug. 16, 2024), <https://educationdata.org/average-student-loan-debt-by-year> [<https://perma.cc/43ZC-79MK>]. This would be about \$25,500 in May 2024 dollars. *Id.*

⁶¹ Melanie Hanson, *Average Student Loan Debt*, EDUC. DATA INITIATIVE (May 22, 2023), <https://web.archive.org/web/20230526212710/https://educationdata.org/average-student-loan-debt> [<https://perma.cc/AS85-LHKF>]. As of May 2023, the average private student loan debt was \$54,921. *Id.*

⁶² *See id.* Tuition at the time of the Author's graduation in 2014 from the University of Wisconsin-Madison was \$9,273 for residents and \$25,523 for nonresidents. *See* UNIV. OF WIS. SYS., 2013–14 OPERATING BUDGET & FEE SCHEDULES, at B-5 (July 2013). As a nonresident student attending a state flagship university, the Author used private loans to supplement the gap in the federal financial aid received for tuition and living expenses. This resulted in a federal debt similar to the current national average. However, the need to borrow significant private loans led the Author to graduate with over \$90,000 in total debt. The Author recognizes this is a personal experience but uses it as an example of what similarly situated, lower-income students may encounter.

⁶³ Hanson, *supra* note 61. Not only are 48.9% of students who borrowed money for school still paying off their loans after two decades, but “20 years after entering school, half of the student borrowers still owe \$20,000 each on outstanding loan balances.” *Id.* Since the writing of this Note, that percentage has decreased slightly, likely due to the Biden Administration's student loan forgiveness plans. *See* Melanie Hanson, *Average Student Loan Debt*, EDUC. DATA INITIATIVE (Aug. 16, 2024), <https://educationdata.org/average-student-loan-debt> [<https://perma.cc/2VCK-JPGK>].

⁶⁴ Abigail Johnson Hess, *CNBC Survey: 81% of Adults with Student Loans Say They've Had to Delay Key Life Milestones*, CNBC (Jan. 28, 2022, 1:17 PM), <https://www.cnb.com/2022/01/28/81percent-of-adults-with-student-loans-say-they-delay-key-life-milestones.html> [<https://perma.cc/44AN-XMU9>]; *see also* Nancy E. Hill & Alexis Redding, *How Student Debt Has Contributed to 'Delayed' Adulthood*, ATLANTIC (Aug. 31, 2022), <https://www.theatlantic.com/family/archive/2022/08/biden-college-student-debt-forgiveness-benefits/671295> [<https://perma.cc/W24L-SAZX>].

⁶⁵ *See* Emma Kerr, *How Your College Choice Can Affect Job Prospects*, U.S. NEWS (Dec. 16, 2020, 9:00 AM), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/how-your-college-choice-can-affect-job-prospects> [<https://perma.cc/S8WY-P3CP>]; ANTHONY P. CARNEVALE, BAN CHEAH, MARTIN VAN DER WERF & ARTEM GULISH, GEORGETOWN UNIV. CTR. ON EDUC. & THE WORKFORCE, BUYER BEWARE: FIRST-YEAR EARNINGS AND DEBT FOR 37,000 COLLEGE MAJORS AT 4,400 INSTITUTIONS 17, 19–20 (2020); *see also* Alvaro Mezza, Daniel Ringo, Shane Sherlund & Kamila Sommer, *Student Loans and Homeownership*, 38 J. LAB. ECON. 215, 255 (2020); Melanie Hanson, *Student Loan Debt & Homeownership*, EDUC. DATA INITIATIVE (June 27, 2024), <https://>

it dramatically, where a student chooses to go to college can affect the trajectory of their entire life.

The impact of debt is not limited to one's post-graduation lifestyle—it is also a crucial factor on which prospective students base their enrollment decisions.⁶⁶ In 2023, *Princeton Review's* annual “College Hopes & Worries Survey” found that the primary concern for a plurality of students and parents was the level of debt they would incur to fund their education.⁶⁷ This has been the number one concern for students surveyed since 2013.⁶⁸ Financial concern is especially important to low- and middle-income students, particularly those who are first-generation students,⁶⁹ because the potential of increased tuition is associated with increased financial risk but no guarantee of a lucrative career.⁷⁰ Thus, students must weigh whether a degree at a school that might cost them significantly more money is worth the risk of taking on a debt they may not be able to pay off or manage.⁷¹

Many first-generation and low- to moderate-income students tend to stay close to home not only due to familial obligations but also to save on overall college costs.⁷² Yet evidence suggests that low- and moderate-income students, as well as first-generation students, who go to school further away from home are more likely to persist through college graduation and earn their bachelor's degree because “increased distances between home and college may help students minimize obstacles that hinder their ability to achieve the levels of social, academic, and cultural integration in the postsecondary environment that translate

educationdata.org/student-loan-debt-homeownership [https://perma.cc/MVL9-HKNU]; JOINT ECON. COMM., EXAMINING THE RELATIONSHIP BETWEEN HIGHER EDUCATION AND FAMILY FORMATION, SCP Report No. 6-21, at 2, 11, 13 (Nov. 2021), <https://www.jec.senate.gov/public/index.cfm/republicans/2021/11/examining-the-relationship-between-higher-education-and-family-formation> [https://perma.cc/HGD6-PM MJ].

⁶⁶ See Michael B. Paulsen & Edward P. St. John, *Social Class and College Costs: Examining the Financial Nexus Between College Choice and Persistence*, 73 J. HIGHER EDUC. 189, 207–09 (2002); see also Michael P. Lillis & Robert G. Tian, *The Impact of Cost on College Choice: Beyond the Means of the Economically Disadvantaged*, J. COLL. ADMISSION, Summer 2008, at 4–14, <https://files.eric.ed.gov/fulltext/EJ829466.pdf> [https://perma.cc/P7E8-34U5].

⁶⁷ 2023 *College Hopes & Worries Survey*, PRINCETON REV., <https://www.princetonreview.com/press/college-hopes-worries-press-release-2023> [https://perma.cc/H6SE-LF27].

⁶⁸ *Id.*

⁶⁹ See Paulsen & St. John, *supra* note 66, at 207–09.

⁷⁰ See Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CALIF. L. REV. 1561, 1573 (2015). Higher tuition costs generally require students to borrow more to pay for them, but the degree they earn may not necessarily lead to a high-paying job. *Id.* at 1573–75, 1584–85.

⁷¹ *Id.* at 1587–88.

⁷² See Nicholas W. Hillman, *Geography of College Opportunity: The Case of Education Deserts*, 53 AM. EDUC. RSCH. J. 987, 989 (2016); Krista Mattern & Jeff N. Wyatt, *Student Choice of College: How Far Do Students Go for an Education?*, J. COLL. ADMISSION, Spring 2019 (explaining that there is a positive correlation between increases in parental income and increases in distance traveled to attend school).

into academic success.”⁷³ In other words, students that cannot afford to leave their state or live outside their home have decreased chances of obtaining a degree.⁷⁴

High out-of-state tuition rates continue to deter many nonresident students from attending out-of-state schools, decreasing the matriculation rate of low-income and first-generation students at these institutions.⁷⁵ In fact, an average of 68.3% of students across the country attend schools within their home state likely in part due to the reduced costs that they offer.⁷⁶ This can lead to students attending schools that may not actually be the best fit for them simply because the price of another scares them away.⁷⁷ In sum, students are more often choosing to stay within their state, which can ultimately lead to disruptions in their access to education, something that has long been understood as a bedrock of American society.

II. INEQUITIES ABOUND: A HISTORY IN THE COURT

Dormant Commerce Clause jurisprudence reveals the basic principles to which states must adhere when they engage in interstate commerce. The Privileges and Immunities Clause imposes similar anti-discriminatory requirements on states but with a specific focus on individual rights. This Part explores several key cases in shaping the boundaries of the Dormant Commerce Clause. It then explains how the Privileges and Immunities Clause has been employed by students to confront tuition disparities in the past.

A. *The Dormant Commerce Clause*

Article 1, section 8, clause 3 of the United States Constitution lays out the power of Congress “[t]o regulate commerce.”⁷⁸ Though brief in its description, the regulation of interstate commerce is among the most important specific powers given to Congress.⁷⁹ It serves as the basis for

⁷³ Alma Nidia Garza & Andrew S. Fullerton, *Staying Close or Going Away: How Distance to College Impacts the Educational Attainment and Academic Performance of First-Generation College Students*, 61 SOCIO. PERSPS. 164, 176 (2018).

⁷⁴ See *supra* notes 72–73 and accompanying text.

⁷⁵ See *supra* notes 72–73 and accompanying text; Brian Knight & Nathan Schiff, *The Out-of-State Tuition Distortion*, 11 AM. ECON. J.: ECON. POL’Y 317, 317 (2019), <https://doi.org/10.1257/pol.20170499> [<https://perma.cc/DLW8-52K9>].

⁷⁶ See IPEDS Data Explorer 2022–23, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/ipeds/Search> [<https://perma.cc/8U9L-QZ84>]; see also Knight & Schiff, *supra* note 75, at 317 (stating that the percentage was 75% in 2019 specifically for public in-state institutions).

⁷⁷ Knight & Schiff, *supra* note 75, at 318.

⁷⁸ U.S. CONST. art. I, § 8, cl. 3.

⁷⁹ See *id.* (“[The Congress shall have Power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

many of the country's most wide-reaching laws, including the Civil Rights Act of 1964⁸⁰ and the Americans with Disabilities Act of 1990.⁸¹ Additionally, the Supreme Court interprets the Commerce Clause to include an implicit prohibition on states from enacting legislation that discriminates against or excessively burdens interstate commerce unless the action is necessary to further a legitimate state interest.⁸² This doctrine is known as the Dormant Commerce Clause: states have an obligation not to interfere with interstate commerce even when Congress has been “dormant”—i.e., when Congress has not explicitly exercised their power.⁸³

The Supreme Court interprets the Dormant Commerce Clause to consist of two main principles: (1) state policies and regulations “may not discriminate against interstate commerce,” and (2) “[s]tates may not impose undue burdens on interstate commerce.”⁸⁴ The Court has also stressed that the “antidiscrimination principle lies at the ‘very core’ of . . . dormant Commerce Clause jurisprudence.”⁸⁵ This means that a state regulation may not discriminate on its face nor have a discriminatory purpose or effect.⁸⁶ A state policy which discriminates against interstate commerce on its face through “economic protectionism”—i.e., policy measures “designed to benefit in-state economic interests by burdening out-of-state competitors”⁸⁷—are subject to “a virtually *per se* rule of invalidity”⁸⁸ unless the state can show the policy “serves a legitimate local purpose” and is narrowly tailored to achieve that interest.⁸⁹

⁸⁰ Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241, 243 (codified as amended in scattered sections of 42 U.S.C.).

⁸¹ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 and 47 U.S.C.). *See generally, e.g.*, United States v. Lopez, 514 U.S. 549, 563 (1995); United States v. Morrison, 529 U.S. 598, 598 (2000) (analyzing Congress’ power of commerce concerning the Gun-Free School Zones Act of 1990 and Violence Against Women Act, respectively, in which Congress cited the Commerce Clause as one of the sources of its authority).

⁸² *E.g.*, South Dakota v. Wayfair, Inc., 585 U.S. 162, 173 (2018).

⁸³ Lopez, 514 U.S. at 579 (Kennedy, J., concurring) (“Yet in contrast to the prevailing skepticism that surrounds our ability to give meaning to the explicit text of the Commerce Clause, there is widespread acceptance of our authority to enforce the dormant Commerce Clause, which we have but inferred from the constitutional structure as a limitation on the power of the States.”).

⁸⁴ Wayfair, 585 U.S. at 173.

⁸⁵ Nat’l Pork Producers Council v. Ross, 598 U.S. 356, 357 (2023) (quoting Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 581 (1997)).

⁸⁶ *See* Best & Co. v. Maxwell, 311 U.S. 454, 455–56 (1940) (“The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack . . . will in its practical operation work discrimination against interstate commerce.” (footnote omitted)).

⁸⁷ Nat’l Pork Producers, 598 U.S. at 369 (quoting Dep’t of Revenue v. Davis, 553 U.S. 328, 337–38 (2008)).

⁸⁸ Wayfair, 585 U.S. at 173 (quoting Granholm v. Heald, 544 U.S. 460, 476 (2005)).

⁸⁹ Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

Several Supreme Court cases have helped further Dormant Commerce Clause jurisprudence. In *Philadelphia v. New Jersey*,⁹⁰ the Court examined a New Jersey statute that sought to prohibit other states from dumping their waste in New Jersey landfills.⁹¹ New Jersey argued that the statute was supported by a compelling state interest in public health and environmental problems of excessive waste.⁹² The Court was unpersuaded, noting that these problems were shared by all states.⁹³ The statute was deemed facially discriminatory, which led the Court to hold that a state could not discriminate against another state's articles of commerce simply on the basis of origin.⁹⁴

The Court again rejected a protectionist statute in *C & A Carbone, Inc. v. Town of Clarkstown*.⁹⁵ In *C & A Carbone*, the Court examined a city trash flow ordinance that required all waste to be processed at a specific privately owned facility and charged an eighty-one-dollar "tipping fee" per ton of waste.⁹⁶ The private entity was essentially given a monopoly over the waste industry, forcing anyone—resident or nonresident—dealing in the market of trash to pay the fee.⁹⁷ The city argued that the ordinance did not discriminate against out-of-state waste producers because all trash, regardless of origin, was required to be processed at the same facility.⁹⁸ However, the Court determined it was not the waste itself that was at issue, but the profit to be gained.⁹⁹ Thus, the ordinance was discriminatory in that it favored a specific in-state processor over any competitors.¹⁰⁰ The Court warned against economic protectionist legislation that "hoard[s] [commerce] for the benefit of [in-state merchants]" and discourages consumers from crossing state lines to make their purchases from nearby out-of-state vendors.¹⁰¹

⁹⁰ 437 U.S. 617 (1978).

⁹¹ *Id.* at 618.

⁹² *Id.*

⁹³ *See id.* at 625.

⁹⁴ *Id.* at 629.

⁹⁵ 511 U.S. 383 (1994). The Court distinguished a similar city ordinance from *C & A Carbone* in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007). The fact that the ordinance in *United Haulers* required trash to be delivered to a "state-created public benefit corporation" was "constitutionally significant." *Id.* at 334. There, the Court stressed that a state's policing power and responsibility to protect the "welfare of its citizens" set New York apart from private businesses and found these interests were enough to overcome any kind of burden the ordinance placed on the interstate commerce of trash. *Id.* at 342; *see id.* at 345.

⁹⁶ *See C & A Carbone*, 511 U.S. at 386–88.

⁹⁷ *See id.*

⁹⁸ *See id.* at 390.

⁹⁹ *See id.* at 391 ("In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.").

¹⁰⁰ *See id.* at 391 ("With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town.").

¹⁰¹ *Id.* at 392.

Even though the ordinance appeared to be facially neutral, the ultimate burden it imposed on the waste industry created an impermissible discriminatory effect under *Philadelphia v. New Jersey*.¹⁰²

Maine's nonprofit tax exception at issue in *Camps Newfound/Owatonna v. Town of Harrison*¹⁰³ fared no better. There, the Court evaluated a Maine tax statute that provided generous tax breaks on real estate and property taxes to nonprofits whose work benefited residents of the state.¹⁰⁴ Meanwhile, the tax benefits for organizations serving primarily nonresidents were far more limited.¹⁰⁵ Camp Newfound was a religious, nonprofit camp with 95% of their campers coming from out of state, meaning it was ineligible to receive the tax breaks.¹⁰⁶ The State argued that the Dormant Commerce Clause was inapplicable because campers were not "articles of commerce" and that interstate commerce was not implicated because the camp was a nonprofit.¹⁰⁷ This argument failed, however, and the Court determined that the camp's nonprofit status did not necessarily exclude its services from the traditional definition of "commerce."¹⁰⁸ As a provider of "goods and services" to people that travel "from all parts of the Nation," the camp necessarily engaged in interstate commerce.¹⁰⁹ Ultimately, the Court invalidated the Maine statute and held that such state tax benefits could not discriminate solely on the basis of the residency of its beneficiaries.¹¹⁰

The undue burden component of the Dormant Commerce Clause is most often referred to as the *Pike* test, which emerged from the 1970 case *Pike v. Bruce Church, Inc.*¹¹¹ In *Pike*, the Court laid out a test for examining the constitutionality of legislation which was facially neutral but had the *effect* of interfering with interstate commerce.¹¹² The Court held that a statute which "regulates evenhandedly" to achieve

¹⁰² *See id.* at 390, 392–95.

¹⁰³ 520 U.S. 564 (1997).

¹⁰⁴ *Id.* at 564.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 567–69.

¹⁰⁷ *Id.* at 572.

¹⁰⁸ *Id.* at 585–86 ("Whether operated on a for-profit or nonprofit basis, [corporations] purchase goods and services in competitive markets, offer their facilities to a variety of patrons, and derive revenues from a variety of sources, some of which are local and some out of State. For purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is therefore wholly illusory.").

¹⁰⁹ *Id.* at 573 ("95 percent of its campers come from out of State. The attendance of these campers necessarily generates the transportation of persons across state lines that has long been recognized as a form of 'commerce.'" (quoting *Edwards v. California*, 314 U.S. 160, 172 (1941))).

¹¹⁰ *Id.* at 588 ("Protectionism . . . to encourage nonprofits to keep their efforts close to home, is forbidden under the dormant Commerce Clause.").

¹¹¹ 397 U.S. 137 (1970).

¹¹² *See id.* at 142.

a “legitimate local public interest” and only incidentally impacts interstate commerce “will be upheld unless the burden” it imposes on commerce is “clearly excessive in relation to the putative local benefits.”¹¹³ The question thus “becomes one of degree,” meaning that “the extent of the burden that will be tolerated” depends on both “the nature of the local interest involved” and whether it could be accomplished by another equally effective alternative “with a lesser impact on interstate activities.”¹¹⁴ In other words, the benefits of the regulation to one state must outweigh the burdens it imposes on the others.

The *Pike* test was further refined in *Kassel v. Consolidated Freightways Corp.*¹¹⁵ In *Kassel*, a plurality of the Court held that an Iowa state statute that imposed a fifty-five-foot limitation on truck-length for those traveling on Iowa highways—but included special provisions for exceptions for Iowa manufacturers—placed an unconstitutional burden on interstate commerce.¹¹⁶ It rejected the State’s claim of safety concerns, holding that an “incantation of purpose to promote public health or safety” does not protect a statute’s constitutionality under the Commerce Clause.¹¹⁷ The Court pointed out that the statute had several exceptions, including permitting cities “abutting the state line” to adopt “by local ordinance . . . the length limitations of the adjoining State” as well as allowing Iowa truck manufactures to obtain a permit “to ship trucks that are as large as 70 feet” and “move oversized mobile homes, provided that the unit is to be moved from a point within Iowa or delivered for an Iowa resident.”¹¹⁸ Not only did these carve outs undermine the State’s argument that the statute was related to safety concerns, but the Court explained¹¹⁹ that the incongruity of Iowa’s law with its neighboring midwestern states was also too significant a burden to bear.¹²⁰

¹¹³ *Id.*

¹¹⁴ *Id.* The Court highlighted in *Pork Producers* that the *Pike* test is not a hard-line departure from the antidiscrimination crux of Dormant Commerce Clause doctrine but rather a complement. See *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 377 (2023) (“As this Court has previously explained, ‘no clear line’ separates the *Pike* line of cases from our core antidiscrimination precedents. . . . [I]f some of our cases focus on whether a state law discriminates on its face, the *Pike* line serves as an important reminder that a law’s practical effects may also disclose the presence of a discriminatory purpose.”).

¹¹⁵ 450 U.S. 662 (1981).

¹¹⁶ *Kassel*, 450 U.S. 662 (1981).

¹¹⁷ *Id.* at 670 (“Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause.”).

¹¹⁸ *Id.* at 666 (citing IOWA CODE §§ 321.457(7), 321E.10, 321E.28(5).7 (1979)).

¹¹⁹ *Id.* at 671 n.12.

¹²⁰ *Id.* at 670–71 (“Iowa’s law is now out of step with the laws of all other Midwestern and Western States. Iowa thus substantially burdens the interstate flow of goods by truck. In the absence of congressional action to set uniform standards, some burdens associated with state safety regulations must be tolerated. But where, as here, the State’s safety interest has been found

The Dormant Commerce Clause is not without exceptions, including the market participant doctrine.¹²¹ The market participant doctrine allows a state to influence “a discrete, identifiable class of economic activity in which [the state] is a major participant,” but the state can only influence the market in which it participates, not external ones.¹²² This means that state market participation cannot have substantial “downstream” regulatory effects.¹²³ The Supreme Court has been reluctant to extend the market participant doctrine too far, only exploring its scope in a handful of cases.¹²⁴ Yet the basic principle that can be interpreted from these cases is that, when a state looks to influence commercial transactions by entering a market as a direct participant rather than a “market regulator,” it may be exempt from the Commerce Clause’s restraints.¹²⁵

B. *Out-of-State Tuition Litigation and Privileges and Immunities*

Out-of-state tuition prices have been a point of legal contention for half a century, with students bringing claims against universities to argue that they should pay in-state prices.¹²⁶ Most of these cases have

to be illusory, and its regulations impair significantly the federal interest in efficient and safe interstate transportation, the state law cannot be harmonized with the Commerce Clause.”).

¹²¹ *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 99 (1984); *see also White v. Mass. Council of Constr. Emps.*, 460 U.S. 204, 208 (1983) (“[W]hen a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause.”).

¹²² *S.-Cent. Timber*, 467 U.S. at 97 (quoting *White*, 460 U.S. at 211 n.7).

¹²³ *Id.* at 82.

¹²⁴ *See, e.g., Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808–10 (1976) (upholding a Maryland statute that established more stringent requirements for out-of-state scrap metal processors because Maryland became a participant in the market once it established itself as a scrap metal purchaser); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436, 437 (1980) (upholding a South Dakota policy which restricted sale of cement from a state-owned plant to state residents); *White v. Mass. Council of Constr. Emps.*, 460 U.S. 204, 210, 214–15 (1983) (sustaining a Boston order that required all construction projects funded in part or in whole by city funds or city administered funds to be performed by workforces comprised of at least 50% city residents).

¹²⁵ *White*, 460 U.S. at 207 (“[T]he Commerce Clause responds principally to state taxes and regulatory measures *impeding free private trade in the national marketplace*. There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.” (emphasis added) (citation omitted) (quoting *Reeves*, 447 U.S., at 436–37)).

¹²⁶ *See e.g., Vlandis v. Kline*, 412 U.S. 441, 454 (1973) (holding that a state’s university system’s “permanent irrebuttable presumption of nonresidence” for determining the rates of tuition and fees violated the Due Process Clause of the Fourteenth amendment); *Landweher v. Regents of the Univ. of Colo.*, 396 P.2d 451, 453 (Colo. 1964) (finding that Colorado’s “classification of students applying for admission to a tax-supported [u]niversity” into “in-state” and “out-of-state” groups” did not violate the Fourteenth Amendment or the Privileges and Immunities Clause); *Montgomery v. Douglas*, 388 F. Supp. 1139 (D. Colo. 1974) (upholding a Colorado statute, which required a one-year residence before a college student could receive in-state tuition rates, as it did not deny the right to travel nor violate the Equal Protection Clause); *Frankel v. Bd. of Regents of*

challenged out-of-state tuition on Due Process, Equal Protection, and Privileges and Immunities Clause grounds.¹²⁷ Importantly, each challenger argued that an institution's residency requirements for in-state tuition eligibility violated their constitutional rights, not that the tuition itself was unconstitutional.¹²⁸ Although the Supreme Court once recognized in such a case that a state has a legitimate right to charge higher tuition rates to nonresidents, the comment was made in dicta.¹²⁹

The crux of at least one of these residency cases' arguments is that tuition residency requirements violate a student's rights under the Privileges and Immunities clause.¹³⁰ The Privileges and Immunities Clause states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."¹³¹ Although the contours of the clause are beyond the scope of this Note, it has four main principles: (1) the clause is an antidiscrimination tool that aims to limit states' ability to treat citizens of other states differently from their own,¹³² (2) these limitations only concern those rights that are "'fundamental' to the promotion of interstate harmony,"¹³³ (3) the clause may still allow a state to discriminate if it has a substantial reason for doing so,¹³⁴ and (4) its usage of the term "[c]itizen[]" refers to United States citizens, not aliens or corporations.¹³⁵

In 2016, the Supreme Court was presented with the opportunity to reexamine the scope of the Privileges and Immunities Clause after *Marilley v. Bonham*,¹³⁶ which involved a constitutional challenge to

the Univ. of Md. Sys., 761 A.2d 324, 324 (Md. 2000) (holding that denying in-state tuition status to Maryland residents who received financial support from nonresidents violated the Equal Protection Clause); *In re Strauss v. City Univ. of N.Y.*, No. 111900/2011, 2012 WL 1576457 (N.Y. Sup. Ct. Apr. 25, 2012) (finding, under *Vlandis*, that a university's irrebuttable presumption of residency violated a student's due process).

¹²⁷ See *supra* note 126.

¹²⁸ See *supra* note 126.

¹²⁹ See *Vlandis*, 412 U.S. at 452–53 (“We fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.”). Although the Court in *Vlandis* recognized a legitimate state interest in charging different tuitions, the Court ultimately ruled Connecticut's university residency policy unconstitutional as its “permanent irrebuttable presumption of nonresidence” for allocating tuition rates violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 453.

¹³⁰ *Landweher*, 396 P.2d at 452–53.

¹³¹ U.S. CONST. art. IV, § 2, cl. 1.

¹³² See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 170 (1869).

¹³³ Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 279 (1985) (quoting *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 388 (1978)). Fundamental rights include the opportunity to practice law, but not the right to a fishing license. See *id.* (holding that the right to practice law is a fundamental right); *Baldwin*, 436 U.S. 371 (holding that the right to a fishing license is not a fundamental right).

¹³⁴ See *Saenz v. Roe*, 526 U.S. 489, 502 (1999).

¹³⁵ See *Zobel v. Williams*, 457 U.S. 55, 74 n.3 (1982) (O'Connor, J., concurring in the judgment).

¹³⁶ 844 F.3d 841 (9th Cir. 2016) (en banc), *cert. denied* 583 U.S. 915 (2017).

California's practice of charging higher fees to nonresident commercial fishers for registrations, licenses, and permits; however, the Court denied certiorari to this Ninth Circuit appeal.¹³⁷ *Marilley* is curious because the Ninth Circuit analyzed how much *difference* in price was allowed, not what the exact price should be.¹³⁸ The court noted that the benefit to and the "appropriate amount of compensation" from a nonresident "need not be determined with mathematical precision."¹³⁹ However, the state must still "treat nonresidents and residents with 'substantial equality.'"¹⁴⁰

The Ninth Circuit ultimately upheld the California law because the fee differential between the resident and nonresident licenses was less than the amount California paid to subsidize—i.e., benefit—nonresident portions of its commercial fishery.¹⁴¹ This suggests that, at least under the Privileges and Immunities Clause, a state university may charge a different out-of-state tuition so long as the price does not exceed any calculated "benefit" conferred on nonresidents. In general, though, courts have determined that "when a state makes an expenditure from a fund to which nonresidents do not contribute," and then provides a "benefit through that expenditure to both residents and nonresidents," the Privileges and Immunities Clause allows that state to "exclude nonresidents from the benefit" or to "seek compensation from nonresidents for the benefit conferred."¹⁴²

III. CONSTITUTIONAL IMPLICATIONS

Although students have brought cases related to out-of-state tuition conflicts in the past,¹⁴³ they focused on the residency requirements needed to qualify for in-state tuition under the Privileges and Immunities Clause.¹⁴⁴ The Privileges and Immunities Clause affords absolute protection to certain *fundamental* rights,¹⁴⁵ but it grants leeway to states

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 851.

¹⁴⁰ *Id.* (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)).

¹⁴¹ *Id.* at 852.

¹⁴² *Id.* at 850. *See generally* *Mullaney v. Anderson*, 342 U.S. 415 (1952); *Toomer*, 334 U.S. at 389, 395.

¹⁴³ *See supra* Section II.B.

¹⁴⁴ *See* cases cited *supra* note 126.

¹⁴⁵ *See Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 388 (1978) (holding that for a right to be protected under the Privileges and Immunities Clause, it must be "fundamental," meaning it is "basic to the maintenance or well-being of the Union"). Of significant note, the Supreme Court held in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) that there was no fundamental right to education. There, parents of children belonging to minority groups and residing in poorer school districts argued that Texas's school finance system was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 4–5. However, the Court upheld Texas's

to discriminate against nonresidents regarding *nonfundamental* rights, especially when money may be involved.¹⁴⁶ That said, Congress can do little to step in and correct any major discriminatory practices under the Privileges and Immunities Clause as this clause only applies to state actions.¹⁴⁷

Congress is better equipped to fix issues that implicate the Dormant Commerce Clause by using their enumerated commerce power.¹⁴⁸ Historical challenges to tuition differences have focused on whether a student qualifies as a bona fide resident for in-state tuition purposes or whether a state's residency requirement is unconstitutional.¹⁴⁹ However, any future tuition challenge should center around the tuition price practices themselves: the distinction is not the residency but the difference in tuition *amounts*.

An examination of the Dormant Commerce Clause cases reveals that states may not manipulate the economy to prevent products or people from crossing state lines unless they have a substantially compelling reason for doing so.¹⁵⁰ Current tuition differences are unconstitutional under the Dormant Commerce Clause because the large disparity between resident and nonresident prices is facially discriminatory against nonresident students. And even if disparate pricing was considered a compelling state interest, it imposes an impermissible burden on the flow of students and disrupts the education market.

funding scheme, reasoning that it did not function to the disadvantage of any suspect class and rejecting the lower court's holding that education was a fundamental right. *See id.* at 37. ("We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive."). Thus, a case brought under the Privileges and Immunities Clause would likely face this precedential obstacle.

¹⁴⁶ *See supra* Section II.B. *Compare* Sup. Ct. of N.H. v. Piper, 470 U.S. 274 (1985) (holding that the right to practice law was fundamental under the Privileges and Immunities Clause and thus protected the plaintiff's right to live in a different state than where she practiced law), *with Baldwin*, 436 U.S. at 388 (holding that "whatever rights or activities may be 'fundamental' under the Privileges and Immunities Clause, we are persuaded[] . . . that elk hunting by nonresidents in Montana is not one of them"), and *Marilley*, 844 F.3d 841 (determining that a fee differential for nonresidents did not violate the Privileges and Immunities Clause as it was not more than the amount California subsidized for the management of the nonresident commercial fisheries).

¹⁴⁷ *See Toomer*, 334 U.S. at 395 ("[The Privileges and Immunities Clause] was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."); *see also Hicklin v. Orbeck*, 437 U.S. 518, 523–24 (1978) ("[The Privileges and Immunities Clause] . . . 'establishes a norm of comity' that is to prevail among the States with respect to their treatment of each other's residents." (citations omitted) (quoting *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975))).

¹⁴⁸ *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992) ("No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.").

¹⁴⁹ *See supra* note 126.

¹⁵⁰ *See supra* Section II.A.

A. *Facial Discrimination in the Name of Education*

Out-of-state tuition premiums are facially discriminatory: universities require nonresidents to pay a different—and higher—price for the exact same product as their in-state counterparts solely on the basis of the student's residency.¹⁵¹ Because the practice is facially discriminatory, there is a presumption of unconstitutionality under the Dormant Commerce Clause.¹⁵² The state and university policies could only survive strict scrutiny by showing a compelling state interest and that no reasonable, nondiscriminatory alternatives exist.¹⁵³

Public institutions are discriminating against out-of-state students by charging them up to four times as much in tuition prices to attend their schools.¹⁵⁴ Just as New Jersey's explicit attempt to ban out-of-state waste was found to be unconstitutional in *Philadelphia v. New Jersey*,¹⁵⁵ so, too, is the practice of prohibitively expensive out-of-state tuition.¹⁵⁶ In *Philadelphia v. New Jersey*, the Court found that all states shared public health and environmental concerns regarding waste disposal, and thus it was unfair for New Jersey to try to protect themselves at the detriment of everyone else.¹⁵⁷ Here, states are charging a disproportionate sum of tuition to out-of-state students because of their place of origin.¹⁵⁸ All states share an interest in funding quality, accessible public education,¹⁵⁹ and it is unfair to force out-of-state students to shoulder that weight.¹⁶⁰

Camps Newfound is also instructive. The unconstitutional tax exemptions to resident-serving organizations are similar to the way a university operates. The state in *Camps Newfound* allowed nonprofits—like a camp—to offer their services at a lowered, “subsidized” fee via handsome tax breaks but denied this benefit to nonprofits serving majority nonresidents.¹⁶¹ Not only was the latter group of nonprofits ineligible for the statutorily provided tax exemptions, but their program prices also increased as a result—which could theoretically cause them to cut back

¹⁵¹ See *Philadelphia v. New Jersey*, 437 U.S. 617, 626–27 (1978) (holding that a state could not discriminate against another state's article of commerce merely on the basis of origin).

¹⁵² See *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) (explaining that, if a statute is deemed facially discriminatory, the question “is whether the discrimination . . . can be justified in view of the character of the local interests and the available methods of protecting them”).

¹⁵³ See *id.*

¹⁵⁴ See *supra* Table 1.

¹⁵⁵ *Philadelphia v. New Jersey*, 437 U.S. at 629.

¹⁵⁶ Although these policies are not as prohibitive as New Jersey's, which attempted to completely ban out-of-state waste disposal, the underlying principles are the same.

¹⁵⁷ *Philadelphia v. New Jersey*, 437 U.S. at 629.

¹⁵⁸ See *supra* Table 1.

¹⁵⁹ See *supra* Section I.A.

¹⁶⁰ See *supra* Table 1.

¹⁶¹ *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 568 (1997).

on services offered at the camp.¹⁶² Similarly, state governments provide funding to their public universities, which allows them to offer their services at a certain lowered rate.¹⁶³ However, when this funding goes down, tuition prices go up, particularly for out-of-state students.¹⁶⁴

This is relevant because many public institutions claim to “benefit” in-state students while also having significant out-of-state populations.¹⁶⁵ According to one recent study, flagship institutions in thirty states saw a minimum 25% increase in their proportion of out-of-state student enrollment from 2002 to 2018; on average, the share of out-of-state students rose 55%, while the share of in-state students dropped 15%.¹⁶⁶ In fact, some institutions’ student bodies are now not only majority out-of-state residents,¹⁶⁷ but many are also purposefully targeting recruitment efforts to out-of-state students, especially those from majority white and affluent areas.¹⁶⁸ This weakens any state argument justifying the benefit conferred on their in-state students.¹⁶⁹ Flagship universities are choosing, in part, to enroll out-of-state students because of the increased revenue they provide, but this may actually take away the supposed benefits in-state students gain by crowding them out altogether.¹⁷⁰ Thus,

¹⁶² See *id.* at 580. (“The record demonstrates that the economic incidence of the tax falls at least in part on the campers, the Town has not contested the point, and the courts below based their decision on this presumption.”). The Court, here, cited to the lower court’s opinion that recognized “the denial of a tax exemption results in increased costs that are passed along to some extent to the campers in the form of increased tuition.” *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 655 A.2d 876, 879 (Me. 1995), *rev’d*, 520 U.S. 564 (1978) (internal quotations omitted).

¹⁶³ See MITCHELL ET AL., *supra* note 7.

¹⁶⁴ See *id.*

¹⁶⁵ Klein, *supra* note 9. The “benefit” is the subsidized tuition, education, and overall experience the university provides, much like the benefit of the services and beautiful Maine environment the nonprofit camps in *Camps Newfound* provided their campers. See *Camps Newfound*, 520 U.S. at 576–77.

¹⁶⁶ Klein, *supra* note 9, at 1, 3 fig.1; see also Sylvia Goodman, *Growing Out-of-State Enrollment at Flagship Universities Could Be Worsening the Student-Debt Crisis*, CHRON. HIGHER EDUC. (Sept. 15, 2022), <https://www.chronicle.com/article/growing-out-of-state-enrollment-at-flagship-universities-could-be-worsening-the-student-debt-crisis> [<https://perma.cc/524P-BNZZ>].

¹⁶⁷ Klein, *supra* note 9, at 12 tbl.2; see also OZAN JAQUETTE, JACK KENT COOKE FOUND., STATE UNIVERSITY NO MORE: OUT-OF-STATE ENROLLMENT AND THE GROWING EXCLUSION OF HIGH-ACHIEVING, LOW-INCOME STUDENTS AT PUBLIC FLAGSHIP UNIVERSITIES 3 tbl.1 (2017), <https://www.jkcf.org/research/state-university-no-more-out-of-state-enrollment-and-the-growing-exclusion-of-high-achieving-low-income-students-at-public-flagship-universities> [<https://perma.cc/8LU3-SPSX>].

¹⁶⁸ See Karina G. Salazar, Ozan Jaquette & Crystal Han, *Coming Soon to a Neighborhood Near You? Off-Campus Recruiting by Public Research Universities*, 58 AM. EDUC. RSCH. J. 1270, 1272 (2021). See generally Ryan Griffith, Comment, *Is Out-Of-State Tuition Unconstitutional and Could Removing It Ease the United States’ Student Debt Crisis?*, 52 GOLDEN GATE U. L. REV. 127, 129–30 (2022) (“UCLA actively recruits students from out of state, and UCLA even boasts of location diversity on its website, showing the numerous out-of-state students it has.”).

¹⁶⁹ Klein, *supra* note 9; see JAQUETTE, *supra* note 167, at 14–15, 18–19.

¹⁷⁰ See JAQUETTE, *supra* note 167, at 18–19; see also Bradley R. Curs & Ozan Jaquette, *Crowded Out? The Effect of Nonresident Enrollment on Resident Access to Public Research Universities*,

although a state may argue it has a substantial interest in providing affordable education to those residents who pay taxes to the State, this is undermined by the reality that its universities are not leading to consistent tangible benefits for such students.

B. The Pike Test: Impermissible Burdens on the Education Market

The *Pike* Test involves weighing the nature and extent of a burden on interstate commerce against the alleged benefit of the state's interest in enacting it.¹⁷¹ In this instance, even if the state's interest in providing discounted tuition prices to in-state students is deemed substantial enough to overcome per se unconstitutionality, the practical effects of out-of-state tuition impose an impermissible burden on interstate commerce. Namely, it deters students from choosing to go to schools outside of their states and disrupts the student-body make up of many large universities.¹⁷² Stated plainly, low- and middle-income students are choosing not to go to major public universities because they cannot afford the tuitions, thus causing colleges to disproportionately draw students from out-of-state, high-income households.¹⁷³

Universities, and specifically state flagship universities, are selling the experience of their school to out-of-state students.¹⁷⁴ This includes highlighting that their school carries a degree of prestige, offers a strong diversity of students, and has a robust athletics program—all marketed to bring out-of-state students in.¹⁷⁵ Once enrolled, nonresident students

39 EDUC. EVALUATION & POL'Y ANALYSIS 666 (2017) (“Our finding that nonresident enrollment crowded out resident enrollment at prestigious public universities is consistent with growing concern that access for resident and low-income students to flagship public universities is being compromised as institutions increasingly pursue admissions policies aimed at tuition revenue and/or academic profile.”); Jaquette & Curs, *supra* note 12, at 557 (“[N]onresident enrollment growth may positively affect state economic development to the extent that nonresident students work in the same state they receive their bachelor’s degree A finding that nonresident enrollment growth crowds out enrollment opportunities for resident students would be inconsistent with state goals.” (citations omitted)).

¹⁷¹ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁷² See *supra* notes 50, 166–167. Notably, schools with high tuitions may also be exacerbating the high- and low-income education gap across the country. See Lillis & Tian, *supra* note 66, at 4–14.

¹⁷³ See JAQUETTE, *supra* note 167; see also Jaquette & Curs *supra* note 12, at 558 (“[P]ublic universities responded to declines in state appropriations by attempting to commercialize and monetize research. Similarly, we found that public universities responded to declines in state appropriations by growing nonresident freshman enrollment, which we conceive as an effort to monetize students.”).

¹⁷⁴ See *supra* note 168.

¹⁷⁵ See Lee Gardner, *Flagships Prosper, While Regionals Suffer: Competition Is Getting Fierce, and the Gap Is Widening*, CHRON. HIGHER EDUC. (Feb. 13, 2023), <https://www.chronicle.com/article/flagships-prosper-while-regionals-suffer> [<https://perma.cc/Y7NA-WZZ8>] (“Flagships typically dominate the attention of elected officials and ordinary citizens in their states. They’re the

are charged a higher price.¹⁷⁶ By attracting nonresident students, schools benefit from their tuition revenue, but they take away business from *other* states as those nonresident students could have opted to stay in their home state. For example, a student from Illinois may not want to go to the University of Illinois in Urbana, a college town surrounded by rural farmland, but would rather have a more urban experience at a school such as the University of Wisconsin-Madison in Madison, Wisconsin, with a campus in the state's capital. But while a wealthier nonresident student may be able to attend an out-of-state school of their choice, the large tuition disparity a nonresident would pay may compel a lower-income student to choose the University of Illinois despite a lack of desire to attend.¹⁷⁷

Charging a higher tuition to out-of-state residents is consistent with the idea that a state is not required to charge a tuition that is equal to in-state tuition—this price differential, however, must still be within reason.¹⁷⁸ In the above example, high tuition is discouraging consumers (i.e., low- and moderate-income students) from crossing state lines to make their purchases (i.e., education) from nearby out-of-state vendors (i.e., prestigious public schools), much like how the trash flow ordinance in *Carbone* discouraged trash haulers to seek alternative processing facilities due to the eighty-one-dollar tipping fee.¹⁷⁹ These schools insulate themselves in such a way that students do not want to leave their states because they receive the benefit of the university right in their backyard while—most likely—avoiding the risk of large sums of debt. This can have more serious implications on a broader level—like decreases in student body diversity or a narrowing of the range of perspectives that are represented—which can lead to negative effects on the overall quality of education that students receive at a given institution.¹⁸⁰

Reduced tuition for in-state students stems from a desire to provide a discount to those who pay taxes to the state,¹⁸¹ and it is a recognized substantial state interest in several different areas outside of education,

marquee institutions, the research centers, the academic powerhouses, the foundation of a state-wide alumni base, and often the state's athletics brand, too."); *see also* Klein, *supra* note 9, at 6.

¹⁷⁶ *See supra* Table 1.

¹⁷⁷ Hillman, *supra* note 72, at 993–94.

¹⁷⁸ *Cf. Marilley v. Bonham*, 844 F.3d 841, 851 (9th Cir. 2016).

¹⁷⁹ *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 412 (1994).

¹⁸⁰ *See Jaquette & Curs, supra* note 12, at 557 (“[T]he growth in the proportion of nonresident students that is associated with declining state appropriations may contribute to an unhealthy learning environment for low-income and underrepresented minority students at public research universities.”).

¹⁸¹ *See* Mary P. McKeown, *State Policies on Tuition and Fees for Public Higher Education*, 8 J. EDUC. FIN. 1, 16 (1982).

like commercial fishing licenses.¹⁸² However, many state schools are not only offering discounts on tuition to state residents but also to specially designated nonresidents through reciprocity agreements.¹⁸³ Reciprocity agreements, which offer a discount on tuition at specific state schools to students from neighboring states, are extremely similar to the exceptions to the truck-length limitation that Iowa left in place for local truckers near the Iowa border in *Kassel*.¹⁸⁴ However, the court held in *Kassel* that the state law was unconstitutionally protectionist.¹⁸⁵ By claiming that the law regarding truck lengths was meant to address public safety, Iowa essentially passed the safety risks on to other states while protecting their own.¹⁸⁶

Here, in-state institutions are not protecting their students from physical harm but from large tuition costs and the risk of debt. They “*protect*” their students while pushing the “*harm*” to the out-of-state students, causing nonresidents to carry the heavy burden of funding an institution in a state where they do not even live. Yet reciprocity agreements grant tuition exceptions to students from neighboring states, allowing them to pay significantly lowered tuition prices, much like Iowa’s carve outs for truckers from nearby locations.¹⁸⁷ This kind of exception undermines a state’s argument that they are serving a compelling state interest through in-state tuition discounts and thus violates the Dormant Commerce Clause.¹⁸⁸

IV. BRINGING THE PROBLEM TO THE COURTS AND CONGRESSIONAL ACTION

The American public education system is extremely robust and popular.¹⁸⁹ But a disparate price should not hinder a student’s decision to

¹⁸² See, e.g., *Marilley v. Bonham*, 844 F.3d 841, 850–51 (9th Cir. 2016); *Toomer v. Witsell*, 334 U.S. 385, 398–99 (1948).

¹⁸³ See *supra* Section I.B.

¹⁸⁴ *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 655–56 (1981).

¹⁸⁵ *Id.* at 676.

¹⁸⁶ *Id.* at 678–79.

¹⁸⁷ See *supra* Section I.B. Although the legality of reciprocity agreements is not entirely within the scope of this Note, it should be mentioned that these agreements reveal a kind of favoritism that has not generally been accepted by the courts. See *infra* note 188; see also *Kassel*, 450 U.S. 662.

¹⁸⁸ Cf. Brief of Amicus Curiae Alan B. Morrison, In Support of Petition for a Writ of Certiorari at 1, *Nat’l Ass’n for the Advancement of Multijurisdiction Prac. v. Berch*, 575 U.S. 1026 (2015) (No. 14-1165) (arguing that the Dormant Commerce Clause precluded Arizona from “conditioning bar admission without examination on the willingness of the state in which the applicant is already licensed to grant reciprocal privileges to Arizona attorneys”). Reciprocity agreements also reveal that, to at least some extent, universities might be able to lower their tuitions for out-of-state residents in general.

¹⁸⁹ See *Digest of Education Statistics Table 303.60.*, NAT’L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d22/tables/dt22_303.60.asp?current=yes [<https://perma.cc/9EFZ-8HF4>] (showing that 11,944,633 students enrolled in public undergraduate institutions in fall 2021).

go to a public university. Oftentimes individuals choose to go to a public university specifically because of its cheaper costs.¹⁹⁰ This Part proposes two solutions: one judicial and one legislative. Sections IV.A–.B highlight how out-of-state students could bring claims against large flagship institutions under the Dormant Commerce Clause to have their tuition practices declared unconstitutional, including anticipated obstacles and counterarguments. This litigation could not only help bring awareness to the inequities that tuition disparity exacerbates and vindicate student's rights, but it could also compel Congress to pass legislation addressing these issues head on. Section IV.C highlights how Congress, regardless of any litigation efforts, could use its Commerce and Tax and Spending Clause powers to address tuition disparities at a federal level.

A. *Making a Case*

Nonresident students attending schools with the largest tuition disparities should bring a claim against their universities for violation of the Dormant Commerce Clause. The students should argue that these universities' tuition policies are discriminatory on their face and thus must overcome a presumption of per se invalidity to survive a constitutional challenge. In the alternative, students should argue that, although a state has an interest in protecting its education system for bona fide tax-paying residents, the benefits of in-state tuition do not outweigh the burden that out-of-state tuition places on interstate commerce and on the upward mobility of low- and moderate-income students. Their claims should highlight not only the egregious disparity in tuition prices but also how this has incentivized universities to overlook their own residents in favor of nonresident students from wealthy families.¹⁹¹ Moreover, their claim should stress that unreasonably high out-of-state tuition is discouraging low- and moderate-income students from leaving their states to obtain an education, ultimately disrupting the education market by influencing where students choose to enroll.¹⁹² The importance of a case like this would be invaluable to the affordable education movement, especially given the recent attention that tuition prices, student loan debt, and financial aid practices have received in both the courts and in the news.¹⁹³

¹⁹⁰ Knight & Schiff, *supra* note 75, at 317.

¹⁹¹ See JAQUETTE, *supra* note 167, at 6.

¹⁹² See *supra* Section I.C.

¹⁹³ See, e.g., Ron Lieber, *Some Colleges Will Soon Charge \$100,000 a Year. How Did This Happen?*, N.Y. TIMES (Apr. 8, 2024), <https://www.nytimes.com/2024/04/05/your-money/paying-for-college/100k-college-cost-vanderbilt.html> [<https://perma.cc/4NEG-QMJL>]; Katherine Smith, *5 Universities Cut \$104.5M Deal in Student Aid-Fixing Suit*, LAW 360 (Jan. 24, 2024, 9:49 PM), <https://www.law360.com/articles/1806487/vanderbilt-3-other-elite-schools-ink-166m-aid-fixing-deals> [<https://perma.cc/MR6P-3FVG>]; Michael D. Shear, *Biden Will Try Again to Wipe out*

Bringing a suit against a public university must overcome several obstacles. Public universities are generally considered agents of the state, meaning that they enjoy sovereign immunity in adverse actions under the Eleventh Amendment as if they were the State itself.¹⁹⁴ A student might be able to overcome the issue of sovereign immunity through the *Ex parte Young*¹⁹⁵ doctrine, a narrow exception to the Eleventh Amendment.¹⁹⁶ The *Ex parte Young* doctrine allows an individual to sue a state official for “prospective equitable relief” that enjoins the official from continuing to violate federal law, even if the state itself was protected from the suit by immunity under the Eleventh Amendment.¹⁹⁷ Thus, under this exception, out-of-state students could seek to enjoin a university’s officials—such as those in a bursar’s office—from collecting any future out-of-state tuition payments because they violate the Dormant Commerce Clause. The *Ex parte Young* exception only applies to ongoing violations and prospective relief, not for judgments based on an official’s past violation of federal law.¹⁹⁸

A case involving students from schools with dramatic tuition differences would help further the legal landscape and discourse around the issue of college affordability and exorbitant out-of-state prices. It would also reveal the impact high out-of-state tuition has not only on students but also on education access and affordability nationwide. This litigation, compounded by the already growing concern over tuition

Student Loan Debt for Millions of Borrowers, N.Y. TIMES (Apr. 5, 2024), <https://www.nytimes.com/2024/04/05/us/politics/biden-student-loan-debt.html> [<https://perma.cc/XR38-VMW7>].

¹⁹⁴ U.S. CONST. amend. XI; see *Lapides v. Board of Regents*, 535 U.S. 613, 616 (2002) (treating the Georgia state university system “as “agents of the [S]tate” and declaring “[t]he Eleventh Amendment grants a [S]tate immunity from suit in federal court by citizens of other States . . . and by its own citizens as well” (internal citations omitted)); see also *Wisc. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 389 (1998) (“[T]he Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense.”).

¹⁹⁵ 209 U.S. 123 (1908).

¹⁹⁶ See *In re Havens*, 229 B.R. 613, 627 (Bankr. D.N.J. 1998) (“The *Ex Parte Young* doctrine, which is to be applied on a case-by-case basis, is a very narrow exception to sovereign immunity set forth in the Eleventh Amendment.” (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996))).

¹⁹⁷ *Nicholl v. Att’y Gen. of Ga.*, 769 F. App’x 813, 815 (11th Cir. 2019) (citing *Ex parte Young*, 209 U.S. 123 (1908)). This immunity means a student would not be able to bring a claim for monetary damages for past tuition spent, but they could bring a claim to enjoin the university from prospectively charging them the full out-of-state tuition price. See *Chaloux v. Killeen*, 886 F.2d 247, 252 (9th Cir. 1989) (“[T]he Eleventh Amendment does not bar actions against state officers in their official capacities if the plaintiffs seek only a declaratory judgment or injunctive relief.” (quoting *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982))); see also *Worcester Cnty. Tr. Co. v. Riley*, 302 U.S. 292, 297 (1937) (“[G]enerally suits to restrain action of state officials can . . . be prosecuted only when the action sought to be restrained is without the authority of state law or contravenes the statutes or Constitution of the United States.”).

¹⁹⁸ *Havens*, 229 B.R. at 627.

and student loan debt in the United States, would assert students' rights to accessible, quality education as well as compel Congress to finally address tuition disparity head on.

B. Market Participant and Compelling State Interests

Universities could attempt to invoke the market participant doctrine to justify their tuition difference. As funders of public universities, States are "participants" in the market of education. Historically, the Court has allowed States to use the market participant doctrine defense when they were fully involved in one or more aspects of the commerce in question.¹⁹⁹ However, here, rather than being a true participant in the education market—such as a purchaser or seller²⁰⁰—States have become regulators by funding public education in only small amounts.²⁰¹ The effects that state funding have on tuition prices ultimately "regulate" (i.e., influence) how students engage with the education market.²⁰²

Tuition prices have effects on the student loans people take out, the places people choose to settle down or purchase a home, where they live or spend their money, and more.²⁰³ Ultimately, tuition prices affect interstate commerce outside of the niche "education market," effectively making states regulators instead of participants.²⁰⁴ The price of large out-of-state institutions forces the hand of low- and middle-income students: unless students want to pay exorbitant prices for education, they must stay close to home to avoid incurring mountains of debt.

States have a valid interest in wanting to provide an affordable education to bona fide residents that pay taxes to the state because those taxes help fund the state's schools.²⁰⁵ Yet a growing number of universities are receiving a significant portion of their funding from tuition revenue, not state funding.²⁰⁶ Several prestigious "public Ivies"

¹⁹⁹ See, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (upholding a Maryland statute that established more stringent requirements for out-of-state scrap metal processors because Maryland became a participant in the market once it established itself as a scrap metal purchaser).

²⁰⁰ See *supra* note 124.

²⁰¹ See *supra* note 124. The Court has accepted the market participant argument when a state was involved in a specific market nearly 100% such that they become a "direct" participant, a definition whose contours the Court has not wholly defined. *Supra* note 124. Regardless, here, universities are not funding 100% of public education, and thus should not be viewed as direct participants but as regulators. See *also supra* note 121.

²⁰² See *supra* Sections I.C, III.B.

²⁰³ See *supra* Sections I.C, III.B.

²⁰⁴ See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572 (1996) ("[W]e reject the Town's argument that the [tax] exemption should either be viewed as a permissible subsidy or as a purchase of services by the State acting as a "market participant."").

²⁰⁵ See *McKeown*, *supra* note 181, at 6.

²⁰⁶ *Budgeting*, UVA FIN., <https://uvafinance.virginia.edu/budget-management/budgeting> [<https://perma.cc/V74C-RHRC>] (showing that only 10% of UVA's budget comes from state

receive less than 13% of funding from their states while receiving over 50% of their funding from tuition;²⁰⁷ education, therefore, has become a privilege instead of a right, and tuition has become a reflection of the “price” that a student pays for its “value.”²⁰⁸ Flagship universities have also heavily increased their share of out-of-state student populations.²⁰⁹ This undermines many states’ argument that they have an interest in their in-state students.²¹⁰ Instead, flagship schools may be viewed as private actors only concerned with economics and revenue, not the interests or welfare of their students.²¹¹

Flagship universities generally draw a large number of out-of-state students because of their rankings and notoriety.²¹² Because these schools may not actually receive much federal or public funding, they are incentivized to charge high out-of-state tuition.²¹³ These universities can justify such high tuition as a result of their prestige.²¹⁴ Thus, many flagship universities overlook high-achieving low-income students altogether, becoming a repository for a majority of out-of-state students, many of whom are less qualified but are able to pay higher tuition rates.²¹⁵ Because of a state’s role as a regulator—and the aforementioned excessive burden that the disparity in tuition places on the education

appropriations); *General Fund Budget Snapshot*, UNIV. OF MICH., <https://publicaffairs.vpcomm.umich.edu/key-issues/tuition/general-fund-budget-tutorial> [<https://perma.cc/4P8W-HTVD>] (showing that the University of Michigan receives 75% of its budget from tuition and only 13% from the state).

²⁰⁷ See *supra* note 206.

²⁰⁸ See Moore, *supra* note 42 (arguing that a university’s purpose as a public institution is undermined when it bases its tuition on economic grounds); see also Jaquette & Curs, *supra* note 12.

²⁰⁹ Klein, *supra* note 9, at 4 (explaining that between 2002 and 2018, across the country, “out-of-state students’ share of the incoming class grew by an average of 55 percent. This growth was widespread, as two-thirds of states . . . increased their out-of-state enrollment by more than 20 percent”). For a historical reference of how high out-of-state enrollment was in 2014, see JAQUETTE, *supra* note 167, tbls.1 & 3. See also John Warner, *One of Higher Ed’s Worst Kept Secrets Is out. It’s Even Grimmer than We Knew.*, SLATE (Sept. 24, 2022, 5:50 AM), <https://slate.com/human-interest/2022/09/public-universities-out-of-state-tuition-student-debt.html> [<https://perma.cc/YF5D-GYNN>].

²¹⁰ See Klein, *supra* note 9.

²¹¹ See Moore, *supra* note 42 (“In fact, as soon as an institution begins to undertake to justify its tuition fees on economic rather than educational grounds, it has perverted its public function. It is no longer providing a service; it is selling a product. The state ought not to be in the business of “selling” education.”); see also JAQUETTE, *supra* note 167 (“For the entire population of public universities, a 10% decline in state appropriations was associated with a 2.7% increase in out-of-state enrollment. For public research universities, a 10% decline in state appropriations was associated with a 5.0% increase in out-of-state enrollment.”).

²¹² See Klein, *supra* note 9.

²¹³ Warner, *supra* note 209.

²¹⁴ See *id.* But see Jessica Blake, *New Report Shows College Rankings Are Losing Influence*, INSIDE HIGHER ED (Sept. 10, 2024), <https://www.insidehighered.com/news/quick-takes/2024/09/10/new-report-shows-college-rankings-are-losing-influence> [<https://perma.cc/7ZEB-XT8V>].

²¹⁵ See Warner, *supra* note 209. Texas and North Carolina are noticeably exempt from this trend. This is because these states have policies in place regarding in-state enrollment quotas,

market²¹⁶—the court should reject any market participant exception and declare disparate tuition practices unconstitutional under the Dormant Commerce Clause.

C. Congressional Action

Congress should also step in to address tuition disparities via legislation given their powers of commerce.²¹⁷ Congressional action is necessary because it would require states to comply with a national standard for tuition differences, the lack of which has caused the constitutional and societal problems discussed throughout this Note. The Supreme Court has determined that, under the Commerce Clause, Congress may regulate three broad categories: (1) the channels of interstate commerce; (2) the instrumentalities of, or persons or things in, interstate commerce; and (3) activities that substantially affect or substantially relate to interstate commerce.²¹⁸ Here, Congress could intervene in tuition pricing as students are not only instrumentalities of commerce, but tuition variation is also an activity that significantly affects interstate commerce. Additionally, gradations and nuances that exist within the Dormant Commerce Clause context allow Congress to legislate when needed as it is better equipped to set a numerical ratio than the courts.²¹⁹

Congress could pass legislation similar to the Civil Rights Act—which directly prohibited blatant discrimination of individuals—to prevent public universities from outright charging different tuitions to nonresidents.²²⁰ Constitutionally sound legislation would view students as persons in interstate commerce: students travel across state lines to obtain (i.e., purchase) an education (i.e., a commodity) from an out-of-state vendor. The fact that these students have participated in interstate commerce by purchasing an out-of-state education gives

which have been extremely effective at ensuring their state schools continue to serve majority in-state residents. *See id.*; *see also* JAQUETTE, *supra* note 167.

²¹⁶ *See supra* Section III.B.

²¹⁷ *See* U.S. CONST. art. I, § 8, cl. 3; *see also* *Camps Newfound/Owatonna v. Harrison*, 520 U.S. 564, 588 (1997) (“If there is need for a special exception [from the Commerce Clause] for non-profits, Congress not only has the power to create it, but also is in a far better position than we to determine its dimensions.” (footnote omitted)).

²¹⁸ *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

²¹⁹ *See South Dakota v. Wayfair*, 585 U.S. 162, 187 (2018) (holding that “Congress may legislate” to address such commerce problems when it feels necessary); *accord Marilley v. Bonham*, 844 F.3d 841 (9th Cir. 2016) (discussing that the court could not pinpoint an exact fee amount that would be acceptable). *See generally infra* note 230 and accompanying text.

²²⁰ Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241, 243 (codified as amended in scattered sections of 42 U.S.C.).

Congress authority to control that market, meaning they could regulate how much state schools could charge for their educations.²²¹

In response, states may choose to increase in-state tuition to equal out-of-state prices to meet their revenue needs. However, state legislatures generally have policies in place that prevent universities from raising in-state tuition past a certain level or a specific year-over-year percentage to prevent such rapid increases.²²² Thus, a university would be unable to immediately increase its tuition prices dramatically after any federal legislation passed.²²³

On a more practical level, federal legislation could resemble state policies, as states have been the real leaders in addressing college costs for years.²²⁴ State policies have focused on three areas: (1) tuition caps and freezes, (2) linkage of tuition and financial aid, and (3) incentives, such as funding for scholarships based on tuition levels, rewards or punishments based on outcomes, or reduced appropriations for excessive tuition increases.²²⁵

Modeling legislation off state policies, Congress should impose a limit on out-of-state tuition growth, or at the very least, ensure the growth is comparable to in-state tuition. Federal legislation has dabbled in this idea of price caps before, specifically regarding Medicare out-of-pocket expenses in the Inflation Reduction Act of 2022.²²⁶ Legislation could place a cap on tuition growth or on the percentage difference. This could be especially effective at ensuring a reduction in out-of-state tuition prices as at least one study has found a positive relationship between a university's

²²¹ See *Katzenbach v. McClung*, 379 U.S. 294 (1964) (finding Congress had the authority to prohibit discrimination of African Americans in restaurants under the Civil Rights Act as it imposed a significant burden on interstate commerce related to food and products in general); see also *Wayfair*, 585 U.S. at 187.

²²² See *Postsecondary Tuition Capping and Freezing*, EDUC. COMM'N OF THE STATES (Nov. 2018); see also Kim & Ko, *supra* note 13; Cindy Hernandez, *University of Illinois System Freezes In-State Tuition at All 3 of Its Campuses for 2024–25 School Year*, CHI. SUN TIMES (Jan. 18, 2024, 10:10 PM), <https://chicago.suntimes.com/news/2024/1/18/24043557/university-of-illinois-tuition-freeze-urbana-champaign-springfield-chicago-education-affordability> [<https://perma.cc/2YX8-TY7G>].

²²³ In an ideal situation, because state law prevents rapid increases and—in this hypothetical—federal law would require equal rates, out-of-tuition would decrease by necessity.

²²⁴ See Kim & Ko, *supra* note 13, at 820–21.

²²⁵ *Id.*

²²⁶ Inflation Reduction Act of 2022, Pub. L. No. 117-169, §§ 1101 *et seq.*, 136 Stat. 1818, 1877 (codified in scattered sections of 42 U.S.C.). The Inflation Reduction Act included provisions regarding out-of-pocket expenses and premium rate increases for Medicare. *Id.* Senator Hawley also introduced a bill regarding caps on credit card interest rates. Josh Hawley, *Hawley Introduces New Legislation to Cap Credit Card Interest Rates and Provide Relief to Working Americans* (Sept. 12, 2023), <https://www.hawley.senate.gov/hawley-introduces-new-legislation-cap-credit-card-interest-rates-and-provide-relief-working> [<https://perma.cc/RH3P-X8ZG>]. Although it failed, the general idea of a cap on percentage growth is not outside the realm of possibility and has been previously contemplated by congressmembers in other areas. *Id.*

autonomy over its tuition setting and tuition increases.²²⁷ Centralizing tuition growth decision-making with Congress could lead to a slowdown, or even a decrease, in tuition prices nationwide, helping curb the student debt crisis and potentially weakening the incentive to continue to admit majority affluent students.²²⁸ Alternatively, Congress may limit the price of out-of-state tuition itself using a fee differential method. This method would calculate the benefits the universities conferred on nonresident students in relation to the “subsidy” they offered through funding to the school to pay for nonresidents to attend.²²⁹ However, this would be a particularly cumbersome task given the already vast difference in costs of attendance among schools nationwide. Thus, a cap on tuition growth would be the most practical and effective route.

Congress could also implement an incentive scheme that resembles state incentive policies, including withholding funding to universities whose tuition differences or increases are over a specific percentage.²³⁰ This could effectively mitigate the costs of public universities that receive large portions of their budgets from government funding, as their financing would be beholden to their compliance. Although many universities have decreased their reliance on government funds²³¹—a result of Congress and states continuing to cut spending on education²³²—meaning these incentives or coercive measures may not have as widespread of an effect,²³³ institutions would be remiss to forgo what little state funding they can come by. Thus, legislation focused on incentivizing certain tuition increase minimization efforts, penalizing excessive costs, and establishing tuition growth caps and price

²²⁷ See Kim & Ko, *supra* note 13, at 831 (“This study . . . reveals that tuition is more likely to increase when the primary authority for tuition-setting decisions is located at the institutions, as opposed to other options.”).

²²⁸ To ensure the effectiveness of this control method, Congress should set a significantly low cap.

²²⁹ See *Marilley v. Bonham*, 844 F.3d 841 (9th Cir. 2016). In *Marilley*, the Ninth Circuit explained that a state may justify fee differentials for nonresidents to compensate for any added enforcement costs. *Id.* The Court upheld the California fee differential because it was “less than the amount by which California subsidize[d] the management of the nonresidents’ portions of its commercial fishery.” *Id.* at 851–52. Congress could choose to engage in a similar, nationwide cost-benefit analysis, too.

²³⁰ See Kim & Ko, *supra* note 13; see also *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that Congress may use its spending power to indirectly implement national policies even where they lack the power to legislate it directly).

²³¹ See *supra* note 206.

²³² See MITCHELL ET AL., *supra* note 7; Kara Arundel, *Biden Signs FY 24 Budget for Education Department, Other Agencies*, K-12 DIVE (Mar. 25, 2024), <https://www.k12dive.com/news/fy-24-budget-proposal-education-department-cut/711098> [<https://perma.cc/H3GJ-P4ZK>].

²³³ Of course, Congress could always choose to appropriate more funding to education to help curb tuition costs for both in- and out-of-state students, but this is highly unlikely at this time.

differentials is likely the most promising way forward in addressing education costs' current Dormant Commerce Clause violations.

CONCLUSION

Out-of-state tuition hikes as a means of remedying the public university funding deficit is concerning. As a nation riddled with student debt, it is imperative that solutions are implemented to stop the debt crisis at the source rather than allay its symptoms. The practice of out-of-state tuition is perpetuating an already vast education gap and student loan crisis that cannot be sustained if the country is to uphold its value of access to education for all.²³⁴ Moreover, although flagship universities often make up for state funding losses through increased out-of-state enrollment thanks to their reputations as large research institutions, smaller regional colleges and universities do not have the same ability or resources.²³⁵ More scholarship must explore how states treat their regional universities differently than their flagships and what effects that funding—or lack thereof—may in turn have on education access and tuition.

Although it seems society has conceded to the idea of college as a luxury given its lack of action regarding college affordability,²³⁶ students may be able to force Congress's hand on the matter. Out-of-state students have an opportunity to help close the achievement gap by arguing that tuition disparities at top public universities across the country are unconstitutional under the Dormant Commerce Clause because they place an impermissible burden on interstate commerce. A declaration of unconstitutionality by the Supreme Court—or even the mere societal pressure that may ensue from such a nationally important case—could result in congressional action under its Commerce or Tax and Spending Clause powers and, ultimately, help shrink the great education divide.

²³⁴ See MICHAEL MITCHELL, MICHAEL LEACHMAN & MATT SAENZ, *CTR. ON BUDGET & POL'Y PRIORITIES, STATE HIGHER EDUCATION FUNDING CUTS HAVE PUSHED COSTS TO STUDENTS, WORSENEDED INEQUALITY* (2019); accord Raj Chetty, David Deming & John Friedman, *Diversifying Society's Leaders? The Determinants and Causal Effects of Admission to Highly Selective Private Colleges*, OPPORTUNITYINSIGHTS.ORG (Oct. 2023), https://opportunityinsights.org/wp-content/uploads/2023/07/CollegeAdmissions_Paper.pdf [<https://perma.cc/T7YF-Y7HH>].

²³⁵ See Gardner, *supra* note 175. See generally MITCHELL ET AL., *supra* note 234; Cebula & Koch, *supra* note 8.

²³⁶ See *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).