COMMENTS

UNOFFICIAL AMERICANS—WHAT TO DO WITH UNDOCUMENTED STUDENTS: AN ARGUMENT AGAINST SUPRESSING THE MIND

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I. INTRODUCTION

CHRISTIAN is fifteen years old.[1] Like many young teens, his professional aspirations span numerous fields. Christian wants "to become an engineer or maybe an archeologist."[2] Eleven years ago, Christian's mother illegally crossed the United States-Mexico border with four-year-old Christian in tow, settling in New York City's Staten Island.[3] Growing up in New York, Christian learned English, went to school, played with his friends, and watched cartoons, like any other kid his age.[4] Older now and with an eye toward the future, Christian's concerns extend beyond childhood issues. As an undocumented immigrant, Christian worries about his lack of post-high-school educational opportunities.[5] Comparing his situation to that of his friends who are American citizens, Christian stated, "The difference between me and most of my friends is, four years from now, they'll be getting ready to go to college.… But

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1. *Staying in School Despite an Uncertain Future: All Things Considered* (National Public Radio broadcast Sept. 18, 2007) [hereinafter *Staying in School*], *available at* http://www.npr.org/templates/story/story.php?storyId=14509728.

2. *Id.*

3. *Id. See also* JEFFERY S. PASSEL, RANDY CAPPS & MICHAEL FIX, URBAN INST., UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES 1(2004) (noting that Mexicans comprise over fifty percent of the undocumented population, with an additional twenty-three percent from other Latin American countries, while Asians constitute ten percent, and Europeans and Canadians another five percent of the undocumented in the United States), *available at* http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf.

4. *Staying in School*, *supra* note 1.

5. *Id.*

when I turn eighteen, I will either have to go back to Mexico and start all over, or hide for the rest of my life living under the line, underground."[6]

Christian's cousin Mike currently "lives under the line." A nineteen-year-old undocumented immigrant, Mike has struggled for years with the debilitating effect of his legal status.[7] In tenth grade, Mike learned his dream of joining the military and going to college could not become a reality.[8] Soon after, Mike learned his legal status also prohibited him from getting a job.[9] Disheartened and frustrated, Mike decided to drop out of high school.[10] Notably, as Christian stated, "It's not just Mikey, I know a lot of kids who drop out. Some of them are already working as day laborers. Some of them joined gangs."[11]

Unfortunately, as Christian's statement indicates, Mike's decision to drop out of school in the face of educational and employment barriers reflects the rule, not the exception. Christian and Mike represent two of the estimated eleven-to-twelve million undocumented immigrants living in the United States,[12] with children accounting for almost two million of this total.[13] While the debate over how to handle immigration issues lingers unresolved, children like Christian grow up and realize that the American dream of education and opportunity does not include them, at least not yet.

Debates concerning persons in Christian's situation or immigration generally are nothing new, but the prevalence of these debates in the mainstream media is new. This is likely instigated by the explosion in twenty-four-hour cable news programming and its heightened focus on security following September 11, 2001,[14] as well as the persistent influx of undocumented immigrants into the United States. The justification for this scrutiny may lie in reports stating that from 2000 to 2006, over four million undocumented

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

12. MICHAEL HOEFER, NANCY RYTINA & CHRISTOPHER CAMPBELL, U.S. DEP'T OF HOMELAND SEC., POPULATION ESTIMATES: ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2006, at 1, 3 (2007), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf; JEFFERY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON MARCH 2005 CURRENT POPULATION SURVEY, at i, 1-2 (2006), *available at* http://pewhispanic.org/files/reports/61.pdf; URBAN INST., CHILDREN OF IMMIGRANTS: FACTS AND FIGURES 1 (2006), *available at* http://www.urban.org/UploadedPDF/900955_children_of_immigrants.pdf. Furthermore, approximately five million children live in undocumented families. PASSEL, *supra*, at 8; URBAN INST., *supra*, at 1.

13. *Dreams Deferred: The Costs of Ignoring Undocumented Students*, IMMIGRATION POL'Y CTR. (Am. Immigration Law Foundation, Wash., D.C.), Oct. 18, 2007, at 1 [hereinafter *Dreams Deferred*], *available at* http://www.immigrationpolicy.org/images/File/factcheck/Access%20to%20Higher%20Ed%209-25%20FINAL.pdf.

14. *Lou Dobbs Tonight*, on weeknights on CNN, is a prime example. Illegal immigration is a daily point of conversation and contention between Lou and his guests. *See* Lou Dobbs Tonight, Broken Borders, http://loudobbs.tv.cnn.com/broken-borders/ (last visited Jan. 26, 2009).

immigrants entered the United States.[15] According to current estimates, "undocumented migration" accounts for an increase of over 500,000 persons a year in the country's population.[16] Thus, not surprisingly, illegal immigration is a popular topic of discussion for pundits, politicians, and the American people.[17]

This article concentrates on the debate over how to handle the undocumented immigrants brought into the United States as children. These children spend all or most of their childhoods in the United States and will most likely remain in the United States as adults.[18] This article argues in favor of fully assimilating these undocumented immigrants into American society by providing them an opportunity to acquire both a college education and legal status. Specifically, this article examines federal and state laws via three interrelated issues.

Part II of this article defines the term immigrant for the purposes of this writing. Part III deals with the issue of undocumented immigrants' eligibility for admission to public postsecondary educational institutions. Analysis of this issue is conducted through an investigation of three areas: foundational case history, federal legislation, and federal preemption. Part IV inquires into whether undocumented students should be eligible for in-state tuition status. Analysis of the in-state tuition issue focuses on four areas: federal preemption, state responses to federal legislation, arguments opposing in-state tuition, and the shortcomings of state plans. Finally, part V discusses the proposed federal Development, Relief, and Education for Alien Minors ("DREAM") Act,[19] including its requirements and benefits. Part V argues in favor of the Act's passage, which would resolve the eligibility and state tuition issues of parts III and IV. The DREAM Act resolves these issues by providing undocumented immigrants a pathway to obtain legal status through higher education or military service. The DREAM Act is good but not perfect. Part V's conclusion suggests some revisions regarding the DREAM Act's eligibility requirements and timeframe.

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15. HOEFER, RYTINA & CAMPBELL, *supra* note 12, at 1, 3. *See also* Randy Capps & Karina Fortuny, *Immigration and Child and Family Policy*, URBAN INST. & CHILD TRENDS (Urban Inst., Wash., D.C.), Jan. 12, 2006, at 2 (stating that fourteen to sixteen million immigrants, including, but not exclusively, undocumented immigrants, entered the United States throughout the 1990s), *available at* http://www.urban.org/UploadedPDF/311362_lowincome_children3.pdf. In contrast, only ten million were estimated to have entered in the 1980s, and seven million in the 1970s. *Id.*

16. Capps & Fortuny, *supra* note 15, at 2.

17. *See, e.g.*, *Poll: Ohioans Oppose Benefits, Privileges for Illegal Immigrants*, TOLEDO BLADE (Ohio), Nov. 13, 2007, http://www.toledoblade.com/apps/pbcs.dll/article?AID=/20071113/NEWS24/71113020 (reporting a Quinnipiac University survey found that most Ohio voters did not want illegal immigrants to get health, schooling, or driving benefits); Don Frederick, *Illegal Immigration—Truly a Partisan Concern*, L.A. TIMES, Sept. 12, 2007, http://latimesblogs.latimes.com/washington/2007/09/illegal-immigra.html (discussing how Republican-leaning voters in the early primary states put illegal immigration at the top of their list of priorities for the next President and Democratic-leaning voters did not).

18. *See* Plyler v. Doe, 457 U.S. 202, 230 (1982) (stating that "many of the undocumented children disabled by this classification will remain in this country indefinitely").

19. Development, Relief, and Education for Alien Minors (DREAM) Act of 2007, S. 774, 110th Cong. (2007).

II. PERSONS AT ISSUE: IMMIGRANTS, NONIMMIGRANTS, AND QUESTIONS OF LEGAL STATUS

The classification of "undocumented immigrants" includes the categories "undocumented aliens," "unauthorized aliens or immigrants," and "illegal aliens or immigrants."[20] Although Congress established numerous status categories under the immigration laws, the key distinctions in this article are "immigrants" versus "nonimmigrants" and "legal status" versus "non-legal status."[21] Regardless of legal status, an "immigrant," for purposes of this article, is a person who comes to the United States with the intention of remaining in the country permanently.[22] A "*non*immigrant," on the other hand, comes to the United States without the intent to stay permanently.[23] Common examples of nonimmigrants are foreign students visiting to study[24] and tourists.[25] This article only discusses immigrants.

One can further classify immigrants according to their legal status. Only those immigrants "admitted" into the United States are here legally.[26] Someone who is not a national or citizen of the United States is only considered lawfully "admitted" into the country "after inspection and authorization by an immigration officer."[27] At issue in this article are two categories of undocumented immigrants. First are those immigrants who entered the United States without being admitted. Second are those immigrants who were admitted for a limited time only, but who overstayed their visas and are no longer lawful visitors. When discussing "undocumented immigrants" or "undocumented students," this article refers to persons never admitted into the United States for permanent settlement, but who nevertheless made the United States their permanent home.

20. *See* 8 U.S.C § 1101 (2006).

21. *See* Toll v. Moreno, 458 U.S. 1, 13-14 (1982) (discussing how the Immigration and Nationality Act of 1952, 66 Stat. 163 (1952), *amended as* 8 U.S.C. §§ 1101-1537, "recognizes two basic classes of aliens, immigrant and nonimmigrant").

22. *See* 8 U.S.C. § 1101(a)(15). *See also* BLACK'S LAW DICTIONARY 765 (8th ed. 2004) (defining "immigrant" as "[a] person who arrives in a country to settle there permanently").

23. 8 U.S.C. § 1101(a)(15) (2006) (defining numerous nonimmigrant categories); Nonimmigrant Definition, Dictionary.com, http://dictionary.reference.com/browse/nonimmigrant (last visited Jan. 26, 2009). *See also Toll*, 458 U.S. at 13 n.19 ("'Congress defined nonimmigrant classes to provide for the needs of international diplomacy, tourism, and commerce ….'") (quoting Elkins v. Moreno, 435 U.S. 647, 665 (1978)).

24. *See* 8 U.S.C. § 1101(a)(15)(F), (J), (M).

25. *See Toll*, 458 U.S. at 13 n.19.

26. 8 U.S.C. § 1101(a)(13)(A) (2006).

27. *Id.*

III. ISSUE ONE: WHETHER PUBLIC POSTSECONDARY EDUCATIONAL INSTITUTIONS CAN ADMIT UNDOCUMENTED STUDENTS

A. Plyler v. Doe, *1982—Laying the Foundation*

Twenty-five years ago, the United States Supreme Court guaranteed undocumented immigrant children the right to a free public education through the twelfth grade.[28] *Plyler v. Doe*, decided in 1982, is the only Supreme Court case that has directly addressed the issue of education for undocumented immigrants. Quoting *Brown v. Board of Education*, the *Plyler* Court stated, "'education is perhaps the most important function of state and local government.'"[29] The Court held that a state cannot deny a public primary and secondary education to undocumented students.[30] In doing so, the *Plyler* Court struck down a Texas statute that allowed the state to withhold funding from school districts that used the funding partly to educate undocumented students.[31] The statute also permitted school districts to deny enrollment to undocumented students[32] or to charge them a tuition fee.[33] Thus, *Plyler* was instrumental in ensuring access to a free public education to generations of undocumented immigrant children.[34]

28. *Plyler*, 457 U.S. at 230 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.").

29. Plyler v. Doe, 457 U.S. 202, 222 (1982) (quoting Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954)).

30. *Id.* at 230.

31. *Id.*

32. *Id.* at 205 n.2.

33. *Id.* at 206.

34. *See, e.g.*, Capps & Fortuny, *supra* note 15, at 8-9. States with the highest shares of children of immigrants—including undocumented immigrants, though not exclusively undocumented immigrants—in pre-kindergarten to fifth grade in 2000:

States with the Highest Shares of Children of Immigrants in Pre-Kindergarten to Fifth Grade in 2000

U.S.	19%
Cal.	47%
Nev.	29%
N.Y.	28%
Haw.	28%
Tex.	27%
Fla.	26%
Ariz.	25%

States with the Highest Percent Growth of Children of Immigrants in Pre-Kindergarten to Fifth Grade, 1990-2000

U.S.	39%
Nev.	206%
N.C.	153%
Ga.	148%
Neb.	125%
Ark.	109%
Ariz.	103%
S.D.	101%

Despite the apparent educational gains by undocumented immigrant children evident on the surface of *Plyler*'s holding, a closer review of the Court's analysis highlights the holding's limitations.

Speaking for the Court, Justice Brennan explained the majority's reasoning, strongly noting that the *parents* of undocumented immigrant children are responsible for the decision to enter the United States wrongfully, not the children.[35] Emphasizing the importance of this point, Justice Brennan stated that "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[36]

Nevertheless, Justice Brennan did not subject the legislation at issue to strict scrutiny. In its equal-protection analysis, the Court stated that undocumented immigrants qualified as "persons" who are protected by the Fourteenth Amendment[37] but did not constitute a suspect class.[38] In the same vein, the Court excluded a right to a public education from its list of fundamental rights protected by the U.S Constitution.[39] Absent a suspect class or a fundamental right, the Court did not apply strict scrutiny, thereby restricting the scope of the holding's future application.[40]

Had the *Plyler* Court held that undocumented immigrants constitute a suspect class or that education is a fundamental right, state laws prohibiting admissions of undocumented students to public postsecondary educational institutions likely would not survive a strict-scrutiny analysis. When applying strict scrutiny, courts often strike down laws that facially discriminate against a suspect class or restrict a fundamental right.[41] Thus, by holding that undocumented immigrants do not constitute a suspect class and that education is not a fundamental right, *Plyler* set a precedent for applying a less-than-strict level

N.J.	25%	Or.	96%
R.I.	22%	Colo.	94%
N.M.	21%	Iowa	94%

35. *Plyler*, 457 U.S. at 220 (citing Trimble v. Gordon, 430 U.S. 762, 770 (1977)) (stating that "children who are plaintiffs in these cases can affect neither their parents' conduct nor their own status").

36. *Id*. This remains a potent point when dealing with undocumented students wanting to attend college.

37. *Id.* at 210.

38. *Id*. at 229.

39. Plyler v. Doe, 457 U.S. 202, 221 (1982) ("Public education is not a 'right' granted to individuals by the Constitution."). *See also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution.").

40. *Plyler*, 457 U.S. at 223-24.

41. Currently, the Court's application of strict scrutiny under an Equal Protection Clause analysis is reserved to race-based classifications and laws restricting fundamental rights. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 10-11 (1967) (applying strict scrutiny and striking down a Virginia law prohibiting interracial marriages); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (applying strict scrutiny and striking down a Connecticut statute prohibiting the use of contraceptives as a violation of the right of privacy).

of scrutiny to laws discriminating against undocumented immigrants or restricting the right to a public education.[42] When applying a lower level of scrutiny, a court often defers to the legislature, thereby increasing the reviewed law's likelihood of survival.[43] Although the *Plyler* Court guaranteed undocumented immigrant children the right to a public primary and secondary education, its application of an intermediate level of scrutiny restricted the use of the decision as a legal basis for expanding other rights of undocumented immigrants, including the right to a postsecondary education.[44]

Plyler may not provide a legal basis for an undocumented immigrant's right to a postsecondary education, but it does support the underlying rationale for why such a right should exist: without access to a postsecondary education and with no chance of gaining lawful employment, undocumented students are more likely to drop out of school.[45] An increase in school dropouts negatively impacts the dropouts' future prospects as well as the community at large.

In *Plyler*, Justice Brennan expressed his concern about the impact of an uneducated class of persons on society.[46] He feared that denying undocumented students access to education would lead to "the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."[47] Indeed, Justice Brennan argued that education is necessary for self-sufficiency, self-reliance, and participation in society;[48] education provides "the means by which [a] group might raise the level of esteem in which it is held by the majority;"[49] education is necessary in maintaining society's institutions;[50] and education advances an individual's

42. The *Plyler* Court, however, applied something more than rational-basis review. The Court applied a level of review on a par with intermediate scrutiny. *Plyler*, 457 U.S. at 230 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.").

43. Subject to some variation, the Court has applied two standards of review less demanding of the legislature than strict scrutiny. The first and most deferential standard is rational-basis review, which only requires a rational relationship between a law and a legitimate government interest. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985). The second standard is intermediate scrutiny, which requires a substantial relationship between the law and an important government interest. *See* United States v. Virginia, 518 U.S. 515, 533 (1996).

44. *See Plyler*, 457 U.S. at 230.

45. *See* ARIANA L. RAMBUYAN, AM. IMMIGR. LAW FOUND., REALIZING THE AMERICAN DREAM: FAIR TREATMENT FOR UNDOCUMENTED STUDENTS 2 (2004) ("Because of their immigration status and the associated barriers to higher education, undocumented students are more likely to drop out of high school than students who are U.S. citizens."), *available at* http://icirr.org/sites/icirr.org/files/Realizing%20the%20American%20Dream.pdf; *Staying in School*, *supra* note 1.

46. *Plyler*, 457 U.S. at 230.

47. *Id*. *See also* Scholarships for Undocumented Students, FinAid.org, http://www.finaid.org/otheraid/undocumented.phtml (last visited Jan. 26, 2009) ("Education increases tax revenues and decreases spending on welfare, health care and law enforcement.").

48. *Plyler*, 457 U.S. at 222 (citing Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).

49. Plyler v. Doe, 457 U.S. 202, 222 (1982).

50. *Id*. at 221.

economic, intellectual, and psychological well-being.[51] Though he applied these principles to primary and secondary education, they are equally valid today with respect to postsecondary education.[52] Justice Brennan's argument regarding the importance of education to society and *all* its persons provides a principle-based argument, if not a legal one, for giving undocumented immigrants access to postsecondary education.

B. Federal Legislation: IIRIRA and PRWORA

Over a decade after *Plyler*, the 1994 mid-term elections ushered in twelve years of a Republican-controlled Congress. In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act

51. *See id*. at 222. Relating the effects of illiteracy resulting from a lack of primary education, the Court found there to be an "inestimable toll … on the social, economic, intellectual, and psychological well-being of [individual students]." *Id.*

52. Nowadays, a middle-class lifestyle practically necessitates a college degree. *See* U.S. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, SPOTLIGHT ON STATISTICS: BACK TO SCHOOL (2007), *available at* http://www.bls.gov/spotlight/2007/back_to_school/. In 2006, workers twenty-five years old or older with some high school education earned an average of $419 per week and had an unemployment rate of 6.8%. High school graduates earned $595 per week, with a 4.3% unemployment rate. In contrast, workers who held a bachelor's degree earned an average of $962 per week, with an unemployment rate of only 2.3%. *Id*. *See also* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATIONAL STATISTICS 2006, at 562 tbl.377 (2006) (showing that, as of 2005, a twenty-five-year-old male working full-time makes $36,000 per year on average if he completed high school, and $60,000 per year if he has a bachelor's degree; similarly, for women the numbers are $26,000 and $42,000 respectively).

The shrinking manufacturing job market in the United States is one reason upward mobility into the middle class is becoming increasingly difficult without a postsecondary degree. *See* John W. Schoen, *Latest Jobs Report Is a Tale of Two Sectors*, MSNBC, Jan. 5, 2007, http://www.msnbc.msn.com/id/16457835. Schoen's article states that 72,000 manufacturing jobs were lost in 2006, and that three million have been lost over the past decade. *Id.* Although jobs in the service sector, such as in the leisure and hospitality industries, have been on the rise, the pay differential is a big concern. Leisure and hospitality "jobs paid, on average, just $9.60 an hour [in 2006], compared with $16.82 for manufacturing jobs.… And it's a big reason that laid-off manufacturing workers face a downward economic spiral if the only alternative available to them are low-wage service jobs in hotels or chain restaurants." *Id*.

Plyler established a way for the children in these typically low-income families to obtain a basic education. Without an opportunity for a postsecondary education, these children will likely struggle and, eventually, undertake jobs similar to those of their parents. *See* Capps & Fortuny, *supra* note 15, at 8-9 ("Work is not an antidote for poverty in immigrant families, because so many immigrants work in low-wage and low-skilled jobs. In 2001, working immigrant families with children were twice as likely as working native families to be low-income (42 versus 21 percent)."). In just over thirty years, 1970 to 2002, "the poverty rate among school-age children of immigrants [including, though not exclusively, undocumented immigrants] almost doubled from 12 to 23 percent, while the rate for non-Hispanic white and black children remained relatively constant." *Id*. at 11-12. *See also* GRACE CHANG, DISPOSABLE DOMESTICS 215 (2000) (finding the district court's decision in *Plyler* "more incisive [than Justice Brennan's decision], focusing on the plight of the immigrant workers who were these schoolchildren's parents, and in whose footsteps these children would most likely follow" if denied access to an education).

("PRWORA")[53] and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").[54] These laws, intended by Congress to restrict immigration, had a profound effect on "federal benefits in many areas of health and welfare," including postsecondary education.[55]

With the passage of the legislation, a debate began regarding states' ability to lawfully admit undocumented students into their public postsecondary educational institutions.[56] Much of the debate stems from the "confusingly worded" language of the statutes.[57] A main point of confusion concerns how much room PRWORA and IIRIRA leave for state action.[58]

The key parts of PRWORA and IIRIRA concerning postsecondary education provide:

> [PRWORA] *8 U.S.C. § 1621*. [A]n alien … is not eligible for any State or local public benefit.[59] …[T]he term 'State or local public benefit' means … any retirement, welfare, health, disability, public or assisted housing, *postsecondary education*, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family … by an agency of a State or local government ….[60]
>
> A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise

53. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

54. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

55. Michael A. Olivas, *IIRIRA, the Dream Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 449 (2004).

56. *Compare* Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 473 (2006-07) ("[E]very word of the legislative record [of 8 U.S.C. § 1623 (2006)] indicates that Congress intended to completely prohibit states from offering in-state tuition rates to illegal aliens."), *with* Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99 (2008) (stating that section 1623 does not prohibit a state from offering residency status benefits to undocumented immigrants if the state so chooses).

57. Olivas, *supra* note 55, at 452. Olivas is a professor of law at the University of Houston. He is an expert in the areas of immigration law and policy, and education law, particularly higher education. He also founded the Institute for Higher Education Law and Governance in 1982. Michael Olivas, Faculty Homepage, University of Houston Law Center, http://www.law.uh.edu/Faculty/main.asp?PID=31 (last visited Jan. 26, 2009).

58. *See, e.g.*, Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 611 (E.D. Va. 2004); League of United Latin Am. Citizens v. Wilson (*LULAC II*), 997 F. Supp. 1244, 1253 (C.D. Cal. 1997).

59. 8 U.S.C. § 1621(a) (2006).

60. *Id.* § 1621(c)(1)(B) (emphasis added).

> be ineligible … only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.[61]

> [IIRIRA] *8 U.S.C. § 1623*. [A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State … for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.[62]

No court has found sections 1621 or 1623 to prohibit states from admitting undocumented immigrants into their public postsecondary educational institutions. Two district courts, however, addressed this issue while determining whether the federal statutes preempted state laws governing postsecondary admissions.[63] The question of federal preemption is an important one: if sections 1621 and 1623 are preemptive, then they restrict the manner in which public postsecondary educational institutions may admit undocumented students.

The following section examines these district court opinions. The first court held that sections 1621 and 1623 preempted state law regarding postsecondary admissions to undocumented immigrants,[64] and the second court did not.[65]

C. The Question of Federal Preemption

Shortly after the passage of PRWORA and IIRIRA, a district court in California held that the federal statutes "manifest[ed] Congress' intent to occupy [the] field" regulating the eligibility of undocumented immigrants for postsecondary education.[66] The case was *League of United Latin American Citizens v. Wilson* (*LULAC II*).[67] To determine whether sections 1621 and 1623 preempted a California law, the district court applied three preemption tests first articulated by the Supreme Court in *DeCanas v. Bica*.[68] Under the first *DeCanas* test, a state statute or policy is preempted if it attempts to regulate an "exclusively … federal power," such as immigration.[69] Under the second test,

61. *Id.* § 1621(d). *See also id.* § 1611 (stating in subsection (a) that "an alien who is not a qualified alien … is not eligible for any Federal public benefit" defined in subsection (c) as including "postsecondary education").

62. *Id.* § 1623(a) (also known as § 505 of IIRIRA).

63. *See Merten*, 305 F. Supp. 2d at 604-05; *LULAC II*, 997 F. Supp. at 1256.

64. *LULAC II*, 997 F. Supp. at 1256.

65. *Merten*, 305 F. Supp. 2d at 605.

66. *LULAC II*, 997 F. Supp. at 1256.

67. *Id.*

68. League of United Latin Am. Citizens v. Wilson (*LULAC II*), 997 F. Supp. 1244, 1253 (C.D. Cal. 1997). *See generally* DeCanas v. Bica, 424 U.S. 351 (1976) (articulating three preemption tests).

69. *DeCanas*, 424 U.S. at 354. *See also* Victor Romero, *Race, Immigration, and the Department of Homeland Security*, 19 ST. JOHN'S J. LEGAL COMMENT. 51, 53 (2004) ("Since the late 1800s, the Supreme Court has held that Congress has virtually plenary power with respect to the admission and deportation of noncitizens."). Professor Romero cites numerous cases, including

preemption of a state law results when Congress intends complete federal control or occupancy of the field that the state law regulates, even if the state law does not conflict with federal law.[70] Finally, under the third test, federal law preempts any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"[71] or that "conflicts with federal law, making compliance with both state and federal law impossible."[72]

In *LULAC II*, the California district court held Proposition 187 to be invalid under the second *DeCanas* test.[73] Proposition 187, a California law passed by voters, denied public benefits to undocumented immigrants.[74] Describing the California measure, the district court stated:

> The initiative's provisions require law enforcement, social services, health care and public education personnel to (i) verify the immigration status of persons with whom they come in contact; (ii) notify certain defined categories of persons of their immigration status; (iii) report those persons to state and federal officials; and (iv) deny those persons social services, health care and education.[75]

Under the second *DeCanas* test, the district court read PRWORA as Congress's intention "to occupy the field of regulation of government benefits to aliens."[76] In doing so, it found PRWORA to be a "sweeping statement" by Congress, erasing all "doubt that the federal government has taken full control of the field of regulation of public benefits to aliens."[77] According to the court, alien eligibility for postsecondary education is a public benefit controlled exclusively by Congress.[78] Additionally, the district court stated that because PRWORA and IIRIRA are comprehensive, states lack the power to legislate in the area of public

Chy Lung v. Freeman, 92 U.S. 275, 275 (1875); Chae Chang Ping v. United States, 130 U.S. 581, 581 (1889); and Galvan v. Press, 347 U.S. 522, 530 (1954).

70. *See DeCanas*, 424 U.S. at 357; Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 601-02 (D. Va. 2004); *LULAC II*, 997 F. Supp. at 1253.

71. *DeCanas*, 424 U.S. at 363 (quotations omitted). *See also LULAC II*, 997 F. Supp. at 1253; *Merten*, 305 F. Supp. 2d at 602.

72. *Merten*, 305 F. Supp. 2d at 602.

73. *LULAC II*, 997 F. Supp. at 1244.

74. History of Proposition 187, http://www.ccir.net/REFERENCE/187-History.html (last visited Jan. 26, 2009).

75. *LULAC II*, 997 F. Supp. at 1249. *See* Olivas, *supra* note 55, at 448 (describing Proposition 187 as a "draconian measure" intended "to eliminate virtually all benefits to undocumented aliens").

76. *LULAC II*, 997 F. Supp. at 1253. "[I]n enacting the [PRWORA], Congress has made it clear that it is the immigration policy of the United States to deny public benefits to all but a narrowly defined class of immigrants which does not include illegal immigrants." *Id*. at 1254.

77. *Id*. at 1254. The court specifically cited sections 1611 and 1621 as ousting state power in regulating fields including postsecondary education.

78. League of United Latin Am. Citizens v. Wilson (*LULAC*), 997 F. Supp. 1244, 1256 (C.D. Cal. 1997).

benefits for undocumented immigrants.[79] Thus, the district court held that sections 1621 and 1623 preempted California's Proposition 187.[80]

Within seven years of the *LULAC II* decision, another district court applied the *DeCanas* tests to an immigration-related policy in Virginia.[81] The Virginia district court held that no preemption existed, directly contradicting the *LULAC II* decision.[82] In *Equal Access Education v. Merten*, the plaintiffs challenged a policy set forth by the State's Attorney General that denied college admission to undocumented immigrants.[83] The plaintiffs complained that adoption of the policy by a number of Virginia's postsecondary educational institutions violated the Supremacy, Commerce, and Due Process Clauses of the Constitution.[84] They also took issue with the Attorney General's encouragement of postsecondary education officials and employees to report suspected undocumented students to the proper immigration authorities.[85]

Analyzing the issues in the case, the Virginia district court did not paint PRWORA and IIRIRA with the same broad strokes employed by the California district court. The Virginia district court's differing opinion was based on a technicality in *DeCanas*. The Virginia district court found it essential[86] that the Supreme Court in *DeCanas* upheld a state statute because the state in that case was not creating its own standards when determining a person's immigration status.[87] Rather than creating its own standards, the state adopted federal standards.[88] With this in mind, the Virginia district court examined the Supremacy Clause claim in *Merten*, applied the three *DeCanas* tests, and concluded that federal preemption was unlikely under the first test and did not exist under the second and third tests.

Under the first test, the district court held that a state can implement a policy denying admission to undocumented immigrants, "provided that in doing so, the institutions implementing the policy adopt federal immigration standards."[89] In ruling on the defendants' motion to dismiss, the district court stated that the plaintiffs needed to present evidence demonstrating that the postsecondary institutions of Virginia had "failed to adopt federal immigration standards in implementing their policies of denying admission to illegal aliens."[90] Without evidence that the institutions created their own standards, no issue of preemption existed.

79. *Id*. at 1255.
80. *See id*. at 1255-56.
81. Equal Access Educ. v. Merten, 305 F. Supp. 2d 585 (E.D. Va. 2004).
82. *Id*. at 608.
83. *Id*.
84. *Id*. at 591.
85. *Id*.
86. *Id*. at 602.
87. DeCanas v. Bica, 424 U.S. 351, 355-56 (1976).
88. *Id*.
89. *Merten*, 305 F. Supp. 2d at 603.
90. *Id*.

Determining that the plaintiffs had failed to prove preemption under the first test, the district court reviewed their arguments under the second test. Under the second test, the plaintiffs argued that PRWORA and IIRIRA manifested Congress's intent to completely occupy the field of postsecondary education access for undocumented immigrants, a position consistent with *LULAC II*.[91] Here, the Virginia district court parted ways with its California counterpart. The court stated that "*LULAC II* is neither controlling nor persuasive with respect to PRWORA's preclusive effect on state regulation of illegal alien access to public post-secondary educational institutions"[92] because PRWORA addresses money, not admissions.[93]

The district court continued that section 1611 of "PRWORA addresses only post-secondary *monetary assistance* paid to students or their households, *not* admissions to college or university."[94] Likewise, section 1621 "denies post-secondary monetary assistance to illegal aliens; and any state wishing to make an illegal alien eligible for any state or local public benefit for which the alien would otherwise be ineligible under PRWORA must enact a state law affirmatively providing for such eligibility."[95] Therefore, PRWORA, the district court concluded, did not govern the admission of an undocumented student to a state college or university because admission is not a public benefit defined under the Act.[96] Following this conclusion, the court stated that Congress did not "occupy completely the field of [undocumented immigrant] eligibility for public postsecondary education."[97] In fact, the district court stated that Congress "has failed to legislate in this field at all and thus has not occupied any part of it, completely or otherwise."[98]

After holding that no federal-field preemption existed under section 1621, the district court examined section 1623. Similarly, the district court concluded that section 1623 left room for the individual states to decide postsecondary admission issues.[99] The district court determined that the "inference to draw from [section] 1623 is that public post-secondary institutions need not admit illegal aliens at all, but if they do, these aliens cannot receive in-state tuition unless out-of-state United States citizens receive this benefit."[100] Thus, under the second *DeCanas* test, the district court found no field preemption issues relating to PRWORA's section 1621 or IIRIRA's section 1623.

The district court's reasoning under the second test flows directly into the third test, under which the court concluded that Virginia's policy did not conflict

91. Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 604 (E.D. Va. 2004).

92. *Id*. at 605 n.19.

93. *Id*. at 605.

94. *Id*. (emphasis added).

95. *Id*.

96. *Id*.

97. *Id*.

98. *Id*.

99. *Id*. at 607. *See also* Olivas, *supra* note 56, at 123 (stating that section 1623 does "not preclude the ability of states to enact residency statutes for the undocumented").

100. *Id*. at 606-07.

with PRWORA or IIRIRA.[101] Again, the court drew a distinction between a public benefit, as defined under PRWORA, and admission to public postsecondary educational institutions.[102] The court found no conflict, concluding that admission policies had nothing to do with the monetary benefits covered under PRWORA.[103] As for section 1623, the court held that "IIRIRA says nothing about admission of illegal aliens to post-secondary educational institutions; admission is not one of the benefits IIRIRA regulates."[104] Here, the inference is that section 1623, like section 1621, deals with monetary benefits, which do not include admissions.[105] According to the district court, enforcement of PRWORA, IIRIRA, and the state's admission policies could happen simultaneously without conflict.[106]

There is no question that states can lawfully admit undocumented immigrants into their public postsecondary educational institutions under PRWORA and IIRIRA. What is not completely clear, as highlighted in the above cases, is whether PRWORA and IIRIRA restrict the *manner* in which the states admit these students. The *LULAC II* and *Merten* cases are important because they exemplify the difference in opinion regarding the effect of the federal statutes on states' regulations of admissions. Further, they are the only two federal cases to directly address the preemption issue as it relates to postsecondary admissions. The argument articulated by the Virginia district court—that the term "benefit," as used in the federal statutes, refers to money, and not admissions—is both logical and persuasive.[107]

From a public policy standpoint, states should permit undocumented immigrants to attend public postsecondary educational institutions if the persons merit admission. Educating undocumented immigrants not only benefits those individuals, but also benefits the communities in which they live and society as a whole.[108]

101. Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 607 (E.D. Va. 2004).

102. *Id*. *See also* Olivas, *supra* note 56, at 124-25 (asserting that the "benefit" to which section 1623 makes reference is a monetary benefit, having nothing to do with residency status).

103. *Merten*, 305 F. Supp. 2d at 607.

104. *Id*.

105. *See* Olivas, *supra* note 56, at 124 ("[T]he benefit actually being conferred by residency statutes is the right to be considered for in-state resident status. This is a non-monetary benefit ….").

106. *Id*.

107. *See* Olivas, *supra* note 55, at 452. Professor Olivas explains that "the word 'benefit' is defined in section 1621 in a way that makes it clear that Congress intended it as a 'monetary benefit.'" *Id*. Additionally, the Virginia district court in *Merten* provided a more detailed analysis of sections 1621 and 1623 under the three *DeCanas* tests than did the district court in *LULAC II*. *Merten*, 305 F. Supp. 2d at 602-08. The district court in *LULAC II* focused exclusively on the second *DeCanas* test, which deals with field preemption. League of United Latin Am. Citizens v. Wilson (*LULAC II*), 997 F. Supp. 1244, 1253-57 (C.D. Cal. 1997).

108. *See Dreams Deferred*, *supra* note 13, at 1. *See also* NAT'L IMMIGRATION LAW CTR., BASIC FACTS ABOUT IN-STATE TUITION FOR UNDOCUMENTED STUDENTS 3 (2006) ("Education quickly pays for itself. It is a benefit to society, not just to those who go to school."), *available at* http://www.nilc.org/immlawpolicy/DREAM/in-state_tuition_basicfacts_041706.pdf.

The issue of federal preemption extends beyond policies and laws regarding admissions. An important issue also exists as to whether PRWORA and IIRIRA preempt state legislation providing undocumented immigrants with residency-based tuition benefits.

IV. ISSUE TWO: THE IN-STATE TUITION DEBATE

The most contentious preemption question regarding PRWORA and IIRIRA concerns in-state tuition.[109] Specifically, to what extent do sections 1621 and 1623 restrict states from granting residency status for tuition purposes to undocumented students?[110] As a result of the lack of case law in this area, states began to answer this question individually in 2001.[111] This section will first examine *Merten*'s judicial review of the issue of residency and then discuss the states' responses to the federal legislation.

A. Federal Preemption and the Question of "Benefit" under PRWORA and IIRIRA

The debate over states granting in-state tuition status to undocumented students parallels the debate over states admitting these students to their public postsecondary institutions. Like the admissions debate, the tuition debate is not a question of permission, but rather a question of application. PRWORA and IIRIRA do not prohibit states from considering undocumented students as state residents for tuition purposes.[112] Whether the federal statutes restrict the manner in which the states make their residency determinations is unclear.[113]

Much of the uncertainty surrounding sections 1621 and 1623 springs from the term "benefit" because its definition determines states' ability to control the manner in which they afford in-state resident status. "Benefit," as used in the

109. *See, e.g.*, Liza Porteus, *States Grapple with In-State Tuition for Illegal Immigrants*, FOX NEWS.COM, Mar. 6, 2006, http://www.foxnews.com/story/0,2933,186876,00.html (identifying the arguments concerning whether and to what extent IIRIRA restricts the states in offering in-state tuition to undocumented students).

110. It is important to note that the term "residency," as used in this article, has nothing to do with legal status. In other words, if a state considers an undocumented student a "resident," it is only for tuition purposes; it does not confer on that person any additional rights or privileges reserved for a U.S citizen or a lawful permanent resident.

111. Alene Russell, *In-State Tuition for Undocumented Immigrants: States' Rights and Educational Opportunity*, AM. ASS'N ST. C. & U. POL'Y MATTERS, Aug. 2007, at 2 (discussing states that have considered laws providing or prohibiting in-state tuition to undocumented immigrants).

112. Section 1621 specifically provides that a state may pass a law granting any public benefit to an undocumented alien that the alien "would otherwise be ineligible" for under the statute. 8 U.S.C. § 1621(d) (2006). "[If] a citizen or national of the United States is eligible for" the same benefit as the undocumented student, then the state may grant eligibility to the undocumented as well. *Id.* § 1623(a). Applying the second *DeCanas* test, PRWORA and IIRIRA do not "completely ouster" the states' rights to exercise discretion over granting in-state tuition because the statutes do not occupy the field. In other words, the states may decide for themselves. DeCanas v. Bica, 424 U.S. 351, 357 (1976). *See also* Olivas, *supra* note 55, at 452-54.

113. Olivas, *supra* note 55, at 452-54.

statutes, is ambiguous.[114] Section 1621 defines "benefit," but the definition fails to clarify whether the term describes a monetary benefit, such as a scholarship, or a status benefit, such as residency for tuition purposes, or both.[115] Whether residency status is a benefit under the statues is important.

To begin with, if the statutes' definition of "benefit" includes residency for tuition purposes, then states would be reluctant to grant residency. The reason for states' reluctance is twofold. First, under this interpretation of the statutes, in order to grant residency to an undocumented student, a state must first pass a law affirmatively creating a right to do so.[116] Second, a state must offer in-state tuition to *all* U.S. citizens or nationals, regardless of their state residency.[117] A law granting subsidized tuition to undocumented students in the state *and* to all non-state-resident U.S. citizens and nationals undoubtedly would be unpopular among states' voters and unlikely to pass in state legislatures.

Further, the interpretation of the term "benefit" under sections 1621 and 1623 may determine whether undocumented students go to college. Considering that undocumented students are not eligible for federal student aid[118] and that many of them live in low-income families, the difference between in-state and out-of-state tuition rates is significant.[119] Out-of-state tuition is up to four times the amount of in-state tuition, a difference that may foreclose the possibility of a college education for undocumented students.[120]

The Virginia district court in *Merten* interpreted the term "benefit," but it did not specifically address the issue of tuition.[121] According to the district court, "public benefits" as used in the federal statutes means *monetary* benefits.[122] The district court's interpretation is logical. First, section 1621 defines the term "state

114. *See* 8 U.S.C. §§ 1621(a), (c)(1)(B), 1623(a).

115. *Id.* § 1621(a), (c)(1)(B).

116. *See* 8 U.S.C. § 1621(d) (2006).

117. *See id.* § 1623(a).

118. Elizabeth Redden, *An In-State Tuition Debate*, INSIDE HIGHER ED, Feb. 28, 2007, http://insidehighered.com/news/2007/02/28/immigration. *See also* U.S. DEP'T of EDUC., FUNDING EDUCATION BEYOND HIGH SCHOOL: THE GUIDE TO FEDERAL STUDENT AID 2007-2008, at 3 (2006) (stating that federal student aid programs are available only to U.S. citizens and eligible noncitizens) *available at* http://studentaid.ed.gov/students/attachments/siteresources/FundingEduBeyondHighSchool_0708.pdf. An eligible noncitizen is defined as a "U.S. national" or a "U.S. permanent resident" with a "Permanent Resident Card." *Id.* at 39. *See also* Scholarships for Undocumented Students, *supra* note 47 (discussing eligibility requirements for "financial aid and scholarships for undocumented students and illegal aliens").

119. *See* Capps & Fortuny, *supra* note 15, at 8-9 (addressing the large percentage of low-income families among the undocumented).

120. *See, e.g.*, UCLA Registrar's Office, Fees: Graduate and Undergraduate Annual 2007-08, http://www.registrar.ucla.edu/fees/gradfee.htm (last visited Jan. 26, 2009) (indicating that the undergraduate in-state tuition rate for UCLA is $7,713 and out-of-state is $27,333). *See also* Dina M. Horwedel & Christina Asquith, *For Illegal College Students, an Uncertain Future*, DIVERSE: ISSUES IN HIGHER EDUC., May 4, 2006, at 22 (stating that in-state tuition "is often as much as 75 percent cheaper than out-of-state tuition"). George Mason University in Virginia, a state that does not provide in-state tuition to undocumented students, is used as an example. *Id.* There, the in-state tuition is set at $9000, and out-of-state is set at $17,000. *Id.*

121. Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 605 (E.D. Va. 2004).

122. *Id.*

or local public benefit" to mean "any … benefit for which payments or assistance are provided to an individual, household, or family … by an agency of a State or local government."[123] Furthermore, section 1623 measures the "postsecondary education benefit" in terms of "amount, duration, and scope."[124] This, for example, prohibits benefits such as scholarship money.[125]

In contrast, in-state residency status is not a monetary benefit. As one commentator observed, "The benefit actually being conferred by residency statutes [ ] is the right to be considered for in-state resident status. This is a non-monetary benefit."[126] Read together, sections 1621 and 1623 suggest that in-state residency status is not a monetary benefit because the state makes no payments to the student or the student's family.[127] As a result, the term "benefit" represents a monetary measure and does not comprise residency, which is a status categorization.

B. The States Respond

A number of states directly addressed the tuition debate through legislation affecting the more than 65,000 undocumented students graduating each year from high schools nationwide.[128] This number will surely increase as the number of undocumented students in the country's public school systems continues to grow.[129] In some states, public schools' immigrant population, many of whom are undocumented, grew 150 to 200% in only ten years.[130] Responding to this large undocumented student base, thirty-two states have considered legislation that would provide a route for undocumented students to gain in-state tuition status.[131] Ten of these states have actually passed such laws: Texas,[132]

123. 8 U.S.C. § 1621(c)(1)(B) (2006).

124. *Id.* § 1623(a).

125. *See* Olivas, *supra* note 55, at 454 (describing the benefit as one of monetary value and not status). *But see* FAIR: Taxpayers Should Not Subsidize College for Illegal Aliens, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters6be3? (last visited Jan. 26, 2009) (stating that granting in-state tuition to illegal aliens is illegal).

126. *See* Olivas, *supra* note 55, at 454 (citing Jessica Salsbury, Comment, *Evading "Residence": Undocumented Students, Higher Education, and the States*, 53 AM. U.L. REV. 459, 479 (2003)).

127. Scholarships for Undocumented Students, *supra* note 47.

128. *Dreams Deferred*, *supra* note 13, at 1 (citing JEFFERY S. PASSEL, URBAN INST., FURTHER DEMOGRAPHIC INFORMATION RELATING TO THE DREAM ACT (2003), *available at* http://www.nilc.org/immlawpolicy/DREAM/DREAM_Demographics.pdf). *See also* National Council of La Raza: Policies, http://www.nclr.org/content/policy/detail/1331/?print=1 (last visited Jan. 26, 2009) (noting that every year, 65,000 immigrants graduate from high schools in the United States who are not eligible for many of the programs that make college accessible to other students).

129. HOEFER, RYTINA, & CAMPBELL, *supra* note 12, at 4 tbl.4 (citing a 123% change in Georgia in the estimated undocumented immigrant population between January 2000 and January 2006, a 65% change in Washington, a 52% change in Arizona, a 50% change in Texas, and a 42% change in North Carolina over the same period).

130. Capps & Fortuny, *supra* note 15, at 9 fig.6.

131. *In-State Tuition for Undocumented Immigrants* (Educ. Comm'n of States, Denver, Colo.), Mar. 2008, at 1; Scholarships for Undocumented Students, *supra* note 47. *See also* Russell, *supra*

California,[133] Utah,[134] New York,[135] Washington,[136] Oklahoma,[137] Illinois,[138] Kansas,[139] New Mexico,[140] and Nebraska.[141] Other states offer partial in-state tuition to undocumented students.[142] In contrast, at least ten states have considered legislation that would ban offering in-state tuition status to undocumented students.[143] Some measures have made it as far as a governor's desk only to be vetoed.[144] Arizona's banning measure, however, succeeded in becoming law,[145] as did measures in Georgia,[146] Mississippi,[147] and most recently South Carolina.[148]

note 111, at 4 (noting that Proposition 300 passed in Arizona in November 2006, prohibiting in-state tuition and state financial aid for undocumented students and requiring the state's colleges and universities to report the number of undocumented students enrolled).

132. H.R. 1403, 77th Leg., Reg. Sess. (Tex. 2001), *amended by* S.B. 1528 (Tex. 2005).

133. Assemb. 540, 2001-02 Sess. (Cal. 2001); CAL. EDUC. CODE § 68130.5 (West 2003).

134. H.R. 144, 54th Leg., Gen. Sess. (Utah 2002); UTAH CODE ANN. § 53B-8-106 (2006).

135. S. 7784, 225th Leg., 2001 N.Y. Sess. (N.Y. 2002).

136. H.R. 1079, 58th Leg., Reg. Sess. (Wash. 2003); WASH. REV. CODE ANN. 28B.15.012 (West 2006).

137. S. 596, 49th Leg., 1st Sess. (Okla. 2003). In 2007, the Oklahoma legislature repealed the 2003 provision that accorded in-state tuition and state financial-aid awards to eligible undocumented students. Memorandum from the Oklahoma State Regents for Higher Education, Undocumented Immigrant Students: Information for the Oklahoma State System of Higher Education (Jan. 2, 2008), *available at* http://www.law.uh.edu/ihelg/undocumented/2008-1-2-guidancetoinstitutions.pdf. Although the new law, H.B. 1804, provides for greater restrictions on state financial-aid benefits than the 2003 legislation, the in-state tuition provision mostly remains the same. *Id*. at 3. H.B. 1804 also grandfathers in undocumented students who were previously eligible for in-state tuition and "enrolled in a degree program during the 2006-07 school year or any prior school year." *Id*. at 2.

138. H.R. 60, 93d Leg., Reg. Sess. (Ill. 2003).

139. H.R. 2145, 2003 Leg. (Kan. 2003); KAN. STAT. ANN. § 76-731a (Supp. 2007).

140. S. 582, 2005 Leg., Reg. Sess. (N.M. 2005); N.M. STAT. ANN. § 21-1-4.6 (LexisNexis 2004 & Supp. 2008).

141. Leg. 239, 99th Leg., 2d Reg. Sess. (Neb. 2006); NEB. REV. STAT. § 85-502 (2007).

142. In Minnesota, for example, a law passed in 2007 required more state colleges and universities (but not all) to provide a flat tuition rate, thus eliminating nonresident tuition. *See* Minnesota House of Representatives Public Information Services, Higher Education, *Funding Package Proposed*, May 7, 2007, http://www.house.leg.state.mn.us/hinfo/sessiondaily.asp?yearid=2007&storyid=1098 (last visited Jan. 26, 2009). This provision was part of a compromise, which included removal of another provision that would have provided in-state tuition to undocumented students in a manner similar to the ten states discussed above. *Id*.

143. *See In-State Tuition for Undocumented Immigrants*, *supra* note 131, at 1.

144. One such measure was vetoed by Colorado's governor, Bill Owens. Owens vetoed H.R. 1023, 2006 Leg., Reg. Sess. (Colo. 2006) on March 30, 2006. *See* Colorado General Assembly, 2006 Session Laws—House Bills, http://www.state.co.us/gov_dir/leg_dir/olls/sl2006a/2006SLHOU.htm (last visited Jan. 26, 2009). On June 26, 2007, Connecticut governor Jodi Rell vetoed legislation that would have allowed undocumented students to qualify for in-state tuition at state colleges and universities. Governor Rell Vetoes Bill to Provide In-State Tuition to Illegal Aliens, http://www.ct.gov/governorrell/cwp/view.asp?Q=385102&A=2791 (last visited Jan. 26, 2009). *See also* Russell, *supra* note 111, at 3 (discussing how Connecticut's governor vetoed the bill in June 2007, citing the issue as a federal one better left to Congress to handle).

145. S. Con. Res. 1301, 47 Leg., 2d Reg. Sess. (Ariz. 2006).

146. Russell, *supra* note 111, at 4.

States that enacted legislation providing in-state tuition status to undocumented students typically use one of two models.[149] The structure of both models removes states from the scope of section 1623 in case the term "benefit" does encompass in-state tuition. The first model defines residents as "those who have studied in and graduated from a state high school, usually for a minimum of three years."[150] The second model is similar, except that it attempts to completely circumvent section 1623 by omitting any reference to "residence."[151] Instead, the basis for the second model is exemptions. It provides "exemptions for payment of out-of-state tuition" for students satisfying "criteria similar to those in the first model."[152]

Both models generally include four statutory elements. First, students must have attended a school within the state for a specified number of years.[153] Second, students must have graduated from one of the high schools in the state.[154] Third, students must have "signed an affidavit stating that they have either applied to legalize their status or will do so as soon as eligible."[155] Fourth, the statutes offer in-state tuition to all U.S. citizens and permanent residents who satisfy the first three requirements to circumvent the legal question of whether section 1623's definition of "benefit" includes state residency status.[156] In practice, however, only the undocumented students living in the state will likely satisfy all of the requirements of these statutes.[157]

States applying the first model include Illinois,[158] Kansas,[159] Nebraska,[160] New Mexico,[161] Texas,[162] and Washington.[163] States applying the second model

147. MISS. CODE ANN. § 37-103-23 (2005).

148. *See* S.C. CODE ANN. REGS. § 59-101-430 (2008) (banning undocumented students from attending state colleges and universities); *In-State Tuition for Undocumented Immigrants*, *supra* note 131, at 2.

149. *State Policies Regarding In-State Tuition for Undocumented Students*, JFF UPDATE (Jobs for Future, Boston, Mass.), Mar. 2007, at 1 [hereinafter *State Policies*], *available at* http://www.achievingthedream.org/_pdfs/_publicpolicy/UndocImmigUpdate_0307.pdf; Russell, *supra* note 111, at 2-3.

150. *State Policies*, *supra* note 149, at 1; Russell, *supra* note 111, at 2-3.

151. *See Olivas*, *supra* note 55, at 455. After noting how the California statute circumvents the residency issue by not referring to residence in its language, Professor Olivas stated that "it is difficult to envision how any student, undocumented or not, could attend and graduate from a California high school without actually 'residing' in the school district." *Id.*

152. *State Policies*, *supra* note 149, at 1; Russell, *supra* note 111, at 2-3.

153. NAT'L IMMIGRATION LAW CTR., *supra* note 108, at 1. *See also State Policies*, *supra* note 149, at 1 (discussing how states can redefine residency to mean "those who have studied in and graduated from a state high school, usually for a minimum of three years").

154. NAT'L IMMIGRATION LAW CTR., *supra* note 108, at 1; *State Policies*, *supra* note 149, at.1.

155. NAT'L IMMIGRATION LAW CTR., *supra* note 108, at 1. *See also State Policies*, *supra* note 149, at 1 (noting that states that allow undocumented students to be eligible for in-state tuition typically require the student to "[f]ile an affidavit stating intent to legalize status and become a permanent U.S. citizen").

156. NAT'L IMMIGRATION LAW CTR., *supra* note 108, at 1, 2 ("[F]ederal law does *not* prohibit states form providing in-state tuition to undocumented immigrants.").

157. For example, it is unlikely that many U.S. citizens or nationals who are residents of Nevada will live for three years in California and graduate from a California high school.

158. *State Policies*, *supra* note 149, at 2.

include California,[164] New York,[165] Oklahoma,[166] and Utah.[167] Six additional states recently proposed bills adopting one of the two models, but most of the bills never made it to the floor for a vote.[168] Controversy over statutes incorporating these two models continues to build, despite arguments that they comply with section 1623.[169] Cases regarding the statues may still be developing,[170] but the debate is already underway.

C. Considering Arguments Opposing In-State Tuition

Not surprisingly, discussion about any type of immigration reform arouses passions in persons on both sides of the debate. The Internet allows a person to join communities of like-minded persons and exchange ideas, vent frustrations, and develop common talking points.[171] A quick search on the Internet will return

159. *Id.* In 2005, approximately 221 undocumented students were enrolled in Kansas schools under its statute. Roberto G. Gonzalez, *Wasted Talent and Broken Dreams: The Lost Potential of Undocumented Students*, IMMIGR. POL'Y IN FOCUS, Oct. 2007, at 9.

160. *State Policies*, *supra* note 149, at 2.

161. *Id.*

162. *Id.* By 2004, Texas estimated that it had 3792 undocumented students in its colleges and universities. Gonzalez, *supra* note 159, at 9.

163. *State Policies*, *supra* note 149, at 2.

164. *Id.* In 2005, it was estimated that 1620 undocumented students were enrolled under California's plan. Gonzalez, *supra* note 159, at 9; *New Estimates of Unauthorized Youth Eligible for Legal Status under the DREAM Act*, MIGRATION POL'Y INST., Oct. 2006, at 1, 4 [hereinafter *Unauthorized Youth Estimates*].

165. *State Policies*, *supra* note 149, at 2.

166. *Id.*

167. *Id.*

168. *See* Assemb. 4032, 212th Leg. (N.J. 2007) (did not make it out of committee); S. 436, 212th Leg. (N.J. 2006) (did not make it out of committee); S. 78, 211th Leg. (N.J. 2004) (did not make it out of committee); H.B. 2705, 74th Leg., Reg. Sess. (Or. 2007) (proposed in 2007); S. 769, 73d Leg., Reg. Sess. (Or. 2005) (did not make it out of committee); H.B. 7973, 2006 Sess. (R.I. 2006) (did not make it out of committee); H.R. 6184, 2005 Sess. (R.I. 2005); S.B. 2220, 2006 Reg. Sess. (Miss. 2006) (did not make it out of committee); S. 296, 93d Gen. Assemb., Reg. Sess. (Mo. 2005) (did not make it out of committee); H.R. 1183, 2005 Sess. (N.C. 2005) (did not make it out of committee).

169. *See* Russell, *supra* note 111, at 2-3.

170. The few cases dealing with the in-state tuition statutes have not shed any light on the substantive arguments for either side. *See* Day v. Sebelius, 376 F. Supp. 2d 1022 (D. Kan. 2005). The plaintiffs in *Day* were U.S. citizens attending university in Kansas but "classified as non-residents … for tuition purposes." *Id.* at 1025. They brought an action challenging the Kansas law that allows qualifying undocumented students to pay in-state tuition. *Id.* The action sought to enjoin the enforcement of the Kansas law as it applies to undocumented immigrants. *Id*. at 1025-26. The plaintiffs' complaint consisted of numerous claims, including that the Kansas statute violated 8 U.S.C. §§ 1621 and 1623. *Id*. at 1026-28. Federal preemption was another claim, as was a claim of equal protection violation for unlawful discrimination against U.S. citizens. *Id*. at 1028-29. The merits of the case were not analyzed because the district court found that the plaintiffs lacked standing to proceed. *Id*. at 1033-34, 1039. Plaintiffs appealed, but the Tenth Circuit upheld the district court's ruling. Day v. Bond, 500 F.3d 1127 (10th Cir. 2007).

171. *See*, *e.g.*, In-State College Tuition for Illegal Aliens—The American Resistance Foundation, http://www.theamericanresistance.com/issues/in_state_tuition.html (last visited Jan.

results of thousands of websites covering the debate over in-state tuition for undocumented immigrants.[172]

Two arguments frequently arise in opposition to states granting in-state tuition to undocumented immigrants.[173] The first maintains that undocumented persons do not pay taxes and therefore should not be allowed to attend taxpayer-subsidized colleges and universities.[174] The second asserts that offering in-state tuition benefits to undocumented students incentivizes illegal immigration.[175] This subsection points out the flaws of each of these arguments.

1. *Misperception: The Tax Burden Argument*

A common refrain among critics of in-state tuition status for undocumented students is that taxpayers should not subsidize the education of illegal immigrants.[176] Critics believe that granting eligibility for in-state tuition to undocumented immigrants is just another tax-funded public benefit abused by illegal aliens.[177] This line of argument involves a number of misconceptions pertaining to undocumented immigrants. The argument ignores the fact that

26, 2009). The American Resistance website contains a list of "[t]alking points against in-state [c]ollege [t]uition" for undocumented immigrants. *Id.*

172. Using google.com, I ran a search using the terms "in-state tuition + illegal immigrants" and received more than 130,000 results.

173. *See* In-State College Tuition for Illegal Aliens, *supra* note 171.

174. *See*, *e.g.*, Press Release, Rep. Elton Gallegly, Don't Penalize Nation's Legal Residents and Citizens (Feb. 7, 2007) (on file with the University of Toledo Law Review), *available at* http://www.house.gov/gallegly/media/media2007/col020707immigration.htm. Elton Gallegly is a senior Republican member of the House of Representatives Judiciary Committee, the Vice Ranking Member of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, & International Law, and represents the 24th Congressional District in California. United State House of Representatives, http://www.house.gov/gallegly/welcome.htm (last visited Jan. 26, 2009). *See also WCVB TV News Boston: Tuition for Illegal Immigrants Sparks Controversy* (ABC television broadcast Apr. 19, 2007) (quoting Rep. Jeffrey Perry) ("'It's pretty black and white to me. If you're here illegally, if you don't have a valid resident status here in Massachusetts, I don't believe the taxpayers should be subsidizing your education.'"), *available at* http://www.thebostonchannel.com/news/12528499/detail.html.

175. *See* Kerry Healey, Editorial, *An Unfair Reward for Illegal Immigrants*, BOSTON GLOBE, Nov. 8, 2005, at A11. Healey wrote this piece while serving as the lieutenant governor of Massachusetts. *Id*. At that time, the state's legislature was considering a bill that would have provided in-state tuition to undocumented students in Massachusetts. *Id*. Healy believed enactment of the legislation "would encourage more illegal immigration." *Id*. *See also* Porteus, *supra* note 109 ("Critics of educational price breaks for illegal immigrants argue … that these state laws will create an onslaught of illegal aliens trying to take advantage of the lower cost.").

176. *See* Press Release, Rep. Elton Gallegly, *supra* note 174.

177. *See Comprehensive Immigration Reform: The Future of Undocumented Students: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 45 (2007) [hereinafter *Immigration Reform Hearing*] (statement of Kris. W. Kobach, Professor of Constitutional Law and Immigration Law, University of Missouri-Kansas City School of Law). *See also* Redden, *supra* note 118 (articulating one point of reasoning behind an argument used against granting in-state tuition: "illegality should not be rewarded through taxpayer subsidies").

undocumented immigrants contribute to the U.S. economy in various ways, including by paying taxes.

While it is true that a state's taxpayers subsidize its in-state tuition rates, "taxpayers" include many undocumented immigrants.[178] Many economists believe that "when averaged over the whole economy, the effect of [illegal immigration] is a small net positive."[179] Harvard professor and economist George Borjas professed that illegal immigration increased the average American's wealth by almost one percent.[180] Payroll tax withholdings provide one explanation for this increase.[181] A recent survey of approximately 2100 undocumented workers found that sixty-six percent of them had federal income taxes withheld over a five-year period.[182] Some officials believe the number is actually closer to seventy-five percent.[183] One source noted that "[s]ince very few undocumented workers file income tax returns to obtain a refund, effectively these workers are paying taxes at a higher marginal rate than U.S. citizens."[184]

A *New York Times* report attributed much of the income taxes paid by undocumented immigrants to the 1986 Immigration Reform and Control Act, "which set penalties for employers who knowingly hire illegal immigrants."[185] To get around the 1986 law, many undocumented immigrants obtain fake work papers and Social Security numbers to gain employment.[186] Social Security payment reports substantiate this theory.[187]

In 2004, the contribution to Social Security from undocumented workers accounted for approximately ten percent of the Social Security surplus.[188] The Social Security Administration maintains an "earnings suspense file" to account for all of the W-2s reporting earnings associated with an incorrect or fictitious Social Security number.[189] In 2006, according to Mark Everson, then IRS Commissioner and former Deputy Commissioner on Immigration and Naturalization Services, a majority of the mismatched Social Security numbers originated in four states with large undocumented populations: California, Texas,

178. *See* Adam Davidson, *Q&A: Illegal Immigrants and the U.S. Economy*, NPR.ORG, Mar. 30, 2006, http://www.npr.org/templates/story/story.php?storyId=5312900.

179. *Id.*

180. *Id.*

181. *See* Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, N.Y. TIMES, Apr. 5, 2005, at A1.

182. Scholarships for Undocumented Students, *supra* note 47.

183. *See* Porter, *supra* note 181, at A1 (quoting Stephen Goss, Chief Actuary of the Social Security Administration) ("'Our assumption is that about three-quarters of other-than-legal immigrants pay payroll taxes.'").

184. *See* Scholarships for Undocumented Students, *supra* note 47.

185. *See* Porter, *supra* note 181, at A1.

186. *Id.* ("Currently available for about $150 on street corners in just about any immigrant neighborhood in California, a typical fake ID package includes a green card and a Social Security card.").

187. *Id.*

188. *Id.*

189. *Id.*

Florida, and Illinois.[190] Furthermore, 2.5 million Individual Taxpayer Identification Numbers, often used by undocumented immigrants, accounted for approximately $5 billion in taxes paid in 2004.[191] The Social Security and income tax figures did not take into account the sales and property tax revenues generated by undocumented immigrants.[192] Thus, the aggregate of these figures demonstrates that a large portion of the undocumented immigrant population pays taxes.

As with taxes, the public often misperceives the effect of undocumented immigrants on public benefit programs.[193] Undocumented immigrants are not eligible for most public programs, including Earned Income Tax Credit, Temporary Assistance for Needy Families, food stamps, and Medicaid.[194] Beyond ineligibility, a fear of the application process required for many of these programs further limits undocumented immigrants' use of such programs.[195] Undocumented immigrants may face language barriers when dealing with applications and are unable to provide employment and income information.[196] Further, some undocumented immigrants are simply unaware of the programs or the rules and procedures surrounding them.[197] This ignorance explains why, despite the "higher poverty and hardship rates, children in [documented and undocumented] immigrant families show lower participation in a wide range of public benefit programs and other social services, with the exception of public health care coverage."[198] Thus, as with taxes, there is a misperception surrounding public benefit programs. Those programs that are not off-limits to undocumented immigrants tend, for the most part, to go underused.[199] Abuse of public benefit programs, therefore, should not be attributed to undocumented immigrants.

2. *Misperception: The Reward-and-Incentive Argument*

Critics of state legislation allowing undocumented students to obtain in-state tuition status contend that such legislation rewards illegal behavior and

190. *Hearing on Impacts of Border Security and Immigration on Ways and Means Program: Hearing before the H. Comm. on Ways & Means*, 109th Cong. 16 (2006) [hereinafter *Impacts Hearing*] (statement of Mark W. Everson, Comm'r, I.R.S.).

191. *Id*. *See* Porter, *supra* note 181, at A1 (maintaining that in recent years, the "earnings suspense file" acquires on average "more than $50 billion a year, generating $6 billion to $7 billion in Social Security tax revenue and about $1.5 billion in Medicare taxes").

192. *Impacts Hearing*, *supra* note 190, at 16 (statement of Mark W. Everson, Comm'r, I.R.S.).

192. *See id.*

193. *See* Capps & Fortuny, *supra* note 15, at 14.

194. *Id*. *See also Facts about Immigrants' Low Use of Health Services and Public Benefits*, NAT'L IMMIGR. L. CENTER (L.A., Cal.), Sept. 2006, at 1 ("The average immigrant utilizes less than half the dollar amount of health care services as the average native-born citizen.").

195. Capps & Fortuny, *supra* note 15, at 15.

196. *Id*.

197. *Id*.

198. *Id*. at 13.

199. *Id*. (noting the use of public health care as being the exception rather than the rule).

incentivizes unauthorized entry into the United States.[200] Deterrence via a withholding of educational benefits, however, is a misdirected effort. The parents of the undocumented students, not the students themselves, are the wrongdoers. In-state tuition rewards not the parent but rather the student who has worked hard, graduated from high school, and earned a spot at a state college or university. Echoing Justice Brennan's argument in *Plyler*, it is essential to distinguish between the wrongs of the parent and the child.[201] At issue are undocumented persons who did not come to the United States by their own volition.[202] Instead, one or both parents brought these persons into the United States as children who were often too young to appreciate their actions or those of their parents.[203] The child's blameworthiness is, at best, speculative.[204] Because the legal system seeks to impose burdens on those who are responsible for the wrongdoing and does not punish one person for the misdeeds of another, punishing undocumented students for the wrongs of their parents offends "fundamental conceptions of justice."[205]

Furthermore, rather than future educational possibilities, the main reason for illegal immigration is immediate economic opportunity from increased work opportunities.[206] One may speculate that some persons illegally come to the United States to provide their children with better educational opportunities. Whether the possibility of in-state tuition adds much by way of this incentive is

200. *See* Healey, *supra* note 175, at A11; Porteus, *supra* note 109.

201. *See* Plyler v. Doe, 457 U.S. 202, 220 (1982) ("[L]egislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."); Redden, *supra* note 118.

202. *See* Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393, 412 (2002) (refuting arguments made against the DREAM Act). *See also* 108 CONG. REC. S10,673-74 (daily ed. July 31, 2003) (statement of Sen. Hatch) ("Most [undocumented students] came to this country with their parents as small children and have been raised here just like their U.S. citizen classmates.").

203. 108 CONG. REC. S10,673 (daily ed. July 31, 2003) (statement of Sen. Hatch). *See also* 108 CONG. REC. S8670-71 (daily ed. July 22, 2004) (statement of Sen. Durbin) (discussing the story of Diana, an undocumented youth brought by her parents from Mexico to Illinois at the age of six); *Staying in School*, *supra* note 1 (telling the story of Christian, an undocumented teen student).

204. *See* Romero, *supra* note 202, at 403 ("Many of these college-age children entered the United States at a young age, often not understanding what they were doing when their parents brought them into the United States. Their blameworthiness at the time of their entry is therefore speculative as they were unsuspecting accomplices to the U.S. immigration violations.").

205. *Plyler*, 457 U.S. at 220. The Court went on to state that "'imposing disabilities on the … child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the … child is an ineffectual—as well as unjust—way of deterring the parent.'" *Id.* (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972)).

206. *See* Tyche Hendricks, *Illegal Immigrants Choice: Work Underground or Leave*, S.F. CHRON., Aug. 27, 2007, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/08/27/MN0JRNMGF.DTL (quoting Wayne Cornelius, Dir., Ctr. for Comparative Immigration Studies, Univ. of Cal.-San Diego: "'The overwhelming incentive for [undocumented immigrants] coming here is the prospect of being employed in jobs that invariably pay far more than low-skilled jobs pay in Mexico or other sending countries.'"). *See also Plyler*, 457 U.S. at 228 ("The dominant incentive for illegal entry in to the State of Texas is the availability of employment ….").

unclear.[207] It is unlikely that a complete ban on in-state tuition for undocumented students would stem the tide of unlawful immigration.[208] Thus, denying in-state tuition status to undocumented students on the unsupported speculation that it possibly could serve as an incentive for more illegal immigration is unfair and, arguably, unjustifiable.

As the arguments above illustrate, the public holds many misperceptions about undocumented immigrants. For most undocumented students, the United States is home, and, for some, it is the only home they have ever known.[209] Many undocumented immigrants view themselves as loyal to America and its principles.[210] It is unrealistic to expect persons who grew up in this country, attended school here, and assimilated into this culture to part ways with their families and return to a country that is only a name or a setting for their parents' family stories. Frustrations regarding the number of undocumented persons who continue to cross the nation's borders are understandable. What is difficult to understand is how punishing a young adult who grew up in the United States and who played no role in deciding to come here will effect any positive change.

D. Can't Go It Alone: Where the States' Plans Come Up Short

Notwithstanding PRWORA and IIRIRA, states can enact legislation providing undocumented students access to in-state tuition. In fact, ten states have enacted such legislation.[211] Despite such legislation, two major roadblocks exist for undocumented students in those states: federal loans and legal status.[212] Many students rely on federal loans to attend college or obtain a postgraduate degree.[213] Even in the states offering in-state tuition to undocumented students,

207. *Plyler*, 457 U.S. at 228 (noting, in reference to free public primary and secondary education, which would arguably be more of an incentive to come to this country illegally than would the opportunity to go to college and *pay* in-state tuition, that "few if any illegal immigrants come to this country … in order to avail themselves of a free public education"). *See also* Romero, *supra* note 202, at 412 (asserting that "there has not been much evidence that most undocumented immigration is due to a desire to pursue free or subsidized education").

208. *See* Romero, *supra* note 202, at 412. I have not found any studies that deal with this specific query. Common sense, however, dictates that there has not been any measurable increase in illegal immigration over the past seven years specifically attributable to the ten states that have enacted measures providing in-state tuition within that period.

209. *See, e.g.*, 108 CONG. REC. S8670-71 (daily ed. July 22, 2004) (statement of Sen. Durbin) (discussing Tereza who was born in Korea and was brought to the United States at the age of two and raised in Illinois).

210. *See* 108 CONG. REC. S1545, S10673 (daily ed. July 31, 2003) (statement of Sen. Hatch) ("Many [undocumented students] view themselves as Americans, and are loyal to our country.").

211. ASHLEY ZALESKI, EDUC. COMM'N OF STATES, IN-STATE TUITION FOR UNDOCUMENTED IMMIGRANTS 1 (2007); Scholarships for Undocumented Students, *supra* note 47.

212. *See* Romero, *supra* note 202, at 396 (identifying and discussing the shortfalls of the states' plans and the need for federal assistance).

213. *See* Jonathan D. Glater, *Education Dep't Criticized for Loans Oversight*, N.Y. TIMES, Aug. 2, 2007, at A1 ("The student loan industry has faced increasing scrutiny of its business practices as tuition has skyrocketed and more students have been forced into debt to finance their education. [In 2006], students took out more than $85 billion in federal and private loans to pay for college.").

the cost may prove too great without federal student aid.[214] Further, without legal status, undocumented students cannot get a job and work their way through college.[215]

Legal status is the central issue surrounding undocumented immigrants and the greatest shortfall of the various states' in-state tuition plans. Even if an undocumented student is able to attend college, illegal status renders the diploma largely ineffectual. Absent a guarantee that along with an education will come the possibility of obtaining legal status, an undocumented person—college graduate or not—cannot expect to legally secure a job and instead lives in fear of removal.[216] Congress must determine the rules and regulations regarding the legal status of immigrants.[217] Only Congress can provide a pathway for the rewards that a higher education can provide.

V. ISSUE THREE: THE DREAM ACT AND A WAY FORWARD

"No Country, however rich, can afford the waste of its human resources."
~Franklin Delano Roosevelt[218]

Congress has spoken on the question of what to do with undocumented students. Since the Development, Relief, and Education for Alien Minors ("DREAM") Act's initial appearance in 2001, it has amassed bipartisan support from forty-eight Senate co-sponsors and over 150 House of Representatives co-sponsors.[219] The DREAM Act attempts to resolve the question of what to do with the undocumented immigrants who were brought to this country as children by their parents. The Act provides the vital pathway to legal status through education or military service.[220] Further, the Act opens the door to lawful

214. With low-income jobs and little to no education, many undocumented families struggle to make ends meet. Persons born outside of the United States account for three-quarters of all workers who have no higher than an eighth grade education. *See* Capps & Fortuny, *supra* note 15, at 11-12 (discussing how from 1970 to 2002 "the poverty rate among school-age children of immigrants [documented and undocumented included] almost doubled from 12 to 23 percent, while the rate for non-Hispanic white and black children remained relatively constant").

215. *See* Romero, *supra* note 202, at 406 (discussing how an undocumented person cannot lawfully hold a job upon graduation).

216. *Id*. at 406-07.

217. Plyler v. Doe, 457 U.S. 202, 224 (1982).

218. Franklin Delano Roosevelt Memorial: Inscriptions, http://www.nps.gov/fdrm/memorial/inscript.htm (last visited Jan. 26, 2009). The quotation is an inscription in Room One of the Franklin Delano Roosevelt Memorial and comes from his Second Fireside Chat on Government and Modern Capitalism, delivered in Washington, D.C. on September 30, 1934. *Id.*

219. *DREAM Act Summary*, NAT'L IMMIGR. LAW CTR. (L.A., Cal.), Apr. 2006, at 2, *available at* http://www.nilc.org/immlawpolicy/DREAM/dream_act_06_summary_2006-04.pdf. The list includes Richard Durbin (D-IL), then Senator Barack Obama (D-IL), Chuck Hagel (R-NE), and Richard Lugar (R-IN) in the Senate; and Lincoln Diaz-Balart (R-FL) and Lucille Roybal-Allard (D-CA) in the House. *Id.*

220. Development, Relief, and Education for Alien Minors (DREAM) Act of 2007, S. 774, 110th Cong. § 4 (2007). Senator Durbin sponsored Senate Amendment 2919 (intended to be proposed to H.R. 1585) that included some language that was not in S. 774. *See* 110 CONG. REC. S11,762-64 (daily ed. Sept. 19, 2007). This intended amendment did not make it off the floor;

employment and federal student aid.[221] Through its requirements and conditions, the DREAM Act strikes the appropriate balance between the interests of the undocumented immigrant and the interests of the country. The proposed versions of the DREAM Act, however, still leave room for improvement in the area of age requirements and the lifespan of the Act itself.

A. Requirements

Although the Act's breadth has expanded and contracted through its numerous versions, many of its core requirements have remained unchanged. A person must satisfy four standard requirements to apply for conditional permanent resident status, which provides up to six years of legal residence.[222] First, the applicant must have lived in the United States for at least five years before the Act's enactment.[223] Second, at the time of initial entry into the country, the applicant must have been fifteen years old or younger.[224] Third, the applicant must have demonstrated and continue to demonstrate good moral character.[225] Fourth, the applicant must have graduated from high school, obtained a general equivalency degree (GED) in the United States, or gained admission to a postsecondary institution.[226] All of the persons meeting the four requirements may apply for conditional status under the DREAM Act without being placed in removal proceedings.[227]

Upon fulfilling the four requirements, the undocumented immigrant has a six-year window to apply for permanent residency. To achieve permanent residency, the person must complete one of the following three alternatives and then petition to have the conditional status removed.[228] The first option requires that the applicant obtain a degree from an institution of higher education, which includes two-year colleges and nationally accredited occupational training programs. Alternatively, the applicant may complete in good standing two years toward a bachelor's or post-graduate degree.[229] Third, the applicant may serve in the U.S. military for at least two years. Under all three options, the DREAM Act

however, it represents the most recent version of the proposed DREAM Act of 2007. Part V.C., *infra*, discusses language addressing the age limitation that was in Senator Durbin's intended amendment to H.R. 1585 but not in S. 774.

221. *See DREAM Act Summary*, *supra* note 219, at 1-2.

222. DREAM Act of 2007 §§ 4(a)(1), 5(a)(1).

223. *Id.* § 4(a)(1)(A).

224. *Id.*

225. DREAM Act of 2007, S. 774, 110th Cong. § 4(a)(1)(B) (2007).

226. *Id.* § 4(a)(1)(D).

227. *Id.* § 4(a)(3). Beyond this, section 4 deals with confidentially of the information submitted and penalties for breach of that confidentiality.

228. *Id.* § 5(c). This section requires a timely petition to be made. *Id.* § 5(c)(3) ("An alien may petition to remove the conditional basis to lawful resident status during the period beginning 180 days before and ending 2 years after either the date that is 6 years after the date of the granting of conditional permanent resident status or any other expiration date of the conditional permanent resident status as extended by the Secretary of Homeland Security in accordance with this title.").

229. *Id.* § 3304(d)(1)(D)(i).

mandates a continual showing of good moral character, which includes an honorable discharge for those choosing the military route.[230]

B. Benefits

This subsection examines the positive affect the DREAM Act's passage would have on both undocumented students and the country. Specifically, this part of the article looks at the potential positives likely to follow the Act's passage, including higher high school graduation rates, an increase in military service, and an increase in skilled labor.

1. *Benefits for Undocumented Students*

A novel piece of immigration policy, the DREAM Act offers a pathway to citizenship conditioned on an undocumented immigrant's educational or military service decisions.[231] This pathway opens the door to legal residency, lawful employment, and federal aid in the form of student loans and work-study.[232] As previously discussed, the exclusion from these benefits traditionally serves as a barrier to an undocumented immigrant's higher education and full integration into American society.[233] By removing these barriers, undocumented students can transform their early education into real income. The Act allows undocumented students to obtain lawful jobs, including higher paying jobs requiring skill and education beyond the twelfth grade.[234]

The beneficial effects of the Act would be far-reaching. It is estimated that 360,000 undocumented high school graduates between eighteen and twenty-four years old would be eligible for conditional legal status upon enactment of the DREAM Act.[235] Estimates indicate that an additional 715,000 undocumented students ages five to seventeen will be eligible some time in the future.[236] The education and further integration of over a million young adults will benefit the individuals as well as the nation. It stands to reason that once they are no longer hindered by their legal status, these young adults will become more involved in their communities, and an increase in the quality of their jobs will lead to an increase in the tax revenue that they generate.

230. DREAM Act of 2007, S. 774, 110th Cong. §§ 5(d)(1)(A), 5(d)(1)(D)(ii) (2007).

231. *See Unauthorized Youth Estimates*, *supra* note 164, at 8.

232. DREAM Act of 2007 §§ 7(b), 11.

233. *See supra* Part IV.C.

234. *See Unauthorized Youth Estimates*, *supra* note 164, at 3.

235. *Id.* at 1.

236. *Id*. It should be noted that the Institute's report contains the disclaimer that all numbers/estimates presented are speculative because of the difficulty in determining the number of undocumented persons in the country. Accordingly, it is difficult to determine the exact effect of the DREAM Act. *Id*. at 7. Also, the figures were based on the DREAM Act's hypothetical passage in 2006 and therefore are likely underestimated today. *Id*. at 7-8.

2. *Benefits for the Country*

Generally speaking, higher education is beneficial on both an individual level and a national level. On the individual plane, the higher the education, the greater the access to jobs that pay well. On the national plane, the higher the education, the better equipped the country becomes to compete in the global marketplace. Investing in this country's youth is an investment in the future of the nation. This investment should include undocumented youth. Political leaders have decreed that "there is to be no mass deportation of illegal immigrants,"[237] so the undocumented youth at issue are in the United States to stay. The Immigration Policy Center, citing a 1999 RAND study, recently stated that "although raising the Hispanic[238] college graduation rate to the same level as that of non-Hispanic whites would increase spending on public education, these costs would be more than offset by savings in public health and welfare expenditures and increased tax revenues resulting from higher incomes."[239] Thus, providing opportunities for undocumented students to acquire their legal status and obtain a higher education or learn a trade will increase investment and tax revenue in the economy.[240]

The predicted positive effect on both undocumented immigrants and the economy is more than mere speculation. Studies following undocumented immigrants who gained legal status after the enactment of the 1986 Immigration Reform and Control Act indicate that better jobs and higher wages accompanied legalization.[241] Another study found that the health and education of undocumented immigrants "will be important to the future productivity of the U.S. labor force and the size of the future tax base—at the federal, state, and local levels. During the 1990s, immigrants represented fully half of the growth in the U.S. labor force; by 2015, they may represent all of that growth."[242] Lawful employment, better jobs, and higher wages generally lead to more tax

237. Editorial, *A Future for Children*, WASH. POST, Sept. 26, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/09/25/AR2007092502039.

238. The vast majority of undocumented immigrants, and immigrants in general, are of Hispanic descent. *See* PASSEL, CAPPS, & FIX, *supra* note 3, at 1 (finding Mexicans account for fifty-seven percent of the total and an additional twenty-three percent are of Latin American descent); Capps & Fortuny, *supra* note 15, at 4 (finding that unlike the non-Hispanic whites that comprised most of the immigrants of the twentieth century, now over fifty percent are of Latin American decent, with thirty-three percent born in Mexico).

239. *Dreams Deferred*, *supra* note 13, at 5. *See also* NAT'L IMMIGRATION LAW CTR., *supra* note 108, at 3 ("Education quickly pays for itself. It is a benefit to society, not just to those who go to school.").

240. NAT'L IMMIGRATION LAW CTR., *supra* note 108, at 1-2.

241. *Id*. at 3. The U.S. Department of Labor found the wages to rise by approximately fifteen percent over five years. *Id*.

242. Capps & Fortuny, *supra* note 15, at 23 (citation omitted). Cited use of "immigrants" refers to all arrivals into the United States, including those from Puerto Rico, the U.S. Virgin Islands, Guam, and other island territories. ANDREW SUM, NEETA FOG & PAUL HARRINGTON, NAT'L BUS. ROUNDTABLE, IMMIGRANT WORKERS AND THE GREAT AMERICAN JOB MACHINE: THE CONTRIBUTIONS OF NEW FOREIGN IMMIGRATION TO NATIONAL AND REGIONAL LABOR FORCE GROWTH IN THE 1990S, at 5-6 (2002).

revenue. Higher wages also typically lead to greater consumer spending.[243] More tax revenue and consumer spending strengthens the American economy.

Higher wages and tax revenue resulting from the DREAM Act will come from more than just the college-bound. In fact, the Act encourages an expansion of the labor force beyond jobs requiring a college education. The Act recognizes that not every person is suited for college and, as such, it would be a waste of valuable human resources to limit legalization only to college-bound students. Whether through college, the military, or an occupational training program, each individual may determine his best route. Simultaneously, the Act serves the country's best interests by expanding the population of persons with the knowledge, skill, and training necessary to keep the United States a global leader.

By providing an opportunity to gain legal status through college, military service, or occupational training, the DREAM Act will likely reduce the dropout rate of undocumented high school students.[244] Similarly, it might encourage those persons who already dropped out of high school to return or get a GED so that they too can apply for legal status.[245] The problem of undocumented immigrant youth dropping out of high school is a bigger one than it might first appear. Like Christian's cousin Mike, many young undocumented immigrants become frustrated with their lack of prospects. In fact, "[a]ccording to the 2000 Census, only 40 percent of undocumented Hispanic males between the ages of 18 to 24 who arrived in the United States before age 16 had completed high school or obtained a GED."[246] Without an opportunity to gain lawful employment, many of the remaining sixty percent of Hispanic males likely saw no point in finishing high school, let alone pursuing a college degree. The DREAM Act provides a vital path to lawful employment and, thus, will likely increase the number of high school graduates among undocumented immigrants.[247]

Overall, the DREAM Act is a smart and effective solution to the issues of education and opportunity for the country's young undocumented immigrants. The Act recognizes that many, if not most, of these individuals consider themselves to be Americans and want to contribute to the country they consider home.[248] By providing a road to legal residency and citizenship, the Act helps

243. *See The Economic Benefits of the DREAM Act and the Student Adjustment Act*, NAT'L IMMIGRATION LAW CTR. (L.A., Cal.), Feb. 2005, at 2, *available at* http://www.nilc.org/immlawpolicy/DREAM/Econ_Bens_DREAM&Stdnt_Adjst_0205.pdf.

244. *See id.* at 1.

245. *Unauthorized Youth Estimates*, *supra* note 164, at 3.

246. *Id*. at 4.

247. Many of the undocumented youth may be drawn to military service under the DREAM Act, which offers job training and money for college. *Id.* at 5. In a poll of sixteen- to twenty-one-year-old Hispanics conducted in 2004, forty-five percent of the males and thirty-one percent of the females "reported that they were 'very likely' or 'likely' to serve on active duty in the next few years (compared to [twenty-four] percent of white males and only [ten] percent of white females)." *Id*.

248. *See Immigration Reform Hearing*, *supra* note 177, at 8 (statement of Marie Nazareth Gonzalez). Marie Nazareth Gonzalez, a twenty-one year old from Missouri, has been living in the United States since she was five. *Id*. In 2002, Marie found out she was undocumented, and deportation proceedings have been initiated but deferred three times. *Id*. at 9. As part of her prepared statement before the Committee, Marie stated, "I will always consider the United States of

erase the stigma of their legal status and encourages undocumented immigrants to emerge from the shadows. Further, the Act prevents the emergence of a permanent underclass, as Justice Brennan sought to avoid in *Plyler*.[249] Notwithstanding its overall excellence, the DREAM Act leaves room for improvement, particularly in recent versions that undercut some of the key provisions proposed in earlier drafts.

C. Suggested Revisions

More than anything else, this subsection is a response to the September 2007 version of the DREAM Act proposed as an amendment to the Department of Defense Appropriations bill.[250] In the September 2007 version, the DREAM Act included two major changes to prior versions. First, noticeably absent from the bill was the provision repealing section 1623 of IIRIRA. Second, the bill incorporated an age limitation, restricting eligibility to those twenty-nine years old or younger.[251]

1. *Section 1623*

Omitting the repeal of section 1623 is a profound change that obliterates a primary purpose of the DREAM Act: to repeal section 1623.[252] The prior versions repealed section 1623 to restore to the states the entire power to determine residency for tuition purposes.[253] It is unclear why the 2007 amendment removed this provision. Section 1623 is controversial. Leaving it intact is antithetical to the purpose of the DREAM Act and provides occasion for future litigation.[254]

If the DREAM Act recognizes that certain undocumented individuals are in the United States permanently and that providing them with an opportunity to gain legal status through higher education benefits the nation, then reason advises

America my home. I love this country …. Many may argue that, because I have a Costa Rican birth certificate, I am Costa Rican and should be sent back, but I tell you I do not feel that way. I hope one day … to be a U.S. citizen." *Id.*

249. *See* Plyler v. Doe, 457 U.S. 202, 222 (1982).

250. After a threat by Republicans to filibuster the measure if Democrats tried to attach it to the defense bill, the DREAM Act amendment was dropped. Stephen Dinan, *Student Illegals Bill Dropped*, WASH. TIMES, Sept. 27, 2007, at A11.

251. *See* 110 CONG. REC. S11,762 (daily ed. Sept. 19, 2007) (discussing intended Senate Amendment 2919 to H.R. 1585, § 3303(a)(1)(F)). *See also* Gary Martin, *Citizenship Path for Kids Near Vote*, SAN ANTONIO EXPRESS-NEWS (Tex.), Sept. 25, 2007, at 3A (reporting that only undocumented immigrants "under the age of 30" would be eligible for conditional legal status under the proposed legislation).

252. *See, e.g.*, DREAM Act of 2001, S. 1291, 107th Cong. § 2 (2001); DREAM Act of 2005, S. 2075, 109th Cong. § 3 (2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 623 (2006).

253. *See, e.g.*, DREAM Act of 2001 § 2; DREAM Act of 2005 § 3; Comprehensive Immigration Reform Act of 2006 § 623.

254. *See, e.g.*, DREAM Act of 2007, S. 774, 110th Cong. (2007) (stating that the bill was meant to amend IIRIRA "to permit States to determine State residency for higher education purposes").

against leaving intact a measure that obstructs the process. Section 1623 discourages the states from offering in-state tuition to undocumented immigrants.[255] In light of the DREAM Act's objectives, leaving section 1623 intact sends contradictory messages. Specifically, it suggests that: (1) the federal government encourages the country's qualified undocumented students to fully integrate into American society by seeking legal status through higher education; and (2) the federal government encourages the states not to offer in-state tuition to its qualified undocumented students, thereby making it more difficult for them to obtain legal status through higher education. If a state's legislature wants to deny its undocumented students in-state tuition, it can do so under the DREAM Act. Nevertheless, the state should do so without the encouragement of the federal government. Thus, future DREAM Act proposals should include the repeal of section 1623.

2. *Age Limitation*

The addition of an age-cap provision is, like the absence of section 1623's repeal, a noticeable change. Unlike removing the repeal provision, adding an age-cap provision made the 2007 version closer to previous versions. When first introduced in the Senate in 2001, the Act set the age of eligibility at twenty years old or younger.[256] Not as restrictive, the September 2007 version set the age at twenty-nine years old or younger.[257] Intermediate versions, however, lacked any age limitation.[258] The versions without an age limitation relied on the Act's other requirements to restrict the applicability of the bill.

The DREAM Act's application requirements already provide an eligibility limitation. Adding an age limitation is, by all appearances, an arbitrary and unfair way to define eligibility. If a person meets all of the initial requirements for application under the Act, it is unnecessary to impose an additional requirement of being under thirty (or twenty-one in the 2001 version.)

Undocumented immigrants who entered the United States as children and who are above the age limitation presumably are just as patriotic, non-culpable, and desirous of legal status as their younger counterparts.[259] Again, if the DREAM Act's objective is to fully integrate these persons and, in essence, educate them, give them legal status, and incorporate them into the U.S.

255. *See supra* Part IV.B for a discussion on how states have adopted models to redefine "residency" in order to circumvent section 1623.

256. DREAM Act of 2001 § 3(a)(1)(B). The Act reads "the alien has not, at the time of application, attained the age of 21." *Id*.

257. 110 CONG. REC. S11,762 (daily ed. Sept. 19, 2007) (discussing intended Senate Amendment 2919 to H.R. 1585, 110th Cong. § 3303(a)(1)(F) (2007)). Raising the age, the 2007 version declares that "the alien is under 30 years of age on the date of the enactment of this Act." *Id*.

258. *See* DREAM Act of 2005, S. 2075, 109th Cong. (2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

259. It is hard to know how many persons would be affected by an age cut-off of twenty-nine, but presumably the number would be small. *See Unauthorized Youth Estimates*, *supra* note 164, at 1.

economy, then the additional age cap seems unnecessary and counterproductive. Equally important, an age cap might bring about unexpected negative consequences, such as splitting up mixed-status families by excluding older siblings while including younger ones.[260]

While profoundly affecting the lives of those excluded, the age-cap provision is arbitrary and, like the absence of the section 1623 provision, antithetical to the stated goals of the DREAM Act. As a result, future versions of the Act should exclude the age-cap provision.

3. *Post-Enactment Eligibility*

A final suggested change to the DREAM Act holds much in common with the preceding argument. Currently, all versions of the proposed Act have limited eligibility to those persons living in the United States for at least five years "preceding the date of enactment."[261] If an individual meets the requirement of good moral character as well as all of the other requirements, then limiting eligibility to those persons in the United States five years prior to the Act's enactment is unnecessarily preclusive. For example, if the DREAM Act were enacted today, why should a seven-year-old immigrant who has been in the United States for four years be excluded? What should this individual do once she graduates from high school and then wants to go to college or into the military?

It is wasteful to require the proposal, debate, and enactment of numerous DREAM Acts to cover such persons, leaving their lives in limbo, while pulling our political leaders away from other issues to resolve an issue already resolved once before. Instead, the Act should grant eligibility to undocumented immigrants once they have satisfied the other requirements *and* have been in the United States for five years or more, regardless of the length of time they were in the country at the time of the enactment. Broadening the scope of the Act in this manner provides an efficient and effective way of staying in line with the DREAM Act's objectives.

Additionally, keeping in line with an efficient, effective, and fair way of handling the problem of undocumented youth, the Act should extend eligibility to those who satisfy all of the requirements and are brought into the United States *after* the enactment of the DREAM Act. Arguments may arise that broadening the Act in such a way would encourage illegal immigration. All of the arguments in favor of the Act, however, weigh in favor of such an extension, especially a child's non-culpability. Border security and visitors with expired visas are serious issues that need a comprehensive solution. The effectiveness of regulating these issues through legislation such as the DREAM Act is questionable. Further, undocumented immigrant children brought to the United

260. The Act's other requirements could potentially have the same effect of splitting up families, but the age cap greatly increases the likelihood of such an effect.

261. DREAM Act of 2007, S. 774, 110th Cong. § 4(a)(1)(A) (2007); Comprehensive Immigration Reform Act of 2006, § 624(a)(1)(A); DREAM Act of 2005 § 4(a)(1)(A); DREAM Act of 2001, S. 1291, 107th Cong. § 3(a)(1)(D) (2001).

States after enactment of the DREAM Act, regardless of the reason, are going to find themselves in the same predicament as those children currently covered by the Act. Again, the current proposals seem shortsighted and unnecessarily preclusive. Thus, future versions of the DREAM Act should eliminate the limitation based on when a person arrived in the United States.[262]

VI. CONCLUSION

Federal action is necessary to deal effectively with the problem of undocumented immigrants brought to the United States as children. Limits on the states' authority in the area of immigration preclude them from providing a comprehensive answer. States can educate undocumented students in their public postsecondary institutions and even grant them residency for tuition purposes. States, however, cannot provide the critical route to legal status, a power reserved to Congress. Overall, the DREAM Act provides an effective, though still somewhat shortsighted, way of dealing with the issue. Immediate federal action is necessary to avoid the alienation of hundreds of thousands of young undocumented immigrants who have known no other home than the United States of America.

262. I realize that broadening the scope of the DREAM Act to include those persons brought by their parents illegally into the country after the Act's enactment is a provision that many in Congress would be uncomfortable voting for. Though I believe it is the most sensible solution until the United States develops an effective and humane way to prevent people from wrongfully crossing into the United States or overstaying their visit, the measure certainly would not be worth jeopardizing passage of the Act. The immediate benefits the Act would offer the millions of young adults already in the United States are not worth the risk.