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COMMENTS

IN SEARCH OF THE AMERICAN DREAM: AN EXAMINATION OF UNDOCUMENTED STUDENTS, IN-STATE TUITION, AND THE DREAM ACT

Kathleen A. Connolly[†]

High school senior Angela Perez maintains a 3.8 grade point average, is ranked fourth in a class of 150, is active in community service, and was voted “most intelligent” in her school’s yearbook poll.¹ Yet, despite her desires to be a political journalist, Angela has no plans to go to college.² She is an undocumented student,³ ineligible for federal grants or loans,⁴ not permitted to work legally, and therefore unable to afford the cost of

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1. See Samuel G. Freedman, *Behind Top Student’s Heartbreak, Illegal Immigrants’ Nightmare*, N.Y. TIMES, Sept. 1, 2004, at B6 (“Angela Perez’s family fled their native Columbia in early 1999 using tourist visas after several relatives had been murdered by left-wing guerillas.”).

2. *Id.*

3. *Id.* The terms “unauthorized” and “undocumented” persons or students “refer to foreign-born persons who entered the United States without inspection, or who violated the terms of a temporary admission and who have not acquired lawful permanent resident status or gained temporary protection against removal by applying for an immigration benefit.” OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2002 YEARBOOK OF IMMIGRATION STATISTICS 213 (2003) (emphasis omitted). While “alien” is a term of art in the legal world, see BLACK’S LAW DICTIONARY 72 (7th ed. 1999), this Comment will use “person” or “student.” The students discussed here “generally derive their immigration status solely from their parents, and when the parents are undocumented or in immigration limbo, their children have no mechanism to obtain legal residency.” *DREAM Act Reintroduced in Senate*, IMMIGRANTS’ RTS. UPDATE (Nat’l Immigration Law Ctr., L.A., Cal.), Sept. 4, 2003, <http://www.nilc.org/immlawpolicy/DREAM/Dream001.htm>.

4. See U.S. DEP’T OF EDUC., THE STUDENT GUIDE: FINANCIAL AID FROM THE U.S. DEPARTMENT OF EDUCATION 2003-2004, at 5, http://studentaid.ed.gov/students/attachments/sitesources/StudentGuideEnglish2003_04.pdf. To be eligible for federal financial aid one must be a “U.S. citizen or eligible noncitizen.” *Id.* Undocumented noncitizens are not eligible for federal financial aid. *Id.* at 33. Additionally, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) precludes unauthorized students from obtaining federal loans. See 8 U.S.C. § 1621(a), (c) (2000).

college tuition.⁵ Additionally, even if she could afford college, she would not be able to compete for jobs after graduation—it is illegal for employers to knowingly hire unauthorized persons.⁶ Consequently, Angela is about to become one of an estimated 65,000 undocumented high school graduates each year for whom the cost of a college education and the negative prospects for employment are obstacles that prevent them from pursuing a college education.⁷

A 1982 Supreme Court decision requires states to provide free elementary and secondary education to unauthorized persons,⁸ but once these students graduate from high school, they are on their own.⁹ Without the prospect of higher education, students are more likely to quit school, enter into menial jobs, join gangs, or become a burden on society.¹⁰ But higher education comes at a cost.¹¹ In the 2003–2004 school year, the average tuition for nonresident students averaged \$12,705;¹² \$8,017 more than the average tuition for resident students.¹³

5. See 8 U.S.C. § 1324(a).

6. See *id.*; Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393, 395 (2002).

7. See Romero, *supra* note 6, at 396 (“[T]wo factors—undocumented status and poverty—work in tandem to preclude many undocumented children . . . from pursuing a college degree.”); Janice Alfred, Note, *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, 615-16 (2003) (noting that the inability to obtain loans or grants is an obstacle that prevents many undocumented students from following their dreams of higher education); Freedman, *supra* note 1 (“The legal ceiling holds down an estimated 65,000 high school graduates each year — undocumented immigrants who have spent most of the [sic] educational lives in American schools and yet are effectively denied in-state tuition at their respective public colleges.”). As a new school year begins, Angela Perez remains in New York, watching as her friends continue on to college while she remains behind. Freedman, *supra* note 1. She keeps a binder filled with academic awards with the hope that one day she will be able to continue on to college. *Id.*

8. Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that the Constitution requires states to provide a free primary and secondary education to unauthorized alien students).

9. See Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 444 (2004).

10. See Jennifer Galassi, Comment, *Dare To Dream? A Review of the Development, Relief, and Education for Alien Minors (DREAM) Act*, 24 CHICANO-LATINO L. REV. 79, 88 (2003) (highlighting the inability to obtain an affordable college education as one reason students drop out of high school); Mary Beth Marklein, *Illegal Immigrants' Kids Catch a College Break*, USA TODAY (McLean, Va.), Jan. 14, 2003, at 1D (“[T]he possibility of college [is] an incentive to stay in school.”). After Utah passed its law allowing in-state tuition for undocumented students, some former dropouts returned to school. *Id.*

11. See AM. ASS'N OF STATE COLLS. & UNIVS. & NAT'L ASS'N OF STATE UNIVS. & LAND-GRANT COLLS., *STUDENT CHARGES AND FINANCIAL AID 2003-2004*, at 6-7 (2004) [hereinafter *STUDENT CHARGES*].

12. *Id.* at 7.

Recognizing the obstacles that unauthorized students face, and the negative financial impact of an uneducated class of people,¹⁴ nine states have passed legislation allowing undocumented persons to receive in-state tuition.¹⁵ At least fifteen other states have considered similar legislation.¹⁶ In addition to these state-sponsored laws, the Senate and the House have proposed federal legislation that would assist unauthorized students by granting them conditional permanent resident status as they work toward their college degree.¹⁷

Many people have criticized these state laws and the proposed federal legislation.¹⁸ The state-sponsored laws appear to contrast directly with a

13. *Id.* at 6-7. The average tuition for resident undergraduate students in public four-year institutions in 2003-2004 was \$4,688. *Id.* at 6. In 2003-2004, tuition and fee increases at public four-year institutions for resident students rose 13.9% from the previous year, and tuition and fee increases at public four-year institutions for nonresident students rose by 11.5%. *Id.* at 6-7.

14. See S. REP. NO. 108-224, at 3 (2004) (discussing a RAND Corporation study that equated higher education levels with public savings “in the form of lower expenditures for public income transfer and health programs, and higher tax contributions,” and that if education levels of the total population were increased, there would be “larger savings in public social programs”).

15. See *Day v. Sebelius*, No. 04-4085-RDR, 2005 WL 1593607, at *2 (D. Kan. July 5, 2005). As of this Comment’s publication, Texas, California, Kansas, New York, Utah, Oklahoma, Illinois, Washington, and New Mexico allow undocumented students to pay in-state tuition rates. *Id.*; see also Andrew Stevenson, Note, *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, 573-75 (2004) (noting that states have enacted this legislation in consideration of students who have grown up, been educated, and plan on remaining in the United States); *infra* Part III.D.2.b.

16. See Financial Aid and Scholarships for Undocumented Students, <http://www.finaid.org/otheraid/undocumented.phtml> (last visited Sept. 25, 2005) [hereinafter Financial Aid] (noting that Colorado, Connecticut, Florida, Hawaii, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, North Carolina, Oregon, South Carolina, Tennessee, and Virginia have similar legislation pending and that Wisconsin passed such legislation, but it was vetoed).

17. See DREAM Act, S. 1545, 108th Cong. § 4 (as reported by S. Comm. on the Judiciary, Nov. 25, 2003); Student Adjustment Act of 2003, H.R. 1684, 108th Cong. § 3 (2003). The permanent resident status is only “conditional” in the Senate proposed DREAM Act. S. 1545, § 5(a)(1). The House Act grants permanent resident status without the “conditional” label. H.R. 1684, § 3(a)(3)(A).

18. See Jessica Salisbury, Comment, *Evading “Residence”: Undocumented Students, Higher Education, and the States*, 53 AM. U. L. REV. 459, 465 (2003) (noting that the state and federal laws face sharp criticism). Groups that are among the primary critics include the Federation for American Immigration Reform (FAIR) and other policy groups whose aim is to limit immigration. See Sara Hebel, *States Take Diverging Approaches on Tuition Rates for Illegal Immigrants*, CHRON. OF HIGHER EDUC., Nov. 30, 2001, at A22; FAIR *Fights Tuition Benefits for Illegal Aliens*, IMMIGR. REP. (Fed’n for Am. Immigration Reform), May 2003, http://www.fairus.org/site/PageServer?pagename=research_researchb759 [hereinafter *Tuition Benefits*] (criticizing state legislatures that “would want to offer lavish college subsidies to illegal aliens”); Federation for American Immigration Reform,

provision in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) that restricts unauthorized students' access to postsecondary education benefits.¹⁹ In addition, critics claim that such state laws and federal legislation seem to favor unauthorized persons over citizens,²⁰ thus violating the rights of U.S. citizens.²¹

As a result, the issue of whether or not states can or should grant unauthorized immigrants the benefit of in-state tuition has become a national debate.²² Is it constitutional to use tax revenue to pay for unauthorized immigrants to attend postsecondary school? If so, is it in the best interests of the states to use public funds to provide benefits, such as a reduced postsecondary education, to unauthorized persons?

This Comment examines the current federal and state laws concerning in-state tuition and unauthorized students, and discusses the legal, economic, and policy concerns surrounding this issue. First, this Comment briefly examines the history of immigration, paying particular attention to the nativism inherent in the history of the United States' immigration policies. Next, this Comment examines modern cases and legislation, including a discussion of the IIRIRA and the current federal law concerning in-state tuition benefits for undocumented persons. Then, this Comment explores states' reactions to the federal legislation by examining their current legislation allowing or denying in-state tuition rates to unauthorized students. Next, this Comment discusses the Development, Relief, and Education for Alien Minors Act (DREAM

Taxpayers Should Not Subsidize College for Illegal Aliens, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters6be3 (last updated May 2003) ("States that offer in-state tuition rates to illegal aliens are actively working against the federal government's effort to combat illegal immigration, harming citizens and legal immigrants, and opening themselves up to substantial costs and criminal liability.").

19. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 505, 8 U.S.C. § 1623 (2000); *infra* notes 118-21 and accompanying text.

20. See Romero, *supra* note 6, at 396 ("Should longtime undocumented immigrants have the same opportunity as lawful permanent residents and U.S. citizens to attend state colleges and universities?").

21. See Day v. Sebelius, No. 04-4085-RDR, 2005 WL 1593607, at *1-3 (D. Kan. July 5, 2005); Press Release, Fed'n for Am. Immigration Reform, Kansas Attorney General Agrees With FAIR on Tuition Benefits for Illegal Aliens (July 22, 2004), http://www.fairus.org/site/PageServer?pagename=media_media3c5a (arguing that U.S. citizens have been denied in-state tuition benefits awarded to unauthorized persons and that taxpayers should not have to subsidize the college educations of people who are in the United States illegally).

22. See AM. ASS'N OF STATE COLLS. & UNIV., ACCESS FOR ALL?: DEBATING IN-STATE TUITION FOR UNDOCUMENTED ALIEN STUDENTS, http://www.aascu.org/special_report/access_for_all.htm (last visited Sept. 26, 2005) ("[F]ew issues in the public policy arena have aroused as much debate and passion as those surrounding immigration to this country.").

Act), and proposes that although the DREAM Act is the most effective way to alleviate the confusion surrounding current federal law, it needs to be altered in order to best reflect long-term policy concerns. Finally, this Comment argues that allowing unauthorized students who meet certain criteria to receive in-state tuition makes sense legally, economically, and socially; therefore, Congress should pass the DREAM Act.

I. IMMIGRATION IN THE UNITED STATES: HISTORY, POLICY, AND ECONOMICS

A. *The Roots of Anti-Immigrant Sentiment in the United States*

In the contemporary United States, news about immigration and the issues surrounding unauthorized entry are widespread.²³ However, the problem of unauthorized, or illegal, immigration is a relatively recent concern in U.S. history.²⁴ Early immigration policy was quite lax, characterized by open borders and relatively few naturalization requirements.²⁵ A growing America needed immigrants to help tame the wilderness, develop the countryside, and provide labor for industry.²⁶ During this open-door “Free Period,” from 1820 to 1880, there were no federal immigration laws other than those passed with the intent of facilitating immigration.²⁷

23. See THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP* 172 (4th ed. 1998) (“Immigration legislation and policy have rarely been off the congressional agenda or the front pages of newspapers in the 1980s and 1990s.”); see also, e.g., MICHAEL WELCH, *DETAINED* 129 (2002) (discussing the news coverage of Elian Gonzalez, the unauthorized boy from Cuba who was rescued at sea); Dan Stein, Editorial, *Illegal Aliens Don’t Belong in State’s School Slots*, RICHMOND TIMES-DISPATCH, Nov. 25, 2002, at A9, 2002 WLNR 1442853 (discussing granting in-state tuition to unauthorized students).

24. HENRY BISCHOFF, *IMMIGRATION ISSUES* 265 (Randall M. Miller ed., 2002) (noting that the issue of undocumented immigrants “hardly entered public thinking during the first hundred years in the history of immigration in the United States, because no federal laws restricted immigration”).

25. See MARION T. BENNETT, *AMERICAN IMMIGRATION POLICIES* 3 (1963) (characterizing the Revolutionary period as one of “free immigration”); Dave McCurdy, *The Future of U.S. Immigration Law*, 20 J. LEGIS. 3, 4 (1994) (noting the 1790 immigration act by Congress only required a two-year residency period and a renunciation of any other national loyalty).

26. See BENNETT, *supra* note 25, at 3; WELCH, *supra* note 23, at 60-61 (“[I]n 1864, when the first immigration office was established, the federal government encouraged immigration as way [sic] to populate America’s vast frontier and to provide labor for an expanding industrialized society.”).

27. BENNETT, *supra* note 25, at 15.

As the United States became more populous, however, immigration policy changed, and began to focus on limiting immigration.²⁸ The first legislative restriction on immigration, the infamous Chinese Exclusion Act of 1882,²⁹ attempted to halt the influx of all Chinese immigrants.³⁰ This legislation set the tone for the following half-century, when many Americans viewed incoming immigrants as “biologically and inherently inferior.”³¹

In the years prior to World War I, a growing mistrust of foreigners led to the passage of the Immigration Act of 1917 (1917 Act) aimed at restricting immigration.³² The 1917 Act denied admission to certain classes of undesirable immigrants.³³ Following World War I, the Immigration Act of 1924 (1924 Act)³⁴ went even further, creating a quota system by capping the number of immigrants based on nationality.³⁵ The nativist goal of this legislation was to preserve the “racial and ethnic” composition of the United States.³⁶

28. See WELCH, *supra* note 23, at 61-62 (indicating a strong correlation between waves of immigration and increased nativist backlash, leading to greater limits on immigration).

29. 8 U.S.C. §§ 261-297 (1940) (repealed 1943); see also ALEINIKOFF ET AL., *supra* note 23, at 158 (condemning the Chinese Exclusion Act as the “first racist, restrictionist immigration law” in the United States); BENNETT, *supra* note 25, at 16-17.

30. See ROGER DANIELS, *GUARDING THE GOLDEN DOOR* 3 (2004) (concluding that the Chinese Exclusion Act “marked the moment when the golden doorway of admission to the United States began to narrow”); WELCH, *supra* note 23, at 61 (explaining that the Chinese Exclusion Act “halt[ed] immigration from China and even stripp[ed] Chinese Americans of their U.S. citizenship”); McCurdy, *supra* note 25, at 4 (noting that the Chinese Exclusion Act “sought to restrain the alleged torrent of Chinese immigrants that had begun with the California Gold Rush in 1848”).

31. McCurdy, *supra* note 25, at 4-5. Academics endorsed the belief that immigrants were “inferior” by teaching that some races would never become “100 percent American.” *Id.* at 5.

32. WELCH, *supra* note 23, at 61.

33. *Id.* As Welch explained:

In years leading up to World War I, mistrust of foreigners, especially those suspected of being political dissidents, influenced the passage of the Immigration Act of 1917. . . . The 1917 law . . . established various classes of undesirable immigrants who would be denied admission to the United States, including illiterates, vagrants, alcoholics, the mentally ill, and those perceived as being immoral.

Id.

34. The Immigration Act of 1924 was also called the National Origins Act. *Id.* at 61-62.

35. See McCurdy, *supra* note 25, at 5 (noting that there was a ceiling of 150,000 European immigrants and that no Japanese immigrants were allowed).

36. *Id.*

B. The Shifting Attitudes Toward Immigration

I. Authorized Entry

After World War II and the Korean War, a growing U.S. economy lured immigrants to come to the United States for work.³⁷ Furthermore, the political and social events of the 1960s were driving forces toward a liberalization of immigration policy.³⁸ In 1965, in the midst of the civil rights movement, Congress replaced the quota system of the 1924 Act with the Immigration and Nationality Act Amendments of 1965.³⁹ These amendments abolished the quota system, placed a ceiling on immigration from the Western hemisphere, and established Eastern Hemisphere preferences for close family members and those with special occupational skills.⁴⁰ Even with these ceilings, however, the immigrant populations from Asia, Mexico, and Latin America continued to increase.⁴¹

Further immigration reform came when Congress passed the Immigration Reform and Control Act of 1986 (IRCA),⁴² a “multi-pronged attack on undocumented migration.”⁴³ Congress recognized that legal immigration benefited the United States,⁴⁴ but wanted to discourage undocumented migration,⁴⁵ especially in a time of economic

37. WELCH, *supra* note 23, at 63.

38. See ALEINIKOFF ET AL., *supra* note 23, at 168 (“By the mid-1960s, Congress was ready for proposals to liberalize immigration policy, particularly after the assassination of President Kennedy and the Lyndon Johnson presidential landslide of 1964.”).

39. Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.); see also ALEINIKOFF ET AL., *supra* note 23, at 168-69; McCurdy, *supra* note 25, at 5 (noting that the quota policies had been in place for nearly 100 years when the 1965 Act finally reversed them).

40. See ALEINIKOFF ET AL., *supra* note 23, at 168-69 (“No longer would one nationality be given a larger quota than another in the Eastern Hemisphere. Preference would be given to reuniting families and to bringing those who had certain desirable or needed abilities.”). The new amendments “replaced nationality and ethnic considerations with a system concerned with the reunification of families, skilled immigrants, and the needs of refugees.” WELCH, *supra* note 23, at 63. The 1965 legislation “eased the procedures for foreign-born family members to enter the country and reduced the pro-European racial bias of the immigration law” McCurdy, *supra* note 25, at 5. A few years later, in 1978, “individual hemisphere ceilings gave way to a worldwide limit of 290,000” *Id.*

41. Alfred, *supra* note 7, at 621-22.

42. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

43. ALEINIKOFF ET AL., *supra* note 23, at 172.

44. McCurdy, *supra* note 25, at 5-6 (noting that the Select Commission on Immigration and Refugee Policy, which Congress established in 1978 recognized the benefits of immigration for the country and proposed the policy behind the IRCA).

45. H.R. REP. NO. 99-682, pt. 1, at 45-46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650. The House report emphasized that the IRCA was an attempt to halt unauthorized entry into the United States. *Id.* at 46 (“While there is no doubt that many who enter

recession.⁴⁶ The IRCA, therefore, attempted to liberalize immigration for legal immigrants⁴⁷ and normalize the status of long-term unauthorized persons,⁴⁸ while creating harsher penalties for newly-arriving unauthorized persons.⁴⁹

2. Unauthorized Entry

Despite IRCA's attempt to close the door,⁵⁰ unauthorized entry continued to rise.⁵¹ In the early and mid-1990s, the public increasingly

illegally do so for the best of motives—to seek a better life for themselves and their families—immigration must proceed in a legal, orderly and regulated fashion. As a sovereign nation, we must secure our borders.”)

46. WELCH, *supra* note 23, at 63 (referring to the recession of the early 1980s, shortly before the Act passed).

47. Paul Brickner & Meghan Hanson, *The American Dreamers: Racial Prejudices and Discrimination as Seen Through the History of American Immigration Law*, 26 T. JEFFERSON L. REV. 203, 228 (2004).

48. Eric R. Kingson, *Foreword* to HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED, at xv, xv (2001); *see also* WELCH, *supra* note 23, at 63 (arguing that lawmakers were moved in the “spirit of humane legislation” to grant amnesty to the three million unauthorized people who had been living in the United States since 1982); Nicole Jacoby, Note, *America's De Facto Guest Workers: Lessons from Germany's Gastarbeiter for U.S. Immigration Reform*, 27 FORDHAM INT'L L.J. 1569, 1623 (2004) (noting that the IRCA granted amnesty to three million undocumented immigrants).

49. Brickner & Hanson, *supra* note 47, at 228. The major features of the IRCA were (1) imposition of penalties on employers who hire undocumented aliens (“employer sanctions”); (2) legalization of long-term undocumented aliens; (3) legalization of aliens who had performed agricultural labor in the United States (“Special Agriculture Workers” or “SAWs”); and (4) protection of U.S. citizens and permanent resident aliens from employment discrimination occasioned by employer sanctions.

ALEINIKOFF ET AL., *supra* note 23, at 172; *see also* Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J.L. & POL'Y 79, 86 (2004).

50. *See* HAYES, *supra* note 48, at 31 (“[I]mmigration reform in the 1970s and 1980s [focused] on slamming the back door shut [and] cutting off the flow of undocumented immigrants. . .”).

51. *See* ALEINIKOFF ET AL., *supra* note 23, at 622 (“If IRCA was intended to end undocumented migration in our time, it has obviously failed.”); Kiera LoBreglio, Note, *The Border Security and Immigration Improvement Act: A Modern Solution to a Historic Problem?*, 78 ST. JOHN'S L. REV. 933, 949 (2004) (“In 1992, . . . the Commission on Agricultural Workers reported that, despite the IRCA amendments to the INA, illegal immigration had continued to rise. . .”). A finding by the Committee on Government Operations partially explains the failure of the IRCA to prevent or stall the arrival of unauthorized persons:

The committee finds that the enforcement provisions of IRCA have never been fully implemented since funding for Border Patrol has never achieved levels authorized in this act. . . . INS has been severely handicapped in its ability to control illegal immigration due to the lack of resources provided to this agency by the Federal Government.

H.R. REP. NO. 103-645, at 3-4 (1994).

viewed immigrants “as a growing threat to American society, its culture, and the economy.”⁵² Unauthorized persons in particular were targeted as wrongfully taking jobs and social benefits.⁵³ Although many debated the cost of public services for unauthorized immigrants,⁵⁴ there was no dispute that states ultimately bore the resulting financial burdens,⁵⁵ as they were required to pay for education,⁵⁶ incarceration,⁵⁷ and emergency

52. WELCH, *supra* note 23, at 29.

53. *See id.* (“Illegal Immigrants in particular were viewed as taking valuable jobs from struggling U.S. workers and consuming tax dollars for social services, health care, education, and welfare.”). Americans have always feared that immigrants “threaten their jobs, security, and safety.” Sara R. Bollerup, Comment, *America’s Scapegoats: The Undocumented Worker and Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 38 NEW ENG. L. REV. 1009, 1011 (2004).

54. BISCHOFF, *supra* note 24, at 269. Discussing the dispute surrounding the cost for services, Bischoff notes that

[s]ome of those who want to clamp down on illegal immigration believe that these newcomers work heavily in an underground cash economy and thus avoid paying income tax and social security tax, but they use public health services, send their children to public schools, and, through fraudulent documents, get on welfare roles. Such critics add that, when illegal immigrants take jobs away from citizens, they contribute to their going on welfare. . . .

On the other side are those who have maintained that the undocumented pay sales taxes, through rent contribute to property taxes, and some, who use false documents, find that they are required to pay income and social security taxes. They further argue that these persons pay more taxes than the cost of services for them, since the undocumented tend to avoid government agencies, few are on welfare, and most do not have children living here.

Id. at 269-70 (footnote omitted).

55. *See* Timothy W. Hagedorn, *Illegal Immigration and the State Predicament: Has the Federal Government Commandeered State Legislative Processes?*, 8 MD. J. CONTEMP. LEGAL ISSUES 271, 271 (1997) (noting that states, in particular, bear the brunt of the costs associated with unauthorized persons); Salsbury, *supra* note 18, at 463 (“[T]he power to regulate immigration is ‘unquestionably exclusively a federal power.’ Yet, once undocumented individuals are within the U.S. borders, the financial burden of providing for them falls largely on the states.” (footnote omitted) (quoting *DeCanas v. Bica*, 424 U.S. 351, 354 (1974))). *But see* McCurdy, *supra* note 25, at 3 (noting that studies have shown that the long-term economic and sociological effects of immigration are beneficial); Stevenson, *supra* note 15, at 552 (noting that the agricultural sector has especially benefited from an unauthorized worker population because unauthorized persons provide a cheap source of labor for American industries). The states that are the most affected by the costs associated with unauthorized persons are Florida, California, New Jersey, New York, Illinois, and Texas. Hagedorn, *supra*, at 271.

56. *See Plyler v. Doe*, 457 U.S. 202, 230 (1982).

57. *See* H.R. REP. NO. 103-645, at 4 (1994) (“[A] significant and growing number of criminal aliens are incarcerated in local and State correctional facilities. . . . [This] places a substantial [financial] burden on certain local and State governments as they attempt to deal with the overall crime problems plaguing communities.”); Jill Keblawi, Comment, *Immigration Arrests by Local Police: Inherent Authority or Inherently Preempted?*, 53 CATH. U. L. REV. 817, 817 (2004) (noting that recently, because of a lack of federal

medical services.⁵⁸ Political pressure in the early 1990s, coupled with the states' economic burdens,⁵⁹ led states to initiate legislation aimed at restricting benefits for both legal and unauthorized persons.⁶⁰

The passage of California's Proposition 187 in 1994 is one example of a state's attempt to regulate benefits conferred to unauthorized persons.⁶¹ Nicknamed the "Save Our State" (SOS) initiative,⁶² Proposition 187 barred unauthorized immigrants from receiving virtually all public benefits, including education, nonemergency health care, and social services.⁶³ A federal judge declared that new federal legislation preempted most of Proposition 187's provisions,⁶⁴ and ultimately a court-

immigration agents, the Bush Administration has encouraged local law enforcement officers to aid in immigration arrests).

58. Proposition 187, § 6 (Cal. Nov 8, 1994), 1994 CAL LEGIS SERV PROP 187 (Westlaw).

59. See H.R. REP. NO. 103-645, at 1-2 ("Budgetary shortfalls combined with a growing demand for health, welfare, education, public safety, and law enforcement services has resulted in a financial strain on local and State governments.").

60. See WELCH, *supra* note 23, at 29 ("In pandering to public anxiety over immigration, politicians in key states initiated legislation adversely affected [sic] immigrants.").

61. See Proposition 187, § 6 (Cal. Nov 8, 1994), 1994 CAL LEGIS SERV PROP 187 (Westlaw); JOEL S. FETZER, PUBLIC ATTITUDES TOWARD IMMIGRATION IN THE UNITED STATES, FRANCE, AND GERMANY 95 (2000) (concluding that nativism won when "59% of California voters approved Proposition 187"); Emilie Cooper, Note, *Embedded Immigrant Exceptionalism: An Examination of California's Proposition 187, The 1996 Welfare Reforms and the Anti-Immigrant Sentiment Expressed Therein*, 18 GEO. IMMIGR. L.J. 345, 348 (2004) ("[P]oliticians touted [Proposition 187] as a way to save California from a variety of ills including 'economic and social bankruptcy.'" (quoting CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION NOVEMBER 8, 1994, at 50)).

62. ALEINIKOFF ET AL., *supra* note 23, at 663; Cooper, *supra* note 61, at 348.

63. Proposition 187, § 6 (Cal. Nov 8, 1994), 1994 CAL LEGIS SERV PROP 187 (Westlaw). Proposition 187 prohibited illegal immigrant children from receiving child welfare or foster care services, ended illegal aliens' access to nonemergency public health services, and excluded unauthorized students from publicly-funded, postsecondary schools. See *id.*; Cooper, *supra* note 61, at 346-47. Critics of Proposition 187 noted that:

the "campaign was tuned to a range of Anglo anxieties and fears: a declining standard of living, and quality of life; a faltering and changing economy; a sense of being overwhelmed by a range of cultures and peoples of color, and concern for dilution of American values, institutions, and ways of life."

WELCH, *supra* note 23, at 14 (quoting A. Mata, *Stereotyping by Politicians: Immigrant Bashing and Nativist Political Movements*, in IMAGES OF COLOR; IMAGES OF CRIME 151 (R. Mann & M. Zatz eds., 1998)).

64. League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997); see also WELCH, *supra* note 23, at 14 ("California federal Judge Mariana Pfalzer ruled that Proposition 187 was unconstitutional . . .").

Earlier, in 1995, a California district court held that Congress had not acted to preempt some of Proposition 187's provisions; therefore, the California governor and state actors were not barred from enforcing them. See League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995); ALEINIKOFF ET AL., *supra* note 23, at

mediated settlement abolished much of what remained of Proposition 187.⁶⁵

In 1994, in the wake of Proposition 187, six of the seven states most impacted by unauthorized persons filed suit against the federal government, demanding federal funds for the costs incurred as a result of providing services for unauthorized persons.⁶⁶ These states argued that the costs of an unauthorized population resulted from the government's failure to enforce immigration laws.⁶⁷ The states were not successful in their attempt at a judicial remedy,⁶⁸ and were forced to deal with the costs of unauthorized persons in any way they could.⁶⁹

675. However, with the welfare and immigration legislation of 1996, Congress explicitly regulated the fields of state and federal benefits. *Id.* Therefore, in the 1997 decision, Judge Pfaelzer held that California was preempted from initiating many of the provisions of Proposition 187:

After the Court's November 20, 1995 Opinion, Congress enacted the PRA, a comprehensive statutory scheme regulating alien eligibility for public benefits. The PRA states that it is the immigration policy of the United States to restrict alien access to substantially all public benefits. Further, the PRA ousts state power to legislate in the area of public benefits for aliens. When President Clinton signed the PRA, he effectively ended any further debate about what the states could do in this field. As the Court pointed out in its prior Opinion, California is powerless to enact its own legislative scheme to regulate immigration. It is likewise powerless to enact its own legislative scheme to regulate alien access to public benefits. It can do what the PRA permits, and nothing more. Federal power in these areas was always exclusive and the PRA only serves to reinforce the Court's prior conclusion that substantially all of the provisions of Proposition 187 are preempted under *De Canas v. Bica*.

Wilson, 997 F. Supp. at 1261; *see also* FETZER, *supra* note 61, at 95.

65. Alfred, *supra* note 7, at 626.

66. *E.g.*, *California v. United States*, 104 F.3d 1086, 1089 (9th Cir. 1997); *New Jersey v. United States*, 91 F.3d 463, 465-66 (3d Cir. 1996) (noting similar cases pending in Texas, Arizona, New York, and Florida); *see also* Hagedorn, *supra* note 55, at 272 (proffering that these states had "recogniz[ed] their inability to control the influx of illegal immigrants").

67. *See* Hagedorn, *supra* note 55, at 272-73 ("Essentially, those states argued that the federal government's failure to enforce immigration laws resulted in the affected states incurring disproportionate costs in educating, incarcerating, and providing emergency medical services to undocumented aliens."). States became "increasingly frustrated by the inability of the INS to stem the flow of illegal immigration." H.R. REP. NO. 103-645, at 2 (1994).

68. *See* Hagedorn, *supra* note 55, at 272 ("The district courts for Arizona, California, Florida, New Jersey, New York, and Texas dismissed the suits. The appellate courts for New Jersey, New York and Florida affirmed those dismissals. Finally, the Supreme Court denied certiorari to hear Florida's claim for federal reimbursement." (footnote omitted)).

69. *See* Proposition 187, §§ 5(b), 6(b) (Cal. Nov. 8, 1994), 1994 CAL LEGIS SERV PROP 187 (Westlaw) (denying welfare services to children and prohibiting nonemergency health care services to unauthorized persons); *Plyler v. Doe*, 457 U.S. 202, 205 (1982) (deciding a controversy over a Texas law restricting funding for the education of unauthorized students); *De Canas v. Bica*, 424 U.S. 351, 352-53 (1976) (deciding a

C. Unauthorized Immigrants' Right to Free Public Elementary and Secondary Education

The focus of much state and local regulation has been on education, an area that greatly impacts economics⁷⁰ and assimilation into American society.⁷¹ The debate over unauthorized persons and their educational rights finds its roots, in large part, in the landmark 1982 Supreme Court decision *Plyler v. Doe*.⁷² *Plyler* held that a state cannot deny undocumented school-age children a free public primary or secondary education.⁷³

In *Plyler*, the Texas Legislature sought to deny undocumented children a free public education by requiring that public funding not be used for the education of undocumented students.⁷⁴ The Court held that the law violated the Equal Protection Clause of the Fourteenth Amendment.⁷⁵ The Court also noted that the federal government has the exclusive power to classify aliens,⁷⁶ and states have authority to act only when "such action mirrors federal objectives and furthers a legitimate state goal."⁷⁷ Therefore, because conserving state educational resources did not mirror congressional objectives, the state could not enforce the law.⁷⁸

Justice Brennan's majority opinion further noted that the Texas law "promot[ed] the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."⁷⁹ The Court stressed that education, while not a fundamental right guaranteed by the Constitution,⁸⁰ provides the tools for "maintaining the fabric of our

controversy over a state labor law that attempted to regulate employment of unauthorized persons).

70. See McCurdy, *supra* note 25, at 8 (noting a study that showed eighty-five to ninety-three percent of costs for unauthorized immigrants are channeled to education).

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

72. 457 U.S. 202 (1982).

73. *Id.* at 230.

74. *Id.* at 205.

75. See *id.* at 224-26. "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Id.* at 210.

76. *Id.* at 225.

77. *Id.*

78. *Id.* at 226 (noting that although states may sometimes have authority to act with respect to unauthorized persons, "in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary education").

79. *Id.* at 230.

80. *Id.* at 221.

society”⁸¹ by instilling cultural values, promoting literacy, and aiding in the overall psychological well-being of the child.⁸²

Furthermore, the Court noted that the Texas law targeted the children of illegal entrants.⁸³ The Court distinguished these children, who were young and had no choice of whether or not to come to the United States, from their parents who knowingly made the decision to come here.⁸⁴ It did not “comport with fundamental concepts of justice” to punish the parents by acting against their children.⁸⁵

Finally, the Court found unpersuasive Texas’s argument that providing a free education would encourage immigrants to come into the country illegally, noting that employment, not education, was the catalyst for illegal entry.⁸⁶

D. Unauthorized Students’ Right to Public Postsecondary Education

Plyler was crucial in providing and guarding the right of unauthorized children to receive a public primary and secondary education.⁸⁷ But *Plyler*’s holding is limited; it does not provide any guidance or protection for these students after they graduate from high school.⁸⁸ Each year, an

81. *Id.* at 221-22.

82. *See id.* at 222-23 (“By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”). The Court invoked the language of *Brown v. Board of Education*:

“[Education] is the very foundation of good citizenship. . . . it is a principle 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 made available to all on equal terms.”

Id. at 223 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

83. *See id.* at 220.

84. *Id.* (distinguishing the parents from their children, the Court noted that “those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated.”).

85. *Id.*

86. *Id.* at 228 (“The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education.”).

87. *See id.* at 230. Recent numbers illustrate the positive impact of the *Plyler* decision; in 2000, U.S. elementary and secondary schools enrolled 607,000 unauthorized students who otherwise would not have had an opportunity for education. *See* AM. ASS’N OF STATE COLLS. & UNIVS., *supra* note 22.

88. *See* Olivas, *supra* note 9, at 444. While the Supreme Court did provide guidance concerning postsecondary tuition benefits for nonimmigrant aliens (i.e., G-4 aliens), *see*

estimated 65,000 unauthorized high school graduates do not continue on to college.⁸⁹ In addition, unauthorized families, headed by parents who usually work low-paying jobs, are often too poor to afford a college education.⁹⁰ Furthermore, as these students are ineligible for federal grants or loans⁹¹ and are not permitted to legally work,⁹² they cannot afford the cost of a college education.⁹³ Many undocumented students, aware that they have no opportunities after graduation, drop out before the end of high school.⁹⁴ Recognizing this issue, states and the federal government have addressed unauthorized students' right to postsecondary education benefits.⁹⁵

1. IIRIRA

The IIRIRA deals, in part, with postsecondary education benefits for unauthorized students.⁹⁶ Created amidst the worsening economy of the early 1990s and the resulting increase in support for restricting immigration,⁹⁷ the IIRIRA overtly limits the rights of unauthorized persons.⁹⁸ Section 505 of the IIRIRA specifically addresses

Toll v. Moreno, 458 U.S. 1, 17 (1982), it has not addressed the issue of postsecondary tuition benefits for unauthorized immigrants, *see* Olivas, *supra* note 9, at 444.

89. Freedman, *supra* note 1.

90. *See* Salsbury, *supra* note 18, at 460 (discussing one unauthorized family that cannot afford to pay the nonresident tuition rate at their state's college); Tiana Murillo, Policy Assistant, Nat'l Immigration Law Ctr., Statement at the National Council of La Raza 2002 Annual Conference (2002), in 9 TEX. HISP. J.L. & POL'Y 7, 10 (2003) (noting that undocumented students are already "disproportionately poor").

91. *See supra* note 4.

92. Immigration and Nationality Act (INA) § 274(a), 8 U.S.C. § 1324a(a)(1) (2000).

93. *See* Romero, *supra* note 6, at 396 (noting that undocumented status and poverty "work in tandem to preclude many undocumented children . . . from pursuing a college degree").

94. *See* Tuition and Undocumented Immigrants, <http://www.ncsl.org/programs/educ/undocimmigrant.htm> (last visited Sept. 7, 2005).

95. *See* discussion *infra* Parts II.D.1, II.D.2.b, II.D.3.

96. *See* 8 U.S.C. § 1623.

97. *See* WELCH, *supra* note 23, at 64 ("[M]oral panic over immigrants emerged in the early and mid-1990s, pressuring the public and political institutions to reevaluate immigration policies."). The 1996 laws "were influenced less by sound policymaking and more by exaggerated political rhetoric that issued warnings that foreigners pose a threat to the American social and economic order." *Id.* at 5; *see also* Alfred, *supra* note 7, at 619 (noting that anti-immigrant sentiment increases "during times of economic hardship, political turmoil, or war"); Jacoby, *supra* note 48, at 1624 ("By 1994, popular support for restricting immigration intensified, as voters increasingly linked their negative economic experiences to immigration.").

98. *See* Olivas, *supra* note 9, at 449 (noting that the IIRIRA dramatically affected federal benefits for unauthorized persons). In the mid-1990s, the negative sentiment specifically targeted unauthorized persons: "Fueled by moral panic, the campaign against immigrants beginning in the early 1990s set out to reduce both legal and illegal

postsecondary education benefits, limiting unauthorized students' eligibility for preferential treatment:

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) 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.⁹⁹

At first glance, the IIRIRA appears to preempt states from granting any postsecondary education benefit to unauthorized persons.¹⁰⁰ However, the language is not clear.¹⁰¹ The confusion surrounding this provision of the IIRIRA is apparent from the states' varied reactions to it.¹⁰²

2. *States' Reactions to the IIRIRA*

a. *States Denying In-State Tuition*

Some states have interpreted the IIRIRA as prohibiting them from providing in-state tuition, a postsecondary education benefit, to unauthorized students unless all U.S. citizens also are eligible for in-state tuition rates.¹⁰³

immigration; however, by the mid-1990s, the economy improved and pro-immigrant groups garnered sufficient support to protect the interests of legal immigrants while redirecting public hostility to illegal immigrants." WELCH, *supra* note 23, at 56. Also enacted in 1996, and reflecting the negative public sentiment towards the immigrant population, was the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at scattered sections of 7, 8, 21, 25, and 42 U.S.C.). This act "restricted the access of permanent resident aliens to most means-tested benefit programs and affirmed the exclusion of undocumented migrants from such programs." ALEINIKOFF ET AL., *supra* note 23, at 174.

99. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 505, 8 U.S.C. § 1623.

100. Olivas, *supra* note 9, at 452 ("[This legislation] looked bleak for those who advocated for undocumented college students. By then, Texas and California, the two largest immigrant-receiver states, had banned these students from in-state tuition classification as residents, and federal legislation was in place that appeared to preempt state efforts to enact such a benefit.").

101. *See id.* (questioning "whatever these [IIRIRA] provisions meant in practice").

102. *See infra* notes 103-18 and accompanying text.

103. *See Galassi, supra* note 10, at 82-83 ("Since the promulgation of this legislation, the vast majority of states have come to believe that their public universities are wholly unable to offer in-state tuition rates to undocumented immigrants."). Schools would go bankrupt if they extended in-state tuition to everyone; therefore, this interpretation of the IIRIRA precludes schools from offering in-state tuition rates to undocumented students. Murillo, *supra* note 90, at 10.

States have considered legislation specifically prohibiting undocumented students from gaining resident tuition status for purposes of postsecondary education benefits.¹⁰⁴ Other states have rejected legislation providing for in-state tuition rates, basing their decisions on the IIRIRA.¹⁰⁵

b. States Granting In-State Tuition

Despite the IIRIRA's apparent prohibitions, nine states have passed legislation that grants unauthorized students eligibility for in-state tuition: California,¹⁰⁶ Illinois,¹⁰⁷ Kansas,¹⁰⁸ New York,¹⁰⁹ Oklahoma,¹¹⁰ Texas,¹¹¹ Utah,¹¹² Washington,¹¹³ and most recently, New Mexico.¹¹⁴

104. See Olivas, *supra* note 9, at 456. Alaska and Mississippi in particular have considered legislation denying educational benefits. See *id.* The Alaska bill specifically would require a student to be a "citizen or legal alien" of the United States to receive in-state tuition. H.B. 39, 23d Leg., 1st Sess. (Alaska 2003). Arizona has considered a similar law to prohibit in-state tuition grants. See AM. ASS'N OF STATE COLLS. & UNIVS., *supra* note 22. The Virginia legislature had passed a similar law, but Governor Mark Warner vetoed it. See *id.* North Carolina introduced legislation to give in-state tuition; however, after public outcry and angry responses, the proposal died in committee without being voted on. H.B. 1183, 2005-2006 Gen. Ass., Reg. Sess. (N.C. 2005); WRAL.com, In-State Tuition Bill Misses Key N.C. Legislative Deadline, <http://www.wral.com/print/4577833/detail.html> (last visited Oct. 25, 2005).

105. See Hebel, *supra* note 18. Wisconsin governor Scott McCallum vetoed a proposal that would have provided in-state tuition rates to immigrants who had graduated from a Wisconsin high school and lived the state for three years. *Id.* His veto message referred to the IIRIRA, contending that Congress was responsible for changing the eligibility status of undocumented persons. *Id.* In New York, lawyers at the City University of New York (CUNY) initially reversed the school's policy of providing in-state tuition rates to immigrants, basing their decision on the IIRIRA. *Id.* New York has since enacted legislation allowing in-state tuition for unauthorized students. See *infra* note 109.

106. Act of Oct. 12, 2001, ch. 814, 2001 Cal. Adv. Legis. Serv. 814 (Deering) (codified at CAL. EDUC. CODE § 68130.5 (West 2003)), 2001 CAL STAT 814 (LEXIS).

107. Act of July 15, 2004, ch. 110, 2004 Ill. Laws (codified at scattered sections of 110 ILL. COMP. STAT. ANN. (West Supp. 2005)), 2004 IL LEGIS 93-738 (Westlaw).

108. Act of May 20, 2004, ch. 172, 2004 Kan. Sess. Laws 1742 (codified at KAN. STAT. ANN. § 76-731a (West, Westlaw through 2004 Reg. Sess.)).

109. Act of Aug. 6, 2002, ch. 327, § 1, 2002 N.Y. Laws 3155, 3155-56 (codified at N.Y. EDUC. LAW § 355 (McKinney Supp. 2005)).

110. Act of May 12, 2003, ch. 210, 2003 Okla. Sess. Laws 868 (codified at OKLA. STAT. ANN. tit. 70, § 3242 (West 2005)).

111. Act of June 16, 2001, ch. 1392, 2001 Tex. Gen. Laws 3582 (codified at TEX. EDUC. CODE ANN. §§ 54.051(m), .052(j), .0551, .057(a), .060(b) (Vernon Supp. 2004)). The number of students who benefited from this law increased from six to forty-three between the fall of 2001 and the fall of 2003. Krystal De Los Santos, *Texas Colleges Admit Illegal Immigrants*, DAILY TEXAN, Mar. 23, 2004, http://www.dailytexanonline.com/gobal_user_elements/printpage.cfm?storyid=638850.

112. Act of Mar. 26, 2002, ch. 230, 2002 Utah Laws 867 (codified at UTAH CODE ANN. § 53B-8-106 (Supp. 2005)).

Ironically, four of the first five states to pass this legislation had the highest percentage of unauthorized persons,¹¹⁵ states that previously had very strong anti-immigrant sentiments.¹¹⁶ Several other states are considering similar legislation.¹¹⁷

The passage of laws that grant in-state tuition to unauthorized students has created much public outcry.¹¹⁸ Critics contend that these state laws violate both the IIRIRA and the Equal Protection Clause.¹¹⁹ First, critics allege that states are preempted from legislating in this area because the federal government has already legislated on the issue of postsecondary education benefits for unauthorized persons through the IIRIRA.¹²⁰ Second, critics contend that these laws specifically violate Section 505 of the IIRIRA by providing unauthorized persons with a benefit that U.S.

113. Act of Mar. 24, 2004, ch. 128, 2004 Wash. Sess. Laws 448 (codified at WASH. REV. CODE § 28B.15.012 (West Supp. 2005)).

114. Act of Apr. 8, 2005, ch. 348, 2005 N.M. Laws 3807 (codified at N.M. STAT. ANN. § 21-1-1.2 (West, Westlaw through First 2005 Reg. Sess.)).

115. See OFFICE OF IMMIGRATION STATISTICS, *supra* note 3, at 214 (noting that in 2000 “[a]bout 4.5 million of the 7.0 million unauthorized residents” in the United States lived in California, Texas, New York, Illinois, and Florida). With the exception of Florida, the remaining four states have enacted legislation that provides in-state tuition for undocumented immigrants. See *supra* notes 106-14 and accompanying text. Ironically, Texas, the state that fought so hard to deny benefits to unauthorized students in *Plyler*, was the first to enact this legislation. See Salsbury, *supra* note 18, at 473.

116. See Jacoby, *supra* note 48, at 1624-25 (noting that, in the mid-1990s, the “key immigrant-receiving states” of California, Texas, and Florida had the strongest anti-immigrant sentiments).

117. See Financial Aid, *supra* note 16 (identifying the following states with pending legislation that would allow in-state tuition rates for unauthorized persons: Colorado, Connecticut, Florida, Hawaii, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, Oregon, South Carolina, and Tennessee).

118. See, e.g., *Day v. Sebelius*, No. 04-4085-RDR, 2005 WL 1593607, at *1-3 (D. Kan. July 5, 2005). On July 19, 2004, a group of twenty-four U.S. citizens, all state university students and their parents, brought suit in federal court challenging a Kansas statute that allows undocumented students to pay in-state tuition rates at Kansas universities. *Id.* at *1. The suit, the first of its kind, alleged that Kansas’s new legislation violated federal laws such as the IIRIRA, the Equal Protection Clause of the Fourteenth Amendment, and Congress’ power over interstate commerce and foreign affairs. *Id.* at *2-3. On July 5, 2005, the District Court of Kansas held that the students and parents lacked standing under both the Equal Protection Clause and the federal statutes to challenge the statute. *Id.* at *6-12; see also Oscar Avila, *Federal Suit Stirs Tuition Debate*, CHI. TRIB., Aug. 2, 2004, Metro §, at 1; Jan Larson, *What Is the Deal with Tuition Breaks for Illegals?*, AM. DAILY (Phoenix, Ariz.), June 16, 2003, <http://www.americandaily.com/article/3694>.

119. See, e.g., *Day*, 2005 WL 1593607, at *2-3.

120. See *id.*; Galassi, *supra* note 10, at 82-83 (“Such beliefs are bolstered by the plenary power that Congress has [t]o establish a uniform Rule of Naturalization.’ When Congress exercises this power by enacting legislation concerning immigration and aliens, the result ‘is that states are powerless to regulate immigration.’”(alteration in original) (footnotes omitted)).

citizens and legal aliens from other states may not likewise enjoy—namely, in-state tuition rates.¹²¹

Proponents of the state laws granting in-state tuition rates to unauthorized persons argue that the laws do not violate the IIRIRA.¹²² Instead, they side-step the IIRIRA in two ways. First, they contend that the state laws evade the resident classification by basing eligibility for in-state tuition not on residence, but on other criteria such as attendance of an in-state high school, graduation, and intent to seek residency in that state.¹²³ Second, they argue that because these laws have more stringent requirements for an unauthorized student to obtain in-state residency than for a citizen to obtain in-state residency, they arguably do not violate the IIRIRA.¹²⁴

3. Federal Reaction to the IIRIRA

a. Proposed Bills

In addition to the state reactions to the IIRIRA, both the House of Representatives and Senate have proposed bills that would, in some manner, deal with the confusing language of the IIRIRA and the issue of unauthorized students receiving in-state tuition rates.¹²⁵ Receiving the most support is the DREAM Act.¹²⁶ This bipartisan act, proposed in July

121. See, e.g., Day, 2005 WL 1593607, at *2.

122. See, e.g., Salsbury, *supra* note 18, at 476-80.

123. See *id.* at 478. California, Utah, New York, and Oklahoma do not classify these students as residents, but instead exempt them from paying nonresident tuition by basing their eligibility on high school attendance and intent to become a resident. *Id.*

124. *Id.* at 479-80. The word “unless” in the statute indicates that unauthorized immigrants may receive benefits as long as citizens can also receive these same benefits. *Id.* But because the requirements for unauthorized aliens to receive in-state tuition are actually more extensive than the requirements for citizens of other states to receive in-state tuition rates, it is argued that the legislation does not confer preferential benefits on unauthorized aliens. See *id.* at 480.

125. See DREAM Act, S. 1545, 108th Cong. (as reported by S. Comm. on the Judiciary, Nov. 25, 2003); Student Adjustment Act of 2003, H.R. 1684, 108th Cong. (2003). Neither the DREAM Act nor the Student Adjustment Act were enacted into law in the 108th Congress. *Bipartisan DREAM/Student Adjustment Act and AgJobs Legislation Await Reintroduction*, IMMIGRANTS ACTION ALERT (Am. Immigration Lawyers Ass’n, Wash., D.C.), Jan., 2005, at 3, 3, <http://www.aila.org/content/default.aspx?docid=12311> [hereinafter *Legislation Await Reintroduction*]. These bills will likely be reintroduced in the 109th Congress. *Id.*

126. See Patricia Medige, *Perspectives on the Bush Administration’s New Immigrant Guestworker Proposal: Immigrant Labor Issues*, 32 DENV. J. INT’L. L. & POL’Y 735, 737 (2004) (discussing Congress’s and the public’s widespread support for the DREAM Act); Freedman, *supra* note 1 (highlighting that the DREAM Act enjoys broad bipartisan support).

2003 by Senators Orrin Hatch (R-UT) and Richard Durbin (D-IL), would change current law regarding undocumented alien minors.¹²⁷

b. The DREAM Act

The DREAM Act attempts to allow states to determine residency, and endeavors to change the status of unauthorized students who have been in the United States for a number of years.¹²⁸ As a means of accomplishing these goals, the DREAM Act would change current law in two ways. First, the DREAM Act would repeal Section 505 of the IIRIRA, thus giving states the discretion to determine residency requirements for postsecondary education benefits for unauthorized persons.¹²⁹ Second, the DREAM Act would allow eligible undocumented children to become conditional lawful permanent residents for six years.¹³⁰

To qualify for conditional permanent residence, the student would have to meet certain criteria: they must have entered the United States prior to age sixteen;¹³¹ they must have been in the United States continually for the five years immediately preceding the enactment of the DREAM Act;¹³² they must be of good moral character;¹³³ they must be admitted to an institution of higher education or earn a high school diploma or GED certificate,¹³⁴ and they must never have been under an

127. *Dream Act Reintroduced in Senate*, *supra* note 3. The DREAM Act was introduced and referred to the Senate Committee on the Judiciary on July 31, 2003. S. 1545. The last action on the DREAM Act in the 108th Congress was on February 9, 2004 when Senator Hatch filed a written report. S. REP. NO. 108-224 (2004). Although the 108th Congress did not pass the DREAM Act, the 109th Congress will likely revisit the issue. See *Legislation Await Reintroduction*, *supra* note 125, at 3.

128. See S. 1545. The DREAM Act was introduced with the recognition that “America’s immigration policy must . . . be sufficiently flexible so that our firm stance against illegal immigration does not undermine our other national interests.” S. REP. NO. 108-224, at 2. The Student Adjustment Act (SAA) also addresses the concerns of unauthorized students and postsecondary education benefits. See H.R. 1684.

129. See S. 1545, § 3. The SAA would also repeal outright IIRIRA § 505. H.R. 1684., § 2.

130. S. 1545, § 5(a)(1). The SAA, in contrast, avoids the “conditional” label and allows students to become permanent legal residents, provided they meet certain criteria. H.R. 1684, § 3(a)(3)(A).

131. S. 1545, § 4(a)(1)(A).

132. *Id.*

133. *Id.* § 4(a)(1)(B).

134. *Id.* § 4(a)(1)(D).

order of exclusion, deportation, or removal.¹³⁵ If a student has met these criteria he or she could gain conditional permanent resident status.¹³⁶

During the six years of conditional permanent residency, the student would be protected from removal and able to obtain work authorization.¹³⁷ This status would also make the student eligible for federal student loan programs and other federal benefits.¹³⁸ However, the student would not be eligible for any funds that did not require repayment.¹³⁹

After six years as a conditional permanent resident, the student could petition to have the “conditional” label removed and obtain the right to stay permanently in the United States.¹⁴⁰ To remove the conditional label, students would have to meet the following requirements: maintaining “good moral character”;¹⁴¹ avoiding grounds of inadmissibility and deportability;¹⁴² continuing to live in the United States;¹⁴³ and either serving in the military, obtaining an associate’s degree, or completing two years of a bachelor’s or graduate degree program.¹⁴⁴ If a person has met these criteria, the time spent in this conditional status would count toward the requirements for naturalization.¹⁴⁵

The DREAM Act would only be applicable to those students who meet the physical presence requirements at *the time of the enactment*.¹⁴⁶ Therefore, anyone who is older than sixteen when they enter the United

135. See *id.* § 4(a)(1)(E) (making an exception where the “alien has remained in the United States under color of law or received the order [of exclusion, deportation, or removal] before attaining the age of 16 years”).

136. *Id.* § 5(a)(1).

137. *Id.* § 4(a)(1); see also 8 U.S.C. § 1324a(a)(1), (h)(3) (2000). In addition, the student would be able to work and drive, but “[he] would not be able to travel abroad for lengthy periods.” *DREAM Act Reintroduced in Senate, supra* note 3.

138. S. 1545, § 12; see also S. REP. NO. 108-224, at 7 (2004).

139. See S. 1545, § 12. Pell grants and scholarships are therefore not available to these conditional permanent resident students. S. REP. NO. 108-224, at 6. In contrast, the SAA, which does not make the permanent resident status “conditional,” allows students who meet the requirements to “obtain Pell grants and student loans on the same basis as other students.” Immigration.com, DREAM Act/Student Adjustment Act of 2003 (Aug. 12, 2003), http://www.immigration.com/improving_immigration/dreamact_details.html.

140. S. 1545, § 5(c)(3).

141. *Id.* § 5(d)(1)(A).

142. *Id.* § 5(d)(1)(B).

143. *Id.* § 5(d)(1)(C).

144. *Id.* § 5(d)(1)(D).

145. See *id.* § 5(e).

146. *Id.* § 4(a)(1)(A) (specifying that a student can be given conditional permanent resident status if the student has been continuously present in the United States for at least five years “immediately preceding the date of enactment of this Act”).

States, or “who has been in the United States less than five years at the time of enactment,” is not eligible to benefit from the DREAM Act.¹⁴⁷ This would provide little incentive for persons to enter the United States illegally in the future, as they would not meet the requirement of physical presence at the time of enactment.¹⁴⁸

E. The Debate—Arguments For and Against Granting Benefits to Unauthorized Persons

The rising population of unauthorized immigrants residing in the United States,¹⁴⁹ in addition to post-September 11, 2001 anti-immigrant sentiment, has aroused tense feelings concerning immigration policy.¹⁵⁰ This anti-immigrant sentiment has especially fueled the debate over unauthorized persons and their right to receive federal and state benefits.¹⁵¹ The proposed federal bills, much like the laws that states have passed, face harsh criticism.¹⁵²

1. Argument One: Granting Public Benefits Rewards Illegal Behavior and Encourages More Unauthorized Entry

Critics argue that unauthorized persons are in this country illegally and therefore are criminals who are unworthy of receiving federal or state benefits.¹⁵³ Additionally, critics contend that more people will be encouraged to enter the United States illegally if there are benefits

147. S. REP. NO. 108-224, at 2 (2004).

148. *See id.* (noting that no one who enters in the future will be able to benefit from the DREAM Act).

149. OFFICE OF IMMIGRATION STATISTICS, *supra* note 3, at 213 (stating that the total unauthorized resident population in January 2000 was 7.0 million, up from 3.5 million in January 1990).

150. *See* WELCH, *supra* note 23, at 203 (“[T]he tragic events of September 11 have had a tremendous impact on American society, and as political leaders strive to balance national security with civil liberties, immigrants’ rights will likely remain in flux.”); Jacoby, *supra* note 48, at 1640 (“[T]he terrorist attacks of September 11, 2001 had an immediate negative impact on public opinion regarding immigrants.”); Freedman, *supra* note 1 (noting the “overall shift in federal immigration policy toward border control and internal surveillance since Sept. 11 attacks”).

151. STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, THE HIGH COST OF CHEAP LABOR: ILLEGAL IMMIGRATION AND THE FEDERAL BUDGET, 37 (2004), available at <http://www.cis.org/articles/2004/fiscal.pdf> (“Because illegals are not even supposed to be in the country, many Americans are angered by the fact that they receive any services at all.”).

152. *See infra* text accompanying notes 153-55, 163, 169-71.

153. Alfred, *supra* note 7, at 628; e.g., *Kansas Passes Tuition Bill Aiding Illegal Immigrants*, USATODAY.COM, May 5, 2004, http://www.usatoday.com/news/education/2004-05-05-immigrant-tuition_x.htm (last visited Nov. 15, 2004) (“Opponents argued that the [proposed Kansas tuition bill] would reward lawbreakers and perhaps even aid terrorists.”).

waiting for them.¹⁵⁴ According to this position, providing benefits only serves to increase the number of unauthorized persons living in the United States.¹⁵⁵

The argument fails because it assumes that the students who stand to benefit are criminals who committed the crime of entering the United States illegally. However, as noted in *Plyler*, unauthorized children are in this country through no fault of their own.¹⁵⁶ They were brought here as young children with no choice; they have done nothing wrong and they are not criminals.¹⁵⁷ The United States does not punish children for the crimes of their parents.¹⁵⁸

Furthermore, numerous studies show that people come to the United States for immediate work, not because of the possibility that their children will receive higher education.¹⁵⁹ Many unauthorized persons are not even aware that the benefit of a free education awaits their children.¹⁶⁰ Thus, the availability of a free public education is not the catalyst for unauthorized entry.¹⁶¹

154. See Stevenson, *supra* note 15, at 572 (noting that restrictionists fear that providing postsecondary education benefits to undocumented students will “attract illegal alien families to move to the U.S.”). California’s Proposition 187 was based on similar fears. See Cooper, *supra* note 61, at 349 (“The theory on which Proposition 187 proceeded was that the welfare, medical, and educational benefits were acting as magnets, drawing illegal immigrants into California.”).

155. See Cooper, *supra* note 61, at 349.

156. See *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (“‘Parents have the ability to conform their conduct to societal norms,’ and presumably the ability to remove themselves from the State’s jurisdiction; but the children who are plaintiffs in these cases ‘can affect neither their parents’ conduct nor their own status.’” (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977))).

157. *Id.*; see also Romero, *supra* note 6, at 403 (“Their blameworthiness at the time of their entry is therefore speculative as they were unsuspecting accomplices to U.S. immigration violations.”).

158. *Plyler*, 457 U.S. at 220 (emphasizing that “‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing,’” would be undermined by punishing children for the crimes of their parents (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972))).

159. See *id.* at 228 (“Although many Americans are upset about [undocumented persons’] use of public services, there is little evidence that illegals come to America to take advantage of public benefits. Most illegal aliens come for jobs, and the vast majority are in fact employed.”); CAMAROTA, *supra* note 151, at 37; *supra* note 86 and accompanying text.

160. See *Plyler*, 457 U.S. at 228; CAMAROTA, *supra* note 151, at 37.

161. See ALEINIKOFF ET AL., *supra* note 23, at 602. Economics is the critical motivation for unauthorized entry into the United States:

Virtually all scholars agree that economic factors provide the most common incentive for illegal entry and residence. America offers jobs to unemployed or underemployed laborers from less developed nations and wages that are generally substantially above prevailing wages in the aliens’ countries of origin

2. *Argument Two: Unauthorized Persons Do Not Pay Taxes and Should Not Receive Benefits Paid for with Tax Revenue*

A second argument made by critics of the proposed DREAM Act is that granting unauthorized persons state-subsidized public education “imposes an unfair and expensive burden on taxpayers.”¹⁶² As unauthorized persons do not pay taxes, they should not benefit from a service paid for with tax revenue.¹⁶³

However, studies have shown that, in general, unauthorized persons *do* pay taxes.¹⁶⁴ In August 2004, the Center for Immigration Studies (CIS), conducted one of the first studies to examine the impact unauthorized persons have on the economics of the federal government, and found that unauthorized households impose only half the costs of legal households.¹⁶⁵ However, their tax payments are only one-fourth of other households, thus creating a deficit.¹⁶⁶

The issue, then, is not that unauthorized persons do not pay taxes; rather, the problem is that the taxes they do pay are not sufficient.¹⁶⁷ A better-educated population would have higher-paying jobs and contribute more money into taxes, ultimately saving money for public social programs.¹⁶⁸

3. *Argument Three: Granting Education Benefits to Unauthorized Students Harms U.S. Citizens*

A third argument against granting unauthorized students access to educational benefits is that it harms U.S. citizens who are fighting for a limited number of places in state universities.¹⁶⁹ Budget crunches at the

(even if the wages the aliens receive here are below wages normally paid to U.S. citizens or legal immigrants).

Id.

162. Stevenson, *supra* note 15, at 571.

163. Federation for American Immigration Reform, *supra* note 18 (“[I]t is unlikely that a majority of a state’s taxpayers would approve having their tax dollars spent on educating illegal aliens . . .”).

164. See S. REP. NO. 108-224, at 3 (2004) (“[T]he Cato Institute estimated that immigrant households paid approximately \$133 billion in direct taxes to federal, state and local governments in 1998.”).

165. CAMAROTA, *supra* note 151, at 5.

166. *Id.*

167. *Id.* (finding that unauthorized persons cause a fiscal deficit because they pay less tax, not because they heavily use social services). *Contra* Stevenson, *supra* note 15, at 573 (analyzing immigrants’ impact on the economy by comparing how much they pay in taxes to what they claim in public benefits and finding that they pay in more than they take out).

168. S. REP. NO. 108-224, at 3.

169. See, e.g., Federation for American Immigration Reform, *supra* note 18. FAIR argues that unauthorized students steal seats at public universities from deserving U.S. citizens:

state level place stress on colleges and universities that only have a limited amount of money to offer their students;¹⁷⁰ therefore, the schools should not be giving money and enrollment away to unauthorized persons.¹⁷¹

The problem with this argument is that the unauthorized students who stand to gain from this benefit are, for all practical purposes, American citizens.¹⁷² They have been in the United States for at least five years,¹⁷³ they have attended school here, they have become active members of their communities,¹⁷⁴ they often consider themselves American,¹⁷⁵ and they plan on remaining in the United States indefinitely.¹⁷⁶ Some of these students are not even aware that they are unauthorized until they attempt to fill out college applications during their senior year of high school.¹⁷⁷ The United States is their home,¹⁷⁸ and most do not plan on

With the cost of a college education skyrocketing, slots at state-subsidized universities are becoming the only hope of a higher education for many American families. With a finite number of seats and amount of aid available, when public universities admit an illegal immigrant and provide subsidized tuition, some other student who is also deserving is denied an opportunity. Admitting and subsidizing illegal aliens, in effect, punishes citizens and legal residents who have done nothing wrong themselves.

Id.

170. STUDENT CHARGES, *supra* note 11, at 4. Detailing the budget problems at the state level, the report found that:

As the 2003-2004 academic year began, . . . [r]ecord spending cuts designed to balance state budgets resulted in program cutbacks, unfilled faculty positions, staff layoffs, wage freezes and salary cuts at state colleges and universities. . . . Institutions worked to close gaps opened by further reductions in state appropriations. Institutions were forced to cover remaining gaps through significant tuition and fee increases.

Id.

171. *Tuition Benefits*, *supra* note 18. Virginia Attorney General Jerry Kilgore argues that “[i]t is outrageous that in these tough economic times, when tuition is being raised on students and families, that those who are breaking our laws are receiving taxpayer funds and potentially taking a spot away from a Virginia student.” Marklein, *supra* note 10.

172. Alfred, *supra* note 7, at 616-17 (noting that many unauthorized students consider themselves American citizens and only know the American culture).

173. Romero, *supra* note 6, at 403 (noting that many unauthorized students who are now of college age entered the United States when they were young children).

174. See Stevenson, *supra* note 15, at 553 (discussing the various “student government, clubs and organizations, church and service groups” where unauthorized students are often involved in their communities).

175. Romero, *supra* note 6, at 403.

176. See *id.*

177. See Alfred, *supra* note 7, at 616-17; Olivas, *supra* note 9, at 437 (noting that many undocumented students “have had no reason to know or confront their unauthorized status until they apply for college”).

returning to their country of origin, a place only known to them by name and story.¹⁷⁹

In addition, by guaranteeing free public education for elementary and secondary school, *Plyler* set the stage for extending postsecondary education benefits to unauthorized students.¹⁸⁰ Arguably, it is imprudent to provide free education to students until high school graduation, then deny them any chance of financing a postsecondary education. States have invested in these students by giving them an elementary and secondary education.¹⁸¹ The students competing for spots at state universities are top students who will one day be an asset to the social and economic fabric of the community in which they live.¹⁸²

III. POSTSECONDARY EDUCATION BENEFITS FOR UNAUTHORIZED PERSONS: LOOKING TO THE FUTURE

As the population of foreign-born people in the United States increases,¹⁸³ the issues surrounding unauthorized persons and public benefits will continue to confront both state and federal policymakers. A 2004 CIS study found that households headed by unauthorized persons

178. See H.R. REP. NO. 99-682, pt. 1, at 49 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5653. The House Judiciary Committee recognized the plight of unauthorized persons working in the United States and the contribution that these persons make to society:

The United States has a large undocumented alien population living and working within its borders. Many of these people have been here for a number of years and have become a part of their communities. Many have strong family ties here which include U.S. citizens and lawful residents. They have built social networks in this country. They have contributed to the United States in myriad ways, including providing their talents, labor and tax dollars.

Id.

179. Alfred, *supra* note 7, at 616-18.

180. Galassi, *supra* note 10, at 86-88 (noting that states have already made a substantial financial investment in these students, and that these students seek only to continue what the Supreme Court began in *Plyler*).

181. *Id.*

182. See Stevenson, *supra* note 15, at 573-74 (noting the argument that undocumented students who excel in school should be recognized with opportunities for higher education). The United States has a compelling interest in educating unauthorized immigrants because there is much evidence showing that “the illegal alien of today may well be the legal alien of tomorrow.” Galassi, *supra* note 10, at 93-94 (quoting *Plyler v. Doe*, 457 U.S. 202, 207 (1982)).

183. Steven A. Camarota, *Immigration in a Time of Recession: An Examination of Trends Since 2000*, BACKGROUNDER (Ctr. For Immigration Studies, Wash., D.C.), Nov. 2003, at 6. In March 2003, the total foreign-born population in the United States reached 33.5 million accounting for 11.7% of the nation’s population. *Id.* In January 2000, there were an estimated seven million unauthorized immigrants living in the United States. U.S. DEPT. OF HOMELAND SEC., *supra* note 3, at 213.

created a net fiscal deficit of \$10.4 billion in 2002.¹⁸⁴ The largest costs arose from public benefits conferred to unauthorized persons: Medicaid, medical treatment for the uninsured, food assistance, and federal aid to schools.¹⁸⁵ The study also showed, however, that the primary reason unauthorized persons create a fiscal deficit is their lack of education, not their use of public benefits and social services.¹⁸⁶ Because unauthorized persons typically work in low-paying jobs that yield less in taxes, they contribute less to the government than they consume.¹⁸⁷

A degree is the stepping stone to higher paying jobs, yet nearly two-thirds of unauthorized persons lack a high school degree.¹⁸⁸ With a deficit of \$10.4 billion a year,¹⁸⁹ and a group of people who will likely be staying in the United States indefinitely,¹⁹⁰ Congress must act to alleviate

184. CAMAROTA, *supra* note 151, at 5. However, the CIS study only takes into account the “balance between the taxes [unauthorized persons] pay and the services they use.” *Id.* at 11. The study “does not consider how illegal immigration or immigration more generally might affect public coffers indirectly by its impact on the economy.” *Id.* at 16. In addition, the report only examines the federal impact, not the state and local fiscal impact of an unauthorized population. *Id.* at 12. Thus, the study fails to consider money reaped back into the economy through “tax payments, job creation, entrepreneurial activity, consumer spending and neighborhood revitalization.” Alfred, *supra* note 7, at 640.

185. CAMAROTA, *supra* note 151, at 5. Medicaid is a \$2.5 billion deficit, medical treatment for the uninsured is a \$2.2 billion deficit, food assistance is a \$1.9 billion deficit, and federal aid to schools is a \$1.4 billion deficit. *Id.* The remaining \$1.6 billion is from the federal prison and court systems, not a benefit conferred by the government. *Id.*

186. *Id.* Generally, unauthorized households use fewer public services than the general public, but because of their low incomes, they pay even less into taxes than they use in services:

When defense spending is not considered, illegal households are estimated to impose costs on the federal treasury of \$6,949 a year or 58 percent of what other households received. . . . However, they pay only 28 percent as much in taxes as non-illegal households. . . . Since they use so much less in federal services than other households, it probably makes the most sense to see the fiscal deficit as resulting from low tax payments rather than heavy use of public services.

Id. at 27.

187. *Id.* at 5.

188. *Id.* The CIS study discusses the correlation between education and tax payments: Overall service use and tax payments by household closely correlates with education levels of household heads. In both simulations [comparing two groups of legal immigrants], those with more than a high school degree are a large net fiscal benefit to the federal government, while those with only a high school education or less are a net fiscal drain.

Id. at 29.

189. *Id.* at 37.

190. See *supra* note 182.

the financial burden created by a class of uneducated persons living in the United States.¹⁹¹

One way to reduce this unequal distribution of resources is to educate unauthorized students, who have grown up in the United States and are likely to remain here, by encouraging them to complete high school and continue on to college.¹⁹² But the cost of a postsecondary education is not cheap.¹⁹³ The average tuition for nonresident undergraduate students in public four-year institutions in the 2004–2005 school year was \$13,756.¹⁹⁴ The average tuition for resident undergraduate students in public four-year institutions in 2004–2005 was \$5,143.¹⁹⁵ As undocumented students are ineligible for federal grants or loans,¹⁹⁶ and not permitted to work legally,¹⁹⁷ granting them in-state tuition can open the door to becoming contributing members of their communities by providing them with a means to afford higher education.

191. See CAMAROTA, *supra* note 151, at 37. The CIS study concludes that amnesty would dramatically increase costs for the United States:

If illegals were given green cards and began to pay taxes and use services like legal immigrants with the same education levels, the net annual fiscal deficit at the federal level would likely increase from \$2,736 to \$7,668 per household under the most likely scenario. . . . The costs increase dramatically because unskilled immigrants with legal status, which is what most illegal aliens would become, can access government programs but still tend to make very modest tax payments. This is because the modern American economy offers very limited opportunities to those with little education, regardless of legal status.

Id. The study notes that as long as unauthorized persons are in the country, the associated costs are unavoidable and concludes that the best economic solution would be to enforce immigration laws and reduce the number of unskilled laborers by enforcing the ban on hiring unauthorized persons. *Id.* at 8, 37. This analysis, however, does not factor in the impact that removal of unauthorized persons would have on the industries that rely on undocumented workers. See *id.* at 8. In good economic times, the United States often relaxes enforcement of immigration rules, because the work force is needed and wanted. WELCH, *supra* note 23, at 78. Welch explains:

In the late 1990s, amid better economic times, Congress backed away from getting tough with employers who hire illegal immigrants. . . . In 2000, a compromise plan emerged in Congress that allowed as many as one million illegal farm employees to stay in the country permanently As an irony of social control, when immigration laws are not enforced, undocumented workers and their employers are encouraged to break the rules.”

Id.

192. See CAMAROTA, *supra* note 151, at 38 (“The fiscal deficit is created by the fact that so many illegal aliens are unskilled and thus have low income.”).

193. See AM. ASS’N OF STATE COLLS. & UNIVS. & NAT’L ASS’N OF STATE UNIVS. & LAND-GRANT COLLS., STUDENT CHARGES AND FINANCIAL AID 2004-2005, at 2 (2005).

194. *Id.* at 4.

195. *Id.* at 2.

196. See 8 U.S.C. § 1621(a), (c) (2000); U.S. DEP’T OF EDUC., *supra* note 4, at 5.

197. See Immigration and Nationality Act (INA) § 274(a), 8 U.S.C. § 1324(a).

A. Affording a Higher Education: State Legislation

There are ultimately two ways to deal with the problem of unauthorized students lacking the financial resources to pay for college: state legislation or federal legislation.¹⁹⁸

Although states have been creative in evading the restrictions of the IIRIRA,¹⁹⁹ their laws face many obstacles. First, as evidenced by a recent Kansas lawsuit,²⁰⁰ it remains unclear whether states have the constitutional right to determine whether or not undocumented students may obtain in-state tuition rates.²⁰¹

Second, and more importantly, the states' laws allow undocumented students to pay in-state tuition rates, but they cannot change the legal status of these students because they are preempted by federal law from doing so.²⁰² Thus, even if courts uphold the state laws, the students who benefit from them will still be considered unauthorized, and will still have limited employment opportunities²⁰³ and a constant fear of removal.²⁰⁴ It does not make sense for states to pay for postsecondary education only to have those students forbidden from legally working in

198. See Salsbury, *supra* note 18, at 465-66.

199. See *id.* at 460-61.

200. Day v. Sebelius, No. 04-4085-RDR, 2005 WL 1593607 (D. Kan. July 5, 2005).

201. See *id.* at *13-14 (deciding that plaintiffs did not have standing to challenge the state law and therefore not reaching the question of whether or not the state law was constitutional). The U.S. Constitution delegates the power to regulate immigration to Congress. See U.S. CONST. art. I, § 8, cl. 4 (empowering Congress "to establish a uniform Rule of Naturalization"). However, as Justice Brennan noted:

[T]he court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised. . . . [S]tanding alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.

De Canas v. Bica, 424 U.S. 351, 355 (1976) (citations omitted); see also Galassi, *supra* note 10, at 89-93 (discussing questions of preemption and federalism surrounding states' constitutional rights to determine postsecondary education benefits for unauthorized students); *supra* notes 118-21 and accompanying text.

202. Stevenson, *supra* note 15, at 578 (noting that the states do not have the power to change the legal status of unauthorized students). Although states can enact their own legislation if Congress has delegated administration of a particular issue to them, they do not have the authority to classify aliens. See Olivas, *supra* note 9, at 445.

203. Romero, *supra* note 6, at 417-18 (discussing the problem of the "highly educated farmworker").

204. See 8 U.S.C. § 1231 (2000) (governing the procedure for removal); Romero, *supra* note 6, at 406-07.

the United States upon graduation.²⁰⁵ Thus, even though the states are taking steps in the right direction, their hands are tied until Congress allows them to change the legal status of unauthorized students.²⁰⁶

B. Affording a Higher Education: Congressional Legislation and the DREAM Act

Although a state-by-state resolution of the issue of undocumented students and postsecondary education benefits is a step in the right direction, the most comprehensive solution to this ongoing debate is the proposed DREAM Act.

First, unlike the states' individual laws, which are subject to preemption challenges,²⁰⁷ the DREAM Act, as federal legislation, would eliminate any preemption concerns. It would explicitly place the power back into the hands of the states, thus removing any confusion that was left in the wake of the IIRIRA.²⁰⁸

Second, the DREAM Act would not require states to provide in-state tuition; rather, states could decide for themselves what policy to endorse.²⁰⁹ Currently, the individual states, and not the federal government, bear the brunt of the costs associated with unauthorized persons.²¹⁰ Therefore, it makes sense that they should be able to decide their own policy.²¹¹ The DREAM Act would recognize this.²¹² It would not mandate that states provide in-state tuition; rather, it would return power to the states by allowing them to make their own policies concerning this issue without having to worry about the IIRIRA.²¹³

The third, and most important, element of the DREAM Act is that it would change the legal status of qualified students, making them

205. See Stevenson, *supra* note 15, at 578 (recognizing that despite receiving in-state tuition rates, unauthorized students will still be at a major disadvantage because of their legal status).

206. See *id.*

207. See *supra* notes 199-206 and accompanying text.

208. See Galassi, *supra* note 10, at 90 (discussing whether “[t]he DREAM Act addresses th[e] confusion [over federal preemption] by proposing to simply eliminate it,” because the Act would explicitly give states the power to determine residency for postsecondary education benefit purposes).

209. See S. REP. NO. 108-224, at 3 (2004) (“[T]he DREAM Act does not require states to give undocumented alien children in-state tuition. [Rather] the DREAM Act returns to the states their prerogative to determine how to allocate their own resources.”).

210. Salsbury, *supra* note 18, at 463.

211. See *id.* at 466. Because states bear the brunt of costs associated with unauthorized persons, sound policy supports giving states greater power to pass laws when they want to grant benefits for unauthorized students. *Id.*

212. S. REP. NO. 108-224, at 3.

213. *Id.*

conditional permanent residents.²¹⁴ The state laws, although permitting the students to attend college at in-state rates,²¹⁵ do not change the legal status of students; thus the threat of removal is always present.²¹⁶ Under the DREAM Act, students with conditional permanent resident status would no longer have to worry about removal.²¹⁷ Additionally, as an exception to current law, which makes it illegal for unauthorized persons to work in the United States,²¹⁸ the DREAM Act's grant of conditional permanent resident status would ensure that these students can compete with their classmates for employment after graduation.²¹⁹ Ultimately, conditional legal status would aid unauthorized students in becoming contributing members of the country they already consider to be their home.²²⁰

IV. THE DREAM ACT—ALMOST THE BEST SOLUTION

A. *The Strength of the DREAM Act*

The DREAM Act deals with the problem of in-state tuition for unauthorized students in a way that promises to address the economic, social, and legal policy concerns surrounding the current immigration debate.

Education is one of the best ways to alleviate the economic burdens an unauthorized population imposes on the U.S. and state governments.²²¹

214. DREAM Act, S. 1545, 108th Cong. § 5(a) (as reported by S. Comm. on the Judiciary, Nov. 25, 2003); *see also* Stevenson, *supra* note 15, at 578-79 (discussing how the proposed DREAM Act would “serve as a much more powerful enabling tool for these students” than state laws because it would allow certain students to adjust their legal status).

215. *See* Marklein, *supra* note 10. In-state tuition rates are often still too high for a poor family to handle; thus, the conditional permanent resident status, by making the student eligible for financial aid, opens more doors. *See id.* (noting that in-state tuition in Utah is \$3000 a year, still too much for many unauthorized families to afford).

216. *See* Stevenson, *supra* note 15, at 579; Marklein, *supra* note 10.

217. S. 1545, § 4(a)(1).

218. *See* Immigration and Nationality Act § 274(a), 8 U.S.C. § 1324(a) (2000).

219. *See* Stevenson, *supra* note 15, at 579 (noting that under the DREAM Act, students “would be eligible to apply for and procure employment without concerns about infringing labor regulations”).

220. *See DREAM Act Reintroduced in Senate*, *supra* note 3. The DREAM Act would net positive results: “If enacted, DREAM 2003 would have a life-changing impact on the students who qualify, dramatically increasing their average future earnings—and, consequently, the amount of taxes they would pay—while significantly reducing criminal justice and social service costs to taxpayers.” *Id.*

221. *See* Alfred, *supra* note 7, at 641 (“[P]roviding [undocumented students] an education today will save the country money in the future – money that the government would need to spend on social welfare, drug rehabilitation and medical emergency services for low-income individuals.”); *supra* text accompanying notes 183-97. *But see*

Education leads to higher-paying jobs, and, consequently, more tax revenue.²²² When people secure better jobs they are more able to afford housing and health care, thus benefiting society, because they are not using public housing and health care.²²³

From a social policy perspective, the students at the heart of the debate over postsecondary education benefits have committed no crime, and therefore should not be penalized for their parents' decisions.²²⁴ These students came with their parents to the United States, attended and graduated from public schools,²²⁵ only to discover the cost of a college education was prohibitively expensive.²²⁶ The DREAM Act addresses these social concerns, recognizing that these students deserve all of the educational opportunities America has to offer.²²⁷

Legally, the DREAM Act would eliminate concerns over whether individual states can constitutionally enact legislation dealing with postsecondary education benefits for undocumented students.²²⁸ By repealing section 505 of the IIRIRA²²⁹ and eliminating any preemption issues, the DREAM Act would give the states legal power to decide for themselves what solution to utilize.²³⁰ More importantly, for students who meet certain criteria, the DREAM Act would grant conditional permanent resident status.²³¹ Therefore, students who qualify would be able to focus on their studies without the fear of removal, apply for federal financial aid, and legally apply for jobs during school and upon graduation.²³²

ALEINIKOFF ET AL., *supra* note 23, at 627 (arguing that the only two solutions available to the problem of illegal immigration are "direct enforcement" and "reducing incentives to enter").

222. CAMAROTA, *supra* note 151, at 23.

223. See Erin Kragh, Book Note, *Forging A Common Culture: Integrating California's Illegal Immigrant Population*, 24 B.C. THIRD WORLD L.J. 373, 387 (2004) ("Access to post-secondary education . . . will enable illegal immigrants to secure better jobs that, in turn, will help them to afford necessities such as housing and healthcare.").

224. See Plyler v. Doe, 457 U.S. 202, 219-20 (1982).

225. See Galassi, *supra* note 10, at 88; *supra* text accompanying notes 172-79.

226. *Id.*

227. S. REP. NO. 108-224, at 2 (2004).

228. See *supra* Part III.B.

229. DREAM Act, S. 1545, 108th Cong. § 3(a) (as reported by S. Comm. on the Judiciary, Nov. 25, 2003).

230. S. REP. NO. 108-224, at 3.

231. S. 1545, §§ 4-5; Stevenson, *supra* note 15, at 579.

232. See *supra* text accompanying notes 221-31.

B. Proposed Change: Looking to the Future

Despite the positive intentions behind the DREAM Act, the proposed law does not meet all policy concerns.²³³ As it was proposed in the last Congress, the DREAM Act would only provide a temporary solution to the described legal, economic, and social issues.²³⁴ Unlike the decision in *Plyler*, which applies to unauthorized students who enter the United States at any time,²³⁵ the proposed DREAM Act is set up only for those students who meet the criteria *at the time of enactment*.²³⁶

What happens, then, in a few years, when there is a new class of unauthorized students who cannot afford a postsecondary education because they entered the United States after enactment of the DREAM Act? As Senator Jeff Sessions (R-AL) contended in his dissent to the proposed DREAM Act, this “one-time” fix cannot work, as the issue will resurface in a few years.²³⁷

The Supreme Court in *Plyler* emphasized that education is not the catalyst for unauthorized entry into the United States.²³⁸ Additionally, the Court emphasized that students themselves commit no crime by following their parents here.²³⁹ The students who would qualify for the Act must have lived in the United States, attended school here, and must contribute to their communities.²⁴⁰ Why, then, should the Act be limited to those students already in the United States at the time of enactment? As it stands, the DREAM Act would help alleviate the problems for the

233. See S. REP. NO. 108-224, at 2, 12-13.

234. See *id.*; *supra* notes 125-27 (discussing how it is likely that the DREAM Act will be reintroduced in the current Congress).

235. See *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that unauthorized students have the constitutional right to a free primary and secondary education).

236. S. 1545, § 4(a)(1)(A); see also S. REP. NO. 108-224, at 2. The students must “ha[ve] been physically present in the United States for a continuous period of not less than 5 years immediately preceding the date of enactment of this Act, and had not yet reached the age of 16 years at the time of initial entry.” S. 1545, § 4(a)(1)(A).

237. S. REP. NO. 108-224, at 12. Senator Sessions discussed how the DREAM Act “represents a cyclical nightmare for the rule of law in immigration policy reform. It does not address the overall problem of illegal immigration, but instead grants legal status to a select, carved-out group of illegally present individuals.” *Id.* Senator Sessions notes that if the DREAM Act passes as is, the same policy issues will be present five years from now. *Id.* Although Senator Sessions uses the temporary nature of the proposed fix as one more reason not to pass the DREAM Act, he agrees that the immigration system needs to be fixed. *Id.* at 12-13.

238. *Plyler*, 457 U.S. at 228 n.24 (“The evidence demonstrates that undocumented persons do not immigrate in search for a free education. Virtually all of the undocumented persons who come into this country seek employment opportunities and not educational benefits”) (quoting *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 578 (S.D. Tex. 1980)).

239. See *supra* text accompanying notes 84-85.

240. See *supra* text accompanying notes 172-79.

students already here, but it would not do anything to prevent or alleviate this same problem for children entering in the future.²⁴¹ Is a child brought to the United States in the future more culpable than one already here? The same policy concerns that dictate passage of the Act now are not going to disappear.²⁴² As much as it would benefit the students here today, the Act would not help those entering the country after Congress enacts it.

Congress should amend the DREAM Act before reintroduction, applying it not just to those students who meet the criteria at the time of enactment, but also to those students who meet the criteria in the future. The United States has an economic and social interest in educating a class of students who are contributing and will continue to contribute to society.²⁴³

V. CONCLUSION

As immigration into the United States continues to rise, issues surrounding immigration will continue to raise political and policy concerns.²⁴⁴ At least three of the five states with the highest percentage of unauthorized persons were the first to enact pro-immigrant legislation allowing undocumented students to receive in-state tuition rates, recognizing the importance of education to a prosperous society. The DREAM Act takes the states' initiatives a step further. In addition to granting the individual states the legal power to determine their own policies without fear of federal preemption, the DREAM Act grants qualified students conditional permanent resident status, a recognition of the truth that legal status is essential to the success of these students. However, Congress must amend the DREAM Act so that it applies not only to those students who meet the criteria now, but also to those students who will meet the criteria in the future. The DREAM Act needs to be a long-term solution. Because "[t]here is no single better predictor of income in the modern American economy than one's education level,"²⁴⁵ the United States will benefit from educating a class of students who will contribute as members of their communities.

241. S. 1545, § 4(a)(1)(A); *see also* S. REP. NO. 108-224, at 2.

242. S. REP. NO. 108-224, at 12-13.

243. *Id.* at 2-3; *see also* Marklein, *supra* note 10; DREAM Act Reintroduced in Senate, *supra* note 3.

244. *See* ALEINIKOFF ET AL., *supra* note 23, at 175 ("There is every reason to believe that immigration policy will remain a front burner political issue for the foreseeable future.").

245. CAMAROTA, *supra* note 151, at 23.

