

TO DREAM OR NOT TO DREAM: A COST-
BENEFIT ANALYSIS OF THE DEVELOPMENT,
RELIEF, AND EDUCATION FOR ALIEN
MINORS (DREAM) ACT

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INTRODUCTION

Historian James Truslow Adams put it best: “That dream of a land in which life should be better and richer and fuller for every man, with opportunity for each according to his ability or achievement. . . . That dream or hope has been present from the start.”¹ That dream, of course, is the “American Dream.”² The United States of America has long been considered a place where someone with nothing could end up with everything, where anyone could succeed, and where the only requisite element for their dreams to become reality was hard work.³ Such idealistic representations of the “American Dream” may or may not be true for the over 300 million men, women, and children who consider the United States their home.⁴ Nevertheless, there is one particular group of individuals for whom the United States provides no hope at all: the children of undocumented immigrants, brought into the United States illegally by their parents and others in search of a better life than the one they lived before.⁵

Today, there are more than eleven million undocumented immigrants deeply integrated into various communities throughout the United States.⁶ This figure includes an estimated 1.7 million children under the age of eighteen.⁷ Each year, nearly 80,000 of these undocumented children turn eighteen, and about 65,000 of them are expected to graduate from high school.⁸ Following graduation, however, these young adults must face the harsh reality that accompanies their undocumented legal

¹ James Truslow Adams, *THE EPIC OF AMERICA* vii (Blue Ribbon Books 1931).

² See *id.* (arguing that the “American Dream” is a general idea that has persisted throughout the world since the late 19th and early 20th centuries as the United States steadily became the most powerful country in the world. The first use of the term is credited to James Truslow Adams in his book *The Epic of America*.)

³ The ideals associated with the “American Dream” were perpetuated by literary giants such as F. Scott Fitzgerald in *The Great Gatsby* and Horatio Alger, who authored several “rags to riches” stories during the late 19th and early 20th centuries.

⁴ See U.S. POPClock Projection, <http://www.census.gov/population/www/pop-clockus.html> [hereinafter POPClock].

⁵ Nathan Thornburgh, *Inside the Life of the Migrants Next Door*, *TIME*, Feb. 6, 2006, at 35 (arguing that despite the significant costs of illegal border-crossing, an estimated 485,000 undocumented Mexicans cross the U.S. border each year. The average cost of the trip now averages more than \$2,000.)

⁶ JEFFERY S. PASSEL, PEW HISPANIC CENTER, *ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION* 1–2 (Mar. 21, 2005) (“As of March 2004, there were an estimated 10.3 million unauthorized migrants living in the United States. . . . [A]verage annual growth over the 4-year period since 2000 was about 485,000 per year. Assuming this rate of growth held steady, the best estimate for March 2005 points to a figure of somewhat less than 11 million for the number of undocumented residents.”).

⁷ See *id.* at 3.

⁸ JEFFREY S. PASSEL, URBAN INST., *FURTHER DEMOGRAPHIC INFORMATION RELATING TO THE DREAM ACT* 1 (Oct 21, 2003), <http://www.nationalimmigrationreform.org/proposed/DREAM/UrbanInstituteDREAM.pdf>.

status in the United States. Many of these young adults will not even attempt to enroll in a college because they do not want to reveal their undocumented status during the application process.⁹ Even if some of them lie about their immigration status on their application and gain admission, they may not be able to secure the financial resources necessary to attend college since their undocumented status disqualifies them from receiving financial aid.¹⁰ Furthermore, these undocumented high school graduates cannot legally obtain meaningful employment because they lack legitimate work authorization.¹¹ As a result, they are relegated to low-skilled, low-paying jobs, hidden in the shadows of American society, discouraged from pursuing something greater in life due to fears of being discovered.

Today, as illegal immigration in the United States remains as sensitive and as polarizing an issue as ever, undocumented children and students often find themselves heavily mired in a very public debate. Some Americans consider the undocumented children to be the same as all other undocumented immigrants and do not believe that these children should receive any preferential treatment.¹² Other Americans believe the undocumented children deserve more opportunities than those they currently have.¹³ Nevertheless, these emotionally charged attitudes and perceptions toward the undocumented children are just that: emotions. For example, although mass deportation, or on the contrary mass-amnesty, is theoretically possible and rhetorically pleasing to some, neither approach is practicable or productive for the overall U.S. economy. In reality, any potential solutions to illegal immigration are bound to be complex and uncertain by virtue of the myriad of issues inherently associated with

⁹ See *The Common Application*, at 1, available at www.commonapp.org/common2007_PrintApp.pdf. (The Common Application is “the recommended form of application for 298 selective colleges and universities for admission to their undergraduate programs.” The actual application requires the applicants to indicate their country of citizenship, and if the applicants are not a U.S. Citizen but lives in the United States, to indicate how long they have been in the country.).

¹⁰ See, e.g., “FAQs: Eligibility”, U.S. Department of Education Free Application for Federal Student Aid (FAFSA) (In order to qualify for Federal Student Aid, one must be a U.S. citizen or an eligible noncitizen and have a valid social security number, which undocumented students lack.), available at <http://www.fafsa.ed.gov/faq003.htm>.

¹¹ See 8 U.S.C. 1324(a) (“In General, it is unlawful for a person or other entity to hire. . . for employment in the United States an alien knowing the alien is an unauthorized alien. . .”).

¹² See, e.g., FAIR, “THE DREAM Act: Hatch-ing Expensive New Amnesty for Illegal Aliens,” (Oct. 23, 2003), available at http://www.fairus.org/site/PageServer?pagename=media_mediaf23a.

¹³ See, e.g., People for the American Way, “UNDOCUMENTED IMMIGRANTS: The Dream Act,” available at <http://www.pfaw.org/pfaw/general/default.aspx?oid=12475> (last visited Oct 20, 2006); see also National Immigration Law Center, “Dream Act Endorsers,” available at <http://democracyinaction.org/dia/organizations/NILC/images/DREAM%20Endorsers.htm>.

illegal immigration.¹⁴ Subsequently, illegal immigration should be addressed one issue at a time rather than seeking to resolve all the issues in one comprehensive stroke. This Note focuses strictly on the issue of the future of undocumented children already present in the United States.

In the past four years in Congress, the Development, Relief, and Education for Alien Minors (DREAM) Act has been introduced and discussed.¹⁵ At its core, the DREAM Act is designed to provide children of undocumented immigrants who meet certain eligibility and performance requirements the opportunity to attend college and eventually gain permanent residency and citizenship in the United States.¹⁶ This Note discusses the desirability of the DREAM Act from an empirical perspective. Part I provides background information regarding the undocumented students in the United States. Part II summarizes the legislative history and relevant clauses of the DREAM Act. Part III discusses the various legal and public policy arguments associated with the DREAM Act. Part IV evaluates the likely effects and implications of the DREAM Act. This Note concludes that the DREAM Act should be passed, not only for the sake of the undocumented students but also for the benefit of the future of the United States.

I. UNDOCUMENTED STUDENTS IN THE UNITED STATES

The undocumented population in the United States comes from all around the world and includes children of all ages.¹⁷ Although most undocumented migrants are adults looking for work, about one in six are children under the age of eighteen.¹⁸ Unlike the adults who enter the United States without authorization, the undocumented children are less likely to understand the ramifications of their illegal status that results from their being brought into the United States illegally.¹⁹ Even though

¹⁴ The issue of illegal immigration is complicated in countless ways, including economy, welfare, employment relations, global issues, etc. Rather than address illegal immigration in its entirety, this Note will focus specifically on the effects of the DREAM Act regarding illegal immigration.

¹⁵ Development, Relief, and Education for Alien Minors Act, S. 2075, 109th Cong. (2005); S. 1545, 108th Cong. (2003).

¹⁶ *Id.* § 4(a)(1)(A–E).

¹⁷ See PASSEL *supra* note 6 at 7 (indicating that although undocumented immigrants come from diverse countries, the vast majority of them are from Mexico. As of March 2004, there were an estimated 6 million undocumented Mexicans in the United States, making up about 57% of the total undocumented population.).

¹⁸ See *id.* at 10.

¹⁹ See Thornburgh *supra* note 5 (describing the story of brothers, Julio, 18, and Carlos, 15, who moved to the Hamptons, NY, from Tuxpan, Mexico almost a decade ago. However, they had to return to Mexico for high school because they lacked valid social security numbers, which are necessary to apply for federal college loans and to prove residency to apply to local community colleges. Back in Mexico, Julio and Carlos have had difficulty adjusting to their new surroundings. They are referred to as “gringos” by other Mexican children.).

some parents move to the United States in search of a better lives for their children, without legal status their children will not be able to enjoy such lives.²⁰ Lacking proper work authorization, the children are often relegated to working illegally themselves.²¹ Moreover, many of these children have little, if any, familiarity and attachment to their native countries since they were raised in the United States during their formative years.²² As a result, returning to their country of legal citizenship is an extremely undesirable option for them.²³

The plight of undocumented children is perpetuated within the context of basic education, where there is no difference between undocumented children and any other children in the United States.²⁴ The Supreme Court ruled in *Plyler v. Doe* that all children physically present in the United States are entitled to receive primary and secondary education, regardless of their legal status.²⁵ As a result, public primary and secondary schools are forbidden from asking potential students about their legal status in the United States or denying enrollment on that basis.²⁶ Until graduating from high school, undocumented children can interact with other children their age, take the same classes, play the same sports, and participate in the same extracurricular activities as their classmates. Unfortunately, the distinction between legal and illegal students becomes painfully clear upon graduation. Unlike their legal counterparts, undocumented students suddenly find themselves with few options to pursue further education and certain career paths.

In order for undocumented high school graduates to attend college, they must jump over many hurdles. First, the student has to be admitted to a college or university, which may or may not have an official admissions policy regarding undocumented students. Some colleges have implemented a “don’t ask, don’t tell” admission policy toward undocumented students.²⁷ Under such policies, admissions officers will

²⁰ See *id.*

²¹ See David Epstein, *Dream Deferred*, INSIDEHIGHERED, July 28, 2006, <http://www.insidehighered.com/news/2006/07/28/immigration> (describing the story of Kathy, a recent social work graduate from Nyack College who is relegated to working as a nanny because she cannot find any other jobs due to her undocumented status).

²² See *id.* (indicating that Adeola, 25, was brought to the United States from Nigeria by her parents when she was a one-year old. Adeola overstayed her student visa and graduated from the University of Michigan, but has been unable to find any jobs due to her undocumented status. Adeola no longer has any family in Nigeria, and doesn’t “even remember what Nigeria looks like.”).

²³ See *id.*

²⁴ See *Plyler v. Doe*, 457 U.S. 202 (1982).

²⁵ See *id.* at 226.

²⁶ See *id.*

²⁷ Andrew Stevenson, *Dreaming of an Equal Future for Immigrant Children: Federal and State Initiatives to Improve Undocumented Students’ Access to Postsecondary Education*, 46 ARIZ. L. REV. 551, 576 (2004).

not initiate further investigation into cases where an application lacks a social security number or where a suspected undocumented applicant simply indicates that he or she is, in fact, a U.S. citizen.²⁸

Second, after gaining admission, undocumented students are likely to have difficulty securing the requisite financial resources to pay for the rapidly rising college tuitions. In the past two decades, tuition has risen faster than both inflation and the median family income of \$44,389.²⁹ The costs of four-year private colleges have risen above \$160,000, and the out-of-state tuition rates for public colleges now range between \$110,000 to \$140,000, having risen at an even faster rate than private colleges.³⁰ These figures are especially discouraging for the undocumented students seeking to attend college, since they are ineligible for governmental financial aid due to their undocumented status.³¹ Moreover, as most undocumented families subsist on low-wage, low-benefit jobs, they are likely unable to financially contribute to their children's college education in any meaningful way.³²

One remaining hope for undocumented students who wish to obtain a college education is to qualify for in-state tuition from their state's public universities, the cost of which would be substantially lower than out-of-state or private tuition rates.³³ Unfortunately for these students, a majority of states widely interpret preexisting federal law as disqualifying undocumented students from in-state tuition rates.³⁴ Specifically, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 prohibits colleges from extending any tuition benefits to undocumented students that is not extended to non-resident U.S. citizens.³⁵ As a

²⁸ *Id.*

²⁹ Damon Darlin, *Today's Lesson: Rethink College Funds*, N.Y. TIMES, Sept. 24, 2005, at C1.

³⁰ *Id.*

³¹ See *supra* note 10.

³² See Randy Capps and Michael Fix, et al., "A Profile of the Low-Wage Immigrant Workforce," The Urban Institute (Nov. 2003), available at http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf. (Even though only 14 percent of all workers in the U.S. are non-citizens, almost 20 percent of all low-wage workers are non-citizens, and 40 percent of all low-wage immigrant workers are undocumented. In 2001, the average low-wage immigrant worker earned \$14,400.)

³³ See Venessa Petit, "Immigration Students Face Big Tuition Barrier," The Washington Post (December 7, 2003);

For example, the non-resident tuition for University of California at Los Angeles costs \$18,684 more than the resident tuition. (UNIVERSITY OF CALIFORNIA AT LOS ANGELES FINANCIAL AID OFFICE, UCLA 2005-2006 ESTIMATED UNDERGRADUATE STUDENT BUDGET PER ACADEMIC YEAR (9 MONTHS) (2005), available at <http://www.admissions.ucla.edu/prospect/budget.htm>.)

³⁴ Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1623 (2006)).

³⁵ 8 U.S.C. § 1623(a) (2006) (A noncitizen "who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary

result, many public colleges refuse to grant in-state resident tuition rates to undocumented students, fearing that any other policy may be a violation of federal law.³⁶ Nevertheless, as of 2006, there are ten states that have interpreted the IIRIRA to permit their state colleges to extend in-state tuition rates to undocumented students.³⁷

II. THE DREAM ACT IN DEPTH

On July 31, 2003, Senators Orrin Hatch (R-UT) and Richard Durbin (D-IL) first introduced the Development, Relief, and Education for Alien Minors Act (DREAM Act) in the 108th Congress.³⁸ Although the DREAM Act initially passed through the Senate Judiciary Committee by a 16-3 vote, there was never a full senate vote during this session of Congress, leading to the Act's reintroduction in the 109th Congress on November 18, 2005.³⁹ The DREAM Act then appeared as an amendment to the Comprehensive Immigration Reform Act of 2006, a bill designed to produce a long-term solution to the illegal immigration problem.⁴⁰ On May 25, 2006, the Senate passed the Comprehensive Immigration Reform Act by a 62-36 vote and the bill is currently awaiting a vote in the House of Representatives.⁴¹

The DREAM Act is a bipartisan Congressional effort to allow certain undocumented students who were brought into the U.S. as a child the opportunity to attend college and eventually to become permanent residents and citizens of the United States.⁴² In order to be eligible for

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.”).

³⁶ See Thomas R. Ruge & Angela D. Iza, *Higher Education for Undocumented Students: The Case for Open Admission and In-State Tuition Rates for Students Without Lawful Immigration Status*, 15 *IND. INT'L & COMP. L. REV.* 257, 269–272 (2004–2005); see also Isis Artze, *Some Doors Open, Others Close for Undocumented Students: Changes in N.Y., California, Texas, Nebraska*, *HISPANIC OUTLOOK IN HIGHER EDUC.*, Jan. 28, 2002, at 23 (For example, in 2002 the City University of New York (CUNY) repealed its twelve year policy for granting in-state tuition to those students who could prove only one year of residency).

³⁷ See *DREAM Act Summary*, National Immigration Law Center, available at http://www.nilc.org/immlawpolicy/DREAM/dream_act_06_summary_2006-04.pdf, April 2006 (The 10 states that offer in-state tuition to undocumented students are: California, Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, and Washington.).

³⁸ Development, Relief, and Education for Alien Minors Act, S. 1545, 108th Cong. (2003).

³⁹ S. 2075, 109th Cong. (2005) (The DREAM Act was reintroduced in the 109th Congress without the sponsorship of Senator Hatch).

⁴⁰ Comprehensive Immigration Reform Act of 2006, S. 2611 § 621–32, 109th Cong. (as passed by Senate, May 25, 2006). S. 2611 is an effort led primarily by President George W. Bush. S. 2611 will allow undocumented immigrants who meet certain requirements to eventually qualify for legal permanent residency and eventually citizenship. S. 2611 § 601(b), 109th Cong. (2006).

⁴¹ *Id.*

⁴² S. 1545, 108th Cong. (2003).

the DREAM Act, however, all potential student-applicants must meet several requirements.⁴³ First, the applicant must have lived in the United States for at least five years at the date of enactment of the DREAM Act and have been younger than sixteen years old at the time of his or her initial entry into the country.⁴⁴ Second, the applicant must be a person of “good moral character.”⁴⁵ Third, the applicant must not be otherwise deportable under the Immigration and Nationality Act.⁴⁶ Fourth, the applicant must have been admitted to college, graduated from high school, or obtained a General Education Development certificate in the United States.⁴⁷ Fifth, the applicant must have never been under a final order of exclusion, deportation, or removal, unless the order was made when they were less than sixteen years of age.⁴⁸ In addition, the Secretary of the Department of Homeland Security has exclusive jurisdiction over the determinations of eligibility for relief under the DREAM Act.⁴⁹

Once a student-applicant demonstrates that he or she has met these initial criteria, a conditional permanent resident status will be granted for six years, during which time the applicant must fulfill additional requirements in order to petition for the removal of the conditional status.⁵⁰ During this six-year period, the applicant must maintain good moral character, comply with all aspects of the Immigration and Nationality Act, and remain a resident in the United States.⁵¹ Furthermore, the applicant must obtain an associate’s degree or complete at least two years of a bachelor’s or higher degree program from a college in the United States and remain in good standing while enrolled.⁵² Alternatively, the applicant may serve in the Armed Forces of the United States for at least two years.⁵³ However, if an applicant demonstrates compelling circumstances for his or her inability to either attend college or serve in the military, the “Hardship Exception” gives the Secretary of Homeland Security discretion to remove the applicant’s conditional status.⁵⁴ Once an applicant fulfills all requirements of the DREAM Act, his or her condi-

⁴³ The DREAM Act provisions described in this Note are based on S. 2075 and S. 1545 because these versions are more specific than S.2611. Nevertheless, the main provisions in S.2075 and S.1545 are also present in S. 2611.

⁴⁴ S. 2075 § 4(a)(1)(A) (2005); S. 2611 § 624(a)(1)(A) (2006).

⁴⁵ S. 2075 § 4(a)(1)(B) (2005); S. 2611 § 624(a)(1)(B) (2006).

⁴⁶ S. 2075 § 4(a)(1)(C) (2005); S. 2611 § 624(a)(1)(C) (2006).

⁴⁷ S. 2075 § 4(a)(1)(D) (2005); S. 2611 § 624(a)(1)(D) (2006).

⁴⁸ S. 2075 § 4(a)(1)(E) (2005); S. 2611 § 624(a)(1)(E) (2006).

⁴⁹ S. 2075 § 7(a) (2005); S. 2611 § 627(a) (2006).

⁵⁰ S. 2075 § 5(a)(1) (2005); S. 2611 § 625(a)(1) (2006).

⁵¹ S. 2075 § 5(d)(1)(A)–(E) (2005); S. 2611 § 625(d)(1)(A)–(E) (2006).

⁵² S. 2075 § 5(d)(1)(D)(i) (2005); S. 2611 § 625(d)(1)(D)(i) (2006).

⁵³ If the applicant is discharged, he or she must receive an honorable discharge in order to be eligible for removal of the conditional status. S. 2075 § 5(d)(1)(D)(ii) (2005); S. 2611 § 625(d)(1)(D)(ii) (2006).

⁵⁴ S. 2075 § 5(d)(2)(A)(ii) (2005); S. 2611 § 625(d)(2)(A)(ii) (2006).

tional status will be upgraded to an unconditional permanent resident status, and the applicant would then be eligible to apply for a U.S. citizenship through the normal naturalization process.⁵⁵

The DREAM Act also provides financial benefits to undocumented students seeking to enroll in college. First, the Act would make college-bound undocumented students eligible for federal student loans and work-study programs.⁵⁶ Second, the Act would retroactively repeal Section 505 of the IIRIRA, thereby allowing states to freely grant in-state tuition rates to resident undocumented students.⁵⁷ The in-state tuition rates of many public colleges are substantially lower than their out-of-state rates, and thus for many undocumented students, attending the public colleges of their home states are a substantially more affordable option than enrolling elsewhere.⁵⁸ The repeal of Section 505 of the IIRIRA will likely provide the greatest positive impact for undocumented students, because unlike most other DREAM Act provisions, the repealing of Section 505 would be permanent and thus benefit all undocumented students seeking to obtain college education, not just those who meet certain requirements.⁵⁹

Despite the initial optimism of Senators Hatch and Durbin, the final version of the DREAM Act that actually passed through the Senate Judiciary Committee in 2003 also included controversial amendments proposed by Senators Charles Grassley (R-IA) and Dianne Feinstein (D-CA).⁶⁰ Their amendments eliminated undocumented students' eligibility to receive federal financial aid grants, including Pell Grants and Supplemental Educational Opportunity Grants (SEOG), although the students would qualify for work-study programs and student loans.⁶¹ The elimination of government grants is significant because grants do not have to be repaid, unlike other loans which require repayment of the principal, plus interest. In addition, institutions that accept DREAM Act students would be required to keep track of these students through the Student and Exchange Visitors Information System (SEVIS) database, which is ordinarily used to track foreign students studying in the United States.⁶² Despite these amendments, the DREAM Act nevertheless provides a

⁵⁵ Orrin Hatch, *DREAM Act Will Benefit Nation*, DESERT NEWS, Dec. 22, 2003 at A12.

⁵⁶ S. 2075 §11(1)–(2) (2005); S. 2611 § 631(1)–(2) (2006).

⁵⁷ S. 2075 § 3 (2005); S. 2611 § 623 (2006).

⁵⁸ See *supra* note 33.

⁵⁹ S. 2075 § 3 (2005); S. 2611 § 623 (2006).

⁶⁰ *Dream Act Passes Senate Judiciary Committee By Large Majority*, IMMIGRANTS' RTS. UPDATE (Nat'l Immigr. L. Ctr., Los Angeles, Cal.), Nov. 24, 2003, available at <http://legalizationusa.org/proposed/DREAM/NILCreport>.

⁶¹ S. 1545 § 12 (2003).

⁶² *Id.* § 11.

concrete path for deserving undocumented students to receive a college education, and eventually, legal status to work in the United States.

III. ARGUMENTS FOR THE DREAM ACT

A. LEGAL ARGUMENTS

1. *Relevance of Plyler v. Doe*

The DREAM Act may largely be divided into two conceptual provisions: (1) allowing and assisting undocumented children to attend college; (2) creating a legalization process for these undocumented children. Given the importance of a college education today, it is not surprising that the DREAM Act provisions providing undocumented children with the same opportunities to pursue higher education as U.S. citizens are extremely controversial.⁶³ The main legal argument in favor of the educational provisions of the DREAM Act invokes the Equal Protection Clause of the Fourteenth Amendment, first linked to the undocumented students' right to education in *Plyler v. Doe*.⁶⁴ The Supreme Court ruled in *Plyler* that the Equal Protection Clause gives undocumented students the right to obtain the same basic education as any other students.⁶⁵ The Court reasoned that an alien is a "person" in any ordinary sense of the term, especially considering that undocumented immigrants "have long been recognized as 'persons' guaranteed due process of law by the fifth and fourteenth amendments."⁶⁶

At issue in *Plyler* was the constitutionality of a Texas statute that withheld state funds from being used to educate undocumented children, and which authorized local school districts to deny enrollment on the basis of a student's undocumented status.⁶⁷ The Court first addressed which standard of review it should use to evaluate the state's action in this case. The Court declined to apply strict scrutiny, which is reserved for cases involving a suspect class (e.g., race) or classifications that infringe upon fundamental rights, because undocumented immigrants were not a constitutionally enumerated group that warranted such broad protection.⁶⁸ Rather, the Court applied an intermediate standard of review as is required when a statute clearly discriminates against a particular

⁶³ *Taxpayers Should Not Subsidize College for Illegal Aliens*, FAIRUS, 2003), http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters6be3.

⁶⁴ *Plyler*, 457 U.S. at 202–207.

⁶⁵ *Id.* at 230.

⁶⁶ See *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). (establishing the rule that once undocumented immigrants are physically within the boundaries of the United States, they are considered a "person" for purposes of constitutional due process rights).

⁶⁷ *Plyler*, 457 U.S. at 218–19.

⁶⁸ *Id.*

group.⁶⁹ Under this intermediate standard of review, Texas had the burden of proving that denying undocumented children basic education furthered a substantial state interest.⁷⁰ Texas argued that the statute furthered three particular State interests: first, protecting the public from a sudden influx of undocumented immigrants; second, relieving the State of the special burden that inclusion of undocumented immigrants imposes upon the public education system; and third, not subsidizing the educational costs of individuals unlikely to contribute back to the State, since undocumented students were less likely to remain in the State.⁷¹

The Court rejected all three of these arguments from Texas.⁷² First, there was no evidence that undocumented immigrants imposed any significant burden on the State's economy.⁷³ Second, the State failed to offer any credible evidence that the quality of education would decline as a result of including undocumented children in the public education system.⁷⁴ Finally, many of the undocumented children affected by the Texas statute indeed intended to remain in the United States indefinitely, and were as likely to remain in the state as any other child who attended Texas public schools.⁷⁵

The Court also emphasized the unique circumstances of the undocumented children seeking education, which remain as true and relevant today as when *Plyler* was originally decided.⁷⁶ Therefore, although "illegal aliens" were not an inherently "suspect" class entitled to the utmost protection from discrimination, the court remained hesitant to exclude these undocumented children from education entirely.⁷⁷ First, these children did not independently choose to come to the United States illegally. As a result, the Court reasoned that punishing the children for the acts of their parents or guardians violated fundamental notions of justice.⁷⁸ Imposing a lifelong disability on the children because of others' decisions directly contradicted the basic idea that "legal burdens should bear some relationship to individual responsibility or wrongdoing."⁷⁹ Second, the issue at hand was regarding education, which has a "fundamental role in

⁶⁹ *Id.*

⁷⁰ *Id.* at 230.

⁷¹ *Id.* at 228–30.

⁷² *Id.*

⁷³ *Id.* at 228.

⁷⁴ *Id.* at 229.

⁷⁵ *Id.* at 229–30.

⁷⁶ *Id.* at 219, 226.

⁷⁷ *Id.* at 220.

⁷⁸ *Id.*

⁷⁹ *Id.* at 220 (citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)) (holding that a Louisiana statute that legally denied workmen's compensation recovery rights to illegitimate children, solely on the basis of their illegitimacy, was unconstitutional).

maintaining the fabric of our society.”⁸⁰ The importance of equal opportunity for education was eloquently emphasized in the hallmark Supreme Court case *Brown v. Board of Education*:

Education is the very foundation of good citizenship. . . it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms.⁸¹

Further distinguishing the importance of education, Justice Blackmun in his concurrence stated that classifications involving the denial of education are unique because the varying degree of education and knowledge between different groups of people may create permanent class distinctions in society.⁸² The *Plyler* Court thus established that the fourteenth amendment is applicable to undocumented children despite their illegal status; all children residing within the physical boundaries of the United States would have the right to obtain primary and secondary education.⁸³

2. *Extension of Plyler v. Doe*

While it is clear that *Plyler* guarantees undocumented students the right to primary and secondary education, there is considerable debate regarding the extension of *Plyler* to higher education.⁸⁴ The fact that the holding of *Plyler* was limited to basic education is important given that there are significant differences between primary and secondary education, and higher education.⁸⁵ The key difference is that there is no established universal right for higher education even for U.S. citizens; therefore, claiming the right to higher education for undocumented stu-

⁸⁰ *Id.* at 221.

⁸¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁸² *Plyler*, 457 U.S. at 234–35 (Blackmun, J., concurring).

⁸³ *See id.* at 202.

⁸⁴ Compare Rebecca Ness Rhymer, *Taking Back the Power: Federal vs. State Regulation on Postsecondary Education Benefits for Undocumented immigrants*, 44 WASHBURN L.J. 603, 604–06 (2005) (advocating the rejection of the DREAM Act and other similar measures because the *Plyler* ruling may not apply to post secondary education) with Andrew Stevenson, *Dreaming of an Equal Future for Immigrant Children: Federal and State Initiatives to Improve Undocumented Students' Access to Postsecondary Education*, 46 ARIZ. L. REV. 551 (2004) (arguing that the *Plyler* ruling may apply to post secondary education). *Undocumented immigrants*

⁸⁵ *Plyler*, 457 U.S. at 226.

dents on the basis of *Plyler* may be overreaching.⁸⁶ Moreover, as the Supreme Court explicitly stated in *Plyler*, and as supported by anecdotal evidence, there is no fundamental right to higher education.⁸⁷ In 2003, for example, only about forty million people in the United States were college graduates.⁸⁸ In comparison with the overall population of the United States, this number represents a select group of individuals who had to make certain personal decisions and sacrifices in order to obtain additional education beyond high school. Consequently, there may be concern that *Plyler*'s emphasis on the importance of primary and secondary education should not extend to higher education.

In addition, it is unclear what standard of review courts should apply to measure the constitutionality of the DREAM Act. Although the *Plyler* court applied an intermediate standard of review, it is questionable whether the same standard would apply to evaluate the right to higher education.⁸⁹ Chief Justice Warren Burger argued in his dissent in *Plyler* the Court should have applied a rational basis review.⁹⁰ Burger reasoned that because undocumented immigrants voluntarily choose to come to the United States illegally, they knowingly subject themselves and their family to the legal consequences of breaking the law.⁹¹ By law, all persons who enter the United States unlawfully, including children of undocumented immigrants, are subject to deportation unless otherwise given an exemption to remain.⁹²

Nevertheless, the dissent in *Plyler* was keen to observe that the "specter of a permanent caste" was a segment of a larger problem that the political branches must solve.⁹³ Chief Justice Burger specifically noted that the answer to this "seemingly intractable problem is to defer to the political processes, unpalatable as that may be to some."⁹⁴ This statement confirms the Supreme Court's recognition of the federal immigration power, over which the federal government has exclusive jurisdiction.⁹⁵ This statement also suggests that the Supreme Court should, and would, respect the federal government's plenary power regarding any immigration legislation, particularly for matters dealing with

⁸⁶ See *id.* at 221.

⁸⁷ See *id.* (reinforcing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973)).

⁸⁸ National Science Foundation, "2003 College Graduates in the U.S. Workforce: A Profile" (Dec. 2005), available at <http://www.nsf.gov/statistics/infbrief/nsf06304/nsf06304.pdf>.

⁸⁹ See Rhymer, *supra* note 84, at 603.

⁹⁰ See *Plyler*, 457 U.S. at 247 (Burger, C.J., dissenting).

⁹¹ See *id.*, at 246 (Burger, C.J., dissenting).

⁹² 8 U.S.C. § 1227 (2006).

⁹³ *Plyler*, 457 U.S. at 218–19, 254 (Burger, C.J., dissenting).

⁹⁴ *Id.* at 254 (Burger, C.J., dissenting).

⁹⁵ *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (reaffirming the federal government's exclusive power to control immigration).

undocumented immigrants. Since undocumented immigrants are not a constitutionally protected group, the legislature and the courts are not bound by the strict scrutiny standard. In short, if the DREAM Act is passed by Congress, it is very unlikely that the Supreme Court will overturn it based on any legal grounds.

3. *Equal Protection Clause Should be Extended to Cover Higher Education*

Despite the above concerns, *Plyler*'s application of the Equal Protection Clause should be extended to the undocumented students' right to higher education in light of the fact that various factors cited by the Court as support for the undocumented students' right to primary and education are also present in the current context of higher education. *Plyler* emphasized the critical necessity of basic education in order for children to become productive members of society, since "education prepares individuals to be self-reliant and self-sufficient participants in society."⁹⁶ Since the days of *Plyler*, a college education has become increasingly necessary for young adults to be "self-reliant and self-sufficient."⁹⁷ The difference between having, and not having a college degree is striking. In 2006, for every one dollar earned by a four-year college graduate, persons without a college degree earned only 67 cents.⁹⁸ There is also empirical evidence that present-day employers put more emphasis on the education level of potential employees than they have in the past.⁹⁹ Due to increased competition in the job market and increased costs of evaluating candidates' qualifications, profit-maximizing employers may be statistically discriminating against candidates who do not have a college degree in favor of those that do.¹⁰⁰ A public poll taken in 2000 further indicates that the general public's perceived significance of education has increased since *Plyler* was decided in 1982: eighty-seven percent of Americans believed that "a college education has become as important as a high school diploma used to be," and seventy-seven percent believed that a college education is more important now

⁹⁶ *Plyler*, 457 U.S. at 222 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

⁹⁷ *See id.*

⁹⁸ David Leonhardt, *Rank Colleges, But Rank Them Right*, N.Y. TIMES, Aug 26, 2006, at C1.

⁹⁹ *See generally* JOSEPH G. ALTONJI & CHARLES R. PIERRET, BUREAU OF LAB. STAT., EMPLOYER LEARNING AND THE SIGNALING VALUE OF EDUCATION (1997), <http://www.bls.gov/ore/pdf/nl970030.pdf>.

¹⁰⁰ *Id.* (asserting that if profit maximizing firms have limited information about the general productivity of new workers, firms may choose to use easily observable characteristics, such as years of education, to "statistically discriminate" among workers. The study further shows that although there is no significant correlation between years spent on education and actual abilities, employers still utilize years of education to distinguish amongst potential employees.).

than it was a decade ago.¹⁰¹ The Supreme Court has also recognized the importance of a college education in cases contesting the use of affirmative action in college admission.¹⁰²

The essence of the *Plyler* ruling was that undocumented children were entitled to a certain level of education sufficient to provide them with the basic set of tools necessary to be productive members of society.¹⁰³ In the early 1980's, a high school degree may have been sufficient to provide such basic tools, but in 2006, this may no longer be the case.¹⁰⁴ Therefore, if *Plyler* is to be understood as having established primary and secondary education to be a requisite tool for a productive livelihood, the Court's reasoning should be extended to higher education, since higher education today has as much practical significance as a high school education had several decades ago.¹⁰⁵

B. PUBLIC POLICY ARGUMENTS

1. *The DREAM Act Will Financially Benefit the United States*

The primary public policy argument in favor of the DREAM Act relies upon the assumption the contributions made by undocumented immigrants outweigh their overall costs to society.¹⁰⁶ Most importantly, there is no clear evidence that undocumented immigrants create a net economic loss to the United States.¹⁰⁷ Assuming that employers will act rationally, no reasonable employer would pay their workers a higher sal-

¹⁰¹ Jodi Wilgoren, *College Education Seen As Essential*, N.Y. TIMES, May 4, 2000, at A23.

¹⁰² See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003). In *Grutter* and *Gratz*, the Supreme Court addressed the use of affirmative action policies by the University of Michigan's law school and undergraduate university respectively. The Court upheld the law school's system as sufficiently narrowly tailored to serve the compelling interest of diversity, see *Grutter*, 539 U.S. at 343, but struck down the undergraduate system as insufficiently narrow because it made "race a decisive factor for virtually every minimally qualified under-represented minority applicant." *Gratz*, 539 U.S. at 274.

¹⁰³ See *Plyler*, 457 U.S. at 221.

¹⁰⁴ See Wilgoren, *supra* note 101.

¹⁰⁵ See *id.*

¹⁰⁶ See generally Howard Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT'L L. & FOREIGN AFF. 371 (1998) (arguing that native U.S. citizens would experience a net economic benefit from a more open immigration policy).

¹⁰⁷ Victor Romero, *Postsecondary Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C.J. INT'L L. & COM. REG. 393, 402 (2002) (arguing that evidence supporting the assumption that undocumented immigrants use more public funds than they contribute is equivocal at best); see also National Immigration Law Center, "Facts About Immigrants' Low Use of Health Services and Public Benefits" (September 2006), available at http://www.nilc.org/immspbs/research/imms&publicservices_2006-9-12.pdf; The available evidence regarding undocumented immigrants' "costs" to society is at equivocal, as there are various studies that purport to support each side of the argument.

ary than what the workers produce.¹⁰⁸ Similarly, the federal, state, and local governments would not knowingly subsidize undocumented immigrants with welfare transfer programs; for example, undocumented immigrants are explicitly ineligible for programs such as unemployment benefits, welfare, food stamps, and Social Security.¹⁰⁹ Governments may unintentionally subsidize undocumented immigrants through public services such as hospital emergency rooms, public parks, police protection, and certain types of public education.¹¹⁰ Available evidence suggests, however, that only a negligible percentage of undocumented immigrants come to the United States in order take advantage of these public benefits, particularly educational benefits.¹¹¹

Whatever the actual costs may be of the indirect benefits provided to undocumented immigrants, these costs are likely offset by the direct financial contributions that undocumented immigrants provide back to society. Undocumented immigrants pay virtually all the same taxes that the average American pays, including income withholding tax, sales tax, and property tax.¹¹² However, unlike U.S. citizens and residents with legal status, undocumented immigrants are not eligible for tax refunds. Unclaimed tax refunds totaled more than \$2 billion during the 2001 tax cycle; this unclaimed balance is held by the Internal Revenue Service for three years, after which period the balance is turned over to the federal government.¹¹³ Coincidentally, California, which has the largest undocumented immigrant population in the U.S., accounted for the largest number of taxpayers who did not file for their refunds in 2001, collectively worth over \$219 million.¹¹⁴ Undocumented workers also make

¹⁰⁸ To highlight, this statement is based on the assumption that people will act rationally while making economic decisions, which may not always be the case in reality, especially since many people's attitudes and perceptions toward undocumented aliens are influenced by non-economic factors.

¹⁰⁹ See *supra* note 107.

¹¹⁰ See *id.*

¹¹¹ Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019, 1055 (1993) ("Even [though California has the highest number of undocumented immigrants in the nation,] the open door [California] community college estimated that fewer than 1% of their 1.5 million students were undocumented.").

¹¹² Undocumented immigrants cannot avoid paying taxes related to general living expenses. For example, commercial stores are legally required to charge sales tax to all of their customers without exception, employers withhold social security taxes regardless of whether their employees provide legitimate social security numbers, and property taxes are similarly unavoidable; see also Statement of The honorable Mark W. Everson, commissioner, Internal Revenue Service, Testimony Before the House Committee on Ways and Means (Jan 26, 2006), available at <http://waysandmeans.house.gov/hearings.asp?formmode=View&id=5171> (Mr. Everson testified that IRS determined that undocumented immigrants have paid almost \$50 billion in federal taxes from 1996 to 2003).

¹¹³ Kay Bell, *IRS Holding Billions in Old, Unclaimed Tax Refunds*, BIZRATE, <http://www.bankrate.com/brm/itax/news/20010205a.asp>.

¹¹⁴ *Id.*

significant contributions to the U.S. Social Security system since many undocumented immigrants apply for and obtain legitimate jobs using fake social security numbers.¹¹⁵ During the 1990's, for example, taxes collected from "suspended" W2 forms amounted to more than \$20 billion.¹¹⁶ Furthermore, undocumented immigrants contribute to the U.S. economy directly by spending a large percentage of their disposable income within the United States.¹¹⁷

Some critics claim that wages paid to undocumented workers do not benefit local communities.¹¹⁸ This claim relies heavily on the notion that undocumented workers frequently send remittances back to their home countries, whereas native U.S. citizens are more likely to spend their money locally, thus creating beneficial multiplier effects.¹¹⁹ Yet in 2004, Latin American born workers in the United States earned an estimated \$450 billion in combined annual gross income, and spent 90 percent of their money within the United States.¹²⁰

Even if undocumented immigrants do impose net costs on society, the DREAM Act will lessen the costs on society since the DREAM Act specifically targets students with the discipline and the drive to obtain a college education. These students will surely produce net benefits to society – in 2002, an immigrant with at least a high school degree contributed a positive net fiscal amount of about \$12,000.¹²¹ The National Research Council noted that "if the only policy goal were the maximization of the positive fiscal impact of immigrants, the way to accomplish it would be to admit only those with the highest education."¹²²

Given the vast amount of resources already invested in undocumented students through their high school years, helping these students

¹¹⁵ Gordon H. Hanson et al., *Immigration and the U.S. Economy: Labor-Market Impacts, Illegal Entry, and Policy Choices* (May 2001), available at <http://ssrn.com/abstract=296108>.

¹¹⁶ Contributions to the Social Security System using fake social security numbers that cannot be matched to names legally recorded in the social security system are collected in a "suspense file." *Id.* See also Mary Beth Sheridan, *Illegals paying Millions in Taxes*, WASH. POST, Apr. 15, 2001, at A11.

¹¹⁷ Thornburgh, *supra* note 5, at 39; see also National Immigration Law Center, "Paying Their Way and Then Some," (Sept. 2006), available at http://www.nilc.org/immispbs/research/immispaytheirway_2006-9-25.pdf.

¹¹⁸ JACK MARTIN & IRA MEHLMAN, FED. FOR AM. IMMIGR. REFORM, THE COSTS OF ILLEGAL IMMIGRATION TO CALIFORNIANS 5, http://www.fairus.org/site/DocServer/ca_costs.pdf?docID=141.

¹¹⁹ See *id.*

¹²⁰ See INTER-AM. DEV. BANK, SENDING MONEY HOME: REMITTANCES TO LATIN AMERICA I, <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=547214>.

¹²¹ STEVEN A. CAMAROTA, CTR. FOR IMMIGR. STUD., THE HIGH COST OF CHEAP LABOR: ILLEGAL IMMIGRATION AND THE FEDERAL BUDGET 30 (2004), available at <http://www.cis.org/articles/2004/fiscal.pdf>.

¹²² THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 333 (James P. Smith & Barry Edmonston eds., 1997), available at <http://darwin.nap.edu/books/0309063566/html/333.html>.

obtain college education may be an efficient social investment for the United States. A 1996 survey found that federal and local governments spent more than \$11 billion a year on undocumented students' education from kindergarten through high school.¹²³ If undocumented students are prevented from furthering their studies beyond primary and secondary school, these large investments will not be fully realized as the students would likely be forced to accept low-skilled and low-paying jobs that did not require much education in the first place.¹²⁴ On the other hand, the DREAM Act creates the possibility of receiving a college education and a secure future for undocumented students, and in the process also creates incentives for the students to study and work harder toward that end.¹²⁵

Undocumented students who would benefit from the DREAM Act are likely to earn more income than they otherwise would earn, in turn resulting in additional tax payments to the government.¹²⁶ A 1999 study by the RAND Corporation found that an immigrant college graduate will provide about \$9,000 more in annual payments to his or her state than a non-college graduate.¹²⁷ In addition, considering that a median-income family makes about \$39,000 and contributes about 19 percent of this income to taxes, undocumented students who obtain college educations would presumably make at least the median household income and contribute the requisite amounts to the state and federal treasuries.¹²⁸ As the United States' budget deficit continues to increase at a record pace, an increase in the number of responsible taxpayers is likely to help the U.S. economy in the long run.¹²⁹ Of course, there is no way to determine with certainty whether the increase in college graduates provided by the DREAM Act will in fact increase state and national revenues. However, empirical data suggests that the passage of the DREAM Act would at a

¹²³ Laura S. Yates, *Plyler v. Doe and the Rights of Undocumented Immigrants to Higher Education: Should Undocumented Students be Eligible for In-State College Tuition Rates?*, 82 WASH. U. L. Q. 585, 604 n.140 (2004).

¹²⁴ See Epstein, *supra* note 21. Without proper work authorization (e.g., a valid social security number), undocumented students can only obtain jobs from employers who are willing to break the law. This occurs most often in industries that are unlikely to be scrutinized, such as farming and landscaping.

¹²⁵ See NAT'L IMMIGR. L. CTR., *THE ECONOMIC BENEFITS OF THE DREAM ACT AND THE STUDENT ADJUSTMENT ACT 1* (2005), http://www.nilc.org/immlawpolicy/DREAM/Econ_Bens_DREAM&Stdnt_Adjst_0205.pdf.

¹²⁶ "They Say: We Say" Responses to Restrictionist Allegations Dream Act/ Student Adjustment Act (Am. Immigr. Law. Ass'n, Issue Packet), available at <http://legalizationusa.org/proposed/DREAM/AILAPacket.pdf> [hereinafter *They Say: We Say*].

¹²⁷ *Id.*

¹²⁸ CONG. BUDGET OFF., *Estimates of Federal Tax Liabilities for Individuals and Families by Income Category and Family Type for 1995 and 1999* 9 (1998), <http://www.cbo.gov/ftpdocs/5xx/doc527/taxliab9599.pdf>.

¹²⁹ CONG. BUDGET OFF., *THE BUDGET AND ECONOMIC OUTLOOK: AN UPDATE 1*, 19 (2006), <http://www.cbo.gov/ftpdocs/74xx/doc7492/08-17-BudgetUpdate.pdf>.

minimum create the potential for the economy to benefit from the increase in income generated by the undocumented students graduating from college.¹³⁰ The alternative is the status quo, where tens of thousands of capable individuals are prevented from contributing to society, to the benefit of no one.

2. *The DREAM Act Will Help Maintain the U.S. Military*

The United States would also benefit from the DREAM Act provision allowing undocumented students to qualify for permanent residency by serving in the U.S. military for at least two years.¹³¹ Immigrants have historically been a significant part of the U.S. military ever since it became an all-voluntary force, and there are currently 60,000 immigrants registered for active duty.¹³² In the ongoing conflict in Iraq, nearly one out of every ten soldiers killed is a foreign-born resident of the United States.¹³³ The need for more soldiers in the military continues to be a crucial issue for U.S. foreign policy, since the brute superiority of the U.S. military is one of the most important factors that allow the United States to defend itself against foreign invasion or intimidation.¹³⁴

Unfortunately, due in part to the recent conflicts in the Middle East, the U.S. military has had an uncharacteristically difficult time recruiting new soldiers. Many individuals are reluctant to join the military during this current period of uncertainty, which as of Aug 20, 2006 had resulted in the death of 2,607 American soldiers in Iraq and 333 in Afghanistan.¹³⁵ For the first time since 2001, the Army began the fiscal year in October 2005 with only 18.4% of the year's target of 80,000 active-duty recruits in the pipelines, which amounts to less than half of 2004 figures.¹³⁶ Providing an incentive for undocumented students to serve in the U.S. military would ease some of the military's burden that results from recruitment shortcomings. Critics may argue that encouraging undocumented students to meet their residency requirement by joining the military amounts to little more than hiring mercenaries. However, the

¹³⁰ See *They Say: We Say*, *supra* note 126.

¹³¹ S. 2075 §5(d)(1)(D)(ii) (2005); S. 2611 § 625(d)(1)(D)(ii) (2006).

¹³² U.S. *Soldiers from Around the World: Immigrants Fight for an Adopted Homeland* AM. IMMIGR. L. FOUND., Aug. 2002, http://www.aifl.org/ipcl/policy_reports_2003_pr001_soldier.asp.

¹³³ *Id.*

¹³⁴ See, e.g., "List of Countries by Size of Armed Forces," available at http://en.wikipedia.org/wiki/List_of_countries_by_size_of_armed_forces (The United States have the second largest standing army in the world, behind China. In addition, the United States spends the most money on defense expenditures - in 2005 the U.S. spent \$518 billion, more than 6 times the next country (China - \$81 billion)).

¹³⁵ *Iraq Coalition Casualty Count*, ICASUALTIES, Aug. 20, 2006, Operation Enduring Freedom, <http://icasualties.org/>.

¹³⁶ Ann Scott Tyson, *Army Having Difficulty Meeting Goals in Recruiting*, WASH. POST, Feb. 21, 2005, at A01.

DREAM Act would not force any applicants to join the military. The DREAM Act simply provides qualified students with the option of either attending college or serving in the military for two years – the students themselves have the final say.¹³⁷

3. *The DREAM Act Will Lessen Potential Social Costs in the Future*

Providing undocumented students the opportunity to attend college, serve in the military, or otherwise find a steady job could also prevent them from pursuing activities that negatively impact society. Currently, the national high school dropout rate for Hispanic students, who make up the majority of the undocumented student population, is 21%, more than twice the national average of 10%.¹³⁸ Unfortunately, without the prospect of college education or a mainstream career path, a large number of undocumented high school dropouts end up joining street gangs, which further increases federal and local public safety costs.¹³⁹ This problem extends country-wide, beyond the confines of urban cities. For example, in Montgomery County, Virginia, more than twenty homicides have been linked to Latino gangs since 2000.¹⁴⁰ Some gang members point directly to the lack of alternative options available to them as undocumented immigrants as the reason why they were initially attracted to gangs.¹⁴¹ In any event, undocumented immigrants who are convicted of crimes must serve out their prison terms in U.S. penitentiaries before being deported.¹⁴² This pre-deportation detention requirement results in additional financial burdens on U.S. taxpayers whose taxes are used to prosecute and detain convicted undocumented immigrants.¹⁴³ If the government is going to be ultimately responsible for the cost of housing undocumented prisoners, what is the rationale for not spending this same amount of money to try to prevent undocumented students from resorting to a life of crime in the first place?

¹³⁷ S. 2075 §5(d)(1)(D)(ii) (2005); S. 2611 § 625(d)(1)(D)(ii) (2006).

¹³⁸ PEW HISP. CTR., *LATINO TEENS STAYING IN HIGH SCHOOL: A CHALLENGE FOR ALL GENERATIONS* (2004), <http://pewhispanic.org/files/factsheets/7.3.pdf>.

¹³⁹ Brigid Schulte, *Advice From the Inside on Stopping Gangs; Latino Youth's Tale Shows Montgomery Officials the Ease of Falling Into Trouble*, WASH. POST, Aug. 29, 2005 at B4.

¹⁴⁰ *Id.*

¹⁴¹ *See id.*

¹⁴² 8 U.S.C. § 1231(a)(4)(A) (2006) (providing that “the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released. . . .”)

¹⁴³ *See generally* United States Government Accountability Office, “Information on Criminal Aliens Incarcerated in Federal and State Prisons and Local Jails” GAO-05-337R (Apr. 7, 2005), available at <http://www.gao.gov/new.items/d05337r.pdf>. (The GAO estimates that the federal cost of incarcerating criminal non-citizens and permanent residents totaled about \$5.8 billion from just 2001 through 2004).

4. *Some Policy Arguments Against the DREAM Act*

Similar to the policy arguments favoring passage of the DREAM Act, the policy arguments against DREAM Act are largely theoretical and rest upon certain assumptions regarding the impact of illegal immigration on society. The most basic assumption is that the rights of U.S. citizens are more important than that of non-citizens.¹⁴⁴ This assumption provides the basis for strong arguments against granting higher education benefits to undocumented immigrants.¹⁴⁵ First of all, competition for college admission is extremely high, especially for prestigious institutions.¹⁴⁶ Therefore, granting undocumented students the opportunity to receive financial aid and in-state college tuition rates would inevitably result in more undocumented students actually applying for and attending college.¹⁴⁷ Given that there are limited enrollment spaces in all colleges, the increase in enrollment of undocumented students effectively translates to the decrease in enrollment of U.S. citizens.

Second, the potential loss of admission slots for U.S. citizens implicates another charged issue relating to college admissions: affirmative action. The Supreme Court upheld an admission policy that took an applicant's race into account for use as a "plus" factor but not a determinative factor.¹⁴⁸ Under this analysis, undocumented students who also happen to be racial or ethnic minorities could receive preferential admissions treatment by virtue of their personal background, further decreasing a U.S. citizen's chances to be accepted to certain colleges.¹⁴⁹ Such admissions policies effectively result in more competition for the non-Hispanic white student population, which made up nearly 67% of all college admissions in 2001.¹⁵⁰ There would also be additional competition for U.S. citizens and permanent residents who are themselves minorities, since undocumented students who are racial and ethnic minorities would also qualify for affirmative action.¹⁵¹ Thus, even if helping undocumented students obtain college education is indeed the "right" thing to

¹⁴⁴ See generally Federation for American Immigration Reform, Immigration Issue Centers: Illegal Immigration, available at http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenterslistbe40. (Many of the articles that FAIR publishes here is premised on the assumption, not necessarily untrue, that the rights of the undocumented immigrants are inherently inferior to the rights of U.S. citizens and permanent residents).

¹⁴⁵ See Rhymer, *supra* note 84, at 604.

¹⁴⁶ *Ivy League College Admissions Survey*, ADMISSIONSCONSULTANTS, http://www.admissionsconsultants.com/college/ivy_league_table.asp.

¹⁴⁷ *Taxpayers Should Not Subsidize College for Illegal Aliens*, FAIRUS, May 2003, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters6be3.

¹⁴⁸ See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁴⁹ See *id.*

¹⁵⁰ National Center for Education Statistics, <http://nces.ed.gov/fastfacts/display.asp?id=98> (last visited Oct. 2, 2006).

¹⁵¹ See Romero, *supra* note 107.

do, accomplishing this goal at the expense of U.S. citizens may be problematic.¹⁵²

Third, despite the many heartfelt stories that often test our moral sensibilities, granting undocumented students the right to work in the United States may be inherently contradictory to government efforts to decrease the rate of illegal immigration. A program that grants all qualified undocumented students the right to achieve permanent residency could motivate more immigrants to come to the United States illegally.¹⁵³ This possibility may especially be applicable for families with children, since parents may rely on their children's U.S. citizenship as a means to obtain legal status in the U.S. themselves.¹⁵⁴ History has shown that amnesty policies do not necessarily function as they theoretically should. For example, although the 1986 "one-time" amnesty was designed to curb undocumented immigration, the rate of undocumented immigration has only increased since then.¹⁵⁵ By increasing incentives for people to illegally immigrate to the United States, the government may be forced to incur substantial costs above and beyond the \$45 billion a year that undocumented immigration currently costs.¹⁵⁶

In addition to the direct financial costs associated with illegal immigration, an increase in the size of the undocumented population could also result in the loss of jobs for U.S. citizens. Such increase could also lead to a decrease in the average household income in the United States as a result of undocumented immigrants driving down general wage levels.¹⁵⁷ Basic demand-and-supply analysis suggests that as the supply of labor increases, employers could hire undocumented immigrants at a lower cost (i.e., wage) than they could before.¹⁵⁸ Another argument

¹⁵² See generally MARTIN & MEHLMAN, *supra* note 118 (arguing that admitting and subsidizing illegal aliens, punishes citizens and legal residents who have done nothing wrong themselves).

¹⁵³ See Jennifer L. Maki, *The Three R's: Reading, 'Riting, and Rewarding Undocumented Immigrants: How Higher Education Has Acquiesced in the Illegal Presence of Undocumented Aliens in the United States*, 13 WM. & MARY BILL RTS. J. 1341, 1363–64 (2005).

¹⁵⁴ 8 U.S.C. § 1151(b)(2)(A)(i) (2006) ("Aliens described in this subsection, who are not subject to the worldwide levels or numerical limitations. . .[are]. . .the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age. . .").

¹⁵⁵ *Why Amnesty Isn't the Solution*, FAIRUS, Oct. 2002, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenterse4a5; see also JACK MARTIN & IRA MEHLMAN, *supra* note 119.

¹⁵⁶ Rhymer, *supra* note 84, at 606.

¹⁵⁷ *Id.*

¹⁵⁸ Thornburgh, *supra* note 5, at 39–40 (indicating that the wage of day laborers in Hamptons, Long Island has decreased from \$15 an hour just a few years ago, to \$10 an hour today. Jeremy Samuelson, a landscaper, admits that he and his neighbors view cheap labor as a perk of living in the Hamptons. "People are making less, maybe, but now lots of people have house cleaners come once a week. . . . [a]nd if you want your roof redone, you can just go to the corner, round up twenty guys, and they'll have it done in an afternoon for less than \$3,000.").

against the DREAM Act is that because these students cannot legally work in the United States, they would not contribute enough taxes back to the government.¹⁵⁹ What would be the point of investing money in someone that legally cannot produce returns?¹⁶⁰

Finally, the DREAM Act, like any other issues related to undocumented immigration, may raise some concerns about national security.¹⁶¹ Since September 11, 2001, the prospect of further terrorist attacks against the United States has come to be viewed as a genuine possibility. In response, new immigration-related policies had been adopted, such as requiring foreign students from certain countries to register separately with the Department of Homeland Security, and requiring foreigners to have their pictures and fingerprint taken upon physical entry into the United States.¹⁶² Upon closer review, however, the DREAM Act itself bears virtually no relation to issues of national security.

Within the context of legitimate national security concerns, it is important to note that only the students who have been living in the United States for five years are eligible for the DREAM Act.¹⁶³ Thus, concerns about preventing potential terrorists from entering the United States are irrelevant in evaluating whether or not the DREAM Act undermines national security. Likewise, it would be nearly impossible for potential terrorists who are already present in the United States to meet the necessary requirements of the DREAM Act.¹⁶⁴ All potential applicants must have spotless records both in and out of school, leaving little room for students to engage in any suspicious or illicit activities.¹⁶⁵ Furthermore, once an applicant qualifies for the DREAM Act, he or she must continue to meet the stringent requirements of good citizenship and academic achievements for six consecutive years in order to receive legal permanent resident status.¹⁶⁶ During this period, the applicants would be constantly monitored via the SEVIS system, which is currently used to track foreign students studying in the United States.¹⁶⁷ This monitoring system would greatly assist law enforcement officers in locating an applicant suspected of engaging in terrorist activities, whereas monitoring these applicants

¹⁵⁹ *Taxpayers Should Not Subsidize College for Illegal Aliens*, *supra* note 63.

¹⁶⁰ *See id.*

¹⁶¹ Romero, *supra* note 107, at 418 (arguing that the Student Adjustment Act, which is a DREAM Act-like proposal, will help fight terrorism by denying “adjustment of status to . . . individuals who might pose a security risk”).

¹⁶² *Hearing Before the Nat’l Comm’n on Terrorist Attacks Upon the U.S.* (Jan. 26, 2004) (statement of Maura Harty, Assistant Sec’y of St. of Consular Affairs), available at http://travel.state.gov/law/legal/testimony/testimony_790.html.

¹⁶³ S. 2075 § 4(a)(1)(A) (2005).

¹⁶⁴ *Id.* § 4(d)(1)(A), (D)(i–ii).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* § 5(b)(1)(A–C); § 5(a)(1).

¹⁶⁷ S. 1545, 108th Cong. § 11 (2003).

would be extraordinarily difficult if they were to remain loose in the United States without a paper trail.

IV. EVALUATING THE ACTUAL EFFECTS OF THE DREAM ACT

Despite its shortcomings, the DREAM Act should be passed because it would result in net social benefits for the United States. Of course, the DREAM Act by itself will not solve all the problems associated with general illegal immigration, nor will it improve the lives of all undocumented immigrants already present in the United States. Nevertheless, upon evaluation of its ramifications and effects, it is clear that the passage of the DREAM Act represents a good place to start addressing the illegal immigration problem.

Both sides of the debate try to exaggerate or minimize the potential effects of the DREAM Act to further their own agendas. One of the most popular and most cited arguments against the DREAM Act has been that such a legalization process essentially rewards and creates further incentives for illegal immigration.¹⁶⁸ However, this argument relies on the faulty assumption that the DREAM Act is intended for all undocumented immigrants.¹⁶⁹ In reality, the passage of the DREAM Act only affects a select group of motivated undocumented students, who upon successfully fulfilling specific requirements, would have an opportunity to apply for U.S. citizenship.¹⁷⁰

1. *The Number of Individuals Affected by the DREAM Act is Limited*

There are not unlimited numbers of undocumented children who would have an opportunity to benefit from the DREAM Act, as the Act is strictly limited to students who will have lived in the United States for at least five years at the time that the bill is passed.¹⁷¹ Although the actual number cannot be calculated with certainty, it is possible to estimate the number of potential beneficiaries. There are approximately 65,000 undocumented students who graduate high school each year.¹⁷² If more

¹⁶⁸ See, e.g., Maki, *supra* note 153, at 1364. The reasoning that the DREAM Act will reward illegal immigration is the same reasoning against any type of measure that purports to better the status of undocumented immigrants.

¹⁶⁹ Response to *Illegals – Go to College, Get Citizenship? (new “Dream” Act)*, <http://www.freerepublic.com/focus/f-news/1391637/posts> (posting 65 comments from ordinary U.S. citizens in response to an article describing the DREAM Act’s imminent re-introduction in 2005. The vast majority of the responses indicate their anger at the government’s willingness to reward undocumented immigrants for successfully coming to the United States.).

¹⁷⁰ S. 2075, 109th Cong. (2005).

¹⁷¹ *Id.* § 4(a)(1)(A).

¹⁷² See PASSEL, *supra* note 6, at 1.

than 65,000 infants less than one year of age are brought into United States every year, then the youngest “class” of students that could qualify for the DREAM Act, in accordance with the Act’s five-year residency qualification requirement, are the undocumented children who are currently 6 years old. Since only individuals younger than twenty-one years can qualify for the DREAM Act, there would only be 16 “classes” of undocumented children that qualify for the DREAM Act. In sum, there are approximately one million children who have the potential to qualify for the DREAM Act.¹⁷³ Assuming every single child who qualifies for the DREAM Act actually fulfills all the enumerated requirements and becomes citizens, there would be one million additional naturalized U.S. citizens over the next sixteen years.

The United States Census Bureau projects the U.S. population to exceed 390 million in 2050.¹⁷⁴ Given the vast size of this U.S. population, adding one million newly legalized citizens over the next sixteen years represents a relatively small addition.¹⁷⁵ Moreover, since every one of these one million legalized citizens will either be college educated or a member of the U.S. military, the DREAM Act is likely to create a new group of economically and socially productive individuals. Research indicates that these individuals collectively will have a strong positive effect on society. – an immigrant with only a high school degree, which all DREAM Act applicants would have, will contribute \$105,000 to the federal fiscal system.¹⁷⁶ Quite frankly, the reason that legislation such as the DREAM Act generates so much public attention is largely because the debate regarding illegal immigration hinges on emotion, not fact. Both sides of the illegal immigration debate must recognize that the DREAM Act is merely a temporary solution targeting a very specific group of educated and motivated children, who are likely to contribute significant financial and social benefits to the United States.

2. *U.S. Would Benefit from Rewarding Talented and Motivated Undocumented Students*

Providing the means for undocumented students to obtain a college education would provide substantial opportunities for these students to use their education for greater good in the United States. In light of the

¹⁷³ 16 classes multiplied by 65,000 individuals equal 1,040,000 individuals.

¹⁷⁴ Jennifer Cheeseman Day, *National Population Projections*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/pop-profile/natproj.html>. This figure does not include the undocumented population, which increases the overall figure even further.

¹⁷⁵ See *id.*; See POPClock, *supra* note 4.

¹⁷⁶ Steve Camarota, *The High Cost of Cheap Labor*, pg 35 (\$105,000 in 1996 is around \$127,451 in 2005, after adjusting for inflation according to the Consumer Price Index. Inflation calculator available at <http://www.westegg.com/inflation/>); see also INTER-AM. DEV. BANK, *supra* note 120.

fierce worldwide competition found in the global economy today, the United States would benefit from government policies that could foster a more educated population and workforce in the future. The international competition for talent has grown such that the United States can no longer remain idle and simply expect to attract the top talents in their respective fields of expertise. For example, top scientists of Chinese origin who have studied and worked in the United States are returning to China to further science and technical research, areas which the United States has traditionally dominated in the past.¹⁷⁷ In addition, Singapore has lately become a hotbed of biological research, another area where U.S. has traditionally led the rest of world, mainly by hiring top scientists and researchers away from the United States.¹⁷⁸

Despite the importance of nurturing and maintaining talented individuals in the United States, many highly motivated and talented students may never get the opportunity to contribute to the United States due to their undocumented status. Many of these students are currently unable to afford college education, where they could further their talents and skills in the interests of the United States.¹⁷⁹ One student who was fortunate enough to attend college and yet is legally prevented from working in the United States is Dan el-Padilla Peralta, who recently graduated from Princeton University as class salutarian.¹⁸⁰ Although his professors consider him the “classist of his generation,” there is a real possibility that he may not be allowed back into the United States once he leaves the country.¹⁸¹ In light of the global competition for the brightest minds of every generation, the United States cannot afford to let great students such as Dan Peralta fall through the cracks. The undocumented students who qualify for the DREAM Act will have lived in the United States for a minimum of five years, which is long enough for young children to become acclimated to a new culture.¹⁸² Their core life experiences have largely been formed and shaped during their time in the United States.¹⁸³ Abandoning these undocumented students, many of them with extraordinary talents and motivation, solely on the basis of their parents’ mistakes

¹⁷⁷ Howard W. French, *China Luring Foreign Scholars to Make Universities Great*, N. Y. TIMES, Oct. 28, 2005, at A1.

¹⁷⁸ Wayne Arnold, *Luring Top Stem Cell Researchers With Financing and Freedom*, N. Y. TIMES, Aug 17, 2006, at C1.

¹⁷⁹ See Vanessa Petit, *Immigrant Students Face Big Tuition Barrier: Cut Off From Lower In-State Rates, They Find a College Education Too Costly* WASH. POST, Dec. 7, 2003, at A08.

¹⁸⁰ Miriam Jordan, *Illegal at Princeton*, WALL ST. J., Apr. 15, 2006, at A1.

¹⁸¹ *Id.*

¹⁸² See Stevenson, *supra* note 27, at 551-553.

¹⁸³ See *id.*

are not only contradictory to the fundamental notion of justice, but also detrimental to the future of the United States.¹⁸⁴

3. *Implementation of the DREAM Act Does Not Result in Economic Burden*

Arguments suggesting that implementing the DREAM Act places a greater economic burden upon the United States have little merit. The Congressional Budget Office estimated that if the DREAM Act (S. 1545) was enacted in 2004, the cost of the program would total \$90 million over the 2004 ~ 2014 period.¹⁸⁵ If the DREAM Act is passed, only about 13,000 undocumented students are likely to enroll in college the following year, and just a small percentage of these students will likely participate in federal student loan programs. The majority of students are more likely to enroll in lower-cost community colleges in order to avoid filing out financial aid forms that could potentially expose other family members' undocumented status.¹⁸⁶ In any event, the \$90 million direct cost of implementing the DREAM Act is insignificant compared to the financial benefits that undocumented students are likely to contribute to society before and after they are legalized.¹⁸⁷ Even assuming that the DREAM Act beneficiaries will only earn the average annual income of a U.S. citizen, each student will pay no less than \$7,400 in federal taxes, which collectively dwarfs the \$90 million cost of implementing the DREAM Act.¹⁸⁸ Moreover, a RAND Corporation study suggests that simply doubling the number of bachelor's degrees for Hispanics, who make up the vast majority of the undocumented immigrant population, would result in a \$7.6 billion increase in tax contributions, a \$5.4 billion decrease in public spending for social welfare, health, and law enforcement programs, and a \$14 billion increase in Hispanics' disposable income throughout their lifetime.¹⁸⁹ On the other hand, preventing undocumented students from attending college or pursuing other produc-

¹⁸⁴ See *Plyler*, 457 U.S. at 220 (citing *Weber*, 406 U.S. at 175) (Supreme Court dicta indicating that children should not be punished for the faults of their parents.).

¹⁸⁵ DEBORAH KALCEVIC ET AL., CONG. BUDGET OFF., COST ESTIMATE: S.1545 DEVELOPMENT, RELIEF, AND EDUCATION FOR ALIEN MINORS ACT (2004), <http://www.cbo.gov/showdoc.cfm?index=4981&sequence=0&from=6>.

¹⁸⁶ See *id.*

¹⁸⁷ See CAMAROTA, *supra* note 121, at 7–8.

¹⁸⁸ See CONG. BUDGET OFF., *supra* note 129, at 40 (indicating that the average pretax family income of the middle quintile is \$39,000. The tax bracket for that income is 19%, thus the resultant tax amount is \$7,410. If each of 13,000 DREAM Act students contributes \$7,000, they will contribute over \$90 million in taxes every year and \$900 million in 10 years. This far outweighs the \$90 million expense to the federal government over 10 years that would result from the passage of the DREAM Act.).

¹⁸⁹ See GEORGES VERNEZ & LEE MIZELL, RAND EDUC. CTR. FOR RES. ON IMMIGR. POL'Y, GOAL: TO DOUBLE THE RATE OF HISPANICS EARNING A BACHELORS' DEGREE 21, <http://www.rand.org/publications/DB/DB350/DB350.pdf>.

tive career path may actually result in additional costs to the federal and state governments due to the various issues related to undocumented students prematurely dropping out of high school in light of their lack of future opportunities.¹⁹⁰ Providing solid opportunities for motivated undocumented students would be an economically sound social investment, and the United States should allow such investment through the DREAM Act for the betterment of her future.

4. *Alternatives to the DREAM Act*

Illegal immigration in the United States will continue as long as differences in economic power and status between the United States and other countries. This constant stream of illegal immigration includes children who will eventually find themselves in the same unfortunate position as the undocumented students who are the current targets of the DREAM Act. What would become of these children and students? If the DREAM Act fails to pass in Congress, there are other methods that could offer similar opportunities for undocumented students, albeit in an incomplete way.

The most practical means of helping undocumented children is through individual state initiatives designed to extend particular benefits to undocumented children. Currently, Section 505 of the IIRIRA prevents states from extending to undocumented immigrants “any post-secondary education benefit unless a citizen or national of the United States is eligible for such a benefit without regard to whether the citizen or national is such a resident.”¹⁹¹ Although many states initially interpreted section 505 to mean that they could not extend in-state tuition benefits to undocumented students, some have since enacted laws to grant in-state tuition rates to undocumented students.¹⁹² The two states leading this trend are California and Texas, both of which also happen to have the two largest undocumented immigrant populations.¹⁹³ Despite initially passing laws to prevent benefits to undocumented students, both

¹⁹⁰ See e.g., *319 Billion Dollars and 1.2 Million Students Lost: Hearing Before the St. Bd. of Educ. Comm. on Planning* (1999) (statement of María “Cuca” Robledo Montecel, Ph.D., Executive Dir., Intercultural Dev. Res. Ass’n) (indicating that the Intercultural Development Research Association reported that in 1986, 86,000 student dropouts from Texas public high schools cost the state \$17.12 billion. By 1998, the number of dropouts increased to more than 1.2 million, costing the state nearly \$319 billion total.), available at http://www.idra.org/Press_Room/Recent_Speeches_and_Testimony/319_Billion_Dollars/.

¹⁹¹ 8 U.S.C. § 1623(a) (2006).

¹⁹² See Jennifer Galassi, *Dare to Dream? A Review of the Development, Relief, and Education For Alien Minors (DREAM) Act*, 24 CHICANO-LATINO L. REV. 79, 82–85 (2003).

¹⁹³ See Jessica Salsbury, *Evading “Residence”: Undocumented Students, Higher Education, and the States*, 53 AM. U.L. REV. 459, 476–80 (2003–04) (providing an analysis of the California and Texas laws); Romero, *supra* note 107, at 404–07 (describing state initiatives to grant undocumented immigrants postsecondary tuition benefits despite IIRIRA Section 505).

states changed course and have since allowed undocumented students residing within their state boundaries to qualify for in-state tuition rates to public universities.¹⁹⁴

The California legislation qualifies any student for in-state tuition rates at a California public university if he or she graduated from a California high school after attending for at least three years.¹⁹⁵ Undocumented students simply have to sign an affidavit stating that he/she will file an application to legalize their status when eligible to do so.¹⁹⁶ California is thus able to grant in-state tuition rates to undocumented students without violating the technical interpretation of Section 505 by in effect creating a high school attendance requirement instead of a residency requirement.¹⁹⁷ Since the California in-state tuition rate is extended to anyone who graduated from a California high school regardless of his or her legal status, undocumented students are not enjoying any benefit that a U.S. citizen or national could not enjoy as well.

The Texas law effectively leads to the same result as the California law, but rather than create a specific exemption for undocumented students from non-resident tuition rates, the Texas law simply classifies qualified undocumented students as residents for tuition purposes.¹⁹⁸ Unlike the California law that just requires attendance at a California high school, the Texas law actually requires three year residence in Texas as well as attendance at a Texas high school.¹⁹⁹ Texas thereby considers undocumented students to be Texas “residents” by defining residence as “the place where a person is physically present and that the person regards as home. . . to which that person intends to return and remain even though currently residing elsewhere.”²⁰⁰ Such legislation may be a technical effort to fall within the purview of Section 505, but the California and Texas statutes nevertheless do not extend any benefits exclusively to undocumented immigrants.²⁰¹ Following the successful passage of the California and Texas laws, eight other states have to date adopted similar statutes: Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Utah, and Washington.²⁰²

¹⁹⁴ Compare CAL. EDUC. CODE § 68130.5 (Deering 2006) with TEX. EDUC. CODE ANN. § 54.052 (2006).

¹⁹⁵ CAL. EDUC. CODE § 68130.5 (Deering 2006).

¹⁹⁶ *Id.* § 68130.5(a)(4) (Deering 2006).

¹⁹⁷ CAL. EDUC. CODE § 68130.5(A)(1–2) (DEERING 2006); SALSURY, *supra* note 193, at 478.

¹⁹⁸ TEX. EDUC. CODE ANN. § 54.052 (2006).

¹⁹⁹ *Id.* § 54.052(j).

²⁰⁰ *Id.* § 54.052(a)(3)(A–B).

²⁰¹ See Stevenson, *supra* note 27, at 575.

²⁰² Kathleen A. Connolly, *In Search of the American Dream: An Examination of Undocumented Students, In-state Tuition, and the Dream Act*, 55 Cath. U.L. Rev. 193, 208 (2005).

There is ongoing debate regarding whether such legislation is legal in light of Section 505. However, neither the Supreme Court nor Congress has provided a conclusive answer on this matter thus far.²⁰³ Most recently, a group of plaintiffs sued the State of Kansas and its public universities claiming that the Kansas statute granting in-state tuition rates to undocumented Kansas residents is unconstitutional.²⁰⁴ The District Court judge dismissed the plaintiffs' case, finding that the plaintiff students and parents, who were paying out-of-state tuition, did not suffer injury as a result of the Kansas statute.²⁰⁵ The plaintiffs thus lacked standing to challenge the Kansas statute.²⁰⁶ This suit is the first legal challenge to a state statute granting undocumented students the right to qualify for in-state tuition rate, and it is currently on appeal to the 10th circuit Court of Appeals.

Critics of these statutes argue that states are manipulating residency requirement in ways that violate federal law.²⁰⁷ However, most state residency laws already contain many inconsistent and incoherent assumptions, which allow institutions to grant in-state resident status and tuition rates to nonresidents who fail to satisfy the general requirements for true residency.²⁰⁸ For example, the University of Maryland grants in-state tuition rates to its incoming out-of-state graduate students if the students are also employed as a graduate research assistant.²⁰⁹ This is the case regardless of whether the student has any intention of residing in Maryland after graduation.²¹⁰ Of course, each state is free to develop whatever laws and exemptions it deems necessary to further respective state interests, but using the residency requirement to deem certain graduate students as "residents" is nothing more than a technical maneuver seemingly contrary to the underlying policy rationale of residency determination.²¹¹

Considering that such manipulation of the residency requirement is already prevalent in various states, the argument that states should not be allowed to modify their residency requirements for the benefit of un-

²⁰³ See Rhymer, *supra* note 84, at 617–25; Maki, *supra* note 168, at 1364–66; Janice Alfred, Note & Comment, *Denial of the American Dream: The Plight of Undocumented High School Students within the U.S. Educational System*, 19 N.Y.L. SCH. J. HUM. RTS. 615, 628–30 (2003).

²⁰⁴ *Day v. Sebelius*, 376 F.Supp.2d 1022, 1025 (10th Cir. 2005).

²⁰⁵ *Id.* at 1033–34.

²⁰⁶ *Id.*

²⁰⁷ See Rhymer, *supra* note 84, at 617–25; Maki, *supra* note 168, at 1364–66 (arguing that states should not be allowed to manipulate their laws to suit their purposes).

²⁰⁸ Olivas, *supra* note 111, at 1032 (indicating that there are "an extraordinary number of exemptions, exceptions, and waivers to state residency practices").

²⁰⁹ Romero, *supra* note 107, at 400–01 (providing the story of the author's wife. She was granted in-state tuition rates at the University of Maryland after moving from California.).

²¹⁰ *Id.*

²¹¹ *Id.*

documented students lacks clout. Why should non-resident graduate students, who may never have lived in the state and not have any intent to remain in the state, receive in-state tuition rates while undocumented students, who are residents and intend to remain in their state indefinitely, are denied the lower tuition rates?²¹² A college education is an intrinsically valuable experience that should not be denied to deserving students on the basis of technical nuances, just because those deserving students also happen to be undocumented.

CONCLUSION

In today's polarized political reality a proposed piece of immigration legislation that is open to an indefinite number of individuals over an indefinite period seems virtually impossible to pass in Congress. Even if an immigration legislation is as narrowly tailored as the DREAM Act, there simply is no way to truly understand the effects of such legislation until it is actually adopted and implemented over a period of time.

The net effect of the DREAM Act on the U.S. economy as a whole will likely be small. Even so, the results of the DREAM Act could provide valuable knowledge and guidelines for developing future immigration policy. Immigration policy has never been, and will never be, a black and white matter, and any expectation that there is one "correct" policy choice is more optimistic than realistic. Instead, the problem of illegal immigration should be addressed one careful step at a time.

Simply relying on the impassioned moral arguments to evaluate the DREAM Act is akin to making a simple value judgment as to whether it is important to provide opportunities to undocumented students or not. However, such value judgments do not advance the overall economic and social welfare of the United States. The best solution to the illegal immigration problem is one that will have the most positive impact on the future of the United States, not the one propped by exaggerated and emotional ideology. The bottom line is that there is no single solution that will cure all problems, but small steps could lead to small improvements over time. The DREAM Act is one such small step – a small step that could lead to a giant leap in the future.

²¹² *See id.*

