

DREAMING OF AN EQUAL FUTURE FOR IMMIGRANT CHILDREN: FEDERAL AND STATE INITIATIVES TO IMPROVE UNDOCUMENTED STUDENTS' ACCESS TO POSTSECONDARY EDUCATION[†]

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I. INTRODUCTION

Like any typical Mexican restaurant in Smalltown, U.S.A., *La Fogata's* coffee is terrible—lukewarm and watered down, grainy sludge clouding the last few sips of each cup. The *menudo*, on the other hand, is outstanding—pungent and rich, with generous chunks of tripe in each spoonful. The small, family owned and operated restaurant in the town of Sunnyside reflects only one piece of the prototypical profile of rural Eastern Washington. Down the main drag and around the corner sits the community high school. Like a number of other schools in the lower Yakima Valley, more than two-thirds of the students of Sunnyside High are Hispanic,¹ and fifty-four percent qualify for the school's free or reduced-price lunch program.² And like those other schools, somewhere between one-quarter and

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1. Wash. Office of Superintendent of Pub. Instruction, Sunnyside High School (2002–03), at <http://www.greatschools.net/cgi-bin/wa/other/1897>; Interview with Sandra Linde, Public Policy Director, Latino/a Educational Achievement Program, in Sunnyside, Wash. (Nov. 6, 2003) [hereinafter Linde interview].

2. Wash. Office of Superintendent of Pub. Instruction, *supra* note 1.

one-third of the senior class lacks legal immigration status and faces extraordinary difficulties in obtaining a postsecondary education.³

Unchecked immigration of undocumented persons from Mexico and Latin America to the United States ("U.S.") is not a new problem. For years, this population has provided American industry—especially the agricultural sector—with a cheap source of labor.⁴ Nevertheless, as the numbers of permanently settled undocumented immigrants in the U.S. increase, debate stirs. If these immigrants are here to stay, employed year-round and paying taxes, their children enrolled in the public school system, should they be permitted to adjust their status and enjoy the benefits of legal residency in this country like the rest of their community?

In 1986, attempting to address this question, Congress passed the Immigration Reform and Control Act,⁵ which allowed for large classes of undocumented immigrants to adjust their status and become legal residents.⁶ Nearly twenty years later, however, U.S. communities are facing new generations of undocumented immigrant families. Although the bulk of these families are similar to those who benefited from the mass legalization seventeen years ago in their vocation and economic status, they also face new challenges. Not the least of these is the backlash against illegal immigration in the aftermath of the terrorist attacks of September 11, 2001, whose effects range from the spread of cultural prejudices to increased border security.⁷

Today, undocumented youths face an especially intriguing challenge. Although they may have been no more than baggage for their parents in a border-crossing trip, their undocumented status makes their presence in the U.S. a

3. Linde interview, *supra* note 1; Interview with Jan Phillips, Counselor, Wahluke High School, in Mattawa, Wash. (Nov. 6, 2003) [hereinafter Phillips interview]; Interview with Oscar Martinez, Chris Bazaldua and Meche Brownlow, Counselors, Toppenish High School, in Toppenish, Wash. (Nov. 7, 2003) [hereinafter Toppenish counselors interview]; Interview with Trino Sandoval, Recruiter, Central Washington University, Toppenish, Wash. (Nov. 7, 2003) [hereinafter Sandoval interview].

4. Paul E. Green, *The Undocumented: Educating the Children of Migrant Workers in America*, 27 BILINGUAL RES. J. 51, 60 (2003). See ERIC SCHLOSSER, FAST FOOD NATION 160–63 (Houghton Mifflin Co. 2002); ERIC SCHLOSSER, REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET 77–108 (Houghton Mifflin Co. 2003).

5. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C.).

6. *Id.* Many migrant and seasonal agricultural workers became legal permanent residents of the U.S. by virtue of this legislation. Interview with Jeane O'Hara, Teacher, Migrant Education Program, Toppenish High School, Toppenish, Wash. (Nov. 7, 2003) [hereinafter O'Hara interview]. See 8 U.S.C.A. § 1160(1)(B) (West 2004) (requiring proof of residence and at least ninety days of agricultural labor in the U.S. between May 2, 1985 and May 1, 1986).

7. James H. Johnson, Jr., *U.S. Immigration Reform, Homeland Security, and Global Economic Competitiveness in the Aftermath of the September 11, 2001 Terrorist Attacks*, 27 N.C.J. INT'L L. & COM. REG. 419, 450–51 (2002).

violation of federal law.⁸ Nonetheless, the American public school system embraces them because a 1982 Supreme Court case guaranteed all children in the U.S. the right to a free K–12 education regardless of their immigration status.⁹ This creates a substantial disconnect between the childhood and adult lives of undocumented immigrants in this country. As these children grow up, the government and their communities treat them as equals to other kids. After graduation day, however, a harsh reality sets in, fraught with inequality and silent discrimination.¹⁰

Judged by their appearance, high school seniors who lack valid immigration documents are indistinguishable from their classmates. On any given fall day at school, they wear sweaters and jeans, and mingle in the hallways between classes gossiping and joking with their friends. These youths enjoy the right to a public education in the U.S. that provides them—just like citizen and legal resident students—with a social center, a place to enroll in free classes, get an affordable lunch, join a sports team, play in the band or sing in the choir. But the similarities begin to dissolve when you sit across the table from them and talk candidly about their outlook on the future and their possibilities after high school. While discussing school and community activities they are currently involved in—student government, clubs and organizations, church and service groups—undocumented students perk up and are eager to share.¹¹ In contrast, many of the same students seem ashamed and physically drained when speaking of their postsecondary plans, hunching their shoulders and speaking softly, eyes focused downward.¹²

The outlook for these students' future is bleak, at least when weighed against the postsecondary plans of their classmates. Many undocumented students finish high school, but a significantly lesser number are likely to graduate from a postsecondary institution.¹³ Strict federal policy excludes these students from eligibility for government educational loans, in-state tuition rates and adjusting their immigration status, effectively denying them access to postsecondary education benefits.¹⁴ Following the current federal mandate, several state

8. See Immigration and Nationality Act § 212(a)(6)(A)(i), 8 U.S.C.A. § 1182(a)(6)(A)(i) (West 2004). An alien's presence in the U.S. without being "admitted" can subject that individual to deportation. See *id.* at 8 U.S.C.A. § 1227(a)(1)(A).

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

10. Interviews with undocumented high school students and graduates in Eastern Washington State (Mattawa and Toppenish) and Southern Arizona (Phoenix and Tucson) (Nov. 2003–Feb. 2004) [hereinafter Student interviews]. Although these students' stories are real, the names included in this Note have been changed to maintain student confidentiality.

11. *Id.*

12. *Id.*

13. Phillips interview, *supra* note 3; Student interviews, *supra* note 10.

14. See U.S. DEP'T OF EDUC., THE STUDENT GUIDE: FINANCIAL AID FROM THE U.S. DEPARTMENT OF EDUCATION, 2003–2004 5 (2003), http://studentaid.ed.gov/students/attachments/siteresources/StudentGuideEnglish2003_04.pdf (requiring "U.S. citizen or eligible noncitizen" as a prerequisite for federal financial aid) [hereinafter STUDENT GUIDE];

legislatures have spoken out against any favorable state treatment of undocumented students and introduced bills to expressly deny them in-state tuition.¹⁵

However, the movement to grant undocumented students opportunities for postsecondary education is growing, at least on the state level. Over the past three years, nine states¹⁶ have enacted legislation that entitles certain undocumented students¹⁷ to in-state tuition at public postsecondary schools, contrary to current federal policy. Many other states have introduced but not yet passed similar legislation.¹⁸

Although federal support has been limited to date, Representatives and Senators have recently proposed several pieces of legislation addressing the issue.¹⁹ Importantly, these put forward uniform policies that would eliminate broad policy disparities at the state level.²⁰ To date, the Development, Relief and

id. at 33 (limiting “eligible noncitizen[s]” to certain legal permanent residents for purposes of receiving federal financial aid).

15. See Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 456 (2004); Am. Ass’n of State Colls. & Univs., *Access for All? Debating In-State Tuition for Undocumented Alien Students*, http://www.aascu.org/policy/special_report/access_for_all.htm (last modified Nov. 6, 2003) [hereinafter *Access for All*]. To date, Alaska and Mississippi have been the only states to pass legislation denying state educational benefits to undocumented students. Olivas, *supra*, at 456. Virginia also passed a similar law in 2003, but Governor Mark Warner vetoed the bill. *Access for All*, *supra*. Other laws to prohibit in-state tuition grants to undocumented students have been proposed in a number of other states including Arizona and North Carolina. *Id.* Additionally, state officials in Colorado and Maryland have publicly spoken out against granting such benefits. *Id.*

16. These states include: California, Delaware, Illinois, Kansas, Oklahoma, New York, Texas, Utah, and Washington. *Id.*; Olivas, *supra* note 15, at 456. Additionally, the Wisconsin Legislature passed similar legislation in August 2001 as part of its budget bill, but the provision was line-item vetoed by the Governor. *Access for All*, *supra* note 15.

17. Although the measures differ according to each law, all states have set requirements that undocumented students must meet to establish eligibility for in-state tuition. Typically, these involve at least three years of continuous residency in the state and graduation from a state high school. See, e.g., WASH. REV. CODE ANN. § 28B.15.012(2)(e) (West 2003).

18. These states include: Arizona, Colorado, Florida, Georgia, Hawaii, Maryland, Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Virginia and Wisconsin. *Access for All*, *supra* note 15.; Olivas, *supra* note 15, at 456.

19. See DREAM Act, S. 1545, 108th Cong. (2003); Student Adjustment Act of 2003, H.R. 1684, 108th Cong. (2003); Preserving Educational Opportunities for Immigrant Children Act of 2003, H.R. 84, 108th Cong. (2003); Educational Excellence for All Learners Act of 2003, S. 8, 108th Cong. (2003).

20. Janice Alfred, *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, 645 (2003); Jennifer Galassi, *Dare to Dream? A Review of the Development, Relief, and Education for Alien Minors (DREAM) Act*, 24 CHICANO-LATINO L. REV. 79, 85 (2003).

Education for Alien Minors (“DREAM”) Act²¹ enjoys the most support, mirrored in the House by its companion bill, the Student Adjustment Act.²² In addition to repealing the federal law that prohibits granting in-state tuition to undocumented students, the DREAM Act proposes a legalization program for these youth, allowing them to obtain conditional legal status in the U.S.²³ Not only would this measure grant these students access to in-state tuition rates, it would also make them eligible for federal financial aid programs to help pay for their postsecondary education.²⁴ Despite garnering favorable press attention, proponents of the DREAM Act are still gathering Congressional support.²⁵

This Note will broadly discuss the debate over undocumented high school students in the U.S. who desire to attend college and the ways current state and federal laws both empower and discourage them. In Part II, case studies in Washington State and Arizona will reveal some of the realities faced by undocumented students nationwide. Part III will consider the constitutional controversies surrounding these students’ right to an education in the U.S. Based on this framework, Parts IV and V will outline legislative barriers and solutions that seek to block or enable this right.

This Note argues that undocumented students in the U.S. desperately need changes in the law. The most effective way to ensure these students realistic access to postsecondary education is to pass federal legislation already proposed on the issue. Not only would a bill like the DREAM Act lessen the financial burden on already poor populations, but more importantly, it would also provide a means for marginalized youths all across the country to assimilate into mainstream American society.

II. SETTING THE STAGE FOR DISCUSSION: CASE STUDIES IN EASTERN WASHINGTON STATE AND SOUTHERN ARIZONA

The personal experiences and perspectives of high school students, teachers, counselors and immigration attorneys paint a clear picture of the lives of undocumented students. The reality, in short: the average undocumented high school student does not have an equal, or even a reasonable chance to obtain a postsecondary education.

21. S. 1545 (proposed by Senator Orrin Hatch (R-UT)). A similar version of the bill was introduced in the 107th Congress, but never made it past committee consideration. *See* DREAM Act, S. 1291, 107th Cong. (2001).

22. H.R. 1684 (introduced by Representative Chris Cannon (R-UT)). Like the DREAM Act, the Student Adjustment Act was introduced but received little attention in the 107th Congress. *See* Student Adjustment Act of 2001, H.R. 1918, 107th (2001).

23. *See* S. 1545, § 5.

24. *See* STUDENT GUIDE, *supra* note 14. *But see* S. 1545 § 12 (recent amendment added to the bill in committee limiting financial aid availability).

25. It is unclear whether the Senate will reach a vote on the DREAM Act during the 108th Congress, and the House has yet to consider the companion Student Adjustment Act in committee. *See* AM. IMMIGRATION LAWYERS ASS’N, AILA ISSUE PAPERS, STUDENT ADJUSTMENT FOR DESERVING CHILDREN, AILA Doc. No. 03031754 (May 26, 2004), available at <http://www.aila.org>.

A. Washington State

Driving down the rural highways of the Yakima Valley in Central Washington State, it is clear even to the untrained eye that agriculture dominates the local economy. Fruit and vegetable stands dot the sides of the road between large expanses of orchards and cropland. Graveyards of agro-industrial machinery, fence parts and irrigation pipe lie strewn about. Occasionally, fields give way to rows of large concrete processing and distribution facilities. Where crops are lacking, an earthy odor announces the presence of large cattle stockyards.

It is equally obvious to the outsider that the area is home to a large Hispanic population. Taco trailers pop up frequently along the highway, improvising patios on the dirt roadside with blue tarps strung up above plastic tables and chairs. Inside many traditionally Anglo farming communities, Spanish is well integrated. Chainsaw dealers sit across the street from *tortillerías*; gas station signs advertise the price of “fountain drinks” alongside “*carne asada y chivo*.”

Nowhere is the coexistence of these two cultures more evident than at area public schools. Signs are posted on the door in both English and Spanish, directing visitors to the office. Phone calls and paperwork are managed in both languages. Pictures in trophy cases and yearbooks reflect mixed race clubs and student government boards. Yet serious lines remain drawn between some Hispanic students and the rest of the community, even if they remain unspoken.

Conversations with high school teachers and counselors reveal these differences with clarity. Jan Phillips, counselor at Wahluke High School in Mattawa, Washington, confirms that undocumented high school students face significant difficulties after they graduate.²⁶ A college education is nearly unattainable for many teenagers in the undocumented immigrant community.²⁷ Of some fifty undocumented seniors that graduate in an average Wahluke High class of slightly less than 100 students, only five may find adequate funding to attend a four-year college or university.²⁸ Another thirty to thirty-five may aspire to enroll in nearby community colleges, but will be frustrated by funding issues along the way.²⁹ The fundamental question for these students, according to Phillips, is whether they can find a way to work at least part-time while attending school.³⁰ Even a minimum wage job—when combined with a reduced course load—may not provide enough income to compensate for the educational loans they cannot receive.³¹

26. Phillips interview, *supra* note 3.

27. *Id.*; Linde interview, *supra* note 1; Toppenish counselors interview, *supra* note 3; Sandoval interview, *supra* note 3; Student interviews, *supra* note 10.

28. Phillips interview, *supra* note 3.

29. *Id.*

30. *Id.* Finding a job outside of the agricultural sector is difficult and sometimes impossible for undocumented youth. *See infra* text accompanying notes 148–65.

31. Phillips interview, *supra* note 3.

Cases of undocumented students like these with limited futures after high school abound in Eastern Washington State.³² Over the past twenty or so years, immigration by Hispanics—primarily from Mexico—has supplied the principal work force for agricultural growers and packing companies in the area.³³ Many of these workers have brought their families with them and have enrolled their children in public schools.³⁴ These families used to migrate seasonally based on job availability, but recent growth and diversification in Washington agriculture has resulted in stable year-round employment for immigrant workers.³⁵ The combination of these trends has established a permanent population of undocumented youths growing up in local communities.

Despite its current prevalence in the area, the undocumented status of students is not a common topic of conversation at school. Toppenish High School counselors Oscar Martinez, Chris Bazaldua and Meche Brownlow admit that they do not know exactly which students have legal documentation and which do not.³⁶ They roughly estimate that ten to twenty percent of Toppenish students are undocumented.³⁷ They are *sure* of one thing though: there are precious few resources available for helping local undocumented students seek a higher education.³⁸

A number of these students are discouraged by visions of a future confined to low-income jobs, removing the incentive to follow through with any formal schooling whatsoever.³⁹ Even more disheartening are cases of students who persevere and manage to finish college, yet are unable to find professional employment because of their lack of proper documentation.⁴⁰ For these reasons

32. *Id.*; Linde interview, *supra* note 1; Toppenish counselors interview, *supra* note 3; Sandoval interview, *supra* note 3; Interview with Raquel Pérez, Secretary, Toppenish High School, in Toppenish, Wash. (Nov. 7, 2003) [hereinafter Pérez interview].

33. Toppenish counselors interview, *supra* note 3; O'Hara interview, *supra* note 6; Sandoval interview, *supra* note 3; Pérez interview, *supra* note 32. *See generally* Green, *supra* note 4.

34. Toppenish counselors interview, *supra* note 3; O'Hara interview, *supra* note 6; Pérez interview, *supra* note 32. *See generally* Green, *supra* note 4.

35. In addition to the introduction of some new winter crops, spillover work during the off-season can now be found in industrial operations, such as local processing and packing plants. Toppenish counselors interview, *supra* note 3; Phillips interview, *supra* note 3; O'Hara interview, *supra* note 6; Johnson, *supra* note 7, at 432.

36. Toppenish counselor interviews, *supra* note 3.

37. *Id.*

38. *Id.*; Sandoval interview, *supra* note 3; *but see* MEXICAN AM. LEGAL DEF. & EDUC. FUND, SCHOLARSHIPS FOR ALL STUDENTS REGARDLESS OF IMMIGRATION STATUS (July 2003), available at http://www.maldef.org/pdf/Scholarships_072003.pdf (listing a handful of nationwide scholarships awarded each year to students regardless of documentation status).

39. Student interviews, *supra* note 10.

40. *Id.*

and others, many of these students eventually end up working—like their parents—as manual laborers in the agricultural industry.⁴¹

Still other undocumented students in Eastern Washington choose to buck the trend, despite a multitude of not-so-subliminal forces in the Yakima Valley pushing them away from higher education and toward low-paying jobs close to home. These young people finish high school and struggle through the frustrating search to obtain a college education with impressive determination. One shining example is Julia, who graduated near the top of the Wahluke High class of 2003.⁴² She now attends the University of Washington on full scholarship and strives to become a farmworker attorney.⁴³ Even though students like Julia consider themselves fortunate to be enrolled in college, they know their trials as undocumented immigrants are far from over. Further challenges—like finding a job without a Social Security number—loom on the post-college horizon, but for now, most of these students take things one day at a time.

B. Arizona

In many other rural regions across the country, undocumented students suffer from similar predicaments, but things are a bit different along the U.S.-Mexico border. In contrast to Washington—one of the states currently experiencing rapid growth in its immigrant population⁴⁴—Arizona and other border states have long been home to many Hispanic families, not just in rural farming communities but also in urban areas.

In the neighborhoods of South-Central Phoenix, Hispanic culture is completely dominant. Brightly colored letters painted on whitewashed concrete walls advertise typical Mexican businesses. At bus stops, in public restrooms and on business flyers, notices are universally posted in Spanish, with English added almost as an afterthought. Unlike Washington State, the population of undocumented immigrants in Arizona is large and diverse. Undocumented immigrants not only work in agriculture, but also in a variety of other industries from food service to construction.⁴⁵ Some are even small business entrepreneurs.⁴⁶

Naturally, this large population of undocumented immigrants correlates with significant enrollment of undocumented students in Arizona public schools. Estimates gauge that some 7,000 students lack legal documentation in the state,

41. *Id.*; Phillips interview, *supra* note 3; Sandoval interview, *supra* note 3; Pérez interview, *supra* note 32; O'Hara interview, *supra* note 6.

42. Phillips interview, *supra* note 3. "Julia" is a fictitious name. *See supra* note 10.

43. Phillips interview, *supra* note 3.

44. Johnson, *supra* note 7, at 432.

45. Telephone Interview with Judy Flanagan, Immigration Attorney (Jan. 23, 2004) [hereinafter Flanagan interview]; Interview with Joe Hauer, Teacher, Wilson Charter High School, in Phoenix, Ariz. (Feb. 19, 2004) [hereinafter Hauer interview].

46. Hauer interview, *supra* note 45.

between 4,000 and 5,000 of them living in Phoenix.⁴⁷ Notwithstanding this fact, the documentation status of students has not traditionally been a topic of interest there. Over the past two years, however, this has changed.

In June 2002, four undocumented students from Wilson High School—a charter school in Phoenix—traveled with a school group to New York to enter a solar-powered boat in a national science fair.⁴⁸ On a side trip to Niagara Falls, immigration officers approached them and asked to see their identification.⁴⁹ This encounter led to the issuance of deportation orders against all four students.⁵⁰ The media took to the students, dubbing them the “Wilson Four” and used their story to illustrate the plight of undocumented students across the U.S.⁵¹ Because these youths had grown up and attended school in the U.S. since their early childhood, they felt almost no connection to their actual countries of citizenship.⁵² This fact inspired numerous governmental officials—including U.S. Senator John McCain—to oppose the students’ removal from the U.S.⁵³

Joe Hauer, the teacher that accompanied the Wilson Four to New York, had hardly even thought about his students’ immigration status before the trip. Now, however, he is fully aware that Wilson High enrolls and gives diplomas to undocumented students each year, and offers his unconditional support where he can.⁵⁴ These students, remarks Hauer, are no less American than he is, building their lives around local communities most of them have lived in as long as they can remember.⁵⁵

47. See Librada Martínez, *Beneficiaria Dream Act a miles de estudiantes*, PRENSA HISPANA, Oct. 22, 2003, available at <http://www.prensahispanaaz.com/edicion629/principal/notas/bene.html>.

48. Hauer interview, *supra* note 45. See also Steven Greenhouse, *Congress Looks to Grant Legal Status to Immigrants*, N.Y. TIMES, Oct. 13, 2003, available at http://ist-socrates.berkeley.edu/~border/list_articles/1013-nytimes-congresslookingtolegalizeimmigrants.htm.

49. Hauer interview, *supra* note 45; Greenhouse, *supra* note 48.

50. Hauer interview, *supra* note 45; Greenhouse, *supra* note 48.

51. See, e.g., *Advocates Optimistic About Immigrant Student Bill*, IMMIGRANTS’ RIGHTS UPDATE No. 16-6 (Nat’l Immigration Law Ctr., Los Angeles, Ca.), Oct. 21, 2002, <http://www.gamaliel.org/Immigration/CRILibraryNews.htm> (on file with Arizona Law Review).

52. See Greenhouse, *supra* note 48 (including comments by Yuliana Huicochea, one of the “Wilson Four”).

53. Flanagan interview, *supra* note 45; Hauer interview, *supra* note 45. Thanks to media and governmental attention, and effective advocacy from Phoenix immigration attorney Judy Flanagan, an immigration judge has twice stayed these students’ deportation orders. Flanagan interview, *supra* note 45; Daniel González, *Students Facing Deportation Given 10-Month Reprieve*, ARIZ. REPUBLIC, Nov. 29, 2003, <http://www.azcentral.com/specials/special03/articles/1129hearing290.html>. Nevertheless, if proposed changes in immigration law do not allow for these students to adjust their status before the next hearing, they still stand to be deported. Flanagan interview, *supra* note 45.

54. Hauer interview, *supra* note 45.

55. *Id.*

Hauer is not the only one in the Wilson School District who feels this way. In fact, the administration and community have collaborated to ensure undocumented students better opportunities after high school.⁵⁶ Whereas students elsewhere may be disadvantaged, those at Wilson stand a good chance of getting scholarships.⁵⁷ In 1990, a private organization called the Wilson Foundation was founded.⁵⁸ Since then, this group has provided funding for twenty to thirty full-tuition scholarships each year for college-bound high school seniors regardless of their immigration status.⁵⁹ This support is a strong showing of solidarity, especially over the past two years, when issues surrounding undocumented immigrants have become more public at the school.

Yet funding is just one hurdle to overcome on the way to obtaining a higher education. Students in college continue to face challenges due to their lack of immigration paperwork. Victor, a 2001 graduate of Catalina High School in Tucson, was forced to withdraw from Pima Community College after studying for two years, the second year on a full athletic scholarship.⁶⁰ Ironically, his problems began upon a spontaneous visit to the International Student Office to ask a general question about the application process for student visas.⁶¹ In a matter of minutes, Victor's hypothetical conversation with one Pima employee put his student status on hold.⁶² He was then told that he would not receive any more credits through the college unless he obtained proper immigration status and re-registered.⁶³

Victor came from Mexico to Tucson with his family almost seven years ago on a legal visitor's visa.⁶⁴ He did not make that trip by any choice of his own, and remains left with very few life choices.⁶⁵ His current documentation—still legal—will expire in a matter of months, when he turns twenty-one.⁶⁶ Although technically Victor is not “undocumented,” he faces the same problems as typical undocumented students. He has already been told that without proper immigration status he cannot get a job or enroll in college.⁶⁷ And without that college degree, he

56. *Id.*

57. *Id.*

58. *See* Wilson Sch. District, Wilson Sch. District Found. Info. Page, at http://www.wsd.k12.az.us/do_foundation.htm (last modified Jan. 24, 2004).

59. Hauer interview, *supra* note 45.

60. Student interviews, *supra* note 10. “Victor” is a fictitious name. *See id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Victor's family all entered the U.S. with valid F-2 visas, accompanying his father, who obtained an F-1 student visa to pursue a study program in Tucson. *Id.* *See* Immigration and Nationality Act § 101(a)(15)(F), 8 U.S.C.A. § 1101(a)(15)(F) (West 2004).

65. Student interviews, *supra* note 10.

66. *Id.* Because Victor is under 21, federal immigration law still considers him a “child,” qualifying the continuing validity of his F-2 visa. *See* Immigration and Nationality Act § 101(b), 8 U.S.C.A. § 1101(b) (defining “child”); *id.* at § 1101(a)(15)(F)(ii) (explaining the F-2 visa).

67. Student interviews, *supra* note 10.

has almost no hope of finding a job that can sponsor him to obtain a work-related visa.⁶⁸

If Victor chooses to comply with the law, he will have to leave the rest of his immediate family and return to Hermosillo, Sonora to live with relatives.⁶⁹ Since he spent a significant part of his childhood in Mexico, perhaps Victor's case is not as sympathetic as the Wilson Four, who have been in the U.S. since elementary school. But Victor makes a strong case for himself; after being in Tucson for six and a half years, he feels like part of the community.⁷⁰ Simply put, he wants to live the life enjoyed by the rest of his high school classmates; he wants to obtain a college degree, get a decent-paying job and contribute to American society.

III. CONSTITUTIONAL FRAMEWORK: THE SPECIAL CASE OF EDUCATION FOR UNDOCUMENTED STUDENTS

Over the past several years, stories like these have provoked numerous debates over the issues surrounding undocumented students' access to higher education.⁷¹ However, the legal underpinnings of the topic go back much further in time. Two constitutional principles help to structure the arguments surrounding these students' right to a postsecondary education. First, the Equal Protection Clause of the Fourteenth Amendment provides that a state cannot "deny to any person within its jurisdiction the equal protection of the laws."⁷² This clause—applicable to undocumented immigrants as well as lawfully admitted aliens and U.S. citizens—supports advocates' push for new legislation.⁷³ In light of Supreme Court precedent giving unique consideration to both undocumented students and the right to education, equal protection may pose a challenge to any law that hampers undocumented students' ability to study at colleges and universities.

Second, the Supremacy Clause of the U.S. Constitution states that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land."⁷⁴ This provision has been interpreted to reinforce the federal government's exclusive power to set national immigration policy and challenge conflicting state law.⁷⁵ If any disparity exists between federal and state law

68. Many of the work-sponsored immigration visas delegated by the federal government every year require advanced educational degrees. *See* Immigration and Nationality Act § 203(b)(1)–(2), 8 U.S.C.A. § 1153(b)(1)–(2). Most of the remaining visas require specialized training in a particular skill, public notoriety for ability within a field, a million dollar investment or other qualifications that are nearly impossible to achieve as a high school graduate. *See id.* at § 1153(b)(2)–(5).

69. Student interviews, *supra* note 10.

70. *Id.*

71. *See supra* notes 14–22 and accompanying text.

72. U.S. CONST. amend. XIV, § 1.

73. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (describing the "universal" application of the Equal Protection Clause "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . .").

74. U.S. CONST. art. VI, cl. 2.

75. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 722 cmt. b (1987).

affecting immigration, federal law may preempt the state law and render it unconstitutional.⁷⁶ Because several apparent conflicts exist between federal and state law concerning postsecondary education benefits to undocumented students,⁷⁷ arguments concerning federal preemption are important to this discussion.

A. Equal Protection: A “Bottom Line” for State Accountability to Undocumented Students’ Rights to Education?

The Supreme Court’s landmark decision *Plyler v. Doe* established the right of undocumented immigrant youths to an education in the U.S.⁷⁸ *Plyler* struck down a Texas law requiring undocumented students to pay a tuition fee to enroll in the public K–12 school system.⁷⁹ The Court found the law in violation of the Equal Protection Clause of the Fourteenth Amendment.⁸⁰ This decision drew an important distinction between education and other public benefits; as noted in Justice Blackmun’s concurring opinion, “classifications involving the complete denial of education are . . . unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions.”⁸¹

The Court stressed two key points. First, it reaffirmed the right of undocumented persons to protection by the Fourteenth Amendment,⁸² recognizing the existence of a significant “shadow population of illegal migrants” in Texas.⁸³ Although these immigrants provided the state with cheap labor, they had limited access to public benefits.⁸⁴ This group’s disadvantaged status reinforced the application of the Equal Protection Clause: “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”⁸⁵ Moreover, the Court noted that the individuals targeted by the discriminatory state policy were not just undocumented immigrants, but undocumented immigrant *children*.⁸⁶ The Court reasoned that these children often illicitly entered the U.S. at a young age and had no choice in the matter; consequently, they should not be punished for the sins of their parents.⁸⁷ These interpretations granted undocumented students a powerful position to stake a claim to their right to education.

76. *Id.*

77. *See* Access for All, *supra* note 15.

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

79. *Id.* at 230.

80. *Id.* at 224–26.

81. *Id.* at 234 (Blackmun, J., concurring).

82. *Id.* at 212 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

83. *Id.* at 218.

84. *Id.* at 219.

85. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). *Accord* *Romer v. Evans*, 517 U.S. 620, 633–34 (1996).

86. *Plyler*, 457 U.S. at 219–20.

87. *Id.* at 220 (citing *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)) (“Their ‘parents have the ability to conform their conduct to societal norms,’ . . . but the children

Second, the Court discussed education as a special public benefit, holding that the right to education lay somewhere between an ordinary and fundamental right, regardless of a person's immigration status.⁸⁸ Although providing an education to its residents was an important function of the state, the right to education fell short of a "fundamental right," and precedent required that strict scrutiny not be applied to an equal protection analysis of school funding issues.⁸⁹ The Court was mindful, however, of the consequences of regarding education as merely an "ordinary right," acknowledging that such a decision might give way to permanent class distinctions and effectively defeat the purpose of the Equal Protection Clause.⁹⁰ Consequently, the holding heightened the state's burden of proof in upholding discrimination. In order to deny or set unreasonable limits on access to education to a certain population, the state had to show a "substantial interest" justifying this action.⁹¹

The Court considered several state interests that Texas argued validated discriminatory treatment of undocumented students. First, the state sought to protect itself from the "harsh economic effects" of a sudden influx of undocumented immigrants.⁹² The Court ruled this premise false based on the evidence in the record; undocumented immigrants imposed an insignificant, if any, burden on the state economy.⁹³ Furthermore, the state could enforce a less restrictive alternative to denying children a public education to curb the negative effects of mass immigration—namely, the general prohibition on the employment of undocumented immigrants.⁹⁴

Second, the state contended that undocumented children were an appropriately excludable class "because of the special burdens they impose on the State's ability to provide high-quality education."⁹⁵ This allegation similarly failed to persuade the Court; in fact, according to the evidence presented, undocumented

who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status'"); *Id.* (citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)) ("[I]mposing disabilities on [a] . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing [P]enalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent.").

88. *Id.* at 223–24.

89. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973).

90. *Plyler*, 457 U.S. at 222 ("Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.").

91. *Id.* at 224.

92. *Id.* at 228.

93. *Id.* ("To 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.").

94. *Id.* at 228–29 n.24. ("Virtually all of the undocumented persons who come into this country seek employment opportunities and not educational benefits.").

95. *Id.* at 229.

children were “basically indistinguishable” from legal resident alien children in terms of educational cost to the state.⁹⁶

Finally, the state argued that undocumented children should be excluded from public schools because “their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State.”⁹⁷ This claim was soundly rejected on the basis that many undocumented children were likely to remain permanent residents of the United States.⁹⁸ Furthermore, the Court refused to question the “productive use” of a public education to undocumented persons who might later “add[] to the problems and costs of unemployment, welfare, and crime” as a result of their lack of education.⁹⁹

The magnitude of this judgment—marking undocumented children as a target group for unreasonable state discrimination and identifying education as a substantial right—carried with it an opportunity for activism favoring the education of undocumented students. The Court implicitly recognized this, harking back to the language of *Brown v. Board of Education*:

[Education] is the very foundation of good citizenship . . . it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms.¹⁰⁰

The Court tread carefully, however, when it commented on protecting undocumented persons. In doing so, the Court granted deference to the federal power to regulate immigration.¹⁰¹

The *Plyler* decision clarified that “illegal aliens” were not an inherently “suspect” class entitled to stricter protection from state discrimination under the Equal Protection Clause.¹⁰² Still, the Court was hesitant to set the stage for the exclusion of undocumented children from public schools.¹⁰³ Thus, it drew a distinction between federal and state laws affecting undocumented immigrants. Independent of the federal government’s power to “discriminate” in its deportation of unauthorized immigrants, Texas had to show that state discrimination in

96. *Id.*

97. *Id.* at 229–30.

98. *Id.* at 230.

99. *Id.*

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

101. *Id.* at 224–26.

102. *Id.* at 219 n.19 (“Unlike most of the classifications that we have recognized as suspect, entry into [the class of undocumented persons], by virtue of entry into this country, is the product of a voluntary action. Indeed, entry into the class itself is a crime.”).

103. *Id.* at 226. Among other reasons, this was because federal immigration law lay silent with respect to the education of immigrants. *Id.*

excluding undocumented children from public schools was “reasonably adapted to the purposes” of a legitimate state interest.¹⁰⁴

All in all, *Plyler*’s equal protection analysis offers a mixed bag for undocumented high school students today seeking a postsecondary education. On one hand, undocumented children—although not a “suspect class” for equal protection purposes—are set apart from their parents as unwitting culprits, guilty of a “crime” they may not even comprehend.¹⁰⁵ On the other hand, however, education cannot be protected as a fundamental right, though it is much harder to deny than a public benefit such as food stamps or a welfare check.¹⁰⁶

B. Preemption and Federal/State Conflicts of Immigration Law

Historically, federal regulation has exclusively controlled immigration.¹⁰⁷ The U.S. Constitution expressly delegates to Congress numerous powers that together suggest a federal directive to regulate immigration.¹⁰⁸ Beyond these enumerated powers, the federal government has filled in theoretical gaps to create authority for strict control over the area.¹⁰⁹ For example, courts have recognized that since the establishment of relations between the U.S. government and citizens of other nations—an inherently political power—is a necessary part of immigration policy, such laws should be regulated and controlled exclusively by the executive and legislative branches of the federal government.¹¹⁰

This federal monopoly on immigration policy can give rise to conflicts with state law. Because of the exclusivity of the immigration power, any state law affecting immigrants risks federal preemption.¹¹¹ This line drawn in the sand by the federal government begs the question: how far can states legislate the rights and entitlements of non-citizens without implicitly interfering with federal immigration policy?

To answer this, the Supreme Court developed a standard for evaluating conflicts between federal and state immigration policy in *DeCanas v. Bica*.¹¹² In

104. *Id.*

105. *See supra* note 87 and accompanying text.

106. *Plyler*, 457 U.S. at 221.

107. *See* 3A AM. JUR. 2D *Aliens & Citizens* § 388 (2003).

108. Most notable among these is the power “to establish a uniform Rule of Naturalization.” U.S. CONST. art. I, § 8, cl. 4. Other provisions that suggest the congressional mandate to regulate immigration are the Commerce Power (U.S. CONST. art. I, § 8, cl. 3), the War Power (U.S. CONST. art. I, § 8, cl. 11), the Migration and Importation Clause (U.S. CONST. art. I § 9, cl. 1), and the Foreign Affairs Power. *See* T. ALEXANDER ALENIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 178–83 (5th ed. 2003).

109. *See* ALENIKOFF ET AL., *supra* note 108, at 183–85; 3A AM. JUR. 2D, *supra* note 107.

110. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

111. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 722 cmt. b (1987).

112. 424 U.S. 351 (1976). Simultaneously, this greatly narrows the power of judicial review over immigration policy, which is only exercised in limited situations. *See Mathews*, 426 U.S. at 81.

order to stand on its own and avoid being stricken as preemptorily invalid, a state law must pass three tests. First, the state statute must not be a “constitutionally proscribed regulation of immigration.”¹¹³ Second, it must be shown that Congress had no “clear and manifest purpose” to effect a “complete ouster of state power” in the area covered by the state law.¹¹⁴ Third, the state provision cannot “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” and render compliance with both federal and state measures impossible.¹¹⁵ Essentially, the federal immigration power does not necessarily preclude states from implementing any legislation that affects the lives of noncitizens; it only mandates that such laws avoid regulating immigration.¹¹⁶

This analytical framework for preemption has helped to define and limit appropriate state regulation of the lives of noncitizens. There is still much controversy, however, over certain areas of immigration law. Currently, one of the most contested issues is postsecondary education benefits for undocumented immigrants. Over the past ten years alone, control over the topic has seesawed back and forth numerous times between the federal government and the states.

The mid-1990s produced a flurry of disputes on education and immigration. First, states led the way with legislation like California’s Proposition 187, aimed at “prevent[ing] illegal aliens in the United States from receiving benefits or public services in the State of California.”¹¹⁷ Among Proposition 187’s provisions were two distinct denials of education benefits to undocumented immigrants—enrollment in public elementary and secondary schools¹¹⁸ and admission to public postsecondary educational institutions.¹¹⁹ Because of the discriminatory nature of this legislation, the League of United Latin American Citizens (“LULAC”) filed a lawsuit against the State. The action alleged that Proposition 187 was unconstitutional, and therefore preemptorily invalid.¹²⁰

A federal court in the Central District of California heard the case in 1995 and delivered a mixed holding with regard to education.¹²¹ First, it held that state denial of public primary and secondary education was an impermissible regulation.¹²² On this point, Proposition 187 failed to meet the third prong of the *DeCanas* test,¹²³ the exclusion of undocumented students from the California

113. *DeCanas*, 424 U.S. at 355–56.

114. *Id.* at 357 (citations omitted).

115. *Id.* at 363 (citations omitted).

116. *Id.* at 355.

117. *League of United Latin Am. Citizens (LULAC) v. Wilson*, 908 F. Supp. 755, 763 (C.D. Cal. 1995).

118. *See* 1994 Cal. Legis. Serv. Proposition 187 § 7 (West).

119. *See id.* at § 8.

120. *LULAC*, 908 F. Supp. at 764.

121. *Id.* at 785–86.

122. *Id.* at 785.

123. *Id.*

public school system would preclude compliance with *Plyler v. Doe*.¹²⁴ The holding, however, also declared that federal law did not preempt California's denial of admission of undocumented applicants to publicly funded State postsecondary schools.¹²⁵

State power to regulate the distribution of higher education benefits did not last long. One year later, in 1996, the federal government enacted two bills—the Personal Responsibility and Work Opportunity Reconciliation Act (“PRA”)¹²⁶ and the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”)¹²⁷—that codified specific provisions governing immigrants’ postsecondary education.¹²⁸ These and many other regulations passed by Congress necessitated a reexamination of Proposition 187 on new grounds of federal preemption.¹²⁹ In a rehearing of LULAC’s case, the District Court interpreted the recent federal legislation as a manifestation of Congress’s wide-ranging intent to regulate the distribution of federal, state and local benefits to immigrant populations.¹³⁰ At least in principle, this holding appeared to curb almost *any* future state action granting or denying benefits to undocumented immigrants.

C. Undocumented Students’ Constitutional Claims to Postsecondary Education: Pitting Equal Protection Against Federal Preemption

Chief Justice Burger, dissenting in *Plyler*, commented on his belief that the judiciary should play a conservative role in determining social policy regarding immigrants to the United States:

While the “specter of a permanent caste” of illegal Mexican residents of the United States is indeed a disturbing one . . . it is but one segment of a larger problem, which is for the political branches to solve. I find it difficult to believe that Congress would long tolerate such a self-destructive result—that it would fail to deport these illegal alien families or to provide for the education of their children.¹³¹

Yet today, more than twenty years after the Court’s holding, facing surging numbers of undocumented immigrants, Congress remains reluctant to take actual steps toward facilitating undocumented students’ access to postsecondary

124. *Id.* at 787. It is interesting to note, however, that the Texas law questioned in *Plyler* was ruled *not* preempted by federal immigration law. *Doe v. Plyler*, 628 F.2d 448, 453–54 (5th Cir. 1980), *aff’d*, 457 U.S. 202 (1982).

125. *LULAC*, 908 F. Supp. at 786.

126. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 2, 5, 7–8, 10–11, 13, 15, 20–21, 25–26, 28–29, 31, 42 U.S.C.).

127. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.).

128. *See* *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1256 (C.D. Cal. 1997) (noting that passage of new federal laws created new preemptory conflicts with California State law).

129. *Id.* at 1252.

130. *Id.* at 1254–55.

131. *Plyler v. Doe*, 457 U.S. 202, 254 (1982) (citation omitted).

education.¹³² In fact, Congress has succeeded in taking steps to *hinder* these students from going to college.¹³³

Several possible explanations account for the lack of national legislative action on this point. First, extending the right to education to include postsecondary schooling goes beyond the *Plyler* holding, which only established the right for undocumented students to obtain a free public primary and secondary education. Clearly, distinctions exist between the right to a public K–12 education and the right to a postsecondary education. Public K–12 education in the U.S. is offered free of charge, while all postsecondary schools charge significant tuition fees that are becoming more costly with each passing year.¹³⁴ Further, there are no limitations on child enrollment in public K–12 schools, whereas postsecondary schools only enroll limited numbers of students each year through competitive admissions procedures. But if education is a springboard for advancement in society—as *Plyler* implies¹³⁵—one can make a persuasive equal protection argument for securing undocumented students’ access to higher education.¹³⁶

Constitutional conflict, however, muddles the argument surrounding this claim. Although the Court has interpreted the Equal Protection Clause to safeguard undocumented students against discriminatory exclusion from a public education,¹³⁷ federal law effectively excludes them from access to a higher education.¹³⁸ Initially, it appears that this federal action might be subject to a constitutional challenge,¹³⁹ but the doctrine of preemption and the stubbornly extensive federal immigration power strongly uphold some standards for unequal treatment of undocumented immigrants.¹⁴⁰ These conflicting constitutional arguments are confusing at best, and have given rise to problematic conflicts of law between the states and the federal government addressing undocumented students and their access to postsecondary education.

132. See *supra* note 14 and accompanying text.

133. See *supra* note 14 and accompanying text.

134. See JOHN A. BOEHNER & HOWARD P. “BUCK” MCKEON, *THE COLLEGE COST CRISIS: A CONGRESSIONAL ANALYSIS OF COLLEGE COSTS AND IMPLICATIONS FOR AMERICA’S HIGHER EDUCATION SYSTEM* 6 (Sept. 4, 2003), <http://edworkforce.house.gov/issues/108th/education/highereducation/CollegeCostCrisisReport.pdf> (“Over the ten-year period ending in 2002–2003, *after adjusting for inflation*, average tuition and fees at both public and private four-year colleges and universities rose 38 percent.”).

135. *Plyler*, 457 U.S. at 221–22 (“[O]ne of the goals of the Equal Protection Clause [is] the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”).

136. See Alfred, *supra* note 20, at 642–44.

137. See *supra* notes 78–87 and accompanying text.

138. See *supra* note 14 and accompanying text.

139. Fifth Amendment equal protection against federal discrimination also extends to undocumented immigrants. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

140. Significantly, some federal courts have recognized that federal laws denying benefits to undocumented immigrants are subject to a higher standard of protection from judicial scrutiny. See, e.g., *Doe v. Plyler*, 628 F.2d 448, 453 n.11 (5th Cir. 1980), *aff’d*, 457 U.S. 202 (1982) (“Actions that are constitutional when taken by the federal government pursuant to its power to regulate immigration may be unconstitutional if taken by a state.”).

IV. OBSTACLES TO REFORM

A. Existing Legal Obstacles: Funding and Jobs

Existing federal law raises several sizeable barriers to undocumented students seeking a postsecondary education in the U.S. Among these, the most significant is the exclusion of these students from the great majority of financial aid programs to fund schooling. Federal education policy declares undocumented students ineligible for all federal financial aid programs, including grants, loans and work-study programs.¹⁴¹ This classification of ineligibility alone presents a huge blockade to undocumented students, as these federal programs represent over two-thirds of all financial aid to U.S. college students.¹⁴²

Additionally, federal public benefit laws have been interpreted by most states to exclude undocumented students from state loan programs and tuition subsidies based on in-state residency.¹⁴³ On a broad level, the PRA prohibits undocumented immigrants from accessing state and local public benefits.¹⁴⁴ More specifically, the IIRIRA prevents states from granting in-state tuition rates to undocumented students unless the same rates are offered to all non-resident applicants.¹⁴⁵ Combined with federal education policy, these laws have a devastating practical effect on undocumented students' college opportunities. Together, denial of access to federal and state funding for postsecondary education makes them ineligible for three-quarters of all available financial aid.¹⁴⁶ Although undocumented students are still theoretically eligible to receive institutional funding from the schools to which they apply, the disfavoring attitude reflected by current federal law has rubbed off on many private institutions who now show reluctance to offer this aid.¹⁴⁷

Employment restrictions pose another legislative obstacle to undocumented students' quest for a college education. Though it is common practice in some industries,¹⁴⁸ hiring undocumented immigrants is a blatant violation of federal law.¹⁴⁹ Outside of the narrow job market that disregards federal employment eligibility guidelines, these individuals simply cannot furnish the

141. STUDENT GUIDE, *supra* note 14, at 33. Although undocumented students are ineligible for federal aid, some noncitizens—including legal permanent residents, refugees and persons on humanitarian parole in the U.S.—do qualify. *Id.*

142. Am. Council on Educ., A Brief Look at Student Financial Aid Programs, <http://www.collegeispossible.org> (last visited Aug. 29, 2004) (on file with Arizona Law Review).

143. Alfred, *supra* note 20, at 619; Galassi, *supra* note 20, at 82–83; Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393, 398–400 (2002).

144. See 8 U.S.C.A. § 1621 (West 2004).

145. See *id.* at § 1623(a).

146. See Am. Council on Educ., *supra* note 142.

147. Alfred, *supra* note 20, at 636–37.

148. See *supra* note 33 and accompanying text.

149. See 8 U.S.C.A. § 1324a.

documentation necessary to meet basic employer requirements.¹⁵⁰ Without access to many jobs, undocumented students are further limited in their options to pay for school.¹⁵¹ Moreover, even if an aspiring undocumented student finds adequate funding to pay for college, exclusionary employment regulations make landing a professional job all but impossible.¹⁵² As one undocumented student in Arizona put it, “this country is OK with illegal immigrants as long as they stay in one place, as long as we are dishwashers or landscapers or restaurant workers, but as soon as we try to do something more, that’s when the fear comes in.”¹⁵³

The practical effects of these laws leave few viable options for the average undocumented student to pursue a higher education.¹⁵⁴ Angel, a 2002 graduate of Toppenish High School, is one of many in Washington State who harbor little hope for a higher education.¹⁵⁵ Of the six students in his graduating class that he knew were undocumented, only one is currently enrolled in college.¹⁵⁶ Angel’s lack of money is the reason he is not continuing in school and he does not foresee his financial situation changing anytime soon.¹⁵⁷ The only jobs he can find are seasonal work in the agricultural industry, paying slightly above minimum wage and sometimes only providing a few weeks of income at a time.¹⁵⁸

However, some undocumented students continue to prove there are exceptions to the rule. Francisco, a Toppenish High senior, is very conscious of the immense financial burden current laws place on him, yet he remains determined to get a college education.¹⁵⁹ Since his freshman year, he has worked part-time during the school year at local restaurants to save money for college.¹⁶⁰ During each summer, while other students go to camp and on vacation, Francisco works full-

150. Title 8, § 1324a(b)(1) of the United States Code calls for employer verification of employee documentation to establish requirements of “employment authorization” and “identity,” including special measures to protect against counterfeit alien resident and registration cards. *See id.* at 1324a(b)(1)(B)(ii)(III). When proper documents are presented, the employer notes compliance on a standard issue I-9 form that must be retained in case of inspection by Immigration or Department of Labor officials. *See id.* at 1324a(b)(3).

151. Student interviews, *supra* note 10; Alfred, *supra* note 20, at 643 (stating that such laws “push these promising students to the low-end job sector”).

152. *See* Richard Ruelas, *Immigrant’s Degree May Prove Worthless*, ARIZ. REPUBLIC, Nov. 10, 2003, <http://www.azcentral.com/news/columns/articles/1110ruelas10.html>.

153. Daniel González & Elvia Díaz, *Migrants Face Loss of In-State Tuition in Proposal by GOP*, ARIZ. REPUBLIC, Feb. 6, 2004 (on file with Arizona Law Review).

154. Phillips interview, *supra* note 3; Sandoval interview, *supra* note 3; Hauer interview, *supra* note 45; Trino Sandoval, *Undocumented Students: The Search for Educational Opportunities* (Nov. 6, 2003) (unpublished manuscript, on file with Arizona Law Review).

155. Student interviews, *supra* note 10. “Angel” is a fictitious name. *See id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* “Francisco” is a fictitious name. *See id.*

160. *Id.*

time in the fields.¹⁶¹ After a typical school day he works from 5:00 to 10:30 each evening, fitting in sports, community service and church activities in his spare time.¹⁶² He aspires to use this money to study psychology or marketing at nearby Heritage College next year.¹⁶³ Although he knows he will have to keep working throughout college to afford tuition, Francisco has no doubt that a postsecondary degree will be worth the effort.¹⁶⁴ Not only do his visions of the future give him hope to persevere, he wants to show his younger brother and sister that they too can make a life for themselves in the U.S.¹⁶⁵

B. Political Obstacles

A general sense of xenophobia underlies laws marginalizing undocumented immigrants.¹⁶⁶ This has been especially true in the aftermath of the September 11 attacks.¹⁶⁷ These anti-immigrant sentiments translate to several general policy arguments that support the exclusion of undocumented students from access to postsecondary education benefits in the U.S.¹⁶⁸ One argument for excluding undocumented students contends that allowing access to state-subsidized public education benefits imposes an unfair and expensive burden on taxpayers.¹⁶⁹ This contention is largely based on general research indicating that immigrant populations in the U.S. claim a disproportionate share of public

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *See* Green, *supra* note 4, at 60 (noting significant contributions migrant families make to society, but also generally negative public sentiment toward them). These prejudicial attitudes are also reflected in national legislative circles. *See, e.g., U.S. Representative Lamar Smith (R-TX) Holds Hearing on Illegal Immigration Before Immigration and Claims Subcommittee of the House Judiciary*, 106th Cong. 3–25 (1999) (exemplifying the anti-immigrant nature of some Congressional hearings, with seven of eight called witnesses delivering negative testimony on undocumented immigrants).

167. Since September 11, legislators have repeatedly drawn connections between unregulated immigration and terrorism. *See, e.g., John H. Hostettler (R-IN) Holds Hearing on Illegal Immigrant Smuggling*, 108th Cong. 2–3 (2003). Some contend, however, that these connections have been overstated and stand to adversely affect U.S. foreign relations, especially with Mexico. *See generally* Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849 (2003).

168. *See* Fed'n for Am. Immigr. Reform, Taxpayers Should Not Have to Subsidize College for Illegal Aliens, <http://www.fairus.org/ImmigrationIssueCenters/ImmigrationIssueCentersMain.cfm> (last modified May 2003) (on file with Arizona Law Review) [hereinafter FAIR Taxpayers]; Romero, *supra* note 143, at 396.

169. FAIR Taxpayers, *supra* note 168.

benefits.¹⁷⁰ Additionally, some specific studies suggest that laws qualifying undocumented students for in-state tuition at public universities might be costly.¹⁷¹

Second, some argue that undocumented students should be denied access to postsecondary education benefits because granting such access would necessarily deny opportunities to U.S. citizens and legal residents, both in terms of admission to schools and access to federal and state funding.¹⁷² Many media sources, these advocates protest, give a one-sided account of this issue.¹⁷³ Although the stories of undocumented students have human appeal as victims “in a state of legal and educational limbo,” the resulting exclusion of other U.S. citizen and legal resident students also desiring to succeed in their pursuit of a college education has remained largely unacknowledged.¹⁷⁴

Finally, others argue that providing postsecondary education benefits to undocumented students will unjustly reward immigrants for breaking the law and attract illegal alien families to move to the U.S. so their children may receive education benefits and obtain legal resident status.¹⁷⁵ Again, this point is reiterated both as part of the general policy argument against ceding public benefits to undocumented immigrants and as a policy justification for exclusionary education laws.¹⁷⁶

170. See generally Steven A. Camarota, *Back Where We Started: An Examination of Trends in Immigrant Welfare Use Since Welfare Reform*, CTR. FOR IMMIGRATION STUDIES (Mar. 2003), <http://www.cis.org/articles/2003/back503.pdf> (on file with Arizona Law Review).

171. See CHIRAG MEHTA & ASMA ALI, *EDUCATION FOR ALL: CHICAGO'S UNDOCUMENTED IMMIGRANTS AND THEIR ACCESS TO HIGHER EDUCATION* iii, (Ctr. For Urban Econ. Dev. Univ. of Chi. ed. Mar. 2003), <http://www.uic.edu/cuppa/uicued/Publications/RECENT/undocumentedImmigrants.pdf> (“Assuming every eligible undocumented student goes on to attend an Illinois public university, the annual cost to the State of Illinois of [a law granting them in-state tuition] is between \$3.3 million and \$11.6 million for every graduating class.”) (on file with Arizona Law Review). Government reports actually report that undocumented students’ access to federal educational assistance funds would likely result in a “negligible” increase in spending. S. REP. NO. 108-224, at 9 (2004). These reports, however, project that if undocumented students are allowed to adjust status and become legal residents, government spending on food stamps and Medicare may increase. *Id.* at 8–10.

172. FAIR Taxpayers, *supra* note 168.

173. See Dan Stein, *Tuition Bill Would Hurt Md. Students*, BALTIMORE SUN, May 13, 2003, <http://www.fairus.org/Media/MediaMain.cfm> (on file with Arizona Law Review).

174. *Id.*

175. S. REP. NO. 108-224, at 13 (comments of Senator Jeff Sessions (R-AL)); FAIR Taxpayers, *supra* note 168.

176. See, e.g., FAIR Taxpayers, *supra* note 168; Green, *supra* note 4, at 54–55 (quoting Newt Gingrich in support of the 1996 amendment allowing states to deny free public education to undocumented children stating “[o]ffering free tax-paid goods to illegal immigrants have increased the number of illegals. . . . This used to be the land of opportunity; now it’s the land of welfare.” (citation omitted)).

V. PROPOSED SOLUTIONS

A. Existing Legal Solutions: In-State Tuition at Public Universities

Although these anti-immigrant viewpoints are extreme, their broad adoption in the policymaking process is dangerously plausible in the political aftermath of September 11. Fortunately for undocumented students, some activists are currently finding ways to help them achieve a postsecondary education despite the potential for prejudice. A corps of advocates—including immigration attorneys, educators, public officials and concerned citizens—has emerged, rejecting anti-immigrant policy arguments as xenophobic and misleading, and campaigning for new legal initiatives to grant undocumented students access to postsecondary education in the U.S.¹⁷⁷

In taking action to increase undocumented students' access to higher education, activists attempt to refute the typical policy justifications for denying public benefits to undocumented immigrants.¹⁷⁸ First, they emphatically deny that providing postsecondary education benefits to undocumented students would impose an unfair burden on taxpayers.¹⁷⁹ They cite a strong body of supporting figures suggesting that the tax burden in subsidizing these students' education may in fact be insignificant.¹⁸⁰ According to numerous analyses, immigrants actually *benefit* states' economies, paying much more in taxes than they claim in public benefits.¹⁸¹ For example, undocumented immigrants in Illinois already contribute nearly seventy million dollars in state income taxes each year despite their confinement to largely low-income jobs.¹⁸² Based on this figure, the economic stimulation likely to occur by investing in higher education and professional careers for undocumented students stands to have an overwhelmingly positive net effect on the State of Illinois.¹⁸³

Likewise, instead of emphasizing the inclusion of undocumented students as necessarily excluding other youth from postsecondary institutions, advocates stress the need for equality in the upper echelon of the educational system just as *Plyler* guaranteed for K–12 students in public schools. They cite the tremendous efforts of some undocumented students, those who excel in school and gain

177. Linde interview, *supra* note 1; Flanagan interview, *supra* note 45. Policy groups in Washington State and Arizona have organized to lobby State and national politicians specifically to promote postsecondary education for undocumented students. Linde interview, *supra* note 1; Flanagan interview, *supra* note 45.

178. See generally AM. IMMIGRATION LAW. ASS'N, IMMIGRATION MYTHS AND FACTS: FIVE IMMIGRATION MYTHS EXPLAINED, <http://www.aila.org> (last modified Aug. 14, 2003) (on file with Arizona Law Review) [hereinafter IMMIGRATION MYTHS].

179. See *id.*; MEHTA & ALI, *supra* note 171; Alfred, *supra* note 20, at 641–42.

180. MEHTA & ALI, *supra* note 171, at 11–12; Alfred, *supra* note 20, at 640.

181. S. REP. NO. 108-224, at 2–3 (2004); IMMIGRATION MYTHS, *supra* note 178 (citing to a National Academy of Sciences study finding that, “a dynamic analysis, with the appropriate assumptions, would likely show that 49 of the 50 states come out ahead fiscally from immigration, with California a close call.” (citations omitted)).

182. MEHTA & ALI, *supra* note 171, at 11–12.

183. *Id.*

recognition for significant extracurricular achievements, as conduct that *objectively* merits their access to higher educational opportunities.¹⁸⁴ Others contend that catapulting these top achievers out of the lowest socioeconomic rung of society would be good public policy, even if it meant denying enrollment in American colleges and universities to some citizen and legal resident youths.¹⁸⁵

Additionally, proponents of increasing undocumented students' access to higher education benefits deny that such action would spur an increase in illegal immigration.¹⁸⁶ To start with, little evidence suggests that education benefits to undocumented students provide a major impetus for immigration to the U.S.¹⁸⁷ Even so, assuming that prospects for an affordable college education for undocumented immigrant youths would attract illegal immigrants, both existing state laws and proposed federal laws set clear limits on access to these benefits.¹⁸⁸ The Senate Judiciary Committee assured that the DREAM Act is limited in scope.¹⁸⁹ Far from a wide-ranging grant of benefits, the Act only applies "to a limited number of people who already reside in the United States for at least five years and who have demonstrated favorable equities in and significant ties to the United States."¹⁹⁰

Beyond the general rejection of anti-immigrant policy arguments, a growing corps of activists also distinguishes undocumented *children* from the larger group of undocumented immigrants.¹⁹¹ In addition to their lack of culpability in coming to the U.S. without documentation, cultural differences draw a key distinction between undocumented parents and children. Parallel to the economic analysis of immigration policy lies the fact that thousands of undocumented youths in this country have spent the great majority of their life

184. Alfred, *supra* note 20, at 643–44.

185. *Id.* at 618.

186. *Id.* at 639–40.

187. Romero, *supra* note 143, at 412.

188. See, e.g., WASH. REV. CODE ANN. § 28B.15.012(2)(e) (West 2003) (requiring at least three years of continuous residence in Washington State and graduation from a state high school); DREAM Act, S. 1545, 108th Cong. § (4)(a)(1) (2003) (requiring at least five years of continuous residence in the U.S., good moral character, and other standards).

189. S. REP. NO. 108-224, at 2 (2004) ("The DREAM Act does not guarantee any illegal immigrant the right to remain in the United States, and does not grant automatic or blanket amnesty to its potential beneficiaries. However, it does give some who have been acculturated in the United States the privilege of earning the right to remain.").

190. News Release, Senator Orrin G. Hatch, Statement of Chairman Orrin G. Hatch before the Senate Committee on the Judiciary: Executive Business Meeting on S. 1545, The DREAM Act, (Oct. 16, 2003), <http://hatch.senate.gov> (on file with Arizona Law Review).

191. See, e.g., Sara Scavongelli, *States Weigh Tuition Breaks for Illegal Immigrants*, STATELINE.ORG (June 23, 2003), at <http://www.stateline.org/stateline> (quoting Tiana Murillo of the National Immigration Law Center as saying, "I think there's a fundamental value Americans share that children shouldn't be punished for things that are beyond their control." (internal quotations omitted)) (on file with Arizona Law Review).

here and consider themselves Americans.¹⁹² To these youths, many of whom cannot even remember living outside the U.S., their citizenship to a foreign country is a technical detail that separates them from their classmates only on paper.¹⁹³ Still, one cannot understate the importance of this detail. These teenagers watch their peers face a myriad of educational and vocational choices after they graduate high school, yet their own options remain drastically limited.¹⁹⁴ Unfortunately, these limitations are much more pervasive than missed school and job opportunities; undocumented students, though they grow up equals to other children in school, soon learn that they—just like their parents—are fugitives in this country, evading a deportation that stands to alienate them from the country they would claim as their own.

Backed by these policy arguments for equal access to higher education, a momentum of legislative action surrounding the issue has begun to build. To date, state legislatures have been most active in taking steps to facilitate undocumented students' access to postsecondary education. Over the past several years, nine states have enacted laws qualifying undocumented students to pay in-state tuition rates at public colleges and universities.¹⁹⁵ Some lawmakers have decried these state laws, claiming they are preempted by the IIRIRA, which states that undocumented aliens cannot be declared eligible to receive any state postsecondary education benefit "on the basis of residence within a State."¹⁹⁶ These laws, however, justify granting in-state tuition to undocumented students by requiring compliance with additional requirements beyond in-state residency alone.¹⁹⁷ According to advocates, these extra requirements create an independent justification for granting state postsecondary education benefits to undocumented students and thereby sidestep federal preemption.¹⁹⁸

192. Student interviews, *supra* note 10; Hauer interview, *supra* note 45. See also Sara Scavongelli, *Legislation Touches the Lives of Undocumented Students*, STATELINE.ORG (June 23, 2003), at <http://www.stateline.org/stateline> (on file with Arizona Law Review).

193. Student interviews, *supra* note 10.

194. *Id.*

195. See *supra* note 16.

196. 8 U.S.C.A. § 1623(a) (West 2004). Opponents of granting postsecondary education benefits to undocumented students contend that the legislative intent of this provision was to "[provide] that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education," as suggested in a House Conference Report. FED'N FOR AM. IMMIGRATION REFORM, IN-STATE TUITION FOR ILLEGAL ALIENS (2002) (on file with Arizona Law Review).

197. Galassi, *supra* note 20, at 81–82; see *supra* note 188.

198. Galassi, *supra* note 20, at 83. Advocates claim that these new standards are in fact authorized by the IIRIRA, which grants States the power to set their own affirmative eligibility criteria for public benefits. See 8 U.S.C.A. § 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 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").

B. Shortcomings of Existing Law

Although the ongoing legislative debates encompass many relevant considerations about undocumented students, there are many practical concerns that must also be brought to the table. For example, even in those states where laws *do* offer aid to undocumented students seeking a postsecondary education, there are many who believe that this only solves a small part of the problem.¹⁹⁹ Essentially, the financial burden eased by these laws is negligible for many undocumented families; even if students are granted deeply discounted in-state tuition rates, the remaining costs are too much to bear on a low-income budget.²⁰⁰

Additionally, aid from these state laws simply does not reach some undocumented students, especially those whose families are true migrant workers. Veronica, a junior this year at Wahluke High School, has lived in four different communities between three U.S. states over the past seven years.²⁰¹ Her father followed job opportunities in Texas, Utah and Washington before finally deciding to take on a semi-permanent job at a Utah dairy.²⁰² Veronica wants to be a doctor—specifically, an OBGYN—and her family decided that her chances for college were best in Washington State.²⁰³ Nevertheless, she will not qualify for in-state tuition because she will only have resided in Washington for two years prior to graduation, one less than the three required.²⁰⁴ Unfortunately, Veronica’s cumulative time in the U.S. does not make up for her family’s mobility in the eyes of the law.

The new state laws also ignore a longstanding policy of “don’t ask, don’t tell” that has allowed many undocumented students to attend college at in-state rates over the years.²⁰⁵ Jan Phillips, counselor at Wahluke High, confirms that some students have been admitted to schools as Washington State residents simply by alleging that they were U.S. citizens on college applications.²⁰⁶ Although failing to record a social security number on paper usually raises some questions, college admissions officers do not always attempt to identify the reasons for these omissions.²⁰⁷ College admissions programs in other states have adopted similarly informal processes to circumvent higher tuition rates. In Arizona, in-state residency for tuition purposes is granted if an applicant has spent at least one year in the state prior to admission at a state college or university.²⁰⁸ In state systems

199. Phillips interview, *supra* note 3; Sandoval interview, *supra* note 3; Student interviews, *supra* note 10.

200. Phillips interview, *supra* note 3; Sandoval interview, *supra* note 3. See John Iwasaki, *Tuition Break Has Surprise Beneficiaries*, SEATTLE POST-INTELLIGENCER, Oct. 30, 2003, http://seattlepi.nwsource.com/local/146109_tuition30.html.

201. Student interviews, *supra* note 10. “Veronica” is a fictitious name. See *id.*

202. *Id.*

203. *Id.*

204. *Id.* See WASH. REV. CODE ANN. § 28B.15.012(2)(e) (West 2003).

205. Phillips interview, *supra* note 3.

206. *Id.*

207. *Id.*; Student interviews, *supra* note 10.

208. Hauer interview, *supra* note 45; Student interviews, *supra* note 10.

where documentation status is immaterial to residency determinations, there is no need for laws granting in-state tuition benefits.

A further shortcoming of state legislation granting in-state tuition to undocumented students is the political volatility of the issue. In Washington State, the Latino/a Educational Achievement Project ("LEAP") was the lobbyist group responsible for pushing through the in-state tuition law.²⁰⁹ LEAP's public policy coordinator Sandra Linde admits that strategizing to pass the law involved more than mere support from legislators.²¹⁰ The tuition bill was first proposed in 2002 but ultimately failed due to uncertainty and criticism from conservative legislators and the media.²¹¹ In 2003, however, covert tactics led to success. The tuition bill was proposed and discussed while the media focused its attention on the war with Iraq.²¹² Subject to minimal public scrutiny, legislators passed the law quickly and pronounced it a great success.²¹³ Though such laws have found acceptance by some states, common sense suggests that similar state legislative action might not be a viable strategy nationwide. In states like Arizona, where immigration issues remain a constant source of bitter political debate,²¹⁴ it is unlikely that such legislation would ever go undetected by public radar. In fact, past Arizona bills on the issue have not gathered enough support to pass,²¹⁵ and a recently proposed law stands to *prohibit* state institutions from granting in-state tuition to undocumented students.²¹⁶

Because of these problems, report cards on these state laws show that their success in helping undocumented students obtain a higher education is marginal at best.²¹⁷ In Washington State, only seventeen students registered at four-year universities under the tuition bill in 2003, and of these, ten were foreign visa-holding students.²¹⁸ Legislators and policy groups were left dumbfounded at the lack of response of undocumented students to the bill even though it went into effect late in the year after most college-bound students had already registered.²¹⁹ LEAP director Ricardo Sanchez blamed ill-informed high school guidance

209. Linde interview, *supra* note 1. See generally Latino/a Educ. Achievement Project, at <http://www.leapwa.org> (last visited Mar. 2, 2004).

210. Linde interview, *supra* note 1.

211. *Id.* See also Melanthia Mitchell, *Undocumented Students May Get In-State Tuition*, THE OLYMPIAN, Feb. 8, 2002, <http://news.theolympian.com/specialsections/Legislature2002/20020208/12940.shtml>.

212. Linde interview, *supra* note 1.

213. *Id.* See also Brad Shannon, *Immigrants' Kids Get Tuition Aid*, THE OLYMPIAN, May 8, 2003, <http://www.theolympian.com/home/news/20030508/southsound/801.shtml> (proclaiming that "the American Dream belongs to all Washington children").

214. Flanagan interview, *supra* note 45; Hauer interview, *supra* note 45. See also, e.g., Mike Sunnucks, *Ballot Proposal Heightens Immigration Issues Debate*, PHOENIX BUS. J., July 8, 2003, <http://www.bizjournals.com/phoenix/stories/2003/07/07/daily13.html>.

215. See Daniel González, *State Resists Trend on Migrant Tuition*, ARIZ. REPUBLIC, May 21, 2003 (on file with Arizona Law Review).

216. See H.R. 2392, 46th Leg., 2d Reg. Sess. (Ariz. 2004).

217. See, e.g., Iwasaki, *supra* note 200.

218. *Id.*

219. *Id.*

counselors and fear within immigrant communities for lackluster undocumented enrollment in postsecondary schools.²²⁰ But many teachers and immigrants tell different stories; in fact, undocumented student populations *already* exist in colleges across the state. However, since many of them are virtually indistinguishable from citizen and legal resident students and find other ways to come up with funding, the in-state tuition bill offers little more than an unattractive label on their college application.²²¹

C. A Comprehensive Solution: The DREAM Act and Student Adjustment Act

Shortcomings aside, state action without a federal counterpart cuts sharply against the grain under a system of immigration law that has unfailingly deferred power to the federal government. Yet state laws in this area not only dance dangerously close to the edges of federal preemption, they also point out a broad spectrum of attitudes on the subject of undocumented immigrants. In the wake of September 11, these laws are important minority voices, recognizing the importance of immigrants to the U.S. and attempting to prevent undue discrimination in federal immigration law.

Because the Constitution does not vest undocumented students with the right to equal access to a postsecondary education, federal legislation is necessary to empower them to obtain it. While states have addressed funding issues to a limited extent through grants of in-state tuition, this still leaves undocumented students in an uncomfortable situation.²²² Without legal immigration status and employment authorization—not to mention their lack of access to federal loans and work-study programs—these students remain highly disadvantaged.²²³ Federal legislation has the power to revise immigration law to allow these students to adjust status and qualify for federal, as well as state, benefits. In the interest of practicality and uniformity of immigration law, a federal solution should be adopted.²²⁴

Based in large part on support from states, groups and individuals making efforts to aid undocumented students to obtain equal access to postsecondary education benefits, the House of Representatives and the U.S. Senate have proposed laws that would help undocumented students gain access to postsecondary education benefits.²²⁵ If passed, this legislation would serve as a much more powerful enabling tool for these students than fragmented state legislation. First, these laws solve funding and public benefit access problems. The

220. *Id.*

221. Phillips interview, *supra* note 3; Student interviews, *supra* note 10.

222. *See supra* notes 143–47 and accompanying text.

223. *See supra* notes 148–53 and accompanying text.

224. This is one point that *all* members of the Senate Judiciary committee agreed on despite their differences with respect to what they believe this uniform policy should be. *See* S. REP. NO. 108-224, at 13 (2004) (comment of Sen. Jeff Sessions: “The time has come to take an honest look at the broad problem of illegal immigration in America and to enact comprehensive reform . . .”).

225. *See* DREAM Act, S. 1545, 108th Cong. (2003); Student Adjustment Act of 2003, H.R. 1684, 108th Cong. (2003).

laws would repeal the section of the IIRIRA prohibiting states from granting in-state tuition to undocumented students, giving state legislatures undisputed authority to pass in-state tuition bills.²²⁶ Additionally, the laws would substantially improve students' access to federal public benefits, though the extent of this improvement is currently unclear. The House Student Adjustment Act would amend the PRA to include undocumented students as "qualified aliens," fully eligible to receive any federal public benefits.²²⁷ The DREAM Act—at least as it emerged after markup from the Senate Judiciary Committee in November 2003—is one short step behind. Although it would limit the full scope of available federal financial aid, the DREAM Act would still open up a range of federal loans and work-study programs to undocumented students.²²⁸ While the Act would not quite equalize the playing field for funding college, it would be *much* closer than before.

Furthermore, the DREAM Act would permit certain undocumented students to adjust their immigration status and become legal residents in the U.S.²²⁹ This status would alleviate two major problems for undocumented students: first, they would no longer have to worry about immigration violations and deportation, and second, they would be eligible to apply for and procure employment without concerns about infringing labor regulations.²³⁰ Exactly *who* will qualify for these immigration benefits, however, is still unclear, as the House and Senate bills differ on this point.²³¹ The Student Adjustment Act currently stands to qualify all undocumented students who are under twenty-one years of age, have been physically present in the U.S. for at least five years, are of "good moral character,"²³² and are enrolled at or above the seventh grade level, or alternatively, are enrolled in or seeking admission to an institution of higher education.²³³ Any applicants who are subject to grounds of inadmissibility or deportation based on their criminal history or affiliation with terrorist organizations would be declared ineligible for adjustment of status, regardless of their compliance with the other requirements.²³⁴ The DREAM Act's eligibility requirements are largely the same, with slightly expanded grounds of automatic disqualification and additional details with respect to the process of adjusting status.²³⁵ Like other special grants of status under immigration law, the DREAM Act would initially grant conditional legal status to undocumented students.²³⁶ This would convert to permanent legal resident

226. See S. 1545 § 3; H.R. 1684 § 2.

227. See H.R. 1684 § 3(e) (standing to amend 8 U.S.C. § 1641(b)).

228. See S. 1545 § 12.

229. See *id.* at § 4.

230. See *supra* notes 182–86 and accompanying text.

231. Compare S. 1545 §§ 4–6 with H.R. 1684 § 3.

232. See H.R. 1684 § 3(a)(3)(A)(iii). See also Immigration and Nationality Act § 101(f), 8 U.S.C.A. § 1101(f) (West 2004) (defining "good moral character" in the context of federal immigration law).

233. See H.R. 1684 § 3(a)(3)(A).

234. See *id.* at § 3(a)(3)(B)(ii).

235. See S. 1545 § 4(a)(1)(C); see generally *id.* § 4.

236. See *id.* at § 5.

status only after each student completed a follow-up interview with immigration officials six to eight years later.²³⁷

VI. CONCLUSION

On the fiftieth anniversary of *Brown v. Board of Education*²³⁸ and the movement to eliminate of race-based segregation in public schools, equal access to educational opportunities remains a controversial issue in the U.S. Although important advances have been made, many have recognized that discrimination remains alive and well in our educational policies.²³⁹ One of the most blatant examples of contemporary inequality is the limited access of undocumented students to postsecondary education despite their unconditional acceptance by the public K–12 school system.

Only recently has this problem been formally identified in legislative circles, and various solutions have been proposed. A growing number of states are granting in-state tuition to undocumented students. Although these laws reduce the financial burdens borne by students, they do not address many other legal obstacles to obtaining a postsecondary degree. On the federal level, however, the DREAM Act and Student Adjustment Act stand to more fully grant immigrants the opportunities they now lack. Not only would these bills grant increased access to funding for college, they would also allow for undocumented students to adjust their status and become legal residents in the U.S. Importantly, all of these laws reflect a desire to reinforce the Equal Protection Clause and recognize that immigrant youths are defenseless victims of prejudice.

Despite efforts by many actors, it should be recognized that undocumented students are their own most compelling advocates for federal legislative action. Though many students like the ones whose stories are shared in this note face unique challenges, their courage to share their experiences in hopes of a better future is remarkable. The movement toward this legislation is one of poignant human interest and incredible determination to succeed, and continues to inspire Americans to show solidarity for undocumented students. After all, this population only seeks to fulfill the “American Dream” so attractively sold to them by our public school system.²⁴⁰

237. *Id.*

238. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

239. *See, e.g.*, Richard D. Kahlenberg, *The New Brown: Integration by Class, Not Race, Can Fix Schools in Poor Cities*, LEGAL AFF., May/June 2003, at 31.

240. Student interviews, *supra* note 10; *see also* Shannon, *supra* note 213.