

**THE DREAM ACT STILL JUST A DREAM FOR NOW:  
THE POSITIVE EFFECTS OF CREATING A NEW PATH TO LAWFUL STATUS BY  
ENCOURAGING MILITARY ENLISTMENT AND THE PURSUIT OF HIGHER  
EDUCATION**

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Children are a vulnerable segment of our population, and their lives are affected each day by circumstances beyond their control. Children are generally insulated and protected by the law because of their status. A different kind of status—immigration status—or lack thereof, however, is a very real problem for many young children throughout America. Due to their parents' unlawful actions, thousands of children who consider the United States their home are forced to return to countries they have never known.

Countless children are brought to the United States by their parents at a young age, graduate from high school at the top of their class, and immerse themselves in American culture. Current immigration laws, however, deny these eager members of society employment authorization and severely restrict access to higher education. Instead, many would-be professionals and military servicemen are apprehended for petty offenses, such as traffic violations, and placed into removal proceedings.

Thankfully, Immigration and Customs Enforcement Director John Morton recently introduced a new Enforcement and Removal Operations policy on June 17, 2011<sup>1</sup>. Despite this small step to provide relief from removal proceedings for undocumented individuals without criminal history and who, among other things, entered the country at a young age, maintained continuous physical presence, and pursued their education, immigration reform is still necessary. One minor solution exists in the Development, Relief, and Education for Alien Minors Act (“DREAM Act,” “DREAM,” or the “Act”).

The full potential of undocumented immigrants within the United States is unrealized due to the limited options for advancement after primary education. Thousands of undocumented students graduate high school each year without an opportunity to seek postsecondary education.<sup>2</sup> It is true that federal law does not expressly keep undocumented immigrants from attending American universities,<sup>3</sup> however, state institutions are restrained from providing in-state resident tuition rates and access to federal grants, loans, or work-study programs on the basis of residency.<sup>4</sup> This indirect

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<sup>1</sup> Morton, John. Director, U.S. Immigration and Customs Enforcement (ICE). Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, June 17, 2011; Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, June 17, 2011.

<sup>2</sup> Immigration Policy Center, The DREAM Act, <http://immigrationpolicy.org/just-facts/dream-act> (last visited June 11, 2011).

<sup>3</sup> College Board, Advising Undocumented Students, <http://professionals.collegeboard.com/guidance/financial-aid/undocumented-students> (last visited June 11, 2011). *But see*, Ben Penn, *Georgia Bans Illegal Immigrants at Top State Universities*, YOUTH TODAY, [http://www.youthtoday.org/view\\_article.cfm?article\\_id=4386](http://www.youthtoday.org/view_article.cfm?article_id=4386) (last visited June 11, 2011).

<sup>4</sup> 8 U.S.C. § 1601, et seq.

limitation provides an insurmountable hurdle for many of America's undocumented youth.

As a result, the estimated 65,000 undocumented students that graduate from high school each year and had rights to public education through the twelfth grade are often unable to enroll in universities.<sup>5</sup> To make matters worse, the federal government forbids employment of undocumented immigrants.<sup>6</sup> These youth inevitably fall through the cracks when they are unable to obtain legitimate employment, further their education, or live up to their own aspirations of being contributing members of society.<sup>7</sup>

As stated by Professor Roberto Gonzalez of the University of Washington, these individuals "have high aspirations, yet live on the margins."<sup>8</sup> Few options for undocumented immigrants are available post high school, despite the fact that they have participated in and furthered American culture. With little incentive to graduate from high school, many undocumented immigrants drop out and become involved in illicit activities.<sup>9</sup> The ripple effect is felt for generations because their children also suffer despite being born American citizens. Harvard education professor, Hirokazu Yoshikawa, adds that "millions of the youngest citizens in the United States, simply by virtue of being born to a parent with a particular legal status, have less access to learning opportunities that are the building blocks of adult productivity."<sup>10</sup> Psychological implications suffered because of the constant fear of deportation, low wage employment, and the lack of higher education for parents can cause poor cognitive development in a child. In the end, an undertrained work force is created, causing lower economic productivity overall.<sup>11</sup>

The DREAM Act is "bipartisan legislation" that would allow "qualifying undocumented youth [to] be eligible for a six year long conditional path to citizenship that requires completion of a college degree or two years of military service."<sup>12</sup> The Act would incentivize a limited class of undocumented individuals to pursue higher education or serve in the military while boosting the economy, reducing high school dropout rates, and realizing the full potential of an overlooked segment of our population. This paper will discuss the DREAM Act by analyzing its provisions and failed attempts at passage. Insight into the evolution of law at both the state and federal levels that restricts access to postsecondary education for undocumented students and leads to inconsistent legal interpretation will also be provided. Lastly, the application and resulting effects of the

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<sup>5</sup> *Report Finds Undocumented Students Face College Roadblocks*, CNN.COM, Apr. 22, 2009, [http://articles.cnn.com/2009-04-22/us/undocumented.students\\_1\\_undocumented-students-tuition-rates-financial-aid?\\_s=PM:US](http://articles.cnn.com/2009-04-22/us/undocumented.students_1_undocumented-students-tuition-rates-financial-aid?_s=PM:US). See also, Conference Report, UCLA Center for Labor Research and Educ., *Undocumented Students Unfulfilled Dreams...*, (May 19, 2007), <http://www.labor.ucla.edu/publications/reports/Undocumented-Students.pdf>.

<sup>6</sup> 8 U.S.C. §§ 1324(a)(1)(A), (a)(2)

<sup>7</sup> *For Family of High-Achieving Kids, Only One Holds the Keys to College*, CNN.COM, Oct. 19, 2010, [http://articles.cnn.com/2010-10-19/living/illegal.immigration.siblings.divided.dreamact\\_1\\_emily-undocumented-students-mixed-status-families?\\_s=PM:LIVING](http://articles.cnn.com/2010-10-19/living/illegal.immigration.siblings.divided.dreamact_1_emily-undocumented-students-mixed-status-families?_s=PM:LIVING).

<sup>8</sup> Roberto G. Gonzales, *Investing in the American DREAM*, IMMIGRATION POLICY CENTER, Dec. 2, 2010 <http://www.immigrationpolicy.org/perspectives/investing-american-dream>.

<sup>9</sup> Brigid Schulte, "Advice From the Inside on Stopping Gangs; Latino Youth's Tale Shows Montgomery Officials the Ease of Falling Into Trouble," WASH. POST, Aug. 29, 2005, at B4.

<sup>10</sup> Kirk Semple, *Illegal Immigrants' Children Suffer, Study Finds*, N.Y. TIMES, May 20, 2011, [http://www.nytimes.com/2011/05/21/nyregion/illegal-immigrants-children-suffer-study-finds.html?\\_r=1&scp=5&sq=undocumented%20students%20&st=cse](http://www.nytimes.com/2011/05/21/nyregion/illegal-immigrants-children-suffer-study-finds.html?_r=1&scp=5&sq=undocumented%20students%20&st=cse).

<sup>11</sup> *Id.*

<sup>12</sup> Basic Information about the DREAM Act Legislation, DREAM Act Portal, July 16, 2010, <http://dreamact.info/students>.

Act will be discussed in light of the narrow class of individuals that could utilize the legislation.

## I. UNDOCUMENTED IMMIGRANTS FACE MANY OBSTACLES IN ACHIEVING THEIR GOALS.

The urgent need for the DREAM Act must be addressed now. Undocumented immigrants have very limited and extremely complicated paths to citizenship.<sup>13</sup> Family immigration is the most common way for undocumented immigrants to attain legal status within the United States. To be eligible for family immigration, the applicant must have a “qualifying relative” within the United States willing to petition on their behalf. The Immigration and Nationality Act (“INA”) section 201(b)(2)(a)(i) includes citizen, or legal permanent resident, mothers, fathers, siblings, or adult children as “qualifying relatives.”<sup>14</sup> Few undocumented immigrants, however, have qualifying relatives within the United States to petition for their residency. Even if this were an option, the government takes years to adjudicate applications.<sup>15</sup> For example, Mexican family petitions dated prior to December 15, 1992, are only now being adjudicated, meaning nearly twenty years passed before any legal immigration status was granted. Extremely long wait times are an unfortunate consequence for most individuals seeking to immigrate to the United States. This bleak reality causes many immigrants to cross the border without documentation, often with young children that cannot be left behind. Those children grow up in America but are disadvantaged by the actions of their parents.<sup>16</sup> Limitations on government loans, grants, scholarships, and in-state tuition are often problematic, and contribute to the common uphill battle against poverty.

Currently, rights to higher education are nonexistent, and access has been further limited by Congressional legislation. Since 1996, Congressional attempts to prevent in-state tuition for undocumented immigrants failed, causing fragmentation throughout the country and polarizing state legislatures. According to a study by the Chronicle for Higher Education, ten (10) states currently allow in-state tuition for some undocumented immigrants.<sup>17</sup> Four states, however, explicitly forbid undocumented immigrants to claim the tuition break.<sup>18</sup> An additional two states—Georgia and Louisiana—bar students without legal immigrant status from public universities altogether in some circumstances.<sup>19</sup>

The question remains the same for many states: To provide, or not to provide, in-state tuition? Several state legislatures provide in-state tuition by narrowly interpreting

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<sup>13</sup> Immigrant Legal Resource Center, DREAM Act Advocacy Toolkit, Mar. 2009, [http://www.ilrc.org/files/dream\\_act\\_advocacy\\_toolkit.pdf](http://www.ilrc.org/files/dream_act_advocacy_toolkit.pdf).

<sup>14</sup> Immigration and Nationality Act (“INA”) § 201(b)(2)(a)(i).

<sup>15</sup> VISA Bulletin for October 2010, Number 25, Volume IX, Washington D.C., available at [http://travel.state.gov/visa/bulletin/bulletin\\_5145.html](http://travel.state.gov/visa/bulletin/bulletin_5145.html).

<sup>16</sup> Kirk Semple, *Illegal Immigrants’ Children Suffer, Study Finds*, N.Y. TIMES, May 20, 2011, [http://www.nytimes.com/2011/05/21/nyregion/illegal-immigrants-children-suffer-study-finds.html?\\_r=1&scp=5&sq=undocumented%20students%20&st=cse](http://www.nytimes.com/2011/05/21/nyregion/illegal-immigrants-children-suffer-study-finds.html?_r=1&scp=5&sq=undocumented%20students%20&st=cse).

<sup>17</sup> Daniel de Vise, *Texas Students Oppose Tuition Break for Illegal Immigrants*, WASH. POST, [http://voices.washingtonpost.com/college-inc/2010/11/texas\\_students\\_oppose\\_immigran.html](http://voices.washingtonpost.com/college-inc/2010/11/texas_students_oppose_immigran.html)

<sup>18</sup> States Take Varying Approaches to Immigration and Higher Education, CHRON. HIGHER EDUC., July 25, 2010, <http://chronicle.com/article/States-Take-Varying-Approaches/123683/>.

<sup>19</sup> de Vise, *supra* note 17.

federal law.<sup>20</sup> States work around the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) by arguing that an undocumented student can receive in-state tuition if he or she graduated from a high school in the state, among other things.<sup>21</sup> Those states focus on language found in Title 8, United States Code (“U.S.C.”) section 1623(a) that prohibits a state from making unlawful aliens eligible only “on the basis of residence within a state” for postsecondary education benefits.

There are two different schemes for providing in-state tuition to undocumented immigrants. The first defines “resident” as “those who have studied in and graduated from a state high school, usually for a minimum of three years.”<sup>22</sup> The second bypasses section 1623 by omitting references to “residence” and instead focusing on exemptions. Individuals are eligible for exemptions if they fulfill criteria similar to those in the first model.<sup>23</sup>

The inconsistent interpretation of federal law has created a disjointed policy throughout the country. To counteract this dilemma, Senator Orrin G. Hatch of Utah<sup>24</sup> and Senator Dick Durbin of Illinois<sup>25</sup> began working to create a path for undocumented students to obtain access to education, employment, and legal status in the United States by amending IIRIRA. Advocates of the DREAM Act have worked tirelessly for nearly a decade to overcome public opposition and slanted political pressures.<sup>26</sup> The mission of the bill is:

To permit States to determine State residency for higher education purposes and authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children, and for other purposes.<sup>27</sup>

Despite the innocuous nature of the DREAM Act, the legislation continues to be met with heavy opposition.<sup>28</sup> In fact, several states that have provided undocumented

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<sup>20</sup> Liza Porteus, *States Grapple With In-State Tuition for Illegal Immigrants*, FOXNEWS.COM, Mar. 6, 2006, <http://www.foxnews.com/story/0,2933,186876,00.html>. (The ten states that allow in-state tuition for non-legal permanent residents institute the premise that they do not discriminate based on *residency*, but on where the students attended high school.)

<sup>21</sup> *Id.*

<sup>22</sup> State Policies Regarding In-State Tuition for Undocumented Students, JFF Update (Jobs for Future, Boston, Mass.), Mar. 2007, at 1, [http://www.achievingthedream.org/\\_pdfs/\\_publicpolicy/UndocImmigUpdate\\_0307.pdf](http://www.achievingthedream.org/_pdfs/_publicpolicy/UndocImmigUpdate_0307.pdf), [hereinafter *State Policies*]; Russell, *supra* note 111, at 2-3.

<sup>23</sup> Michael A. Olivas, “*IIRIRA, the Dream Act, and Undocumented College Student Residency*,” 30 J.C. & U.L. 435, 445 (2004).

<sup>24</sup> Unaccompanied Alien Child Protection Act: Hearing Before the Subcomm. On Immigration, Border Security, and Citizenship of the S. Comm. on the Judiciary, 107th Cong. (2202) [hereinafter *Unaccompanied Alien Child Protection Act*] (statement of Sen. Orrin G. Hatch, Utah), *available at* [http://judiciary.senate.gov/member\\_statement.cfm?id=172&wit\\_id=51](http://judiciary.senate.gov/member_statement.cfm?id=172&wit_id=51).

<sup>25</sup> U.S. Senators Dick Durbin, Durbin, Hagel, Lugar: Congress Should Act Now to Help Students Gain Access to Higher Education, Nov. 21, 2005, <http://durbin.senate.gov/record.cfm?id=24974>.

<sup>26</sup> DREAM Act Portal *supra* note 11.

<sup>27</sup> S. 3827, 111th Cong. (2010).

<sup>28</sup> Americans for Legal Immigration, *Massive Public Opposition to Bad Dream Act Amnesty*, *available at* <http://www.alipac.us/article2562.html>.

students in-state tuition are at risk of having the enactments repealed.<sup>29</sup> Divisive debate will continue until the federal government reforms our immigration laws.

## II. ATTEMPTS AT PASSAGE AND GOALS OF THE DREAM ACT

The DREAM Act works to provide opportunities for undocumented students to obtain access to education, employment, and legal status in the United States.<sup>30</sup> Each version of the bill weighs heavily against punishing minor children for their parents' decision to enter the United States without documentation, while simultaneously maximizing the potential of a very narrow class of undocumented individuals. The legislation presented to the 111th Congress sought to provide access to lawful status by way of military enlistment or postsecondary education.

### a. Legislative History: Only in DREAMS.

The first version of the DREAM Act—though not titled as such—was introduced to the 107th Congress in 2001 by Senators Orrin Hatch (R-Utah) and Richard Durbin (D-III) in the Senate<sup>31</sup> and by Representatives Howard Berman (D-CA) and Chris Cannon (R-UT) in the House.<sup>32</sup> This version<sup>33</sup> sought only to provide an avenue to lawful permanent residency to students pursuing four-year degrees. Senators Hatch and Durbin introduced the bill again, for the first time entitled the DREAM Act, on July 31, 2003.<sup>34</sup> Although the bill was well received in the Senate Judiciary Committee, passing by a 16-3 vote, the 108th Congress never conducted a full vote during its session. Subsequent versions of the bill, containing minor amendments, have been presented to both the House (as the “American Dream Act”) and Senate (as the “DREAM Act”) in each session since 2001.

Many endorsed the Act in the past due to its narrow classification of qualified undocumented immigrants.<sup>35</sup> Nevertheless, some members of Congress voted against the bill for fear that it would hamper the chances of Comprehensive Immigration Reform (“CIR”).<sup>36</sup> Others were pressured not to support “any form of immigrant ‘amnesty’.”<sup>37</sup>

The DREAM has often been packaged into larger legislation. Provisions of the bill were incorporated into the CIR Acts of 2006 and 2007.<sup>38</sup> Although the DREAM Act passed by a voice vote in the Senate as an amendment to the CIR Act of 2006 (“S. 2611”)

<sup>29</sup> Glynis Kazanjian, *DREAM Act Opponents Close to Signature Goal*, POTOMAC PATCH, June 10, 2011, <http://potomac.patch.com/articles/dream-act-opponents-close-to-reaching-petition-signature-goal-2>.

<sup>30</sup> S. 729 109th Cong. (2009), summary from Mar. 26, 2009, available at <http://www.thomas.gov/cgi-bin/bdquery/D?d111:1::/temp/~bdLXVX:@@D&summ2=m&/home/LegislativeData.php>

<sup>31</sup> S. 1291, 107th Cong. (2001)

<sup>32</sup> H.R. 1918, 107th Cong. (2001)

<sup>33</sup> H.R. 1918, 107th Cong. (2001)

<sup>34</sup> S. 1545, 108th Cong. (2003).

<sup>35</sup> H.R. 1918, 107th Cong. (2001) Student Adjustment Act of 2001; H.R. 108th Cong. (2003), Student Adjustment Act of 2003; H.R. 5131, 109th Cong. (2006) American Dream Act; H.R. 1275, 110th Cong. (2007) American Dream Act; S. 729, 109th Cong. (2009) and H.R. 1751, (2009)

<sup>36</sup> Immigration Policy Center, *supra* note 1.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

in May 2006, the bill never came to a vote in the House.<sup>39</sup> After a similar CIR bill failed in 2007, the DREAM was considered by Congress as a stand-alone bill, but was its supporters were unable to reach the 60 votes necessary to invoke cloture.<sup>40</sup> Senator Durbin and other co-sponsors included the DREAM Act in the 2008 Department of Defense and Reauthorization Bill.

The DREAM Act was integrated into the 2010 National Defense Authorization Act along with measures seeking to repeal the military's "Don't Ask, Don't Tell" policy.<sup>41</sup> On September 21, 2010, the bill was introduced by Senate Democrat Harry Reid (D-NV), the Senate's Majority Leader, but was killed by a Republican filibuster.<sup>42</sup> All Republican senators and one Democrat ended any opportunity for the DREAM Act to proceed to debate with a 56-43 vote. Efforts to pass the measure began again when Senators Durbin and Lugar reintroduced the DREAM Act as a stand-alone bill on September 22, 2010.<sup>43</sup> On November 17, 2010, Senate Majority Leader Harry Reid announced that he would present the DREAM during the lame duck session of Congress. After numerous concessions and heated debate, the bill failed yet again.

*b. The DREAM Act as a New Path to Lawful Status and Solution for the Tuition Question.*

The DREAM Act of 2010, as introduced on September 23, 2010, amended IIRIRA by repealing section 505.<sup>44</sup> If enacted, undocumented individuals would be eligible for in-state tuition on the same basis as other college enrolled American students.<sup>45</sup> The most recent version of the DREAM Act gives the Secretary of Homeland Security the power to cancel removal and adjust status to conditional permanent residency for aliens pursuing higher education or military enlistment.<sup>46</sup> Finally, the Act mandates penalties to counteract the risk of false applications<sup>47</sup> by instituting a Government Accountability Office report to track the number of individuals who adjust their immigration status under the Act.<sup>48</sup>

The provisions of the DREAM Act are stringent. Qualified undocumented youth are only eligible for a six-year conditional path to citizenship.<sup>49</sup> The applicant must have entered the United States before the age of sixteen and be between the ages of twelve and thirty-five at the time of application.<sup>50</sup> That person must have established continuous physical presence in the U.S. for at least five consecutive years prior to the enactment of the bill. The applicant must have also graduated from a high school within the United States, obtained a General Education Diploma ("GED"), or been accepted into an

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<sup>39</sup> Comprehensive Immigration Reform Act of 2006, S. 2611 (2006), available at <http://www.govtrack.us/congress/bill.xpd?bill=s109-2611>.

<sup>40</sup> Immigration Policy Center, *supra* note 1.

<sup>41</sup> S. 729.

<sup>42</sup> Kelly Field, *The Dream Act is Dead, at Least for Now*, CHRON. HIGHER EDUC., <http://chronicle.com/article/The-Dream-Act-Is-Dead-at/124560/>.

<sup>43</sup> *Id.*

<sup>44</sup> S. 3827.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at § 8.

<sup>48</sup> *Id.* at § 12.

<sup>49</sup> *Id.* at § 5.

<sup>50</sup> *Id.* at § 4.

institution of higher education.<sup>51</sup> Finally, the individual must demonstrate good moral character.<sup>52</sup>

Additional criteria must be satisfied in order to appeal for removal of the conditional status.<sup>53</sup> Merely fulfilling the requirements for qualification does not make one eligible for lawful status or the benefits associated therewith.<sup>54</sup> To that end, within six years of approval for conditional permanent residency, the applicant must have completed at least two years of higher education or military service.<sup>55</sup> A petition to remove the conditional basis for “lawful resident status” may be filed during “the period beginning 180 days before and ending 2 years after” the six-year conditional permanent resident status is granted.<sup>56</sup> The applicant can then begin standard naturalization process with credit for the time spent under conditional and permanent status.<sup>57</sup>

### III. EVOLUTION OF THE CURRENT LAW: THE SUPREME COURT’S IMPACT AND DUAL LEGISLATIVE EFFORTS IN CONGRESS

Prior to 1982, each state had its own laws and procedures for determining whether students could enroll in the public school system. Lack of uniformity created a question as to the national policy of children entering the country without proper documentation. The Supreme Court partially answered the question in *Plyler v. Doe*.<sup>58</sup> Efforts to clarify the law regarding access to higher education were furthered when Congress enacted PRWORA and IIRIRA. Despite these attempts, much confusion and incongruity still exists.

#### a. *Plyler v. Doe*

Several proponents of the DREAM Act argue that it is comprised of two conceptual provisions: (1) allowing undocumented children to attend college through access to financial aid and other associated benefits; and (2) creating a path to citizenship for these undocumented children.<sup>59</sup> The educational emphasis of the DREAM Act provides for heavy debate given the current, difficult job market and high demand for postsecondary schooling. Relying on the Equal Protection Clause of the Fourteenth Amendment for support, the Supreme Court has previously held that undocumented students have a right to primary and secondary instruction.<sup>60</sup>

In *Plyler*, the United States Supreme Court invalidated a Texas statute prohibiting free access to public education.<sup>61</sup> Undocumented minor students seeking to enroll in

<sup>51</sup> *Id.* at § 4(a)(1)(d).

<sup>52</sup> *Id.* The INA does not directly define “good moral character” but provides a non-exclusive list of acts that establish a lack of good moral character – INA §§ 101(f), 316(e). Most of the offenses in § 212(a)(2) are referenced. Crimes involving moral turpitude and controlled substance offenses are also included. INA § 101(f)(3).

<sup>53</sup> S. 3827 at § 5 Conditional Permanent Resident Status

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Plyler v. Doe*, 357 U.S. 202 (1982).

<sup>59</sup> Lee, Youngro, *To Dream or Not to Dream: A Cost Benefit Analysis of the Development, Relief, and Education for Alien Minors (DREAM) Act*, 16 Cornell J.L. & Pub. Pol’y 231, 237.

<sup>60</sup> *Plyler*, 357 U.S. 202 (1982).

<sup>61</sup> *Id.*

Texas public schools brought an action to overturn the law on equal protection grounds.<sup>62</sup> The Supreme Court had never considered whether undocumented immigrants could seek Fourteenth Amendment Equal Protection.<sup>63</sup> In determining that the Fourteenth Amendment was not limited to United States citizens, the Court found: (1) undocumented children can seek relief under the Equal Protection Clause; (2) the statute failed to satisfy an intermediate level of scrutiny; (3) the right to public education, though not fundamental, is more significant than other social benefits; and (4) the State cannot deprive a person's access to public education solely because of his or her undocumented status.<sup>64</sup>

Justice Brennan rejected the State's argument that undocumented children were not entitled to equal protection because they were not "within its jurisdiction."<sup>65</sup> The reasoning employed by the Court relied heavily on the language "persons guaranteed due process of law by the Fifth and Fourteenth Amendments."<sup>66</sup> An alien is a "person" in the ordinary sense of the term, as due process rights have long been acknowledged to apply to all individuals, with or without status.<sup>67</sup> Justice Brennan concluded that there was "simply no support for the suggestion that 'due process' is somehow of greater stature than 'equal protection' and therefore available to a larger class of persons."<sup>68</sup> To be clear, because undocumented immigrants are afforded due process, they receive equal protection to the same extent.

To reach this determination, the Supreme Court had to first apply the appropriate standard of review to evaluate the State's interests. In declining to apply strict scrutiny, the Court held that undocumented immigrants were not a constitutionally enumerated group.<sup>69</sup> As such, broad protection was unwarranted.<sup>70</sup> Strict scrutiny is instead reserved for cases involving a "suspect class," such as race, national origin, alienage, religious affiliation, or classifications that infringe upon fundamental rights including the freedom of speech, the right to marry and the right to procreate, among others.<sup>71</sup> The Court found that intermediate scrutiny was applicable because undocumented immigrants equated to a particular group that had suffered clear discrimination by a statute.<sup>72</sup> Thus, Texas had the burden to prove that denying undocumented children basic education furthered a substantial state interest.<sup>73</sup>

Texas argued that the statute furthered three particular State interests.<sup>74</sup> The Court, however, rejected each argument endorsed by the State.<sup>75</sup> Texas introduced no proof that

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<sup>62</sup> *Id.*

<sup>63</sup> Michael A. Olivas, *IRIRA, The DREAM Act, and Undocumented College Student Residency*, citing U.S. CONST. amend. XIV, § 1.

<sup>64</sup> *Plyler*, 357 U.S. 202 (1982).

<sup>65</sup> *Id.* at 213-216.

<sup>66</sup> *Id.* at 213.

<sup>67</sup> See *Shaugnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, (1886). (This line of cases stands for the proposition that an undocumented immigrant physically within the borders of the United States is considered a "person" for Due Process rights).

<sup>68</sup> *Plyler*, 357 U.S. at 213.

<sup>69</sup> *Id.*, 357 U.S. at 218-219.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 229-230. The interests advanced were: (1) protecting the public from a sudden influx of undocumented immigrants; (2) relieving the State of the special burden that inclusion of undocumented immigrants imposes upon the

their economy sustained any significant burden because of undocumented immigrants. Furthermore, no credible evidence was introduced to show that the quality of education would decline as a result of allowing undocumented students to enroll in public schools.<sup>76</sup> The Court finally determined that many of the students affected by the statute intended to remain in the United States and were equally likely to continue attending Texas public schools as any other child.<sup>77</sup>

The majority expressed a deep apprehension toward excluding undocumented students entirely from education even if they were not considered a “suspect class.”<sup>78</sup> The Court reasoned that punishing children for the acts of their parents was against the concept of justice.<sup>79</sup> These children did not make the independent decision to come to the United States illegally. Denying access to public education would inflict a “lifetime of hardship on a discrete class of children not accountable for their disabling status”<sup>80</sup> and would work against the basic idea that “legal burdens should bear some relationship to individual responsibility or wrongdoing.”<sup>81</sup> Consequently, the statute would no longer disallow undocumented children access to free public education because Texas failed to overcome intermediate scrutiny.

The majority opinion, however, did not establish a constitutional right to higher education—citizen or not. The decision to invalidate the Texas statute applied to primary and secondary schooling only.<sup>82</sup> Subsequent to the decision, states were left without adequate guidance as to how to deal with the problem of undocumented students’ admission to colleges and universities, and at what price. Nearly a decade passed before Congress enacted statutes that attempted to address an undocumented individual’s ability to attend postsecondary schooling.

*b. Significant Acts of Congress Reveal Intent to Indirectly Deny Higher Education to Undocumented Students.*

The Illegal Immigration Reform and Immigration Responsibility Act of 1996<sup>83</sup> (“IIRIRA”), 8 U.S.C. section 1623(a) (2004) and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996<sup>84</sup> (“PRWORA”), 8 U.S.C. sections 1611 and 1621, hinder undocumented immigrants’ ability and incentive to pursue higher education by constraining access to public benefits and in-state tuition. No court has found that sections 1621 or 1623 prohibit states from admitting undocumented immigrants into

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public education system; and (3) not subsidizing the educational costs of individuals unlikely to contribute back to the State, since undocumented students were less likely to remain in the state

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 228-230.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 220.

<sup>79</sup> *Id.*

<sup>80</sup> *See id.*, at 219-220 (explaining “children who are the plaintiffs in these cases ‘can affect neither their parents’ conduct nor their own status’”) (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

<sup>81</sup> *Id.* at 220 (citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)) (holding that illegitimate children could not constitutionally be denied workmen’s compensation recovery rights by Louisiana statute solely on the basis of their illegitimacy).

<sup>82</sup> *See id.* at 230 (J. Brennan referring to “free public education.”).

<sup>83</sup> 8 U.S.C. § 1623.

<sup>84</sup> 8 U.S.C. § 1621

public postsecondary educational institutions.<sup>85</sup> The statutes instead govern monetary assistance<sup>86</sup> to undocumented aliens for postsecondary education by focusing on “benefits” and providing requirements for in-state tuition.<sup>87</sup> The laws also extend past the field of education. Should any undocumented immigrant manage to receive the education he or she set out to obtain, the statutes effectively make them ineligible to work in the United States.<sup>88</sup>

Congress enacted PRWORA as part of an effort to restrict immigrants’ eligibility for public benefits at federal, state, and local levels. The language indirectly dealt a harsh blow to undocumented students seeking to obtain college degrees without directly addressing access to postsecondary education. PRWORA distinguishes eligibility for public benefits between those considered “qualified” and “non-qualified.”<sup>89</sup> As defined by the statute, the term “public benefits” includes “postsecondary education . . . or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit.”<sup>90</sup> To qualify, an individual must receive government authorization to be within the United States borders. If “non-qualified,” the individual is declined any public benefit—federal, state, or local—unless a state takes affirmative measures to grant its own public benefits to those persons without an approved reason for being in the country. The end result erases many opportunities for an undocumented student to obtain a college education because many states are reluctant to provide local benefits through affirmative enactments.<sup>91</sup>

Congress contemporaneously enacted IIRIRA.<sup>92</sup> Like PRWORA, IIRIRA restricts higher education benefits that can be disbursed to undocumented immigrants. Unlike PRWORA, IIRIRA specifically delineates requirements for in-state tuition.<sup>93</sup> Note, again, that the statute does not deny any undocumented immigrant admission to a college or university. Instead, section 505 of IIRIRA allows for an undocumented person to be eligible for postsecondary education benefits based on residence only if a citizen of the United States is also eligible for that benefit, regardless of residence.<sup>94</sup> This means that any institution offering an undocumented immigrant in-state tuition for postsecondary education must also offer the same rate for all United States citizens and nationals.

By its terms, the statute seems to eliminate an institution’s ability to charge out-of-state tuition. Nevertheless, eleven state legislatures have interpreted the provisions as

<sup>85</sup> *Martinez v. The Regents of the University of California*, Cal.Rptr.3d, 2010 WL 4582522 (Cal.).

<sup>86</sup> *See Equal Access Educ v. Merten*, 305 F. Supp. 585, 605 (2004). *See also*, 8 U.S.C. §§ 1601-1646 (2000)

<sup>87</sup> Basic Information about the DREAM Act Legislation, DREAM Act Portal, July 16, 2010, <http://dreamact.info/students>.

<sup>88</sup> 8 U.S.C. §§ 1324(a)(1)(A), (a)(2).

<sup>89</sup> 8 U.S.C. § 1601

<sup>90</sup> *Id.* § 1611(c)(1)(B) (addressing federal benefits); *Id.* § 1621(c)(1)(B) (addressing state and local benefits)

<sup>91</sup> 8 U.S.C. § 1621(d) (“A state may provide that an alien who is not lawfully present in the United States is eligible for any State or local benefit for which such alien would otherwise be ineligible under subsection (a) of this section only though the enactment of a State law after August 22, 1996, which *affirmatively provides for such eligibility.*”) (emphasis added). *See also* § 1611 (stating that “an alien who is not a qualified alien...is not eligible for any federal public benefit” defined in subsection (c) as including post-secondary education” in subsection (a)).

<sup>92</sup> *Id.* at § 1623

<sup>93</sup> 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, 569 (2004).

<sup>94</sup> 8 U.S.C. § 1623(a) provides “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 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.”

restrictions on residency only, and utilize other factors in determining tuition rates.<sup>95</sup> On June 6, 2011, the Supreme Court denied review of California's decision to uphold such a scheme in *Martinez v. Regents University of California*.<sup>96</sup> The Supreme Court's denial of certiorari shows much deference to the legislative process when it comes to immigration reform and, specifically, access to higher education for undocumented immigrants.

*c. Differing Interpretations Lead to Inconsistent Application of Law Throughout the States.*

Texas became the first state to pass legislation affording undocumented students in-state tuition rates when Governor Rick Perry signed H.B. 1403, later codified as section 54.052(j) of the Texas Education Code.<sup>97</sup> The statute provided that an undocumented student was exempt from non-resident tuition if that student:

- (1) resided with his or her parent, guardian, or conservator while attending a Texas high school;
- (2) graduated from high school or attained the equivalent of a high school diploma in the State of Texas;
- (3) resided in Texas for at least three years prior to high school graduation or receipt of an equivalent diploma;
- (4) registered as an entering student at an institution of higher education no earlier than Fall 2001; and
- (5) filed an affidavit with an institution of higher education stating that he or she will apply for legal status as soon as he or she is able to do so.<sup>98</sup>

The bill was later revised in 2005 to make residency requirements uniform for all students.<sup>99</sup>

California followed suit shortly thereafter. Governor Gray Davis signed California Assembly Bill (Cal. A.B.) 540, which was later codified as section 68130.5 of the California Education Code.<sup>100</sup> The requirements of this statute were nearly identical to that of Texas. Since 2002, nine more states have passed similar legislation, arguing that they are complying with IIRIRA.<sup>101</sup> Those states contend that IIRIRA focuses on

<sup>95</sup> See National Immigration Law Center, "DREAM Act: Basic Information (Oct. 2007)", available at [www.nilc.org/immlawpolicy/DREAM/dream\\_act\\_06\\_summary\\_0406.pdf](http://www.nilc.org/immlawpolicy/DREAM/dream_act_06_summary_0406.pdf); and National Immigration Law Center, "DREAM Act Summary" (Apr. 2006), available at [www.nilc.org/immlawpolicy/DREAM/dream\\_act\\_06\\_summary\\_2006-04.pdf](http://www.nilc.org/immlawpolicy/DREAM/dream_act_06_summary_2006-04.pdf). ("The laws in these eleven states require undocumented students to: 1) attend a school in the state for a certain number of years; 2) graduate from high school in the state; and 3) sign an affidavit stating that they will apply to legalize their status as soon as they are eligible to do so.")

<sup>96</sup> Case Detail, *Martinez v. Regents of University of California*, Washington Legal Foundation, [http://www.wlf.org/litigating/case\\_detail.asp?id=593](http://www.wlf.org/litigating/case_detail.asp?id=593) (last visited on June 12, 2011).

<sup>97</sup> Tex. Educ. Code § 54.052(j) (Vernon 2002). Amended in 2005 by Texas SB 1528.

<sup>98</sup> Tex. Educ. Code § 54.052(j).

<sup>99</sup> *Id.*

<sup>100</sup> Cal. Educ. Code § 68130.5 (West 2002).

<sup>101</sup> Thomas R. Ruge and Angela D. Inza, Article, *Higher Education for Undocumented Students: The Case for Open Admission and In-State Tuition Rates for Students Without Lawful Status*, 15 Ind. Int'l & Comp. L. Rev. 257, 270 (2005).

residency requirements, while these laws generally focus on where the student graduated from high school.<sup>102</sup>

To highlight the disparate application of law, Georgia's Board of Regents voted on October 13, 2010, to bar admission of undocumented immigrants to the state's most selective public universities.<sup>103</sup> As of September, 501 undocumented students were enrolled in the thirty-five four-year and two-year colleges in the University System of Georgia.<sup>104</sup> Given that the system has more than 310,000 students, individuals without status make up less than one percent of the total student body.<sup>105</sup> John Millsaps, spokesman for the Regents, stated, "clearly the system is not being swamped by these students by any stretch of the imagination."<sup>106</sup> This action was taken as an effort to subdue protests that academically qualified citizens of Georgia are being denied admission as a result of undocumented students. The program took effect in Fall 2011 by "prohibiting the admission of undocumented students on campuses where academically qualified students have been turned away for two consecutive years."<sup>107</sup> Twenty-nine students will be affected by the provisions because they are currently enrolled at the five campuses that will immediately be subject to the change.<sup>108</sup>

California's Supreme Court continued to support in-state tuition for undocumented immigrants by upholding the availability of benefits for any student who attends a California high school for three or more years and graduates.<sup>109</sup> In *Martinez v. The Regents of the University of California*, Justice Ming W. Chin led the majority in reversing a 2008 appeals-court decision holding that tuition benefits were unconstitutional and federally preempted by the IIRIRA.<sup>110</sup> The "fatal flaw" in the Regents' argument was that the California benefit is not based on residence.<sup>111</sup> According to Justice Ming, "Congress specifically referred to residence—not some form of surrogate residence—as the prohibited basis for granting unlawful aliens a postsecondary education benefit."<sup>112</sup> Plaintiff's attorney and Secretary of State-elect of Kansas, Kris W. Kobach, vowed to appeal the ruling to the United States Supreme Court. That aspiration, in haste, failed on June 6, 2011, when the United States Supreme Court denied review of the decision.<sup>113</sup>

<sup>102</sup> *Id.*

<sup>103</sup> Georgia Board of Regents Policy Manual § 4.1.6 Admission of Persons Not Lawfully Present in the United States. *See generally*, Section 4: Student Affairs. The new rules to be implemented for admission are: (1) add a section to all applications explaining the legal ramifications for knowingly providing false information; (2) require applicants to state on the applications whether they are eligible and seeking in-state tuition; (3) order all thirty-five (35) campuses to verify the "lawful presence" of any admitted student seeking in-state tuition; and (4) deny illegal immigrants admission to any college that has turned away academically qualified applicants because of a lack of space or other issues.

<sup>104</sup> *Id.*

<sup>105</sup> Jack Stripling, *Georgia Bars Admission of Illegal Immigrants*, Oct. 14, 2010, INSIDE HIGHER EDUCATION, <http://www.insidehighered.com/news/2010/10/14/georgia>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> The schools immediately affected are: The University of Georgia, Georgia Institute of Technology, Georgia State University, Medical College of Georgia, and Georgia College and State University.

<sup>109</sup> Josh Keller, *California Supreme Court Upholds Law Giving In-State Tuition to Illegal Immigrants*, CHRON. HIGHER EDUC., Nov. 15, 2010, <http://chronicle.com/article/California-Supreme-Court/125398/>.

<sup>110</sup> *Martinez*, Cal.Rptr.3d, 2010 WL 4582522(Cal.)

<sup>111</sup> *Id.* at 6 of the opinion.

<sup>112</sup> *Id.*

<sup>113</sup> Case Detail, *Martinez v. Regents of University of California*, Washington Legal Foundation, [http://www.wlf.org/litigating/case\\_detail.asp?id=593](http://www.wlf.org/litigating/case_detail.asp?id=593) (last visited on June 12, 2011).

Due to the inconsistent treatment of undocumented immigrants, administrators and students are left with little direction. In-state tuition is only one hurdle in an obstacle course of issues that undocumented youth must confront. Even after receiving in-state tuition, many students without legal status are still unable to pursue higher education without additional financial aid. To make matters worse, those students are also unable to work their way through college. The few pro-immigrant legislatures that have enacted in-state tuition laws lack the ability to provide a path to lawful status within the United States. Individual states cannot solve the problem on their own because the federal government has the sole power to regulate immigration. Until full-scale reform is achieved, the DREAM Act will provide a minor solution and solid basis for the improvement of immigration laws in the future.

#### IV. PUTTING THE PROVISIONS OF THE DREAM ACT INTO PERSPECTIVE

The DREAM Act provides limited relief to children included in the “1.5 generation.”<sup>114</sup> This generation is defined as: “[I]mmigrants brought to the United States at a young age who were largely raised in this country and therefore share much in common with second-generation Americans.”<sup>115</sup> These students are culturally American, growing up here and often having little attachment to their country of birth.<sup>116</sup> The vast majority are bicultural and fluent in English.<sup>117</sup> Despite this fact, many undocumented immigrants are discouraged from pursuing higher education or naturalization because of insurmountable financial hurdles and restricted forms of relief. The DREAM Act works to thwart these harsh realities by incentivizing students to stay in school and proceed to college or enlist in the military.<sup>118</sup> Accordingly, the DREAM Act lists the following specific requirements:

- (1) Must have entered the United States before the age of sixteen;
- (2) Must have been present in the United States for at least five consecutive years prior to enactment of the bill;
- (3) Must have graduated from a United States high school, or have obtained a GED, or have been accepted in an institution of higher education;
- (4) Must be between the ages of 12 and 35 at the time of the application;
- (5) Must have good moral character.

These requirements seem fairly straightforward at first glance, however, the implications of corresponding immigration laws greatly impact an individual’s eligibility. Therefore, it is imperative to understand the true meaning behind these requirements

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<sup>114</sup> Immigration Policy Center, *The DREAM Act to be Revived in Congress*, Nov. 18, 2010, <http://www.immigrationpolicy.org/>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

a. *Preliminary Qualifications for the DREAM Act and the Associated Benefits.*

Under the proposed legislation, the Secretary of Homeland Security is vested exclusive jurisdiction to determine eligibility for relief and must propose regulations within 180 days after the date of enactment.<sup>119</sup> Applicants must apply for relief no later than one year after either: (1) admission to an institution of higher education in the United States or (2) obtaining a diploma or GED certificate in the United States.<sup>120</sup> At that juncture, the Secretary of Homeland Security is restricted from removing any alien who has a pending application for conditional status.<sup>121</sup>

Despite the nonexistence of regulations for the DREAM Act, it is safe to assume that the Act will play off of other immigration law regulations to maintain uniformity. Individual states will likely have the authority to make the necessary factual findings to establish eligibility.<sup>122</sup> The following section analyzes how to establish eligibility for conditional permanent residency.

i. Age Requirements and Admission to Institutions of Higher Education, High School Graduation, or its Equivalent

The Dream Act's age and admission requirements are fairly straightforward: an applicant must have entered the United States at an age younger than sixteen and be between the ages of twelve and thirty-five at the time of application.<sup>123</sup> Furthermore, the applicant must also prove his or her college admission, high school graduation, or obtainment of a GED certificate.<sup>124</sup>

ii. Continuous Physical Presence

The DREAM Act also requires physical presence within the United States for a continuous period of at least five years immediately preceding the date of enactment.<sup>125</sup> The DREAM Act incorporates INA section 240A(d)(2) which states that, "an alien shall be considered to have failed to maintain continuous physical presence in the United States if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days."<sup>126</sup> In general, brief, casual, and innocent absences will not be considered failures to maintain continuous physical

<sup>119</sup> S. 3827, 111th Cong. § 7 (2010). The Attorney General will have exclusive jurisdiction, however, for those individuals placed into deportation, exclusion, or removal proceedings either prior to or after filing of an application until the proceedings are terminated.

<sup>120</sup> *Id.* at § 4(a)(4). If found to be falsified, § 8 of the Act implements penalties for any applicant that makes any false statements in their application. Penalties include a fine in accordance with title 18, United States Code, or imprisoned not more than 5 years, or both.

<sup>121</sup> *Id.* at § 4(a)(f).

<sup>122</sup> Interview with Evelyn Cruz, Clinic Director, Sandra Day O'Connor College of Law at Arizona State University Immigration Law and Policy Clinic, in Tempe, Ariz. (Nov. 14, 2010). Akin to the SIJS Process, a signed court order making the necessary factual findings under § 101(a)(27)(J) of the INA must accompany the application. The Code of Federal Regulations will further set forth standards for implementing the statute. Additional guidance may be provided in Memorandum form.

<sup>123</sup> S. 3827 § 4(a).

<sup>124</sup> *Id.* at § 5(e).

<sup>125</sup> *Id.* at § 4(a)(1)(a).

<sup>126</sup> *Id.* at § 4(b). Note: INA 240A(d)(3) provides an exception to continuity for those in the armed forces. Thus, DREAM Act applicants that enlist in the military do not suffer from a break in presence if moved overseas.

presence in the United States.<sup>127</sup> Furthermore, service of a notice to appear will not terminate continuous presence.<sup>128</sup> Nevertheless, persons that have been subject to a court order of removal or who have accepted voluntary departure will generally not qualify.<sup>129</sup>

The Secretary of Homeland Security has the power, however, to either extend time periods or waive breaks in continuous presence for limited reasons.<sup>130</sup> For example, the Secretary of Homeland Security may waive absences compelled by humanitarian purposes, family unity, or when otherwise in the public interest.<sup>131</sup> A waiver may also be granted if the alien demonstrates that the failure to timely return to the United States was due to exceptional circumstances.<sup>132</sup>

### iii. Good Moral Character

The applicant must have been a person of good moral character *since* the date the Act passed, implying that any offenses prior to enactment showing lack of “good moral character” will not be considered.<sup>133</sup> This appears to be a large departure from immigration law because *ex post facto* application under these circumstances is generally allowed. An alien, however, must have never been under a final administrative or judicial order of exclusion, deportation, or removal.<sup>134</sup>

Immigration law does not provide a definition of “good moral character.” Rather, INA section 101(f) provides a list of crimes that indicate whether a person is not of “good moral character.” The list generally includes convictions for criminal activities.<sup>135</sup> The DREAM Act explicitly states that the applicant must not be rendered inadmissible under INA section 212(a) or deportable pursuant to INA section 237(a).<sup>136</sup> Accordingly, aggravated felonies, crimes involving moral turpitude and possession of controlled substances, will bar an applicant from eligibility.

<sup>127</sup> *Id.* at § 4(c).

<sup>128</sup> *Id.* at § 4(b).

<sup>129</sup> *Matter of Romales-Alcaide* 23 I. & N. Dec. 423 (BIA 2002). *But see also*, *In re Avilez-Nava*, 23 I. & N. Dec. 799, Int. Dec. 3517 (BIA 2005) clarifying *Romales* and determining that persons turned away at ports of entry without any threat of the institution of exclusion proceedings were not under court order. Furthermore, respondent’s continuous presence within the United States was not broken although they remained outside the country for two weeks.

<sup>130</sup> S. 3827 at § 4(c).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at § 4(c)(2). Justifiable circumstances can be no less compelling than serious illness of the alien, or death or serious illness of a parent, grandparent, sibling, or child

<sup>133</sup> *Id.* at § 4(a)(1)(b).

<sup>134</sup> *Id.* at § 4(a)(1)(e). Although limited exceptions exist for this as well (ie. if the alien (1) has remained in the United States under color of law after such order was issued or (2) received the order before attaining sixteen (16) years of age).

<sup>135</sup> INA, § 1101(a)(48)(a) (2010) defines conviction as, “a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where: (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, AND (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.”

<sup>136</sup> S. 3827 at § 4(a)(1)(c)(i)-(ii). Providing that an applicant may not be inadmissible under paragraph (2), (3), (6)(E), (10)(A), or (10)(C) of § 212(a) of the INA (8 U.S.C. 1182(a)); and the alien must not be deportable under paragraph (1E), (2), or (4) of § 237(a) of the INA (( 8 U.S.C. 1227(a)).

#### iv. Benefits

Qualified applicants under the DREAM Act may obtain conditional permanent residency status.<sup>137</sup> A conditional permanent resident has the ability to be employed in the United States and seek higher education assistance in the form of student loans.<sup>138</sup> Applicants are not eligible for grants. The DREAM Act has always limited assistance under the Higher Education Act and Title IV of the PRWORA. An alien lawfully admitted for permanent residence that has not adjusted their conditional status is ineligible for Federal Pell Grants or Federal supplemental educational opportunity grants under part A of the Higher Education Act of 1965.<sup>139</sup>

There is clearly a desire to secure repayment of financial assistance from applicants that have yet to satisfy their obligations under the Act. Until applicants have fulfilled the requirements to lift the conditional basis for cancellation of removal and adjustment of status, they remain ineligible for Federal Pell Grants and Federal Supplemental Educational Opportunity Grants. Pell grants are considered the foundation of federal financial aid,<sup>140</sup> while federal supplemental educational opportunity grants promote access to postsecondary institutions.<sup>141</sup> Neither form of financial aid requires repayment.

#### b-iii. *Steps Necessary to Achieve Legal Permanent Residency*

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An applicant's conditional permanent resident status will be valid for a period of six years.<sup>142</sup> Within those six years, the individual must have completed two years of higher education or military enlistment.<sup>143</sup> Once five-and-a-half years of the six years have passed, the individual is able to apply for legal permanent residency.<sup>144</sup>

An applicant must not cease to meet any of the requirements in section 4(a)(1)(b)-(c) of the Act, become a public charge, or receive anything other than an honorable discharge from the military during the period of conditional permanent residency.<sup>145</sup> The applicant must also not abandon residence.<sup>146</sup> Absence due to active duty in the uniformed services, however, is not counted against the applicant.<sup>147</sup> Finally, the individual must demonstrate, under penalty of perjury, good moral character throughout the conditional

<sup>137</sup> *Id.* at §5(a)(1).

<sup>138</sup> *Id.* at § 7(c), § 11. *See also*, Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, Employment must be consistent with the Fair Labor Standards Act, and State and local laws governing minimum age for employment.

<sup>139</sup> *Id.* at § 10.

<sup>140</sup> U.S. Dept. of Educ., Federal Supplementary Educational Opportunity Grant (FSEOG) Program, <http://www2.ed.gov/programs/fseog/index.html>.

<sup>141</sup> U.S. Dept. of Educ., Federal Pell Grant, <http://studentaid.ed.gov/PORTALSWebApp/students/english/PellGrants.jsp>.

<sup>142</sup> S. 3827 § 6 provides an exception applicable to individuals that upon enactment have already fulfilled the requirements of § 4(a)(1)(a)-(d) and § 5(d)(1)(D) so long as the applicant met the requirements of subparagraphs (A), (B), and (C) of § 5(d)(1).

<sup>143</sup> *Id.* at § 5(c)(1).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at § 5(b)(1).

<sup>146</sup> Abandonment is a question of intent determined by the individual's behavior. Abandonment is presumed if the alien has been absent for more than 365 days, in the aggregate, during the period of conditional residence, unless the alien demonstrates otherwise.

<sup>147</sup> 10 U.S.C. § 101(a) defining "uniform services," as, "(a) the armed forces; (b) the commissioned corps of the National Oceanic and Atmospheric Administration; and (c) the commissioned corp of the Public Health Service."

residency period.<sup>148</sup> If the applicant fails to meet these requirements, their conditional status will be revoked and their status prior to applying for relief under the Act will be reinstated.<sup>149</sup>

Once granted lawful permanent residency, the individual will be considered as having been a lawful permanent resident for the entirety of the process for purposes of Title III of the INA.<sup>150</sup> The individual will then be able to apply for naturalization.<sup>151</sup> This added incentive is completely justified as a benefit for positively impacting society.

e.iv. *Settle for Nothing Now: The DREAM Act is Only a Stepping Stone* ←

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There is no arguing that the Act, as proposed, will be very beneficial for a select portion of the undocumented population. On a much broader scale, however, the DREAM has great potential to be the spark that ignites immigration reform as a whole. Although the legislation functions largely as a compromise in place of a total overhaul of decades of failed law and policy, its passage is nonetheless a step in the right direction. Proponents of the bill must always keep this in mind. There is no room for further compromise. The DREAM Act cannot be the ultimate goal—it is simply a means to an end.

After the DREAM Act failed to gather enough votes for passage in September 2010, the bill was subsequently proposed during the congressional lame-duck session in November.<sup>152</sup> With optimism in limbo, Senate Majority Leader Harry Reid vowed not to back down in his effort to lobby enough conservative votes to gain approval. A slew of concessions followed that, passed, would have led to a watered down version of an already accommodating set of provisions. The major differences between Senate Bill 3827 (September 23, 2010) and Senate Bill 3992 (November 30, 2010) included, but were not limited to, the following:

- Senate Bill 3992 attempted to provide the right to travel outside the U.S. for those in conditional status, but failed to exempt federal provisions that bar individuals from reentering the country if they have previously been in the U.S. without documentation. Rather, individuals in conditional status would need to acquire a waiver from the federal government to be allowed reentry;
- Senate Bill 3992 did not repeal federal law that limits avenues for which states can provide in-state tuition to undocumented immigrants. States would have continued facing the dilemma of providing in-state tuition to U.S. citizen graduates of their high schools living outside of the state if they intended to offer in-state tuition to undocumented students;
- Senate Bill 3992 requires applicants to be younger than thirty at the time of applying, as opposed to thirty-five;

<sup>148</sup> S. 3827 at § 5(d)(1).

<sup>149</sup> S. 3827 at § 5(b)(1).

<sup>150</sup> *Id.* at § 5(e).

<sup>151</sup> United States Citizenship and Immigration Services, *Who is Eligible for Naturalization?*, A Guide to Naturalization available at <http://www.uscis.gov/files/article/chapter4.pdf> (last visited on September 26, 2011).

<sup>152</sup> S. 3992, 111th Cong. (2010).

- Senate Bill 3992 mandates that each applicant show good moral character since entering the United States, rather than since the time of application;
- Senate Bill 3992 subjects each applicant to more grounds of inadmissibility, deportability, and other restrictions, such as unlawful voting, student visa abuse, persecution of others, posing a public health risk, likelihood of becoming a public charge, and any felony conviction or three misdemeanor convictions;
- Senate Bill 3992 provides more restrictive deadlines for applying for conditional nonimmigrant status and adjustment of status;
- Senate Bill 3992 requires applicants to demonstrate their eligibility for relief to receive a stay of removal while their applications are pending;
- Senate Bill 3992 expanded disclosure requirements that include exceptions to confidentiality for criminal, homeland security, or national security purposes.<sup>153</sup>

The DREAM cannot act as the only beacon of hope for nonimmigrant rights. There are far too many undocumented persons living in America that risk being removed at a moment's notice despite their irreplaceable contributions to our society. Most of these individuals will be wholly unaffected by the Act. Therefore, reducing the bill's impact by any degree is not an option. Rather, the DREAM Act should provide relief for those undocumented individuals willing to further their education and enlist in the military while simultaneously serving as a platform for rational immigration reform discourse going forward. Accordingly, providing avenues for a select number of undocumented individuals will promote the best interests of the United States.

#### **V. THE DREAM ACT WILL SERVE BOTH FEDERAL AND STATE INTERESTS BY ENCOURAGING THE PURSUIT OF HIGHER EDUCATION AND MILITARY ENLISTMENT**

Few topics are more hotly debated than immigration. The anti-immigrant sentiment expressed in Arizona with the enactment of S.B. 1070 is part of a much larger movement being advocated across the United States. To many, the thought is that increasing access to citizenship will only worsen the harsh economic predicament faced by documented Americans.<sup>154</sup> National concerns ranging in credibility push against any discussion regarding the provision of public benefits for undocumented students. Though disputes depend on factors such as socioeconomics, race, and politics, dissent is focused primarily on federal and state interests. Opponents of the DREAM Act argue that the bill will encourage illegal immigration and deplete the job market for Americans.<sup>155</sup> Proponents

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<sup>153</sup> See National Immigration Law Center, "Summary of Significant Changes in the DREAM Act from S. 729 to S. 3992," available at <http://www.nile.org/immlawpolicy/dream/DREAM-changes-summary-2010-12-03.pdf>.

<sup>154</sup> Joe Messerli, *Should American Maintain/Increase the Level of Legal Immigration?*, BALANCED POLITICS, available at <http://www.balancedpolitics.org/immigration.htm> (last visited September 26, 2011).

<sup>155</sup> S. Rep. No. 104-224, at 12-14 (2004).

argue that passing the DREAM will financially benefit the United States and lessen social costs without constricting job opportunities or encouraging unlawful entry.<sup>156</sup>

The main point that critics of the DREAM Act fail to recognize is that withholding educational benefits from children does not punish the actual wrongdoers. The deterrent effect of punishment is not realized when the punishment is misapplied.<sup>157</sup> This misdirected hostility does not succeed in addressing the main reason for illegal immigration: immediate economic prospects from increased work opportunities.<sup>158</sup> Better education is merely a secondary gain.<sup>159</sup>

Students, however, are uniquely situated and present a great chance to rationalize immigration policy. The lack of comprehensive immigration reform begs for bipartisan legislation such as the DREAM Act to improve the current law. Failed versions of the DREAM Act not only provide incentives to obtain higher education and/or serve our military, but would also positively impact the economy. Conservative views have nevertheless prevailed in arguing that the DREAM Act controverts federal law and would be unduly burdensome. To the contrary, the DREAM would only apply to a narrow class of individuals and leave the determination of residency for higher education purposes to the States.

Simply put, the DREAM Act is “good for our economy, good for our security, and good for our nation.”<sup>160</sup> The following section will discuss how enacting the DREAM and extending *Plyler* will not incentivize illegal immigration, but allow our border security experts to focus on serious threats to our national security. Our country’s increased competitiveness in the global economy and the important economic benefits associated with the DREAM Act will also be analyzed.<sup>161</sup> Finally, the section will close by examining the positive contribution to military recruitment efforts and readiness that will be produced by the DREAM Act.<sup>162</sup>

*a. Extending Plyler to Higher Education Will Further the Interests of the Federal Government*

*Plyler* made clear that education is a federal interest and denying minor undocumented immigrants access to free public education is unconstitutional. Unfortunately, the decision was limited to twelfth grade and lower. No universal right to higher education was established. Another hurdle for extending *Plyler* to postsecondary education is the inability to determine the standard of review that a court would apply to judge the constitutionality of the Act.

This, however, may very well work in the Act’s favor.

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<sup>156</sup> National Immigration Law Center, *The Economic Benefits of the DREAM Act and the Student Adjustment Act*, available at [http://www.nilc.org/immlawpolicy/dream/Econ\\_Bens\\_DREAM&Stdnt\\_Adjst\\_0205.pdf](http://www.nilc.org/immlawpolicy/dream/Econ_Bens_DREAM&Stdnt_Adjst_0205.pdf) (last visited September 14, 2011).

<sup>157</sup> See *Plyler*, 457 U.S. 202, 220 (1982).

<sup>158</sup> See *Id.* at 228 (“The dominant incentive for illegal entry into the State of Texas is the availability of employment...”).

<sup>159</sup> *Id.*

<sup>160</sup> Luis Miranda, *Get The Facts On The DREAM Act*, The White House Blog, Dec. 1, 2010, <http://www.whitehouse.gov/blog/2010/12/01/get-facts-dream-act>.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

In *Plyler*, Chief Justice Burger's dissent took notice of the "specter of a permanent caste" within a larger United States population and acknowledged its deference, "to the political process, unpalatable as that may be to some."<sup>163</sup> Taken together, these statements indicate the Supreme Court's unwillingness to subvert the plenary power of Congress to implement and enforce immigration law. The legislature and the courts are not bound to a strict scrutiny review given that *Plyler* found undocumented immigrants not to be a constitutionally protected group. As a result, it is very unlikely that the DREAM Act would be overturned by the Supreme Court on any legal grounds because its provisions should fulfill intermediate scrutiny.

Since the decision in *Plyler*, the fundamental importance placed on education has been elevated throughout our society. The landmark decisions in *Grutter v. Bollinger*<sup>164</sup> and *Gratz v. Bollinger*<sup>165</sup> further highlighted the essential purpose that education plays throughout the United States in the context of affirmative action.<sup>166</sup> Even before *Plyler* and *Gratz*, the seminal value of education was a central tenant in *Brown v. Board of Education*.<sup>167</sup> In *Brown*, the Supreme Court emphasized the importance of equal opportunity in the education setting by stating:

Education is the very foundation of good citizenship . . . it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms.<sup>168</sup>

For many, *Plyler*, *Gratz*, and *Brown* mean that being a productive member of society is predicated by access to primary and secondary education. The core equal protection reasoning pervasive throughout *Plyler* still applies today. Education is a federal interest and obtaining a postsecondary education is as important—if not more important—now as a high school education was in 1982. The impact of denying education is devastating. Justice Blackmun noted in his concurrence that varying degrees of education and knowledge amongst different groups of people may create class distinctions throughout society that are everlasting.<sup>169</sup> The majority acknowledged that "education prepares individuals to be self-reliant and self-sufficient participants in society."<sup>170</sup> Given the job market and increasing global competition, the federal government's interests have not

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<sup>163</sup> *Id.* at 241

<sup>164</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>165</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>166</sup> See generally *Grutter*, 539 U.S. 306 (2003) and *Gratz*, 539 U.S. 244 (2003). The Supreme Court addressed affirmative action policies at the University of Michigan's law school and undergraduate university in both cases. In *Grutter*, the Court held that the law school system was sufficiently narrowly tailored to serve the compelling interest of diversity. In *Gratz*, the Court found the undergraduate system too broad because race was a decisive factor for almost every qualified under-represented minority applicant.

<sup>167</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>168</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>169</sup> *Id.* at 235-36 (Blackmun, J., concurring).

<sup>170</sup> *Id.* at 222 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

changed. Indeed, the DREAM Act “will play an important role in the nation’s efforts to have the highest proportion of college graduates in the world by 2020.”<sup>171</sup>

*b. The DREAM Act Will Not Incentivize Illegal Immigration because of the Limited Number of Undocumented Immigrants Eligible for Relief.*

The DREAM Act will not encourage illegal immigration by creating incentives or rewards for undocumented immigrants to obtain lawful status within the United States. The narrow relief the Act provides is not intended to be a comprehensive solution to the immigration issues that divide our country. In fact, Secretary Janet Napolitano has praised the legislation as a fair and limited option for dealing with innocent children who were brought to the United States at a young age.<sup>172</sup> Specifically, Secretary Napolitano stated, “it’s important to point out that [the DREAM Act] fits into a larger strategy of immigration enforcement and complements the Department of Homeland Security plan to prioritize enforcement resources to remove dangerous criminal aliens from the country.”<sup>173</sup> Under the Obama administration, the Department of Homeland Security has “deported a record number of illegal aliens convicted of criminal offenses, including 195,000 in fiscal year 2010.”<sup>174</sup> These numbers reflect a seventy percent increase in criminal removals compared to 2008.<sup>175</sup> The DREAM Act “would further enhance” the administration’s efforts by enabling the removal process to be focused on undocumented immigrants with criminal records.<sup>176</sup>

As mentioned, eligibility is limited to undocumented persons who have been in the United States for over five years when the bill is passed, and who fulfill other stringent requirements. To be sure, “no one who poses a threat to public safety will be able to adjust their status under the DREAM Act,” as the bill ensures that “individuals who committed offenses that are grounds for removal will be barred from relief.”<sup>177</sup> These regulations make opportunities for an unlimited number of undocumented students to obtain citizenship nonexistent.

According to the UCLA Center for Labor Research and Education, there are approximately 65,000 undocumented students that graduate from United States high schools each year.<sup>178</sup> Due to the Act’s five-year residency requirements, those individuals that have reached the age of six and were brought to the United States before reaching one year of age would constitute the youngest eligible class for relief.<sup>179</sup> Thus, there are only thirty classes eligible for relief under the Act in the next thirty-five years. Approximately two million undocumented immigrants would have the potential to fulfill the requirements of the DREAM Act.

<sup>171</sup> Julianne Hing, *DREAM Act’s Good for National Security*, COLORLINES, Dec. 2, 2010, [http://colorlines.com/archives/2010/12/sec\\_napolitano\\_dream\\_acts\\_good\\_for\\_national\\_security.html](http://colorlines.com/archives/2010/12/sec_napolitano_dream_acts_good_for_national_security.html).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Janet Napolitano, *How The DREAM Act Would Bolster Our Homeland Security*, THE WHITE HOUSE BLOG, Dec. 14, 2010, <http://www.whitehouse.gov/blog/2010/12/14/how-dream-act-would-bolster-our-homeland-security>.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Undocumented Students, Unfulfilled Dreams... *supra* note 5.

<sup>179</sup> Lee, Youngro. *To Dream or Not to Dream: A Cost Benefit Analysis of the Development, Relief, and Education for Alien Minors (DREAM) Act*. 16 Cornell J.L. & Pub Pol’y 231.

A more precise breakdown is provided by the Immigration Policy Center.<sup>180</sup> 114,000 potential beneficiaries with at least an associate's degree would be immediately eligible for conditional LPR status;

612,000 potential beneficiaries would be immediately eligible for conditional LPR status because they already have a high school diploma or GED (and would have incentive to complete two years of college or two years of military service) to be eligible for permanent status;

934,000 children under 18 could be eligible for conditional LPR status in the future, which would provide them with incentives to finish high school and pursue a postsecondary education or join the military;

489,000 potential beneficiaries could be eligible for conditional LPR status in the future if they obtain a GED.<sup>181</sup>

There are over 310 million people within the United States.<sup>182</sup> It is projected that the population will exceed more than 390 million in 2050.<sup>183</sup> Assuming each potential beneficiary fulfills the requirements, granting two million undocumented citizens permanent residence will not have any measurable detrimental impact on the use of public benefits or on the job market. According to the Migration Policy Institute, however, only thirty-eight percent of all potential beneficiaries can be expected to successfully complete the process to become a legal permanent resident.<sup>184</sup> Nevertheless, the United States would still benefit from an increase in college-educated persons and military servicemen. The DREAM Act could effectively reduce the amount of people classified as a "public charge," while strengthening the job market and military.

Higher education also means greater access to better paying jobs. This logically results in a country that is better-equipped to compete in the global marketplace. By removing many barriers to income, individuals are allowed to integrate further into American society without the constant fear of removal.<sup>185</sup>

*c. The Potential for Higher Education and Responsible Tax Payers will Financially Benefit the United States and Allow Naturalized Immigrants to Invest in the Economy.*

Providing incentives to remain in school will enable access to better jobs and generate more taxable income. The Congressional Budget Office estimates that the DREAM Act will cut the deficit by \$1.4 billion and "increase government revenues by

<sup>180</sup> Immigration Policy Center, *The DREAM Act*, available at <http://immigrationpolicy.org/just-facts/dream-act>.

<sup>181</sup> *Id.*

<sup>182</sup> US Census Bureau available at <http://www.census.gov/>.

<sup>183</sup> *Id.*

<sup>184</sup> Julianne Hing, *DREAM Act's Good for National Security*, COLORLINES, December 2, 2010, [http://colorlines.com/archives/2010/12/sec\\_napolitano\\_dream\\_acts\\_good\\_for\\_national\\_security.html](http://colorlines.com/archives/2010/12/sec_napolitano_dream_acts_good_for_national_security.html).

<sup>185</sup> See Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. N. Int'l L. & Com. Reg. 393, 412 (2002).

\$2.3 billion over the next ten years.”<sup>186</sup> Furthermore, the UCLA North American Integration and Development Center found that beneficiaries of the DREAM Act would produce an estimated \$1.4 trillion to \$3.6 trillion total earnings over their working lives.<sup>187</sup> This income is “substantially higher” than what would be earned by undocumented individuals without the benefit of higher education.<sup>188</sup>

Given the resources already invested in undocumented students’ primary and secondary education, it makes no sense to block paths to postsecondary education. The United States Department of Education reported a 22.1 percent dropout rate for Hispanics in 2006 (more than twice the rate of African-American students and three times the rate among white students).<sup>189</sup> It is clear that many undocumented students, particularly those of Hispanic heritage, choose to forego their early education because of the realization that they will have no access to higher education.

Raising the college graduation rate of Hispanics to that of non-Hispanics would increase spending on public education by ten percent nationwide, but the costs would be greatly offset by savings in public health and benefits, as well as increased tax revenues resulting from higher incomes.<sup>190</sup> According to a study conducted by the RAND Corporation, a thirty-year-old immigrant woman who graduates from college will pay \$5,300 more in taxes and will cost the government \$3,900 less in expenses annually than an immigrant who never finished high school.<sup>191</sup>

The College Board reports that employees with a four-year degree earn much more and are less likely to be unemployed than those with just a high school diploma.<sup>192</sup> Median earnings for full time workers with bachelor’s degrees in 2008 were \$55,700 compared to \$33,800 for those without them.<sup>193</sup> Differences in employment are more drastic than in 2007 when there was only a 2.3 percent difference in unemployment rates between college grads and high school-only-grads. The current unemployment rate for college grads over twenty-five is 4.6 percent compared to 9.7 percent for high school grads, a 5.1 percent difference.<sup>194</sup>

It is clear that the costs of the DREAM Act would be significantly outweighed by the gains that beneficiaries would provide through their contributions to the economy.<sup>195</sup> While many argue that undocumented immigrants create a net economic loss in the United States, no evidence has ever been produced to lay foundation for this claim.<sup>196</sup>

<sup>186</sup> Julianne Hing, *DREAM Act’s Good for National Security*, COLORLINES, Dec. 2, 2010, [http://colorlines.com/archives/2010/12/sec\\_napolitano\\_dream\\_acts\\_good\\_for\\_national\\_security.html](http://colorlines.com/archives/2010/12/sec_napolitano_dream_acts_good_for_national_security.html).

<sup>187</sup> Immigration Policy Center, *The DREAM Act: Fact Checklist*, <http://immigrationpolicy.org/just-facts/dream-act#up>.

<sup>188</sup> Hing, *supra* note 188.

<sup>189</sup> U.S. Dep’t. of Educ., Nat’l Center for Educ. Statistics, *The Condition of Education 2008* (NCES 2008-031).

<sup>190</sup> Immigration Policy Center, *The DREAM Act: Fact Checklist*, *citing* a RAND Study, <http://immigrationpolicy.org/just-facts/dream-act#up>.

<sup>191</sup> Roberto G. Gonzales, *Young Lives on Hold: The College Dreams of Undocumented Students*, THE COLLEGE BOARD (April 2009).

<sup>192</sup> The College Board, *Education Pays*, <http://education.newsweek.com/blogs/crib-sheet/2010/10/19/what-s-a-college-degree-worth.html>.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> See generally Howard Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. Int’l L. & Foreign Aff. 371 (1998) (citizens of US would experience net economic benefit from less restricted immigration policy).

<sup>196</sup> Victor Romero, *Postsecondary Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C.J. Int’l L. & Com. Reg. 393, 402 (2002).

Undocumented individuals not only provide hard labor at extremely low wages for questionable employers, but they are also ineligible for programs such as unemployment benefits, welfare, food stamps, and Social Security.<sup>197</sup> Additionally, only a very narrow section of the undocumented population actually immigrates to the United States to take advantage of hospital emergency rooms, police protection, public parks, and educational benefits.<sup>198</sup>

Any actual costs that accrue due to the consumption of indirect benefits will be replenished with financial contributions from undocumented immigrants that have received conditional status. Qualified applicants for the DREAM Act will be eligible for employment opportunities. These beneficiaries would help fill positions that have long been in demand in the United States like teachers and nurses.<sup>199</sup> Better business practices will be required and more accountable hiring will result. This will lead to a more streamlined tracking of healthcare costs and overall population control.

Critics, including United States Immigration Support, a leading publisher of legal books and immigration guides, suggest that wages earned by undocumented workers are sent as remittances to foreign countries and therefore do not benefit local communities.<sup>200</sup> This is a baseless claim. Direct evidence to the contrary shows that in 2004, Latin American born workers in the United States earned approximately \$450 billion in combined annual gross income, and spent 90% of their money within the United States.<sup>201</sup>

The DREAM Act would keep talented students in the United States and stop the “brain drain” that occurs when only five to ten percent of undocumented high school graduates advance to college.<sup>202</sup> None of the states that have passed laws allowing undocumented students to qualify for in-state tuition have experienced a large influx of undocumented students.<sup>203</sup> Nor have native-born students suffered from displacement.<sup>204</sup> The measures have actually increased school revenues because students normally unable to attend college can now pay for tuition.<sup>205</sup> It is clear that allowing these students to fall through the cracks “imposes economic and emotional costs on undocumented students and United States society as a whole.”<sup>206</sup>

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<sup>197</sup> *Id.* Victor Romero. See also, Kay Bell, *IRS Holding Billions in Old, Unclaimed Tax Refunds*, explaining that unbeknownst to many, undocumented immigrants pay taxes even though they are still ineligible for tax refunds. This means that billions of dollars worth of unclaimed tax refunds are held by the IRS each tax cycle. The unclaimed refunds then become property of the federal government after three years. Bizrate, available at <http://www.bankrate.com/brm/itax/news.20010205a.asp>.

<sup>198</sup> *Id.* Victor Romero.

<sup>199</sup> Immigration Pol’y Center, *The DREAM Act: Fact Checklist*, <http://immigrationpolicy.org/just-facts/dream-act#up>, *supra* note 189.

<sup>200</sup> U.S. Immigration Support, *Immigrants Send Money Home in Record Numbers*, <http://www.usimmigrationsupport.org/immigrants-send-money-home.html> (last visited June 5, 2011).

<sup>201</sup> Nathan Thornburgh, *Inside the Life of the Margins Next Door*, TIME, Feb. 6, 2006, at 39; see also National Immigration Law Center, *Paying Their Way and Then Some*, (Sept. 2006), [http://www.nilc.org/immspb/research/immispaytheirway\\_2006-9-25.pdf](http://www.nilc.org/immspb/research/immispaytheirway_2006-9-25.pdf).

<sup>202</sup> Immigration Policy Center, *The DREAM Act: Fact Checklist*, <http://immigrationpolicy.org/just-facts/dream-act#up>, *supra* note 189.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

*d. The DREAM Act Will Weaken the Burden of Social Costs While Bolstering the United States Military.*

Individuals make choices that hurt society when they don't have better options. Providing access to college education, military service, and employment will encourage many undocumented immigrants to sidestep detrimental activities. The United States is no stranger to gang violence and it is undisputed that high dropout rates feed into gang enrollment.<sup>207</sup>

Federal and local public safety costs rise as gang and drug violence become more prevalent.<sup>208</sup> Added police protection inevitably leads to an ever-increasing prison population—supported by taxpayer money.<sup>209</sup> Wasting money on housing undocumented immigrants for poor decision-making in the face of inadequate opportunity lacks reason. Crime prevention can be realized through education and military enrollment.<sup>210</sup> Qualifying for permanent residency by serving the military will provide another federally beneficial route for undocumented immigrants to be productive members of society.

There is no question that the United States relies on the strength of its military to retain its position as a global leader. Soldiers are crucial to that end. Much of the military's power since becoming an all-voluntary force has come from foreign-born enrollment.<sup>211</sup> There are currently 60,000 foreign-born soldiers registered for active duty; that number represents nearly eight percent of the armed forces.<sup>212</sup> Nearly one out of every ten soldiers killed is foreign born.<sup>213</sup> The military demands the translation and cultural expertise of immigrants. West Point Professor, Lt. Col. Margaret Stock, states that the DREAM Act “would be tremendously beneficial to the military. It gives the opportunity to enlist hundreds of thousands of high-quality people.”<sup>214</sup> The Department of Defense even included the Act in their 2010-2012 Strategic Plan to assist in recruiting for the military.<sup>215</sup>

The military has experienced extremely low levels of enlistment in the last decade, due in large part to the unyielding War on Terror.<sup>216</sup> The DREAM Act provides motivation for military service, and can make up for the deficiency in recruiting without forcing applicants to join. Qualified students would simply have the option of pursuing a higher education or serving in the military for at least two years. The United States benefits from either decision.

<sup>207</sup> Schulte, *supra* note 9.

<sup>208</sup> *Id.*

<sup>209</sup> 8 U.S.C. § 1231(a)(4)(A) (2006). Note that undocumented immigrants must serve their prison terms in US penitentiaries before they are deported.

<sup>210</sup> Lee, Youngro. *To Dream or Not To Dream: A Cost Benefit Analysis of the Development, Relief, and Education for Alien Minors (DREAM) Act*, at 9. Cornell J.L. & Pub Pol'y 231.

<sup>211</sup> American Immigration Law Foundation, U.S. Soldiers From Around the World: Immigrants Fight for an Adopted Homeland, AM. IMMIGR. L. FOUND., Aug. 2002, [http://www.aifl.org/ipc/policy\\_reports\\_2003\\_pr001\\_solder.asp](http://www.aifl.org/ipc/policy_reports_2003_pr001_solder.asp).

<sup>212</sup> Immigration Policy Center, The DREAM Act: Fact Checklist, <http://immigrationpolicy.org/just-facts/dream-act#up>.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Alan Gomez, Alien Minors Act could boost U.S. Military Ranks, USA TODAY, Sept. 24, 2010, at [http://www.usatoday.com/news/military/2010-09-23-dreamact23\\_ST\\_N.htm](http://www.usatoday.com/news/military/2010-09-23-dreamact23_ST_N.htm).

## VI. TURN THE DREAM INTO REALITY

Providing higher education opportunities to undocumented students who have educated themselves or served the military will promote state and federal interests. It is time for Congress to acknowledge that states have developed a jigsaw puzzle of regulation for undocumented immigrants' higher education opportunities. A few brave states alone cannot provide the relief necessary to take advantage of unfulfilled potential. It is not in the best interests of the United States to continue restricting a segment of the "1.5 generation" that are willing and able to be productive members of society.

It is clear that the government does not wish to punish adolescents for their parent's actions. The DREAM is not a dramatic departure from current law, but a natural extension of Congressional acts and Supreme Court decisions. Comprehensive immigration reform is necessary, but will not be achieved until a significant compromise is made. Pending that realization, the DREAM Act will create a very narrow opening for that group of undocumented people with established American roots to become legally recognized members of a society they already contribute to. Columnist Braden Goyette of *The Nation* outlines a clever breakdown of the societal harm being done by intolerant views.<sup>217</sup> Goyette provides this outline: "Anti-immigrant sentiment today -> banning kids from education system -> professional segregation -> less integration -> pundits and politicians blame immigrants for not integrating -> rise in xenophobia -> less security and social stability for everyone on the whole."<sup>218</sup>

The United States is currently depriving itself of talented workers and entrepreneurs, and is losing vital tax revenues and economic contributions.<sup>219</sup> Unlocking the door for thousands of young people each year to pursue the American Dream will increase investment and taxable income, save taxpayer money, and increase the strength of the military. Additionally, dropout rates, potential for gang involvement, and illicit activities will be reduced.

Discouraging positive societal participation must stop now. The United States needs to recognize that much of the potential that makes up the fabric of our country is being overlooked. Let's make the DREAM come true.

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<sup>217</sup> Braden Goyette, *Georgia Bans Undocumented Students from Top Schools*, THE NATION, <http://www.thenation.com/blog/155447/georgia-bans-undocumented-students-top-schools>.

<sup>218</sup> *Id.* Analysis of the 2006 PISA Study results of the German and Austrian school systems that separated children by achievement at the age of 10.

<sup>219</sup> Immigration Policy Center, *The DREAM Act: Fact Checklist*, <http://immigrationpolicy.org/just-facts/dream-act#up>.