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PLYLER V. DOE¹ AND THE RIGHTS OF UNDOCUMENTED IMMIGRANTS TO HIGHER EDUCATION: SHOULD UNDOCUMENTED STUDENTS BE ELIGIBLE FOR IN-STATE COLLEGE TUITION RATES?

I. INTRODUCTION

There are an estimated 1.5 million undocumented aliens in the American public education system, and between 50,000 and 60,000 graduate from American high schools each year.² Although guaranteed free public primary and secondary education by the Supreme Court decision *Plyler v. Doe*,³ these students have limited opportunities to obtain higher education.⁴ Because of their immigration status, these students are ineligible for financial aid.⁵ Federal law authorizes, and arguably mandates, postsecondary educational institutions to deny undocumented aliens the in-state tuition rates available to state residents, rendering the possibility of continued education even less likely.⁶ Nonresident tuition is usually two to three and a half times the amount of in-state tuition.⁷ Given the high cost of college and university tuition, the unavailability of either

1. 457 U.S. 202 (1982).

2. Janice Alfred, Note, *Denial of the American Dream: The Plight of Undocumented High School Students Within the U.S. Educational System*, 19 N.Y.L. SCH. J. HUM. RTS. 615, 638 (2003).

3. 457 U.S. 202 (holding that a Texas statute denying free public school primary and secondary education violated the Equal Protection Clause).

4. Alfred, *supra* note 2, at 616.

5. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") precludes undocumented immigrants from qualifying for federal financial aid or student loans. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8, 42 U.S.C.).

6. The Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA") prohibits states from offering illegal immigrants the lower tuition rates offered to state residents. Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (codified at 8 U.S.C. § 1623). The statute reads:

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.

Id.

7. *Combating In-State Tuition for Illegal Aliens*, available at <http://www.fairus.org/news/NewsPrint.cfm?ID=342&c=41> (last visited Apr. 10, 2004).

financial aid or in-state tuition rates effectively precludes most young undocumented aliens from continuing their educations.⁸

Postsecondary education is a state responsibility,⁹ and every state has established some form of a public higher education system.¹⁰ These systems are the primary means by which students pursue their educational and professional aspirations.¹¹ It is generally recognized that in today's world, higher education is critical to personal and professional success.¹² Even as early as 1926, a Washington state court declared,

It cannot be doubted that the minor who is unable to secure a college education is generally handicapped in pursuing most of the trades or professions of life, for most of those with whom he is required to compete will be possessed of that greater skill or ability which comes from an education.¹³

By denying in-state tuition to undocumented immigrants, the United States government denies these young adults, some of whom have lived most of their lives in the United States and intend to remain in the United States, the opportunity to attend college and enjoy the upward mobility that higher education affords.¹⁴ In effect, the United States government condemns undocumented immigrant students to low-paying jobs and lives in the lowest socioeconomic sectors.¹⁵

In 1982, the Supreme Court declared it unconstitutional for a state to deny undocumented alien children the benefit of a free public primary and secondary education.¹⁶ Although the Supreme Court has never directly considered the constitutionality of denying higher education to undocumented immigrants, the same reasoning that applied in *Plyler* may be extended to the postsecondary education context.¹⁷ However, the matter is a complicated one, involving not only issues of equal protection and

8. Alfred, *supra* note 2, at 616.

9. RONALD T. VERA, LEGAL ACCESS AND POSTSECONDARY HISPANIC STUDENTS 8–9 (1984).

10. *Id.* Each state system is hierarchical and ranges from elite and highly selective state universities and colleges to easily accessible and less expensive community colleges and open door institutions. *Id.* at 9. See also Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019, 1023 (1995).

11. VERA, *supra* note 9, at 9.

12. *Id.*

13. *Esteb v. Esteb*, 138 Wash. 174, 183 (1926), *quoted in* VERA, *supra* note 9, at 9.

14. Olivas, *supra* note 10, at 1025.

15. Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C.J. INT'L L. & COM. REG. 393, 396 (Spring 2002).

16. *Plyler*, 457 U.S. at 203.

17. See, e.g., Olivas, *supra* note 10, at 1022.

public policy, but federalism, politics, and economics as well. As one commentator observed, the denial of higher education to undocumented immigrants is “an admissions case, an immigration matter, a taxpayer suit, a state civil procedure issue, an issue of preemption, a question of higher education tuition and finance, a civil rights case, and a political issue.”¹⁸

Part II of this Note will explore the history of undocumented immigrants’ access to primary, secondary, and higher education.¹⁹ Part II will also discuss the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”)²⁰ and the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”),²¹ federal legislation that forbids states from offering in-state tuition rates to undocumented students, as well some states’ efforts to circumvent those laws.²² Finally, Part II will discuss pending legislation that seeks to repeal IIRIRA section 505, permit states to extend tuition benefits to undocumented immigrants, and adjust the immigration status of immigrants who pursue higher education in this country.²³ Part III analyzes the federalism issues surrounding the IIRIRA and the benefits that will flow from extending in-state tuition rates to undocumented students.²⁴ Finally, Part IV proposes that Congress enact the Development, Relief, and Education for Alien Minors Act (“DREAM Act”) and additional legislation so that future undocumented youths may also enjoy those benefits.²⁵

II. HISTORY

A. *Laying the Foundation for Plyler v. Doe*

In the 1954 landmark case *Brown v. Board of Education*,²⁶ a unanimous Supreme Court recognized that “education is perhaps the most important function of state and local governments,”²⁷ and declared that all people, regardless of race, should have equal access to public education.²⁸

18. *Id.* at 1021.

19. *See infra* Part II.A–C.

20. 8 U.S.C. § 1623 (2000).

21. 8 U.S.C. §§ 1621, 1622 (2000).

22. *See infra* Part II.D.

23. Development, Relief, and Education for Alien Minors Act of 2003, S. 1545, 108th Cong. (2003). *See infra* Part II.F.

24. *See infra* Part III.

25. *See infra* Part IV.

26. 347 U.S. 483 (1954).

27. *Id.* at 493. The *Brown* Court declared that:

Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is

However, in 1973, almost twenty years after the Supreme Court decided *Brown*, it held that education is *not* a fundamental right.²⁹ The Court therefore refused to apply strict scrutiny review to an equal protection challenge to the Texas school-financing system.³⁰ The district court concluded that Texas's system of public school financing, which resulted in great interdistrict disparities in school expenditures because of differences in the amounts of money collected through local property taxation, violated the Equal Protection Clause of the Fourteenth Amendment.³¹ The Supreme Court reversed on the bases that the poor are not a "suspect class," and education is not a fundamental right explicitly or implicitly protected by the Constitution.³² Accordingly, the Court applied the deferential rational basis standard of review and concluded that unequal expenditures between school districts are not the product of an irrational or invidiously discriminatory system.³³

Four years later in *Nyquist v. Mauclet*,³⁴ the Supreme Court declared a state statute barring legal resident aliens from receiving financial aid to cover higher education costs unconstitutional.³⁵ The Court stated that discrimination against aliens is only justified if it is necessary to achieve a legitimate and substantial state interest.³⁶ The Court stated that because

required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today 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 made available on equal terms.

Id.

28. *Id.*

29. *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973). In *Rodriguez*, the Mexican-American parents whose children attended primary and secondary school in a poor, urban district brought a class action suit against the State Board of Education, the Commissioner of Education, the State Attorney General, and the Bexar County (San Antonio) Board of Trustees. *Id.*

30. *Id.* Texas's school financing program provided that the state would supply funds for 80% of the program, and school districts would provide the remaining 20%. *Id.* at 9. The districts' share was apportioned among the school districts under a formula designed to reflect each district's relative tax liability. *Id.* at 9-10. As a result of this system, there developed a great disparity between expenditures on education in San Antonio and throughout the state of Texas. *Id.* at 15.

31. *Id.* at 15-16.

32. *Id.* at 28, 37.

33. *Id.* at 54-55.

34. 432 U.S. 1 (1977).

35. *Id.* at 12.

36. *Id.* at 7. See also *VERA*, *supra* note 9, at 41.

immigrants are required to pay state taxes that support financial aid programs, it is unjust for a state to discriminate against its resident aliens.³⁷

B. Plyler v. Doe

Writing for the majority in *Plyler*, Justice Brennan concluded that a Texas statute barring undocumented immigrant children from receiving free primary and secondary public education violated the Equal Protection Clause of the Fourteenth Amendment.³⁸ In reaching this decision, the Court first determined that, like the Due Process Clause, the Equal Protection Clause extends to undocumented immigrants.³⁹ Because a state's jurisdiction includes all residents, all people within a state are granted "at least the minimal safeguards" of equal protection.⁴⁰ Thus, the protections of the Fourteenth Amendment extend even to politically powerless residents who have not attained citizenship.⁴¹

Next, Justice Brennan considered the issue of which standard of review to apply to this equal protection challenge.⁴² Justice Brennan concluded that undocumented aliens do not constitute a "suspect class,"⁴³ and based on the Court's earlier holding in *Rodriguez*, education is not a fundamental

37. *Nyquist*, 432 U.S. at 12. See also *VERA*, *supra* note 9, at 42.

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

39. *Id.* at 210. The *Plyler* Court quoted the Fourteenth Amendment, which provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* (alteration in original). The Court held that:

Use of the phrase "within its jurisdiction" . . . does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory. That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter.

Id. at 215.

40. Alaine Patti-Jelsvik, Note, *Re-Educating the Court: Proposition 187 and the Deprivation of Education to Undocumented Immigrants*, 18 WHITTIER L. REV. 701, 716 (1997) (citing Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An analysis of Plyler v. Doe*, 44 U. PITT. L. REV. 409, 429 (1983)).

41. *Id.* at 717.

42. *Plyler*, 457 U.S. at 216–24.

43. *Id.* at 219 n.19.

We reject the claim that "illegal aliens" are a "suspect class." . . . Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a "constitutional irrelevancy."

Id.

right.⁴⁴ However, emphasizing the innocence of the children affected by the Texas statute and the disability created by the denial of an education, Justice Brennan adopted an intermediate standard of review.⁴⁵ According to this standard, Texas bore the burden of proving that its law furthered “some substantial goal of the State.”⁴⁶

The majority concluded that the State failed to establish that the denial of public education to undocumented children furthered some substantial state interest.⁴⁷ While Texas may have had an economic interest in mitigating the effects of dramatic shifts in population, the Court determined that excluding undocumented children from public schools was not an effective means of dealing with the demographic or economic problem.⁴⁸ First, there was no evidence that denying education to undocumented children would reduce the rate of illegal entry.⁴⁹ Second, there was no indication that undocumented immigrants pose a significant burden on the state’s economy.⁵⁰ Furthermore, even if the State were to establish that barring undocumented children from public schools

44. *Id.* at 221. *See also* Olivas, *supra* note 10, at 1045. Olivas suggests that the Supreme Court could have adopted strict scrutiny by holding that undocumented children are a suspect class. *Id.* He writes that Justice Brennan:

[F]ound . . . that undocumented entry is “the product of voluntary action” and therefore “not irrelevant to any proper legislative goal.” This reasoning, while arguably applicable to the parents, was repudiated by Justice Brennan himself as inapplicable to undocumented children Justice Brennan failed, therefore, to provide an internally consistent reason for not holding that these children were members of a suspect class.

Id. at 1045–46 (quoting *Plyler*, 457 U.S. at 216 n.14, 219 n.19, 220).

Alternatively, the Supreme Court could have found undocumented children to be members of a suspect class by reviewing *Plyler* in light of previous national origin and alienage cases, which together provide a record of “deep-seated prejudice” of the states’ treatment of aliens. Olivas, *supra* note 10, at 1046.

45. *Plyler*, 457 U.S. at 224.

Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants.

Id. at 219–20 (emphasis in original).

46. *Id.* at 224.

47. *Id.* at 230.

48. *Id.* at 228. *See also* DAVID W. STEWART, IMMIGRATION AND EDUCATION: THE CRISIS AND THE OPPORTUNITIES 39 (1993).

49. *Plyler*, 457 U.S. at 228 (stating that undocumented immigrants are drawn to Texas by economic incentives, not free education). The Court held that “charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration.” *Id.* (quoting *Doe v. Plyler*, 458 F. Supp. 569, 585 (E.D. Tex. 1978)).

50. *Id.* The Court maintained, “[t]o the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc.” *Id.*

improved the quality of education, it is unlikely the Court would uphold the State's attempt to exclude this discrete group.⁵¹

The Court's holding that the Texas statute was unconstitutional turned largely on the injustice of punishing undocumented children who were not responsible for their presence in the United States.⁵² While Justice Brennan conceded that under *Rodriguez* there is no fundamental right to education, he suggested a "putative" right to education.⁵³ Justice Brennan explained that education is critical to participation in the American political system and to the realization of "economically productive lives to the benefit of us all."⁵⁴ He maintained that denying children a basic education would handicap them for life:

The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.⁵⁵

Because undocumented children did not choose to enter the United States illegally, and "can affect neither their parents' conduct nor their own status,"⁵⁶ the Court found it unjust to punish them by deprivation of the free public education to which all other children in the state of Texas are entitled.⁵⁷ The Court held that "legislation directing the onus of a

51. *Id.* at 229. The Court also looked to federal congressional policy for support of the Texas statute and perceived "no national policy that supports the State in denying these children an elementary education." *Id.* at 226.

52. *Id.* at 220.

[Section] 21.031 [of the Texas statute] is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of [section] 21.031.

Id.

53. Olivas, *supra* note 10, at 1043 (emphasis added) (stating that the nature of the right to an education seems to persuade the Court more in *Plyler* than in *Rodriguez*). Some scholars argue that the plurality's opinion in *Plyler* in fact contradicts the *Rodriguez* holding that education is not a fundamental right. See VERA, *supra* note 9, at 10; Patti-Jelsvik, *supra* note 40, at 726–27. Without overruling *Rodriguez*, the *Plyler* Court made a compelling argument to this effect and established that education cannot be characterized as just another government benefit. *Id.*

54. *Plyler*, 457 U.S. at 221. Indeed, Justice Brennan concluded that "education has a fundamental role in maintaining the fabric of our society." *Id.*

55. *Id.* at 222.

56. *Id.* at 220 (citing *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

57. *Id.*

parent's misconduct against his children does not comport with fundamental conceptions of justice."⁵⁸

C. *Undocumented Aliens and Education After Plyler*

Since *Plyler*, the Supreme Court has posited that the intermediate scrutiny standard "is only applicable when state legislation affects undocumented children in the area of public education, and even then only when the legislation enjoys neither implied nor express [federal] congressional approval."⁵⁹ This position represents a significant setback for undocumented minors because current federal legislation favors denying postsecondary educational benefits to undocumented students.⁶⁰

Decided just weeks after *Plyler*, the Supreme Court held in *Toll v. Moreno*⁶¹ that Maryland's student residency requirement, which precluded nonimmigrant residents from establishing state residency, was unconstitutional.⁶² Under the University of Maryland's policy, students whose parents were admitted to the United States as officers or employees of international organizations were precluded from establishing residency for the purpose of receiving tuition benefits.⁶³

More recently, California and New York courts have confronted the question of whether a state can deny in-state tuition benefits to *undocumented* immigrants.⁶⁴ California case law and state policy in this area is particularly reflective of the complexity of the issues involved. In 1983, in response to *Toll*, California changed its Education Code to eliminate the requirement that alien students seeking resident tuition rates

58. *Id.*

59. Patti-Jelsvik, *supra* note 40, at 716 (citing Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. PITT. L. REV. 409, 429 (1983)).

60. *See supra* notes 5 and 6.

61. 458 U.S. 1 (1982).

62. *Id.* at 19.

63. *Id.* at 4. The case was decided on the basis that Maryland's policy violated the Supremacy Clause. *Id.* The Supreme Court did not reach the questions of due process or equal protection considered by the lower courts. *Id.* at 9–10. However, Justice Brennan's opinion in *Plyler*, decided on equal protection grounds using intermediate scrutiny, suggests that had he reached the issue in *Toll*, he would have found the University of Maryland policy invalid on equal protection grounds. *See* Olivas, *supra* note 10, at 1048. Because the Court found that federal immigration law authorized this particular classification of nonimmigrant aliens to establish domicile in the United States, the University of Maryland was precluded from refusing to consider them residents for tuition purposes. *Id.* at 1048–49; *Toll*, 458 U.S. at 11 (citing *Takahishi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948)).

64. *See, e.g.*, *The Regents of the Univ. of Cal. v. Bradford*, 276 Cal. Rptr. 197, 198 (1990); *Paula R. v. Goldstein*, 747 N.Y.S.2d 66 (2002).

prove that they have legal permanent resident status.⁶⁵ Then, in 1984, the California Attorney General published a formal opinion stating that undocumented aliens are, under section 68062 of the California Education Code, considered nonresidents for tuition purposes.⁶⁶

In the fall of 1984, five undocumented students who were admitted to the University of California and later notified that they were required to pay non-resident tuition fees brought suit against the University.⁶⁷ In *Leticia A. v. Bd. of Regents of the Univ. of Cal.*,⁶⁸ the Alameda County Superior Court held that the policy of determining residency based on terms other than those applied to United States citizens was unconstitutional pursuant to the California Constitution.⁶⁹ The court “enjoined the University to determine residency status of undocumented aliens on the same terms as United States citizens” in residency determinations.⁷⁰

However, *Leticia A.* was reversed in 1990 by *Regents of the Univ. of Cal. v. Bradford*,⁷¹ which held that undocumented aliens are not eligible for residency and in-state tuition.⁷² This case arose when Bradford, an employee of the University of California responsible for determining the residency status of prospective students, was asked to resign because of his unwillingness to comply with the Alameda County Superior Court’s *Leticia A.* ruling.⁷³ In his suit, Bradford asked that the University of California again “be required to comply with Education Code § 68062, subdivision (h), as interpreted by the California Attorney General.”⁷⁴ The

65. 276 Cal. Rptr. at 198.

66. *Id.* California Education Code section 68062(h) provides that an alien student may be classified as a resident for tuition purposes “unless precluded by the Immigration and Nationality Act (8 U.S.C. § 1101) from establishing domicile in the United States.” *Id.* (citing Cal. Ed. Code § 68062 (2004)).

67. *Leticia A. v. Bd. of Regents of the Univ. of Cal.*, No. 588982-4, slip op. at 2 (May 7, 1985). All five of the plaintiffs had graduated from California high schools and had resided continuously in California for an average of seven years. See Olivas, *supra* note 10, at 1051.

68. *Leticia A. v. Bd. of Regents of the Univ. of Cal.*, No. 588982-4, slip op. at 2 (May 7, 1985).

69. *Id.*

70. *American Ass’n of Women v. Bd. of Trs.*, 38 Cal. Rptr. 2d 15 (1995) (stating that the Alameda County Superior Court decision was not appealed). Like Justice Brennan in *Plyler*, the California judge regarded education as more than a minimal interest and therefore required more than a mere rational relationship; applying a heightened standard of review, the judge looked for a “substantial state interest.” Olivas, *supra* note 10, at 1053.

71. *Bradford*, 225 Cal. App. 3d at 980.

72. *Id.*

73. *Id.* at 976.

74. *Id.* At the request of the Chancellor of the California State University, the Attorney General published a formal opinion stating that undocumented immigrants are considered nonresidents under the Education Code. *Id.* (citing 67 Ops. Cal. Atty. Gen. 241 (1984)).

University argued that this interpretation of the Education Code was unconstitutional because it “deprives undocumented aliens of equal protection of the laws . . . discriminates against the poor, senselessly deprives good students of a post-secondary education, and furthers no substantial state interest.”⁷⁵ However, the court determined that the state can discriminate against undocumented aliens and has a legitimate interest in doing so.⁷⁶ Furthermore, the court distinguished the facts of this case from those presented in *Plyler*, stating, “[t]here is, of course, a significant difference between an elementary education and a university education.”⁷⁷ The California Court of Appeals held that section 68062(h) of the California Education Code was constitutional on its face and that it precludes undocumented aliens from qualifying as residents for tuition purposes.⁷⁸

In May 1992, the Alameda County Superior Court, which heard the *Leticia A.* case, issued a “Clarification of Order” to reconcile its *Leticia A.* decision with the *Bradford* decision.⁷⁹ Conceding that the University of California was bound by the *Bradford* decision, it declared that California state universities and colleges were still subject to the injunctive relief granted by the Alameda County Superior Court in *Leticia A.*⁸⁰ In *American Ass’n of Women v. Board of Trustees*,⁸¹ the California Court of Appeals addressed the question of which decision would prevail, *Leticia A.* or *Bradford*, and held that the *Bradford* decision governs the California state university system.⁸²

This issue resurfaced some years later in California with the enactment of Proposition 187.⁸³ Among many other rights, services, and benefits,

75. *Id.* at 980.

76. *Id.* at 980–81. The state’s legitimate interest in denying undocumented aliens in-state tuition rates include the interests in not subsidizing violations of the law, educating the state’s own lawful residents, avoiding strengthening the employment prospects of those whose employment is forbidden, conserving fiscal resources to benefit the state’s own residents, and “not subsidizing the educations of those who may be deported.” *Id.* at 981.

77. *Id.* at 981–82.

78. *Id.* at 980. Further, the court held that the unappealed *Leticia A.* decision was not binding on the Los Angeles County Superior Court. *Id.* at 976.

79. *American Ass’n of Women v. Bd. of Trs.*, 38 Cal. Rptr. 2d 15, 17 (1995) (discussing the 1992 “clarification of order”).

80. *Id.*

81. *Id.*

82. *Id.* at 16–17. The court found no indication in the *Bradford* decision that it was not intended to bind the California state university system. *Id.*

83. 1994 Cal. Legis. Serv. §§ 7 & 8 (West) (codified at Cal. Educ. Code §§ 48215 & 66010.8) (“Prop. 187”). In 1994, there were an estimated 1.3 million undocumented immigrants residing in California; half were Mexican and Central American, and one-third were Asian. JEWELLE TAYLOR

Proposition 187 prohibited undocumented immigrants from even attending California state colleges and universities.⁸⁴ However, before the federal district court could determine the constitutionality of denying college admission to undocumented students, Congress enacted legislation that occupied the field and preempted California's state action.⁸⁵

D. The Federal Legislation

Although California's Proposition 187 was declared unconstitutional in federal district court,⁸⁶ its purpose was fulfilled by the federal legislation that followed.⁸⁷ In the PRWORA,⁸⁸ Congress established a national policy of restricting availability of public benefits, including benefits for postsecondary education, to undocumented aliens.⁸⁹ Shortly after enacting

GIBBS & TEIAHSHA BANKHEAD, PRESERVING PRIVILEGE: CALIFORNIA POLITICS, PROPOSITIONS, AND PEOPLE OF COLOR 78 (2001). California's infamous Proposition 187, which denied public benefits to undocumented immigrants, barred undocumented students from even attending California public colleges and universities. Alfred, *supra* note 2, at 625. The Proposition, for which 59% of voters were in favor, was enacted in response to increased overcrowding of schools, increased expenses incurred by school districts, and the perceived decreased in the quality of education, all of which were attributed to undocumented children in the public school systems. Brendan Bryce, Plyler v. Doe: *Progressivism and Undocumented Aliens*, 4 WIDENER L. SYMP. J. 357, 371 (1999). Section 8 of Proposition 187 forbids the use of public funds to provide education for those who were illegally present in the United States and created a system of required notification to regulate undocumented immigration. Prop. 187; Patti-Jelsvik, *supra* note 40, at 707.

84. Prop. 187. See, e.g., Alfred, *supra* note 2, at 625; Ellen Badger & Stephen Yale-Loehr, *They Can't Go Home Again: Undocumented Aliens and Access to U.S. Higher Education*, Nov. 1999, at <http://www.twmlaw.com/site/resources/general42cont.htm> (last visited Apr. 10, 2004). Section 8 of Proposition 187 provided for the exclusion of undocumented immigrants from institutions of higher education by a series of verification and reporting requirements. Prop. 187. Verification of students' immigration status was to be conducted first and then again at the commencement of each semester. Prop. 187. When admissions officers became aware of possible violations, they had 45 days in which to report the violation to the State Superintendent of Public Instruction, the Attorney General of California, INS, and the applicant or enrollee. Prop. 187; Patti-Jelsvik, *supra* note 40, at 705–07. The purpose of section 8 was to forbid the use of public funds for the education of undocumented aliens, to deter illegal immigration, and to create a system of required notification to regulate illegal immigration. *Id.* at 707–08.

85. In February 1995, six undocumented university and college students brought an action against the University of California, among others, claiming that Proposition 187 violated their federal and state civil rights. Steve Albert, *Judge Pollack Issues Injunction Against Prop 187 Measures*, THE RECORDER, Feb. 9, 1995, at 1. San Francisco Superior Court Judge Stuart Pollack issued a preliminary injunction against implementation of the higher education portions of Proposition 187. *Id.* Finally in 1998, the United States District Court of California concluded that section 8 of Proposition 187 was preempted by the PRWORA and the IIRIRA, federal legislation enacted by Congress in 1996. League of United Latin American Citizens v. Wilson, 1998 U.S. Dist. LEXIS 3418, 24–26 (1998).

86. See *supra* note 85 and accompanying text.

87. In fact after Proposition 187, California Governor Gray Davis assured voters that “the spirit of Proposition 187 lived on” in the federal legislation that supplanted it. Alfred, *supra* note 2, at 626.

88. See *supra* note 5.

89. 8 U.S.C. § 1611 (2000). The PRWORA created a comprehensive statutory scheme for

the PRWORA, Congress passed the IIRIRA,⁹⁰ which expressly restricts undocumented immigrants' access to postsecondary education.⁹¹ The statute provides that "an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident."⁹² Thus, the IIRIRA prohibits states from charging in-state tuition unless they provide the same rates to nonresident applicants.⁹³

Because it is economically impossible for postsecondary institutions to offer all applicants the lower in-state tuition rates, the federal legislation effectively bars them from extending in-state tuition rates to undocumented immigrant residents.⁹⁴ Furthermore, because undocumented students are neither eligible for federal financial student loans and grants⁹⁵

determining aliens' eligibility for federal, state, and local benefits and services. *Id.* The Act separates all aliens into two categories labeled "qualified" and "unqualified" and grants or denies public benefits based on that categorization. *Id.* § 1611(a); see § 1641 for definitions of qualified and unqualified. Section 1611 states that

an alien who is not a qualified alien . . . is not eligible for any Federal public benefit . . . (c) . . . for purposes of this chapter the term "Federal public benefit" means . . . (B) any . . . postsecondary education . . . or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

8 U.S.C. § 1611(a), (c)(1)(B).

90. See *supra* note 6 for an explanation of the IIRIRA. Pub. L. No. 104-208, Div. C, 110 Stat. 3009, (codified at 8 U.S.C. § 1623).

91. *Id.*

92. 8 U.S.C. § 1623(a) (2000). Section 507 of the IIRIRA requires states and postsecondary educational institutes to provide the Bureau of Citizenship and Immigration Services ("BCIS") (formerly titled the Immigration and Naturalization Services) copies of or information from the documents they receive from applicants for the purpose of verifying citizenship or immigration status. *Id.*

93. *Id.* The same year that the PRWORA and the IIRIRA were enacted, the Gallegly Amendment was introduced as part of the 1996 spending bill. Alfred, *supra* note 2, at 627. The Amendment would have reversed *Plyler* by authorizing states to exclude undocumented minors from public primary, secondary, and postsecondary schools. *Id.* After much debate, the Amendment was withdrawn from the bill, and later attempts to reintroduce it failed. *Id.* at 627-28.

94. Liana Y. Sebastian, *Dream Put on Hold: Congress and In-State tuition for Children of Illegal Immigration*, 16 GEO. IMMIGR. L.J. 874 (2002). As of yet, the BCIS has not issued any regulations implementing the IIRIRA. As a result, it is unclear whether the BCIS or the postsecondary education institution is required to determine the immigrant applicants' immigration status. Badger & Yale-Loehr, *supra* note 84.

95. Under Title IV of the Higher Education Act, federal law prohibits any undocumented alien from receiving federal student financial aid. See generally 20 U.S.C. §§ 1070-99 (2000); STEWART, *supra* note 48, at 198. As "the federal government provides three-quarters of all available student aid," this law constitutes a serious impediment to undocumented immigrants obtaining higher educations. MARYANN JACOBI GRAY ET AL., IMMIGRATION AND HIGHER EDUCATION: INSTITUTIONAL RESPONSES

nor in-state tuition rates, most undocumented students are precluded from continuing their education beyond secondary school.⁹⁶

Although student aid comes from various sources⁹⁷ and higher education financial aid officers have significant freedom in its allocation,⁹⁸ they must be careful to comply with all government requirements and regulations.⁹⁹ The IIRIRA does not specify the sanctions or consequences of noncompliance,¹⁰⁰ however most institutions consider themselves bound by its language because they wish to avoid the scrutiny of the Bureau of Citizenship and Immigration Services (“BCIS”) and they fear losing federal financial student aid.¹⁰¹ Higher education institutions with additional, independent sources of financial aid, such as endowments or private donations, may choose to support undocumented immigrants with those funds.¹⁰² However, “The fact that these students do not qualify for either federal student aid or the in-state tuition rates places a major financial burden on the private higher education institutions.”¹⁰³ Thus private colleges and universities have two options: They may offer sizable scholarships to undocumented students and accept that financial loss, or they may admit undocumented students without scholarships and effectively deny them admission as a consequence of the unaffordable tuition rates.¹⁰⁴

TO CHANGING DEMOGRAPHICS 45 (1996) [hereinafter INSTITUTIONAL RESPONSES]. Only 19% of student aid comes from private sources and the postsecondary education institutions themselves, and another 6% comes from the states. *Id.*

96. *Id.*

97. *See supra* note 95.

98. In creating each student’s financial aid package, student financial aid offices can mix and match funds in order to enhance overall eligibility rates and rates for populations of special interest. INSTITUTIONAL RESPONSES, *supra* note 95, at 45.

99. *Id.* Student aid offices are subject to periodic review and audits to ensure compliance. *Id.*

100. Badger & Yale-Loehr, *supra* note 84. Unlike 8 C.F.R. § 214.3(g)(1), which requires schools to monitor students with nonimmigrant status (such as F or M status) and provides that institutions which fail to do so risk losing their certification to admit international students, there are no similar requirements or regulations in IIRIRA section 505. *Id.*

101. Alfred, *supra* note 2, at 637.

102. INSTITUTIONAL RESPONSES, *supra* note 95, at 46.

103. Alfred, *supra* note 2, at 637.

104. *Id.* The only option left to undocumented immigrants: applying for admission as international students, is a non-option. *Id.* at 638. They still would not qualify for in-state tuition rates and, in order to qualify for a scholarship, they would have to return to their national country and apply for international student visas. *Id.* The problem that renders this alternative most impractical is that visa grants are not guaranteed and the student may be unable to re-enter the United States without proper documentation. *Id.*

E. State Responses to the IIRIRA

The vast majority of states accept that their public postsecondary institutes are forbidden from offering in-state tuition to undocumented immigrants.¹⁰⁵ Due to the possibility that failure to maintain adequate records or to comply with federal policy may jeopardize their institutions' eligibility for financial aid, most schools are committed to compliance.¹⁰⁶ However, the lack of guidelines for implementing and enforcing section 505 has resulted in a "confusing tangle" of tuition policies.¹⁰⁷ For example, in June 1998, the State Universities of New York ("SUNY") updated its admissions policies in order to comply with federal law and began denying in-state tuition rates to undocumented students.¹⁰⁸ On the other hand, New York City's public university system ("CUNY"),¹⁰⁹ which had begun allowing undocumented immigrants to enroll at in-state tuition rates in 1989,¹¹⁰ did not change its policy until after the terrorist attacks of September 11, 2001.¹¹¹

105. Jennifer Galassi, Comment, *Dare to Dream: A Review of the Development, Relief, and Education for Alien Minors (Dream) Act*, 24 CHICANO-LATINO L. REV. 79, 82 (2003). The question of whether the IIRIRA does, or even can, bar undocumented immigrant students from attending American universities is controversial; however, most commentators have interpreted the law as referring to tuition benefits rather than admission. Laura Khatheressian, *FERPA and the Immigration and Naturalization Service: A Guide for University Counsel on Federal Rules for Collecting, Maintaining and Releasing Information About Foreign Students*, 29 J.C. & U.L. 457, 468 n.52 (2003).

106. INSTITUTIONAL RESPONSES, *supra* note 95, at 46.

107. STEWART, *supra* note 48, at 198.

108. Alfred, *supra* note 2, at 636. Badger & Yale-Loehr, *supra* note 84.

109. CUNY is comprised of six community colleges, eleven senior or comprehensive colleges, two professional schools, and one graduate center. *City University Tuition Charged to Illegal Aliens is Upheld as Rational, Nonarbitrary*, N.Y.L.J., Feb. 14, 2002, at 17 [hereinafter *City University Tuition*]. It enrolls approximately 200,000 students in degree programs and 300,000 in non-credit or certificate courses. *Id.*

110. At its inception, CUNY did not charge tuition to any New York residents. *City University Tuition*, *supra* note 109. In 1976, the university system began charging tuition and created a distinction between residents and nonresidents. *Id.* From 1976 until 1989, it charged undocumented students the nonresident rates. *Id.* In 1989, Chancellor Joseph S. Murphy, without seeking approval of the Board of Trustees, changed the policy and began charging undocumented immigrant students the in-state rates. *Tuition Increased for Illegal Aliens*, 8 CITY L. 33 (Mar./Apr. 2002). From 1989 until 1996, the policy of offering state resident tuition rates to undocumented immigrants was neither challenged nor discussed. *Id.* However, after IIRIRA section 505 was enacted, the school consulted an immigration attorney, who advised the school that until Congress implemented regulations and financial sanctions for noncompliance there was no need to change the policy. *Id.* The policy was again changed after the terrorist attacks of September 11, 2001, when Chancellor Matthew Goldstein, also without seeking the Board of Trustees' approval, revoked the policy of extending in-state rates to undocumented New York residents. *Id.*

111. Alfred, *supra* note 2, at 636-37. Unlike the 1989 change of policy, the change in 2001 raised an outcry and prompted an Article 78 petition. *City University Tuition*, *supra* note 109.

Despite the general trend toward compliance with IIRIRA section 505, some states have skirted the federal statute by using criteria other than state residency to grant in-state tuition to undocumented immigrants.¹¹² Seven states have passed laws granting in-state tuition to undocumented aliens, and nine others are considering such legislation.¹¹³ States such as Texas and California have circumvented federal legislation by basing eligibility for in-state tuition on attendance at and graduation from a state high school rather than residency in that state.¹¹⁴ They defend these

An estimated 2,000 undocumented students were affected by the change in policy, and a number of these students filed an Article 78 petition seeking to nullify the Chancellor's decision. *See, e.g.,* Cerise Anderson, *CUNY's Hike In Tuition For Illegal Aliens Upheld*, N.Y.L.J., Feb. 8, 2002, at 1; *Tuition Increased for Illegal Aliens*, *supra* note 110, at 33. Article 78 petitions are filed in order to determine whether state action is without sound basis in reason, is arbitrary or capricious, or is illegal as a matter of law. *City University Tuition*, *supra* note 109.

In *Matter of Paula R. v. Goldstein*, the petitioners argued that the terms of IIRIRA section 505 were so vague as to be unenforceable and that the reclassification of undocumented immigrants as nonresidents was based on "anti-immigrant" attitudes, not on sound legal interpretation of the statute. *City University Tuition*, *supra* note 109. The court found in favor of CUNY and held that the Chancellor's efforts to comply with federal law were not arbitrary or capricious. *Id.*

112. *See, e.g.,* Mary Shaffrey, *Changes in the Cards; IRS Eyeing Taxpayer-ID Numbers to Stem Use by Illegal Immigrants*, WASH. TIMES, Sept. 7, 2003, at A1.

113. *Id.* Thus far Texas, Utah, California, New York, Washington, Illinois, and Oklahoma have passed laws making in-state tuition rates available to undocumented students. *Id.* It is worth noting that the three states with the largest immigrant populations, namely, New York, California, and Texas, have enacted such legislation. Alfred, *supra* note 2, at 648.

On the other hand, a handful of states have forbidden the granting of in-state tuition rates to undocumented immigrants. John O'Connor, *Tuition Break for Illegal Immigrants Polarizing Business Groups*, THE DAILY RECORD, May 15, 2003. For example, in 2001, Wisconsin Governor Scott McCallum vetoed a proposal that would give in-state tuition benefits to immigrants that had lived in Wisconsin for three years and graduated from high school in Wisconsin. Galassi, *supra* note 105, at 82.

In addition, a similar bill was proposed in Maryland, where average in-state tuition rates are \$7,000 less per year than nonresident tuitions. *See* O'Connor, *supra*; Jason Song, *Freedom Rides Rallies for Immigrants*, THE BALTIMORE SUN, Oct. 2, 2003. The bill offered in-state tuition to undocumented students who attended high school for three years in Maryland and pledged to begin the citizenship process. *Id.* The Maryland House of Delegates passed the bill, but Governor Robert L. Ehrlich, Jr. vetoed it in May 2003 on the grounds that it was preempted by IIRIRA section 505. *Id.*; Andrea Cecil, *Support Rebuilds for Illegal Immigrant Tuition Bill*, THE DAILY RECORD, Oct. 1, 2003.

Interestingly, the University System of Maryland and the Maryland community colleges supported the proposed bill because they did not think that the tuition differences would have a significant impact on school budgets. O'Connor, *supra*. The President of the Maryland Association of Community Colleges voiced his support of the bill on the grounds that community college graduates account for \$7 billion in value-added economic activity, and making postsecondary education affordable would serve to further increase that amount. *Id.* Two organizations representing the Latino community in the state of Maryland, CASA of Maryland, Inc. and Maryland Latino Coalition for Justice, are renewing the call to extend in-state tuition benefits to undocumented students. Andrea Cecil, *Support Rebuilds for Illegal Immigrant Tuition Bill*, THE DAILY RECORD, Oct. 1, 2003.

114. Romero, *supra* note 15, at 405. Texas and California laws offer in-state tuition rates to undocumented students who: (1) attended for three years and graduated from a high school within that state, and (2) present sworn affidavits that they will seek legal status as soon as they become eligible.

initiatives on the grounds that 8 U.S.C § 1621(d) allows states to enact laws to make undocumented immigrants eligible for in-state tuition.¹¹⁵ Jack Martin, the special project director for the Immigration-Reform Federation, suggests that a lawsuit would be necessary to challenge the states' ability to enact these laws.¹¹⁶ However, he believes that litigation is unlikely because, unlike many federal statutes, section 1623 does not explicitly give individuals the right to sue, leaving the Department of Justice as the only entity with standing.¹¹⁷

F. Pending Federal Legislation

In July 2003, Senators Orrin G. Hatch and Dick Durbin introduced the DREAM Act.¹¹⁸ This bill seeks to repeal IIRIRA section 505, permit states to offer in-state benefits to undocumented students, and permit adjustment of the immigration status of long-term United States residents.¹¹⁹ The

Id.

It should be noted that the Texas and California laws were not easily enacted. It took California over two years to pass the legislation with Governor Gray Davis vetoing the bill on the grounds that it violated IIRIRA section 505. *Id.* However, the fact that the legislation was passed after the terrorist attacks of September 11, 2001 provides hope that other state legislatures will be able to enact similar laws. *Id.* at 406.

115. Galassi, *supra* note 105, at 89. Section 1621(d) provides:

A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible . . . only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

8 U.S.C. § 1621(d) (2000).

116. Galassi, *supra* note 105, at 90.

117. *Id.*

118. DREAM Act, S. 1545, 108th Cong. (2003).

119. *Id.* The DREAM Act mirrors the Student Adjustment Act which was introduced in the House of Representatives in 2001 by Representatives Chris Cannon and Dick Durbin. Sebastian, *supra* note 94, at 875. The Student Adjustment Act sought to restore states' rights to determine their own residency requirements for educational purposes if the student was of good moral character, resided in the United States for at least five years, was under the age of 21, and was seeking a college education. *Id.* Only those present in the United States at the time of the Act's enactment would be eligible for those tuition benefits. *Id.* The Student Adjustment Act was shelved after the events of September 11, 2001, as the government's attention turned to increasing national security. *Id.*

The DREAM Act differs from the earlier Student Adjustment Bill in that it removes the age ceiling so that "no one [is] arbitrarily cut-off from its benefits." 149 CONG. REC. S10,673 (2003) (statement of Sen. Hatch). Also, whereas the Student Adjustment Act required high school graduation as a condition for obtaining legal status, the DREAM Act enables students who have been accepted into an institution of higher education before graduating from high school to obtain conditional resident status. *Id.* This allows the students an earlier start on procuring the necessary funds to finance their education. Finally, recognizing that not everyone can attend a four-year college or university, the DREAM Act also covers those students who wish to pursue alternatives such as attending community college or trade school, serving in the armed forces, and performing community service. *Id.* at

proposed Act is aimed at students who “were brought to the United States as young children by their parents, speak English, consider themselves Americans, and will spend the rest of their lives in this country.”¹²⁰ According to Senator Hatch, each year between 50,000 and 60,000 undocumented immigrants graduate from high school or receive equivalent degrees.¹²¹ Because these undocumented students are denied in-state tuition rates, cannot legally work, are ineligible for federal financial aid, and have great difficulty obtaining private loans, they cannot continue their educations and are therefore limited to low-skill, low-wage employment.¹²²

The two main goals of the DREAM Act are to eliminate section 505 of IIRIRA and permit young people, not yet 21 years of age, to become legal permanent residents if “they are deemed to: possess good moral character, have been in the United States for at least five years, and have or will have graduated from high school when they submit their application.”¹²³

S10,674.

120. See Galassi, *supra* note 105, at 81.

121. 149 CONG. REC. S10,674 (2003). As the Senator noted:

Each year, approximately 50–60,000 undocumented children, including honors students and valedictorians, graduate from our nation’s high schools or receive an equivalent degree. Many of these students were brought to the U.S. by their parents at an age when they were too young to appreciate the legal consequences of their actions. Despite long-term residency in the U.S. and a demonstrated commitment to obtaining an education, these students have no avenue for adjusting their immigration status and it is very difficult for them to attend college or work These roadblocks to higher education hurt our society because we are deprived of future leaders, and the increased tax revenues and economic growth they would produce.

Id. Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, explained that “[t]he purpose of the DREAM Act is to create incentives for out-of-status youngsters to achieve as much as they can in life and to contribute to the greatness of the United States.” *Id.* at S10,674.

122. 149 CONG. REC. S10,674 (2003). Furthermore, many undocumented minors drop out of high school when they realize that they will not be able to attend college. *Id.* The drop-out rate for undocumented immigrant high schoolers is 50%. Galassi, *supra* note 105, at 88.

123. Galassi, *supra* note 105, at 85. See also “Dream 2003”, at www.nilc.org (last visited Apr. 10, 2004); DREAM Act, S. 1545, 108th Cong. (2003). The DREAM Act:

[a]mends the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to repeal the denial of an unlawful alien’s eligibility for higher education benefits based on State residence unless a U.S. national is similarly eligible without regard to such State residence . . . Authorizes the Secretary of Homeland Security to cancel the removal of, and adjust to conditional permanent resident status, an alien who: (1) entered the United States prior to his or her sixteenth birthday, and has been present in the United States for at least five years immediately preceding enactment of this Act; (2) is a person of good moral character; (3) is not inadmissible or deportable under specified . . . grounds [of the Immigration and Nationality Act] . . . ; (4) at the time of application, has been admitted to an institution of higher education, or has earned a high school or equivalent diploma; and (5) from the age of 16 and older, has never been under a final order of exclusion, deportation, or removal.

2003 Bill Tracking S. 1545. The Act also details requirements for adjustment of status and conditions for legal permanent residency. *Id.* The “National Immigrant Law Center estimates that at least 50,000

Proponents of the bill emphasize that it will not serve as an incentive for illegal immigrants because it limits eligibility to those who entered the United States five years prior to the bill's enactment.¹²⁴

III. ANALYSIS

A. Federalism Issues

While immigration law and federal financial law are exclusively subject to federal mandate, public education is a matter left to state and local governments.¹²⁵ Although there is much criticism of the IIRIRA on the grounds that it improperly interferes with states' rights to determine residency requirements and educational policies, the federal government has "broad power to affect immigration policy in areas traditionally left to the states."¹²⁶ Thus, although section 505 of the IIRIRA effectively removes the states' ability to determine who qualifies as "residents" for the purpose of in-state tuition rates,¹²⁷ it is unlikely that the PRWORA or the IIRIRA unconstitutionally infringe upon states' rights to determine how to use state funds.¹²⁸ Finally, while Congress cannot force states to regulate immigration,¹²⁹ section 505 does not directly compel the states to

to 65,000 undocumented immigrants that graduate each year meet the terms of the Dream Act." Galassi, *supra* note 105, at 81. There are no studies as to how many undocumented immigrant students will not be covered by the Act. *Id.*

124. See Senator Orrin Hatch, 149 CONG. REC. S10,674; see also Romero, *supra* note 15, at 412 for another response to the argument that the DREAM Act will encourage illegal immigration. Opponents of the DREAM Act contend that the proposal to couple legal resident status with in-state tuition encourages others to enter the United States illegally. Federation for American Immigration Reform ("FAIR"), *Issue Brief: Taxpayers Should Not Have to Subsidize College for Illegal Aliens*, at www.fairus.org/html/04182108.htm (last visited Apr. 10, 2004) [hereinafter FAIR, *Issue Brief*]. Victor Romero responds to the deterrence argument by stating that there is little to no evidence that free or subsidized education encourages illegal immigration, and even if it was an incentive, the age, residency, and good moral character requirements will preclude immigrating in order to obtain those benefits. Romero, *supra* note 15, at 412.

125. *Id.* at 396–97.

126. *Id.* at 397–98.

127. "Dream 2003", *supra* note 123. Residency and domiciliary requirements are traditionally left to state determinations and generally depend on (1) duration of residency in the state, and (2) intent to reside in that state. See Romero, *supra* note 15, at 400. Undocumented immigrant youth seeking higher education are likely to meet these two requirements. *Id.* at 401.

128. Alfred, *supra* note 2, at 629. Case precedent establishes "that Congress has plenary power over issues relating to national sovereignty and immigration." *Id.* See also Romero, *supra* note 15, at 399 n.22.

129. *Printz v. United States*, 521 U.S. 898 (1997) (holding that the Brady Handgun Violence Prevention Act violated the Tenth Amendment by requiring state and local enforcement officers to conduct background checks on prospective handgun purchasers). Romero, *supra* note 15, at 399 n.22.

do so.¹³⁰ Rather it may be seen as *permitting* the states to deter illegal immigration.¹³¹

While some states have designed initiatives to circumvent IIRIRA section 505 and make in-state tuition rates available to undocumented students, this is an imperfect solution because it does not alleviate many of the problems and concerns faced by postsecondary institutions and the students themselves.¹³² Even in states where undocumented students receive tuition benefits, they are still ineligible for federal financial aid and, without any guarantee that they will be able to legalize their immigration status, they face threats of possible removal from the United States and ineligibility for employment after earning their degrees.¹³³

B. Extending Plyler v. Doe

The same reasoning put forth by Justice Brennan in *Plyler v. Doe* may be applied to the extension of tuition benefits to undocumented students seeking a postsecondary education.¹³⁴ Therefore, *Plyler* could serve as a foundation for extending affordable postsecondary education to undocumented immigrants.¹³⁵

Those who seek to defend the denial of affordable higher education to undocumented students emphasize the difference between denying basic education, as in *Plyler*, and higher education.¹³⁶ However, it should be

130. Romero, *supra* note 15, at 399 n.22.

131. *Id.* One scholar suggests that *Toll v. Moreno* supports the argument that IIRIRA section 505 is unconstitutional. *Id.* However, it would be difficult to challenge its constitutionality because BCIS has not yet enacted regulations implementing the IIRIRA, probably out of reluctance to direct disbursement of state funds. *Id.* Additionally, only the Department of Justice has standing to challenge it. *Id.*

132. See Romero, *supra* note 15, at 406–07. For example, Texas and California have made in-state tuition available to undocumented immigrants by basing eligibility on attendance at, and graduation from a state high school. *Id.* at 406. For further discussion, see *supra* Part II.E.

133. *Id.* at 406.

134. See, e.g., Galassi, *supra* note 105, at 86.

It should be acknowledged that some scholars believe that the continued viability of *Plyler v. Doe*, even as it applies to primary education, may be uncertain due to the conservative make-up of the Supreme Court. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 185–86 (1996). Even so, others claim that one day the Supreme Court will almost certainly hear “from undocumented immigrants asserting that *Plyler v. Doe* should equalize their access to colleges and universities,” as well as public primary schools. See STEWART, *supra* note 48, at 40.

135. Galassi, *supra* note 105, at 86.

136. See, e.g., Badger & Yale-Loehr, *supra* note 84. Even without federal legislation in the picture, the possibility of extending *Plyler* into other contexts, such as higher education, is uncertain. NEUMAN, *supra* note 134, at 185–86. Today’s Supreme Court is more conservative than the Burger Court, and Chief Justice Rehnquist consistently dissents from decisions that invalidate alienage discrimination. *Id.* at 185–86. See *supra* text accompanying note 134.

recognized that *Plyler* was decided over twenty years ago, when postsecondary education was less critical to an individual's personal and professional advancement than it is today.¹³⁷ Society is much more technologically advanced and complex than it was twenty years ago, and primary and secondary education are no longer sufficient for economic success.¹³⁸ As a result, postsecondary education is now perceived as part of a "total educational system."¹³⁹

Furthermore, like the minors in *Plyler*, the students affected by section 505 are young people who are not responsible for their illegal status, who have grown up in the United States and have received the benefits of free public elementary education,¹⁴⁰ and intend to remain in the United States indefinitely.¹⁴¹ By the time undocumented students graduate from high school, the government has already made a huge economic investment in their primary and secondary education.¹⁴² Finally, as Justice Brennan wrote in *Plyler*, "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."¹⁴³

The PRWORA and the IIRIRA function to significantly reduce the likelihood that undocumented immigrant youths will ever attain legal status, and the statutes significantly increase the likelihood that these persons will be trapped "at the bottom of the socioeconomic ladder."¹⁴⁴ By

137. See Romero, *supra* note 15, at 411 n.58. Romero notes that "twenty years have passed since *Plyler* and in a world in which many opportunities for economic and personal advancement require postsecondary education, the opportunity to attend college might very well be the new educational floor." *Id.* That is to say, that the need for an advanced degree in today's world is equal to the need for a high school diploma in the days of *Plyler*. Badger & Yale-Loehr, *supra* note 84.

138. Lucila Rosas, Comment, *Is Postsecondary Education a Fundamental Right? Applying Serrano v. Priest to Leticia "A"*, 16 CHICANO-LATINO L. REV. 69, 86 (1995). Today, an individual needs at least one or two years of college in order "to compete in the non-menial labor market." *Id.*

139. *Id.*

140. The largest direct public assistance to undocumented immigrants is public primary and secondary education. Galassi, *supra* note 105, at 86-87. A 1996 survey of the national cost of education for illegal immigrants found a total cost of \$6 to \$8.1 billion, with net county and city costs from \$6.1 to \$8.2 billion and costs of bilingual education reaching between \$1.4 and \$1.8 billion. *Id.* at 87. Considering the substantial economic investment in these children, it is counterintuitive to enact legislation like section 505 that creates a cut-off date for the beneficence established in *Plyler* and abandon those children who otherwise qualify to continue their education. *Id.*; see also Beth Peters & Marshall Fitz, *To Repeal or Not to Repeal: The Federal Prohibition on In-State Tuition For Undocumented Immigrants Revisited*, 168 ED. LAW REP. 565, 568 (2002).

141. See, e.g., Alfred, *supra* note 2, at 618; Badger & Yale-Loehr, *supra* note 84; Galassi, *supra* note 105, at 87.

142. Galassi, *supra* note 105, at 87.

143. *Plyler*, 457 U.S. at 220. See also Alfred, *supra* note 2, at 644.

144. Alfred, *supra* note 2, at 632.

preventing advancement of undocumented youths to skilled and professional careers, the statutes will increase the rate of high school drop outs,¹⁴⁵ decrease students' ability and potential to contribute to the growth of local and regional economies, and increase their reliance on state benefits.¹⁴⁶ The long-term effect will be to keep the current class of low-skilled workers in place, so that the underclass, as it continues to grow, will be unevenly distributed throughout the country.¹⁴⁷ As one scholar eloquently states: "undocumented status and poverty are mutually reinforcing obstacles to advancement."¹⁴⁸ Barring qualified undocumented youths from obtaining advanced degrees creates a subclass of persons otherwise capable of becoming professionals and significant taxpayers.¹⁴⁹ Not only does this deprive the United States of the potential economic contributions of capable and talented young people, but by keeping undocumented immigrants in the lower classes, it also indirectly increases societal ills such as poverty, dependence on government support, and crime.¹⁵⁰

A common justification for denying undocumented immigrants the opportunity to continue their education beyond secondary school is the assumption that undocumented aliens create a net economic loss to the United States by drawing more public funds than they contribute.¹⁵¹ However, this argument was rejected by the *Plyler* Court, and the evidence on this point is at best equivocal.¹⁵² Another common argument is that

145. Latinos, whose population consists of the greatest percentage of undocumented immigrants, already have the highest drop-out rate of any ethnic group. Peters & Fitz, *supra* note 140, at 568.

146. *Id.*

147. *Id.*

148. Romero, *supra* note 15, at 395.

149. Alfred, *supra* note 2, at 618. Some individuals argue that the hypocrisy of exploiting undocumented immigrants for manual labor at low wages, while denying their children a chance at higher education, needs to be addressed. O'Connor, *supra* note 113.

150. Alfred, *supra* note 2, at 618; Rosas, *supra* note 138, at 85.

Furthermore, there is a notable hypocrisy and injustice in exploiting undocumented immigrants for cheap labor while denying them the opportunity of self-betterment through higher education. O'Connor, *supra* note 113.

151. *See, e.g.*, Alfred, *supra* note 2, at 640; Romero, *supra* note 15, at 402.

152. FAIR, *Issue Brief*, *supra* note 124.

It is uncertain whether the costs of immigrant education are balanced out by the taxes immigrants pay. Some studies show that immigrants do not cause negative cash flow for taxpayers. STEWART, *supra* note 48, at 213. One scholar writes:

Evidence shows that the American economy has reaped major benefits from immigrants over the past three decades through tax payments, job creation, entrepreneurial activity, consumer spending, and neighborhood revitalization. For example, immigrants pay between \$120,000 and \$200,000 more to the U.S. government than they exhaust in government services In addition, according to the Urban Institute, immigrants add twice as many jobs to the economy as does the native-born population, and contribute to local employment more than non-

offering in-state tuition rates to undocumented aliens will promote unlawful immigration.¹⁵³ However, data provided by pro-immigrant advocates suggests that individuals do not immigrate to the United States in order to take advantage of public education and public services; rather, they come to seek employment and reunite with family members who are already here.¹⁵⁴ Finally, anti-immigrant groups such as FAIR argue that it is illogical to spend tax dollars on higher education for those who cannot work legally in the United States and will therefore not pay United States taxes.¹⁵⁵ However, this issue is addressed by the DREAM Act, which provides for the adjustment of immigration status in order to enable graduates of postsecondary educational institutions to work legally.¹⁵⁶

Some authors suggest that the social and economic benefits of offering in-state tuition to undocumented immigrants outweigh the “current incentive to save money.”¹⁵⁷ Although some studies suggest that state and local expenditures for immigrant education exceed tax revenues from immigrants, “a narrow or short-term view of educational expenditures . . . ignores the investment dimension of education.”¹⁵⁸ Affordable

immigrants.

Alfred, *supra* note 2, at 640–41.

153. FAIR, *Issue Brief*, *supra* note 124.

154. Alfred, *supra* note 2, at 640.

155. FAIR, *Issue Brief*, *supra* note 124. FAIR also argues: “[A]pologists for illegal immigration claim that illegal aliens do work that Americans will not do. But their argument for in-state tuition is that these illegal aliens should not be forced by lack of education to do unskilled work. Which is it?” *Id.*

Victor Romero responds to this criticism, stating that the percentage of undocumented workers who are eligible for the benefits offered by the DREAM Act is too small to significantly deplete the workforce, that those who will leave the workforce to pursue a higher education will be replaced through lawful and unlawful entry, and that FAIR’s argument confuses those who chose to enter the United States unlawfully with those who did not. Romero, *supra* note 15, at 413–14.

156. See *supra* text accompanying note 123; see also Romero, *supra* note 15, at 415.

157. Alfred, *supra* note 2, at 618; STEWART, *supra* note 48, at 214 (“Few actions are more costly to society than failure to provide appropriate educational opportunities for *all* of society’s members. Dollars invested in education for immigrants and their children now will be repaid many times over in the future.”).

158. See STEWART, *supra* note 48, at 213–14 (discussing the costs and benefits of providing public primary and secondary education to immigrant students). For example, the National Research Council Report “concluded that California taxpayers provide net benefits for immigrants in excess of the taxes [the immigrants] pay.” GIBBS & BANKHEAD, *supra* note 83, at 78–79. But the Report cautions that the long-term balance between immigrant taxes and the cost of public services immigrants use will depend on various complex factors, including education levels. *Id.* Similarly, David Stewart states that, “[i]mmediate financial return should not be the measure that is applied in these instances.” STEWART, *supra* note 48, at 214.

In addition, the evidence that immigrants consume more tax dollars than they spend is inconclusive. Alfred, *supra* note 2, at 640. Other research suggests that immigrants actually *pay* \$120,000 to \$200,000 more to the United States than they exhaust in government services. *Id.* In

postsecondary education will save tax money on social welfare, drug rehabilitation, medical emergency services, and the criminal justice system.¹⁵⁹

Another important consideration is that today's economy is in a period of transition, and "commentators predict that the future labor markets will demand more well-educated workers and fewer less-educated" workers.¹⁶⁰ Immigration experts assert that the long-term impact of immigration on the American economy depends on the level of education attained by the immigrant population; not surprisingly, the higher the level of the immigrant population's education, the more positive, long-term fiscal impact.¹⁶¹ "For example, the net present value of the fiscal impact of an immigrant with less than a high school education is \$13,000 while that of an immigrant with more than a high school education is in excess of \$198,000."¹⁶² According to the Rand Corporation, a leading conservative think tank, making higher education accessible to all Latinos, the ethnic group with the largest proportion of undocumented immigrants, would benefit the country, the states, and those individuals.¹⁶³ The Rand Corporation's research indicates that doubling the number of bachelor's degrees for Latinos would result in a \$7.6 billion increase in federal, state, and local tax contributions, and a \$5.4 billion decrease in public spending for social welfare, health, and law enforcement programs.¹⁶⁴ "In addition, the disposable income of these students over their lifetimes would be . . . \$14 billion."¹⁶⁵

addition, immigrants have benefited the economy over the last three decades by "tax payments, job creation, entrepreneurial activity, consumer spending, and neighborhood revitalization." *Id.* Reports from the Rand Institute and the Urban Institute indicate that the benefits of immigrant labor outweigh the cost of services consumed by undocumented immigrants. GIBBS & BANKHEAD, *supra* note 83, at 79. Finally, immigrants are credited with having saved the furniture, garment, and shoe industries in Southern California, and the textile industries in Los Angeles, San Francisco, and New York City. *Id.*

159. Alfred, *supra* note 2, at 641.

160. *Id.* at 643; *see also* INSTITUTIONAL RESPONSES, *supra* note 95, at 1. National projections for the 1990s and beyond were that 40% of all jobs would be professional, managerial, and technical occupations; 30% would require skilled labor; and barely 2% would require low-skilled labor. *Id.*

161. Alfred, *supra* note 2, at 643.

162. *Id.*

163. Marie Watteau, Press Release, *Students Sue Officials of Several Public Colleges and Universities for Denying Admission Based on Perceived Immigration Status*, available at www.maldef.org/news/press.cfm?ID=182&FromIndex=yes (Sept. 3, 2003).

164. *Id.*

165. *Id.* In short, "[if] immigrants are to enjoy the benefits of economic assimilation and if our nation is to enjoy the fruits of a well-educated labor force, newcomers must participate fully and successfully not only in K-12 but also in higher education." INSTITUTIONAL RESPONSES, *supra* note 95, at xi.

IV. PROPOSALS

It is important that Congress pass the DREAM Act so that undocumented students and the United States as a whole can begin to benefit from its provisions. However, this legislation, with its many conditions and restrictions,¹⁶⁶ is only a short-term solution. The bill's provisions apply only to those undocumented immigrants who have been present in the United States for five years as of the time of the bill's enactment.¹⁶⁷ Thus, those minors who entered the United States unlawfully less than five years before the bill's enactment, and those who will arrive in the future will not have the opportunity to continue their educations beyond high school.¹⁶⁸ For this reason, a bill that is more far-sighted and far-reaching is necessary.

In order to ensure that the benefits of the DREAM Act do not expire, Congress must enact another bill that provides in-state tuition benefits and adjustment of status to undocumented students who either (a) entered the United States before they reached a given age, or (b) have resided in the United States for a certain number of years, perhaps four, at the time that they will apply for postsecondary school admission and adjustment of status. The former solution may be problematic, however, because an age-at-time-of-entry requirement might provide incentives for minors to immigrate illegally with or without their families. For example, were the cutoff age sixteen years, it is not difficult to imagine unaccompanied sixteen year olds immigrating to the United States in the hopes of procuring subsidized educations and brighter futures. Therefore, the latter approach, which proposes a length of residency requirement, is preferable. A law that requires a four-year residency at time of application more effectively ensures that the students entered the United States at their parents' direction, attended four years of high school in the United States, and have begun to develop American identities. Furthermore, such a law is unlikely to encourage unlawful immigration because the benefits to be derived from the illegal entry are delayed for a relatively long period of time.

In short, Congress should pass the DREAM Act as a short-term solution to removing the bar on postsecondary education to undocumented students. However, Congress will eventually need to enact further

166. See *supra* text accompanying note 123.

167. See *supra* text accompanying note 123.

168. See *supra* note 123.

legislation so that all undocumented students who immigrate as children and grow up in the United States will have the opportunity to attend institutions of higher education, legalize their immigration status, and pursue a trade or career.

V. CONCLUSION

The combination of the high cost of postsecondary education, the ineligibility of undocumented students for federal financial aid, the difficulty of obtaining loans without legal immigration status, and the federal prohibitions against offering undocumented students in-state tuition rates effectively bar undocumented immigrants from continuing their education beyond high school. This lack of postsecondary education prevents bright, talented, and ambitious students from pursuing skilled jobs or professional careers and traps them in the lowest socioeconomic classes. Not only do the students themselves suffer, but the country also suffers from the loss of potential tax revenues generated by educated residents and the loss of money spent on social welfare and the criminal justice system.¹⁶⁹

The DREAM Act, which is under consideration by the Senate, seeks to remedy this problem, which tens of thousands of youths confront who enter the United States illegally with their parents, grow up in the United States, and, in most instances, spend their entire lives in the United States. The Act would repeal IIRIRA section 505, extend in-state tuition benefits to undocumented students, and permit undocumented students to legalize their immigration status. Congress should pass the DREAM Act and follow up with further legislation so that the in-state tuition benefits are not limited to those students who have been present in the United States for five years prior to the date of enactment. Such legislation would provide undocumented minors with the same opportunity for personal and economic achievement that is available to other children residing in the United States.

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169. Alfred, *supra* note 2, at 618; Rosas, *supra* note 138, at 85.

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