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DARE TO DREAM? A REVIEW OF THE DEVELOPMENT, RELIEF, AND EDUCATION FOR ALIEN MINORS (DREAM) ACT

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I. INTRODUCTORY NOTE

The Development, Relief, and Education for Alien Minors (DREAM) Act is a piece of legislation that will be sent to the Senate floor in the coming months. Although this bill, like all bills, has the possibility of never becoming law, the issues that are addressed in it are ones that will continue to be the topic of debate and will surely spawn more legislation in the future. The need to address illegal immigrant's access to post-secondary education will become a subject that commands more attention from the Legislature if it is not dealt with in this present session of Congress. Because the DREAM Act stands to repeal a 1996 federal statute that discourages states from allowing illegal immigrants admission to state universities at in-state tuition rates, the implications of this legislation merit discussion.

II. THE PROBLEM

A. José

José Morales¹ was brought to the United States as a baby from Mexico. José's parents left their hometown of Guadalajara,

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1. This name is fictitious. The vignette, however, is based on a compilation of the experiences of numerous illegal immigrants. See Francisco Miraval, *Defienden Derecho de Indocumentados a Estudiar en la Universidad*, LA CONEXIÓN, Sept. 30, 2002, at 15 (recounting the experience of an undocumented Mexican student who will be unable to attend college because of his illegal status in the United States). A coalition has formed in Denver, Colorado to protest Congressman Tom Tancredo's recent petition concerning Jesús Apodaca. Apodaca, a Mexican high school student in Colorado, was accepted to the University of Colorado, but will be unable to at-

Mexico in 1986 to come to a small ranching town in Arizona in search of a brighter future for their family. The Morales family left relatives and friends to fight against worsening economic conditions while they went north hoping to find jobs in animal husbandry. The Morales found work in Arizona and proceeded to raise their children there.

Their eldest son, José has received all of his schooling, from kindergarten through high school, in public schools. He is bilingual, although he prefers to speak English. José considers himself an American and was horrified by the destruction caused by the terrorist attacks that occurred on September 11. These attacks confirmed José's desire to follow a pre-law track at the University of Arizona and to eventually attend law school at the University of California, Los Angeles (UCLA). José has been very active in his high school; he played varsity basketball and football and was the vice president of his senior class, all the while remaining on the A/B honor roll.

B. *Esperanza*

Esperanza Cortez² was brought to the United States from El Salvador in 1998 at the age of thirteen by her older siblings upon the death of her parents. Esperanza, unlike her brother and sisters, fared extremely well in school because she had studied English prior to coming to the U.S. In May, Esperanza will be graduating fifth in her class out of 347 students from Norfolk High School. Esperanza has even secured a partial scholarship from a local service organization, in which she has been active during high school, to attend the University of Virginia (UVA). At UVA, Esperanza plans to major in English and to one day become a high school English teacher.

C. *Clouded Dreams*

In the months prior to their first year in college, both José and Esperanza will learn that they will not qualify for in-state tuition to attend their respective public universities because they do not have legal immigrant status in the United States. Despite their scholastic success, unless the two can afford the out-of-state tuition and fees that exceed \$20,000 per year, José and Esperanza

tend because the out-of-state tuition and fees he is required to pay are prohibitive. Not only does Apodaca find himself in difficulty with regard to his position vis-à-vis the University, but Tancredo poses the additional threat to Apodaca and his family of deportation. The coalition that has formed to protest the deportation proceedings of this star student and his family has the additional purpose of supporting passage of legislation that is presently in the Senate that would facilitate Apodaca's entrance into the University of Colorado. *Id.*

2. This is also a fictitious name. *See id.*

will be unable to pursue their education beyond high school. Unfortunately, their situation is not unique.

Although no studies have been conducted on the number of students that are foreclosed access to a college education due to their lack of legal status,³ the National Immigrant Law Center estimates that at least 50,000 to 65,000 illegal immigrants that graduate each year from public high schools in the United States meet the terms of the Dream Act.⁴ In general, these students were brought to the United States as young children by their parents, speak English, consider themselves Americans, and will spend the rest of their lives in this country.⁵ Regardless of their academic qualifications, desire, and motivation, federal legislation that was passed in 1996⁶ has worked to keep the vast majority of illegal immigrants from obtaining in-state tuition benefits that would allow them to attend college. Of the eight million illegal aliens living in the United States,⁷ those tens of thousands that graduate from public high schools each year must have the opportunity to continue their academic pursuits. The 1996 legislation that acted to effectively bar access to this education was ill-conceived at its inception and the need to repeal it has never been stronger.

3. Edward Hegstrom, *Top Student to be denied Scholarships/Immigration Status Casts Cloud on Future*, HOUS. CHRON., May 11, 2000, at 14A.

4. Mary Beth Marklein, *Immigrants May Get Tuition Break*, USA TODAY, Aug. 12, 2002, at D6; Press Release, Congressman Chris Cannon, Cannon Introduces the Student Adjustment Act, Designed to Help Children of Illegal Immigrants Gain Access to Higher-Ed (June 7, 2001) (stating that “[t]ens of thousands of undocumented students who have lived in the U.S. for at least five years graduate from U.S. high schools every year”), available at <http://www.house.gov/cannon/press2001/jun07.htm>.

5. Press Release, *supra* note 4.

6. Pub. L. No. 104-208, 110 Stat. 3009-672 (codified as 8 U.S.C. § 1623) (1996).

7. Press Release, Center for Immigration Studies, Eight Million Illegal Aliens in 2000: Census Bureau Finding Raises Concern over Border Control in Light of Terrorist Threat (Oct. 24, 2001) (on file with the North Carolina Law Review), available at <http://www.cis.org/articles/2001/censusrelease1001.html>. See also University of California, Davis, *Income, Education Politics*, 9 MIGRATION NEWS, Oct. 2002 (on file with the North Carolina Law Review) (stating that in 2000 there were 35 million Hispanics in the United States and by 2020, it is estimated that this population will rise to 70 million, “[giving] the U.S. the second largest Hispanic population in the world, after Mexico.”), available at http://migration.ucdavis.edu/mn/Archive_MN/oct_2002-04mn.html.

III. EXISTING FEDERAL AND STATE LEGISLATION

A. *Bars to Postsecondary Education Benefits for Undocumented Students*

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996⁸ (IIRAIRA) seriously affected both legal and illegal immigrants' ability to receive state and federal benefits. Among the changes brought about by this Act, was the decision to limit, if not curtail entirely, illegal immigrants' access to "any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident."⁹ This statute speaks to Congress' desire that no undocumented immigrant receive state benefits that U.S. citizens were not receiving.¹⁰ Section 1621 states that unless an alien is "(1) a qualified alien (as defined in section 431 [8 U.S.C.S. § 1461]), (2) a nonimmigrant under the Immigration and Nationality Act, or (3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C.S. § 1182(d)(5)] for less than one year,"¹¹ she will not be qualified to receive any state or local public benefit.

Since the promulgation of this legislation, the vast majority of states have come to believe that their public universities are wholly unable to offer in-state tuition rates to undocumented immigrants.¹² In November 2001, City University of New York (CUNY), at the behest of the new vice chancellor, revoked its policy of extending in-state tuition rates to immigrants who had lived in New York for at least one year.¹³ Wisconsin Governor, Scott McCallum, has evinced his belief that Congress has spoken definitively to all the states on the subject of undocumented students' eligibility to receive in-state tuition, vetoing a proposal that planned to provide in-state tuition benefits to immigrants

8. This Act is contained in the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

9. 8 U.S.C. § 1623(a) (2000).

10. Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393, 399-400 (2002).

11. 8 U.S.C. § 1621(a) (2000).

12. See Sara Hebel, *States Take Diverging Approaches on Tuition Rates for Illegal Immigrants*, CHRON. OF HIGHER EDUC., Nov. 30, 2001, at A22 (discussing lawyers' and legislators' belief that §§ 1621 and 1623 forbid universities from offering in-state rates to immigrants that are illegally present in the United States unless they offer the same fees to all U.S. citizens, regardless of their state of residency).

13. *Id.*

that had lived in Wisconsin for three years and graduated from a high school of the state.¹⁴

Such beliefs are bolstered by the plenary power that Congress has “[t]o establish an uniform Rule of Naturalization.”¹⁵ When Congress exercises this power by enacting legislation concerning immigration and aliens, the result “is that states are powerless to regulate immigration.”¹⁶ In *League of United Latin American Citizens v. Wilson*,¹⁷ a district court applied this principle in concluding that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA), federal legislation that addressed the areas of public benefits for aliens, preempted all but three sections of Proposition 187, state legislation attempting to regulate the same field.¹⁸

CUNY and Governor McCallum appear to be laboring under the belief that the IIRAIRA works in much the same way as the PRA (to preempt state legislation concerning aliens and immigration) when they refuse to legislate around the obstacle that the IIRAIRA erects to illegal aliens’ access to postsecondary benefits. Lest it seem that the states have accepted this federal legislation as the slamming and padlocking of the door leading to affordable higher education to undocumented immigrants, a review of state legislation that leaves the door ajar is merited.

C. *State Initiatives to Grant Undocumented Immigrants Postsecondary Tuition Benefits Despite §§ 1621, 1623.*

Some states have not been content to interpret §§ 1621 and 1623 as barring undocumented students from receiving postsecondary benefits. Working from the belief that the federal government is unable to determine how states or public universities can distribute state benefits,¹⁹ such states have looked to the very statutes that purport to deny benefits to illegal immigrants to achieve their goals. They have read § 1623(a) with § 1621(d), which explains that “[a] State may provide that an alien who is

14. *Id.* McCallum explained his veto of the proposal stating that “until Congress changes the eligibility status of undocumented persons for this benefit, the focus of taxpayer-subsidized postsecondary education needs to remain on students who are legal residents of the state.” *Id.*

15. U.S. CONST. art. I, § 8, cl. 4.

16. Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 958 (1995). See also Marisa Ann Tostado, Comment, *Alienation: Congressional Authorization of State Discrimination Against Immigrants*, 31 LOY. L.A. L. REV. 1033, 1038-41 (1998) (discussing federal discrimination against aliens and Congress’ plenary power over immigration).

17. No. CV 94-7569 MRP, 1998 U.S. Dist. LEXIS 3418 (C.D. Cal., 1998).

18. *Id.* at 45.

19. Hebel, *supra* note 12, at A22.

not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) only through the enactment of a State law."²⁰ This section serves the purpose of specifically authorizing or un-preempting state laws.²¹

California and Texas have seized upon the opportunity to do exactly what § 1621(d) allows. These states have interpreted § 1623(a) as providing that no state may provide postsecondary education benefits to an illegal alien present in the U.S. on the basis of the alien's residence in the state unless the state would also provide the same benefit to a citizen or national residing in another state.²² This section acts, then, as a hurdle that must be cleared rather than a wall that cannot be penetrated for extending in-state tuition rates to illegal immigrants.

California's legislation requires a student, undocumented or otherwise, to receive this benefit if the student attended high school in California for at least three years and has graduated from a California high school. In the case of an undocumented student, an affidavit must be signed stating that he or she has or will file an application to legalize his or her immigration status when eligible to do so.²³ The Texas legislation²⁴ mirrors the re-

20. 8 U.S.C. § 1621(d) (2000).

21. See Manheim, *supra* note 16, at 944-50. The application of Manheim's theoretical framework, which lays out the relationship between federal and state powers over immigration matters, to §1623(a) suggests that it serves the purpose of specifically authorizing or un-preempting state laws.

22. Josh Bernstein et al., *Section-by-Section Summary, in AMERICAN IMMIGRATION LAWYERS ASSOCIATION, INTRODUCING THE 1996 IMMIGRATION REFORM ACT* 253, 274 (R. Patrick Murphy et al. eds. 1996).

23. CAL. EDUC. CODE § 68130.5(a) (2002). The relevant provision states: Nonresident tuition at California State University and California Community Colleges; payment exemptions; requirements. Notwithstanding any other provision of law:

- (a) A student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, who meets all of the following requirements shall be exempt from paying nonresident tuition at the California State University and the California Community Colleges:
- (1) High school attendance in California for three or more years.
 - (2) Graduation from a California high school or attainment of the equivalent thereof.
 - (3) Registration as an entering student at, or current enrollment at, an accredited institution of higher education in California not earlier than the fall semester or quarter of the 2001-02 academic year.
 - (4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so. *Id.*

Notice that the receipt of in-state tuition is not based on residency requirements.

24. TEX. EDUC. CODE ANN. § 54.052(j)(1-4) (2002).

quirements of the California statute. The Utah version²⁵ of this legislation stands ready to extend postsecondary benefits if a federal law will allow it. The federal law alluded to by Utah's legislation is included in a piece of legislation initially sponsored by Senator Orrin Hatch (R-UT) and Senator Richard Durbin (D-IL), the Development, Relief, and Education for Alien Minors (DREAM) Act.²⁶

Even though some states have used ingenuity to find ways to assist undocumented students to pursue their education beyond high school, other states simply do not believe that such state action is permissible. These states feel that as long as § 1623(a) is in place, they are unable to extend in-state tuition to undocumented students. If passed, the DREAM Act would extinguish all doubts on the subject.

IV. THE SOLUTION

A. *Introduction and Arguments*

The Development, Relief, and Education for Alien Minors (DREAM) Act attempts to accomplish two main goals: (1) to eliminate the federal provision (§ 1623(a)) that has been interpreted as precluding public universities from providing in-state tuition to undocumented students²⁷ and (2) to provide young people, who have not yet attained the age of 21, the opportunity to become permanent residents if they are deemed to: possess good moral character, have been in the United States for at least five years, and have or will have graduated from high school when they submit their application.²⁸ The latter is important in and of itself because it would provide children a means of obtaining legal status independent of their parents.²⁹ It also allows the education that these students would receive to be more than just education for the sake of education; without legal status in the United States, these future college graduates would not be able to work legally in this country. An analysis of the subsection dealing with adjusting legal status is warranted; however, it is beyond the scope of this paper and will be left to others to undertake.

The DREAM Act, enjoying bipartisan support in the Senate with 15 co-sponsors, looks to assist children who have grown up

25. UTAH CODE ANN. § 53B-8-106 (2002).

26. S. 1291, 107th Cong. (2001).

27. *Id.* at § 2.

28. *Id.* at §§ 3-4.

29. American Immigration Lawyers Association, *Senate Clears Measure to Provide Opportunities for Students*, IMMIGRATION LAW TODAY, July/Aug. 2002, at 427-28.

and been educated in the country – not those children who are “crossing the border today”³⁰ – who played no role in their illegal arrival in the United States.³¹ Although education is not a fundamental right guaranteed by the Constitution,³² the Supreme Court did have occasion to speak to the issue of denying free public education to illegal students in *Plyler v. Doe*.³³ There, the Court stated that such action violated Fourteenth Amendment guarantees.³⁴ The *Plyler* decision only addressed access to kindergarten through twelfth-grade education, leaving the issue of postsecondary education unsettled in the absence of federal legislation.

Opponents of the DREAM Act and other legislation that would facilitate the extension of postsecondary benefits to undocumented students argue that the Court’s silence on the topic combined with the federal legislation already in place, such as § 1623(a) and § 1621, advocate against passage of the legislation. DREAM Act supporters, however, point to a dearth of debate in the Senate and House Reports³⁵ on the subject, likely due to the legislation’s incorporation in a larger appropriations bill for the Department of Defense, as supplying no indication of congressional intent, either pro or con, on the issue. Additionally, the DREAM Act, supporters argue, represents an extension of the *Plyler* reasoning that regardless of legal status, education is a necessary tool to avoid constraining undocumented students to the bottom rungs of the socio-economic ladder.³⁶

DREAM Act proponents reason that *Plyler*’s guarantee of public kindergarten through twelfth-grade education to illegal students lays a foundation for extending the opportunity of affordable postsecondary education to this same group. A 1996 survey studying the national cost of illegal immigration to the

30. Noah Grand, *Senate bill would allow undocumented immigrants to become citizens*, DAILY BRUIN, Aug.19, 2002 (on file with the North Carolina Law Review) (referencing Senator Orrin Hatch’s remarks), available at <http://www.dailybruin.ucla.edu/news/articles.asp?ID=20544>.

31. Interview by Bill O’Reilly with Orrin Hatch, United States Senator, Utah, The O’Reilly Factor, Fox News Network (July 31, 2002).

32. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (stating that the Constitution does not explicitly protect education).

33. 457 U.S. 202 (1982). Although education is not a fundamental right, the Court determined it to be key in sustaining “our political and cultural heritage” as well as “perhaps the most important function of state and local governments.” *Id.* at 221-23.

34. *Id.* at 222.

35. S. REP. NO. 104-286 (1996); H.R. REP. NO. 104-617 (1996); H.R. REP. NO. 104-863 (1996).

36. 457 U.S. at 207-08. See also Patty Murray, *The American Dream*, SEATTLE POST-INTELLIGENCER, July 27, 2002, at B3 (explaining her reasons, as Senator of Washington, for supporting the passage of the DREAM Act, pointing to, *inter alia*, a college education as a “necessary tool for success”).

United States, revealed that primary and secondary public education constituted the “largest direct public assistance outlays for all illegal immigrants covered in the study,”³⁷ totaling \$6 to \$8.1 billion with net county and city costs ranging from \$6.1 to \$8.2 billion, and bilingual education reaching between \$1.4 to \$1.8 billion.³⁸ A substantial investment in the education of these children has been made.³⁹ A decision to abandon those students who academically qualified to pursue their education at the post-secondary level is not the correct step to take,⁴⁰ especially after such an enormous financial investment in these students’ education has been made.

The *Plyler* holding rests partly on the fact that the undocumented children are not responsible for their illegal presence in the United States.⁴¹ The Court cited *Weber v. Aetna Casualty Surety Co.*⁴² for the proposition that punishing a child for the choices of their parents is “illogical” and “unjust.”⁴³ Such punishment would amount to “imposing disabilities on the . . . child [which] is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility of wrongdoing.”⁴⁴ The students who stand to benefit from the DREAM Act are similarly situated; they are in the United States illegally because of decisions their parents made. They should not be made to answer for their parents’ choices. Many of the students who would benefit from the DREAM Act are the very ones who became the first recipients of the *Plyler* elementary and secondary educational guarantees. These young people have

37. *Impact of Illegal Immigration on Public Benefit Programs and the American Labor Force: Hearing before the Subcommittee on Immigration and Claims of the Comm. on the Judiciary House of Representatives*, 104th Cong. 25-26 (1996) (statement of Donald L. Huddle, Professor Emeritus of Economics, Rice University).

38. *Id.* at 26.

39. Dena Bunis & Minerva Canto, *Bill Would Give Nation Immigrant Tuition Law*, ORANGE COUNTY REGISTER (California), July 17, 2002, (quoting Representative Chris Cannon (R-Utah), “We’ve already made an investment in them” [by providing education at the elementary through high school levels] as a reason to support the DREAM Act’s passage).

40. See CAL. EDUC. CODE § 68130.5(a) (2002) (stating in statutory notes that a belief underlying California’s extension of in-state tuition benefits to illegal immigrants is because they “have already proven their academic eligibility and merit by being accepted into our state’s colleges and universities”).

41. 457 U.S. 202 at 219-20.

42. 406 U.S. 164 (1972). *Weber*, a case wholly unrelated to issues of undocumented children’s education, but still applicable in deciding a child’s access to benefits, dealt with a decedent father’s illegitimate children’s access to his workmen’s compensation benefits. The Court found that a Louisiana statute that denied recovery of benefits to unacknowledged illegitimate children was in violation of the Equal Protection Clause of the Fourteenth Amendment. The violation occurred because there was no significant relationship between the denial of recovery by illegitimate children and the purposes of recovery of the statute.

43. *Id.* at 175.

44. *Id.*

taken advantage of the educational opportunity provided to them and now only seek to continue what the Supreme Court began in 1982.

Although foreign born, the lives of these undocumented youths are here in the United States. This is the country they consider home, the place where they will seek employment and where they will remain.⁴⁵ Many undocumented high school students have received some, if not all, of their education in United States public schools. The drop out rate for illegal children is estimated at about 50 percent.⁴⁶ Although there are numerous explanations for the high drop-out rates of illegal students,⁴⁷ at least one of them is the inability to obtain affordable in-state college education.⁴⁸

The DREAM Act would turn college dreams into reality and would likely provide many of these students with the incentive to graduate from high school. Without the option of pursuing their education, undocumented youths are left to choose between entering low-level jobs, joining gangs, or becoming a general problem to society.⁴⁹ Access to higher education, then, benefits the individual student while improving society as a whole by providing a positive alternative to those options presently available to undocumented students and by producing a more educated labor force.⁵⁰ Additionally, education has been

45. Press Release, *supra* note 4.

46. Interview by Bill O'Reilly, *supra* note 31.

47. See Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393, 396 (2002) (stating that undocumented status and poverty "work in tandem to preclude many undocumented children . . . from pursuing a college degree"); see also The University of California, Davis, *supra* note 7. Twenty-one percent of Hispanics as compared with 22.7% of Blacks, 10.2% of Asians and Pacific Islanders, and 7.8% of non-Hispanic Whites were poor, as defined by 2001 poverty line determinations. *Id.*

48. See CAL. EDUC. CODE § 68130.5(a)(2002) (commenting in the historical and statutory notes that despite a student's attendance in elementary and secondary schools and intention to remain in the United States, preclusion from postsecondary education is likely due to a requirement of paying out-of-state tuition fees); Bunis & Canto, *supra* note 39 (citing an example of the difference between tuition rates at the University of California, Irvine, where in-state costs are \$4,555 a year while out-of-state fees total \$16,057, a savings of over \$11,000).

49. Interview by Bill O'Reilly, *supra* note 31.

50. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973). Although the Court finds that education is not a fundamental right, they concede their agreement with the lower court's statement of the importance of education for the individual and society alike; see also CAL. EDUC. CODE § 68130.5(a)(2002) (recognizing in the historical and statutory notes that the benefits of extending access to in-state tuition benefits to undocumented students, which "increases the state's collective productivity and economic growth"); Angela D. Forest, *Post-Sept. 11 Crackdown Limits Immigrants' Access to Colleges*, HERALD SUN (North Carolina), July 19, 2002, at C3 (referencing Nolo Martínez's, director of the Governor's Office for Hispanic/Latino affairs in North Carolina, comments that the more than 10,000 people in the state who would be able to enroll in college courses if the DREAM Act were passed would positively affect the state's economy by creating a more educated work force).

described as an important tool for “maintaining the fabric our society.”⁵¹ As such, the need to insure that all students, documented or otherwise, have access to education at all levels is heightened. The *Plyler* Court’s proclamation that “[w]e cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests”⁵² reverberates in the Supreme Court chambers from the not-so-distant past as a rallying call for the supporters of the DREAM Act who believe that legislative action should ensure that a student’s access to education does not end upon the conferring of a high school diploma, or at the very least that the states, and not the federal government, should decide this issue.

B. *Questions of Preemption and Federalism*

At present, a question exists whether the federal government has spoken definitively on the issue of undocumented students’ access to postsecondary in-state tuition benefits so as to preclude a state from passing legislation in the area.⁵³ Those who argue that the question must be answered in the affirmative, contend that federal preemption is at work here. They maintain that the federal statutes, § 1623(a) and § 1621, and the government’s exclusive constitutional authority over the regulation of immigration, prohibit states and universities from addressing this issue.⁵⁴

Those states that have passed legislation extending in-state tuition benefits to illegal immigrants⁵⁵ do not subscribe to the belief that federal preemption is at work. Instead, they argue that the language of § 1623(a) only prohibits offering postsecondary benefits to these students on the basis of residency. Additionally, they point to § 1621(d), which expressly provides that states may enact laws making illegal aliens eligible for state or local public benefits.⁵⁶ They argue that this provision serves an un-preempting function, allowing states to legislate in an area that would otherwise be foreclosed to them.⁵⁷

that would provide more money for tax revenue); Interview by Bill O’Reilly, *supra* note 31 (quoting Orrin Hatch’s statement that “if a young kid goes through – gets their high school degree, goes to college and gets a college degree and works the rest of their lives that it means about \$100,000 to taxpayers of America”); Press Release, *supra* note 4 (detailing the losses the nation suffers when students cannot become fully educated).

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

52. *Id.*

53. See Hebel, *supra* note 12, at A22-23 (presenting opinions and interpretation of legislators, lawyers, and university officials on the federal statute’s implications).

54. See *supra* notes 11-18 and accompanying text.

55. See *supra* notes 23-27 and accompanying text.

56. 8 U.S.C. § 1621(d) (2000). See *supra* note 20 and accompanying text.

57. Tostado, *supra* note 16, at 1049.

It is difficult to properly interpret these federal statutes, especially when there are no regulations concerning the provisions. Without such provisions, enforcement of any interpretation of the law is unlikely.⁵⁸ Additionally, Jack Martin, the special projects director for the Immigration-Reform Federation, points out that a lawsuit challenging states' ability to enact policies that offer in-state tuition to illegal immigrants would be necessary to decide the issue.⁵⁹ Such litigation would be difficult to come by because there may not be any individual with standing to challenge such policies.⁶⁰ Instead, it appears that only the United States Justice Department would be able to bring suit under the federal immigration law because, unlike many federal statutes, § 1623 does not explicitly provide individuals the right to sue.⁶¹

The questions surrounding this federal statute have many states and universities pondering the possibilities of, and limitations on, extending in-state tuition to undocumented students.⁶² The DREAM Act addresses this confusion by proposing to simply eliminate it. The Act would explicitly restore to the states the ability to determine residency for purposes of postsecondary education benefits by repealing § 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.⁶³

Although the Constitution provides Congress with plenary power "to establish an uniform Rule of Naturalization,"⁶⁴ it does not provide the power to dictate how states or public universities shall award state benefits, including resident tuition to universities. Because this power is neither delegated to the federal government by the Constitution nor prohibited to the States, the Tenth Amendment instructs that this power is thus reserved to the states.⁶⁵ Federalism concerns, therefore, advocate for passage of the DREAM Act, so that the ability to award state benefits at the states' discretion will be rightfully returned to the states, a place from which it should have never been seized.

C. *Fourteenth Amendment Challenge*

Support for passage of the DREAM Act is also drawn from the objections that the federal legislation, as interpreted by the majority of the states, requires the states to commit a Fourteenth Amendment violation through its enforcement. The Fourteenth

58. Hebel, *supra* note 12, at A22.

59. *Id.*

60. *Id.*

61. *Id.* at A22-23.

62. See *supra* notes 12-14 and accompanying text.

63. S. 1291, 107th Cong. § 2 (2d Sess. 2001).

64. U.S. CONST. art. I, § 8, cl. 4.

65. U.S. CONST. amend. X.

Amendment provides that “[n]o State shall . . . deny *any person within its jurisdiction* the equal protection of the laws.”⁶⁶ Regardless of an alien’s legal status in the United States, he or she is certainly a “person” for Fourteenth Amendment considerations.⁶⁷ Congressional debates on section 1 of the Fourteenth Amendment lend support to this interpretation as well.⁶⁸ Undocumented aliens, therefore, are able to bring an equal protection challenge against the federal legislation that seeks to deny them access to postsecondary benefits based on their legal status in the United States.

Although Congress has plenary power to regulate issues of immigration, Congress “cannot direct states to discriminate against immigrants if the discrimination would violate the Equal Protection Clause.”⁶⁹ This principle springs from the *Katzenbach v. Morgan*⁷⁰ decision that Congress may not “restrict, abrogate, or dilute” a state’s fulfillment of judicially imposed, constitutional obligations.⁷¹ Although not necessarily binding, this precedent would serve as persuasive authority in challenges to federal prohibitions that interfere with state’s compliance with the Equal Protection Clause to allow undocumented children ac-

66. U.S. CONST. amend. XIV, § 1 (emphasis added).

67. *Plyler*, 457 U.S. at 210. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (discussing the scope of the protections guaranteed in the Fourteenth Amendment). “The Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . [The provisions of the Fourteenth Amendment] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection of equal laws.” *Id.*

68. 457 U.S. at 214 (discussing legislative intent for the Fourteenth Amendment to apply to all people within the boundaries of a State). See also CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) (referencing Senators’ support for a wide scope of the Fourteenth Amendment). Senator Bingham expressed his support of the reach of the Amendment to include “citizens or strangers, within this land.” *Id.* at 1090. Senator Howard stated that the Amendment should reach all people who “may happen to be” within the boundaries of a state. *Id.* at 2766.

69. *Tostado*, *supra* note 16, at 1064. It should be noted that this situation is unique in that a plaintiff would be able to bring a Fourteenth Amendment Equal Protection challenge against federal legislation. In most situations, federal legislation cannot be challenged by the Fourteenth Amendment because it only applies to the states. Instead, a Fifth Amendment due process challenge is the appropriate way to challenge federal legislation that is believed to be unjustifiable. See generally, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (deciding that segregation in public schools in the District of Columbia was constitutionally invalid because it violated plaintiffs’ Fifth Amendment rights). The Supreme Court has stated that, “discrimination may be so unjustifiable as to be violative of [the due process clause of the Fifth Amendment].” *Id.* at 499. Application of this principle can be seen when applied to the situation of an undocumented student denied the reduced tuition extended to bona fide residents of D.C. Because there is not a state involved in this equation, in order to challenge the federal legislation that would keep this student from receiving the reduced tuition, he or she would need to bring a due process challenge as opposed to an equal protection violation claim.

70. 384 U.S. 641 (1966).

71. *Id.* at 651-52 n. 10.

cess to public schools⁷² and, perhaps as an extension, to post-secondary tuition benefits as in the case here.

Rational basis plus is the appropriate standard to use when evaluating whether an equal protection violation has occurred causing an illegal alien's quasi-fundamental rights to be violated.⁷³ This is the standard that was employed by the *Plyler* Court in evaluating the denial of a free public education to illegal students.⁷⁴ It is arguable whether this higher standard would be employed to evaluate denial of postsecondary benefits to undocumented students. In the alternative, the standard of rational basis, that "the classification at issue [bear] some fair relationship to a legitimate public purpose,"⁷⁵ would be used to evaluate the potential equal protection violation.

In conducting this analysis, we will assume *arguendo* that the lesser of the two standards is applicable. Even under this standard, however, a Fourteenth Amendment violation occurs. The charge advanced by those persons who advocate for limiting access to postsecondary benefits to United States citizens and other legal aliens by denying these benefits to undocumented immigrants is that the rational basis test is satisfied because states preserve their monetary resources through compliance with this federal legislation. Although the number of ineligible non-citizens that manage to qualify for financial aid is unknown,⁷⁶ the Department of Education's Office of Inspector General identified 26 instances, between 1993 and 1995, where ineligible non-citizens did receive aid, almost half of which were illegal aliens.⁷⁷ A state's desire to only extend financial resources to its' own citizens by denying assistance to undocumented students probably satisfies the legitimate interest prong of this test.

The difficulty arises, however, in the means of accomplishing this interest. The requirement that state governments deny post-

72. Jeffrey A. Needelman, Note, *Attacking Federal Restrictions on Noncitizens' Access to Public Benefits on Constitutional Grounds: A Survey of Relevant Doctrines*, 11 GEO. IMMIGR. L.J. 349, 372 (1997).

73. 457 U.S. at 235. The court suggests when denying undocumented children a right to education, "the state must offer something more than a rational basis for its classification." *Id.*

74. *Id.*

75. *Id.* at 216. *Accord San Antonio*, 411 U.S. at 40 (stating that the traditional standard of review requires a showing of a rational relationship to legitimate purposes).

76. HEALTH, EDUC., AND HUMAN SERVICES, UNITED STATES GENERAL ACCOUNTING OFFICE, VERIFICATION HELPS PREVENT STUDENT AID PAYMENTS TO INELIGIBLE NONCITIZENS 3-4 (1997). The 26 identified cases of ineligible citizens receiving financial aid totaled almost \$332,000. *Id.* at 4. This is the report that was required to study "the extent to which aliens who are not lawfully admitted for permanent residence are receiving postsecondary Federal Student financial assistance." H.R. REP. NO. 104-863, at 688 (1996).

77. HEALTH, EDUC., AND HUMAN SERVICES, *supra* note 77, at 4.

secondary benefits to illegal aliens is not sufficiently related to a state's interest in conserving their resources. The amount of money that the illegal workforce generates for the nation is probably more than the overall expenditure on this group.⁷⁸ Denying postsecondary benefits to illegal immigrants may, in the long run, actually result in increased costs.⁷⁹ Additionally, the federal attempt to guard against undocumented immigrants receiving benefits that other citizens were not receiving, is undercut by exceptions that states have made to the usual residency requirements that are said to benefit such citizens.⁸⁰ For these reasons, the second prong of the rational basis test will probably not be satisfied. Because the means of achieving the desired interest is not rationally related, the denial of postsecondary benefits to undocumented immigrants would likely be deemed to constitute a violation of the Equal Protection Clause. Such a denial clearly conflicts with the goal of the Equal Protection Clause: "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit,"⁸¹ thus this federal legislation should be deemed unconstitutional.

V. CONCLUSION

The DREAM Act, if passed, will enable undocumented students to pursue the dream of higher education. These are students, many of whom have overcome such adversities as their illegal status and poverty,⁸² who have qualified themselves academically for the rigors of a college education. Federal legislation lacking much, if any, clear legislative intent has sought at least to discourage, if not completely forbid, states from extending postsecondary tuition benefits to undocumented students.⁸³

Despite this federal legislation, a handful of states have attempted, some successfully, to pass their own statutes that make receipt of in-state funds contingent on factors other than residency.⁸⁴ The principle of federalism argues in favor of returning the choice to states to decide how to distribute state benefits.⁸⁵ Additionally, the Equal Protection violation that the federal legislation poses to undocumented students weighs in favor of passage of the DREAM Act. Finally, the acknowledgment that "the

78. Tostado, *supra* note 16, at 1068-69.

79. Interview by Bill O'Reilly, *supra* note 31.

80. Romero, *supra* note 10, at 404.

81. 457 U.S. at 221-22.

82. See Romero, *supra* note 10, at 396.

83. 8 U.S.C. § 1623(a) (2000).

84. See *supra* notes 23-25.

85. See *supra* text III B.

illegal alien of today may well be the legal alien of tomorrow,"⁸⁶ eloquently states the reality that these undocumented students are a part of our nation and will continue to be so. It is in our best interest as a nation to include these students in the educational process from kindergarten through twelfth grade to the college level by offering in-state tuition to undocumented students. In a world where education is an essential tool to constructing a sturdy foundation for achieving success, the DREAM Act returns the decision to the states whether to open the doors to the tool shed by extending in-state tuition to these students so that they may then enter and choose the materials that they will need to design and create the life of their dreams.

86. *Plyler*, 457 U.S. at 207 (quoting *Plyler v. Doe*, 458 F.Supp. 569, 577 (1978)).