


1-1-2013

A Path to Citizenship Through Higher Education for Undocumented Students In The United States: Examining the Implications of *Martinez v. The Regents of the University of California*

Diana Moreno
American University Washington College of Law

Follow this and additional works at: <http://lawcommons.luc.edu/clrj>

 Part of the [Education Law Commons](#), [Immigration Law Commons](#), and the [Juvenile Law Commons](#)

Recommended Citation

Diana Moreno, *A Path to Citizenship Through Higher Education for Undocumented Students In The United States: Examining the Implications of Martinez v. The Regents of the University of California*, 33 CHILD. LEGAL RTS. J. 92 (2013).
Available at: <http://lawcommons.luc.edu/clrj/vol33/iss1/7>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Children's Legal Rights Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

**A Path to Citizenship Through Higher Education for
Undocumented Students In The United States:
Examining the Implications of *Martinez v. The Regents
of the University of California***

Diana Moreno^{*}

I. Introduction

The discussion surrounding undocumented immigrant children and public education is not a new phenomenon. Due to an outdated and deficient immigration system, millions of people have immigrated to the United States illegally, many of whom do so with children.¹ These children are often so young that they may have little or no memory of their birth country, and thus may have had no voice in the decision to leave their home country.² When these children arrive in the United States, they are enrolled in U.S. public schools, study English, learn American history, culture, and traditions, and consider America their “home.”³ Although undocumented parents bring their children to the United States with plans to stay permanently, and the children consider themselves American, there are advocates for stricter immigration control who have argued that providing these undocumented immigrant children a free public

* Diana Moreno received her Juris Doctor from American University Washington College of Law. She received her B.A. in Psychology with a minor in Political Science from San Diego State University. Thanks to my editors, my parents, and to Nina, for your constant support, encouragement, and reminders to never forget where I came from.

¹ UCLA CTR. FOR LABOR RES. & EDUC., UNDOCUMENTED STUDENTS: UNFULFILLED DREAMS... 3 (2007) [hereinafter UNDOCUMENTED STUDENTS], <http://www.labor.ucla.edu/publications/reports/Undocumented-Students.pdf>.

² *Id.*

³ *Id.*

A Path to Citizenship Through Higher Education

education is a burden on society.⁴ More liberal and progressive Americans argue that these undocumented children need to be educated, and that choosing not to educate these youth will eventually become an even larger burden on society.⁵

The Supreme Court in *Plyler v. Doe*, a landmark case decided almost thirty years ago, addressed this very issue of providing a free public education to undocumented children. In *Plyler*, the United States Supreme Court ruled that a state could not deny undocumented immigrant children a public education.⁶ The *Plyler* decision, however, is only applicable for primary and secondary school children.⁷ Once an undocumented student graduates from high school, new issues arise, such as access to higher education, which must also be addressed.⁸

Undocumented immigrants are individuals who either entered the United States without authorization,⁹ or who entered legally, but remained in the U.S. beyond the permitted authorization period.¹⁰ Since the 1980s, there has been an influx of immigrants into the

⁴ *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (generalizing one of appellant's arguments which states an interest in the "preservation of the state's limited resources for the education of its lawful residents").

⁵ *Id.* at 221 (arguing that "we cannot ignore the significant costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests").

⁶ *Id.* at 230.

⁷ *See id.*

⁸ *See generally* CATHERINE EUSEBIO & FERMÍN MENDOZA, EDUCATORS FOR FAIR CONSIDERATION, THE CASE FOR UNDOCUMENTED STUDENTS IN HIGHER EDUCATION (2013), http://www.e4fc.org/images/E4FC_TheCase.pdf (describing the social and economic advantages of a policy that assists undocumented students seeking higher education).

⁹ This is also commonly known as "EWI," or "entering without inspection."

¹⁰ UNDOCUMENTED STUDENTS, *supra* note 1. The authorization period is the period on a visa, for which the bearer is allowed entry into the U.S. for a specific purpose. The date granted on the visa governs how long a person may stay in the U.S. and if the requirements are not followed, the person violates status and is considered be "out of status." *Glossary of Visa Terms: Out of Status*, TRAVEL.STATE.GOV, http://travel.state.gov/visa/frvi/glossary/glossary_1363.html#O (last visited Mar. 26, 2013).

A Path to Citizenship Through Higher Education

United States.¹¹ In 1980, there were 14 million foreign-born residents in the United States.¹² That number increased to approximately 19 million by 1990, and it further rose to about 31 million by the year 2000.¹³ In 2010, the number of foreign-born residents¹⁴ had reached 40 million, or about 13 percent, of the total U.S. population.¹⁵ This influx was followed by a number of restrictions and policy changes for undocumented immigrants, such as policies that restricted their access to health care¹⁶ and that denied welfare benefits¹⁷ and

¹¹ See Jeanne Batalova & Alicia Lee, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION INFO. SOURCE (Mar. 12, 2012), <http://www.migrationinformation.org/usfocus/display.cfm?ID=886>. Reasons for the influx during these years is a combination of many factors: The Refugee Act of 1980, which granted refugee status to many people after the Vietnam War, and the Haitian and Mariel boatlifts; The Immigration Act of 1965, which eliminated country-specific quotas and emphasized family-reunification, which allowed many residents already present in the U.S. to bring family members, and thus giving incentives for others family members to join family already present in the U.S., whether through legal means or not; and last, many Latin American countries were experiencing economic and civil unrest, which pushed many to immigrate, especially those that already had family present in the United States. ELIZABETH S. ROLPH, *IMMIGRATION POLICIES: LEGACY FROM THE 1980S AND ISSUES FOR THE 1990S* (1992), <http://www.rand.org/content/dam/rand/pubs/reports/2007/R4184.pdf>.

¹² Batalova & Lee, *supra* note 11.

¹³ *Id.*

¹⁴ “Foreign Born” refers to people that do not have U.S. citizenship from birth. It includes people who have entered legally, through visas, refugees, asylees, and permanent residents, and additionally those who entered illegally. Batalova & Lee, *supra* note 11.

¹⁵ *Id.*

¹⁶ María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1374 (2005) (discussing the Undocumented Alien Emergency Medical Assistance Amendment of 2004). See generally Undocumented Alien Emergency Medical Assistance Amendments of 2004, H.R. 3722, 108th Cong. (2d Sess. 2004). This bill, which never passed into law, would have mandated that hospitals check their patients’ citizenship. *Id.*

¹⁷ López, *supra* note 16 (mentioning the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, tit. IV, Pub. L. No. 104-193, 110 Stat. 2105 (codified at 8 U.S.C. §§ 1601-46 (2005))).

A Path to Citizenship Through Higher Education

workplace protection.¹⁸ Additionally, through new regulations, California,¹⁹ Arizona,²⁰ and Massachusetts,²¹ have eliminated bilingual education opportunities in primary schools. In particular, in 1994, California experienced a large increase of illegal immigration and a downturn in the state's economy, prompting voters to enact Proposition 187, which denied public education and other benefits to undocumented children.²²

Children who were brought to the U.S. during the 1990s were part of the movement that led to this spike in immigration. These children are now finishing high school and have few options for higher education; alternatively, some have already completed college,²³ but face bleak employment opportunities as a result of their undocumented status.²⁴ Undocumented students inherently face more challenges in comparison to their American citizen peers.²⁵ These students often live in constant fear that they, or their parents, will be discovered as undocumented and subsequently be deported.²⁶ In

¹⁸ *Id.* (mentioning *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 (2002), which held that undocumented workers are not entitled to back pay, despite employer's engagement in unfair labor practice).

¹⁹ *Id.* at 1375 (mentioning California's Proposition 227 from 1998).

²⁰ *Id.* at 1374 (mentioning Arizona's Proposition 203 from 2000, codified in title 15, sections 751-755 of Arizona Revised Statutes).

²¹ *Id.* (mentioning Massachusetts's Question 2 from 2002).

²² 1994 Cal. Legis. Serv. Prop. 187 § 7 (West 2012) (preempted by federal law).

²³ Federal law does not prohibit undocumented students from attending college. Undocumented students that want to go to college are told to leave "country of citizenship" blank and not provide a Social Security number on their applications. KAREN HERNANDEZ, EDUCATORS FOR FAIR CONSIDERATION, HOW TO SUPPORT COLLEGE-BOUND UNDOCUMENTED STUDENTS: ADVICE FOR PARENTS 9-10, http://www.e4fc.org/images/E4FC_ParentGuide.pdf.

²⁴ See Erika Niedowski, *Undocumented Students Face Obstacles Even After College*, HUFFINGTON POST, Oct. 3, 2011, http://www.huffingtonpost.com/2011/10/03/undocumented-students-face-obstacles-even-after-college_n_991832.html (students may graduate college, some with honors, but are unable to join the U.S. workforce); UNDOCUMENTED STUDENTS, *supra* note 1.

²⁵ See EUSEBIO & MENDOZA, *supra* note 8, at 2.

²⁶ *Id.*

A Path to Citizenship Through Higher Education

addition, many face social and economic challenges, as nearly forty percent of undocumented students live below the poverty level.²⁷ In comparison, the poverty rate for children with U.S.-citizen parents is eighteen percent.²⁸ This presents challenges not only throughout elementary and high school, but may also inhibit these students from applying to college²⁹ because they have limited access to financial resources.

Unlike students who are American citizens, undocumented students cannot apply for federal financial aid to help pay for higher education. Further, many states do not even allow these students to qualify for in-state tuition, which is typically much lower than out-of-state tuition.³⁰ In-state tuition for undocumented students has become a complex issue.³¹ There are thirteen states that permit undocumented students who meet specific requirements to receive in-state tuition; however, six states prohibit undocumented students from being eligible for in-state tuition.³² In 2008, South Carolina enacted

²⁷ *Id.*

²⁸ JEFFREY S. PASSEL & D' VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES iv (2009), <http://www.pewhispanic.org/files/reports/107.pdf>.

²⁹ *Id.* at 11.

³⁰ *Financial Aid and Scholarships for Undocumented Students*, FINAID.ORG, <http://www.finaid.org/otheraid/undocumented.phtml> (last visited Jan. 22, 2013).

³¹ *Id.*

³² States that enacted legislation to allow in-state tuition are California, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Mexico, New York, Texas, Utah, and Washington, with Oklahoma allowing it under a state Board of Regents Policy and Rhode Island allowing it through a Board of Governors approval. Legislation in these states generally requires students to have: 1. Attended high school in that state for a specified number of years (e.g., three or four years), and 2. Graduated from a high school in the state. See *Undocumented Student Tuition: State Action*, NAT'L CONF. ST. LEGISLATURES (July 2012), <http://www.ncsl.org/issues-research/educ/undocumented-student-tuition-state-action.aspx>. Arizona, Colorado, Georgia, Indiana, Ohio, and South Carolina ban undocumented students from in-state tuition. Richard Pérez-Peña, *Immigrants to Pay Tuition at Rate Set for Residents*, N.Y. TIMES, Nov. 19, 2012, http://www.nytimes.com/2012/11/20/us/illegal-immigrants-to-pay-in-state-tuition-at-mass-state-colleges.html?_r=0.

A Path to Citizenship Through Higher Education

legislation that prohibited undocumented students from enrolling in its state colleges or universities, which was followed, in 2010, by a similar prohibition at “selective” universities in Georgia, and in 2011 by another ban at two-year colleges in Alabama.³³ Furthermore, federal law restricts employers from hiring people who cannot provide documentation of legal immigration status, which for undocumented students would make employment nearly impossible to find, even with a college degree.³⁴ Thus, when an undocumented student completes a higher education, that student is precluded from utilizing that degree because of an immigration status the student did not choose. As undocumented youth grow up in America and graduate from high school, it begs the question: “Where do they go from here?”

Education is a gateway to success, and while it is not a fundamental right granted in the U.S. Constitution,³⁵ it is not a mere governmental benefit either.³⁶ This Article argues that students who excel in primary and secondary school should have the opportunity to pursue and utilize higher education, regardless of his immigration status or the state in which he lives. By examining *Martinez v. Regents of the University of California*, this Article will address the issue of granting undocumented students access to in-state tuition rates and the lingering issues of the educational and employment options for undocumented students upon graduation from high school. Part II examines the history of opposition toward undocumented students by reviewing the *Plyler v. Doe* decision. Part

³³ See ALENE RUSSELL, AM. ASS'N OF STATE COLLS. & UNIVS., STATE POLICIES REGARDING UNDOCUMENTED COLLEGE STUDENTS: A NARRATIVE OF UNRESOLVED ISSUES, ONGOING DEBATE AND MISSED OPPORTUNITIES (2011), http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/PM_UndocumentedStudents-March2011.pdf; *Undocumented Student Tuition: State Action*, *supra* note 32.

³⁴ 8 U.S.C.A. § 1324(a) (West 2012); Niedowski, *supra* note 24.

³⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

³⁶ *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (stating that education is not “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation”).

A Path to Citizenship Through Higher Education

III then explores current data on immigrant students and federal provisions that have an impact on undocumented students. Part IV introduces *Martinez* first by discussing illegal immigration in California, and then by comparing and contrasting lawsuits in other states regarding in-state college tuition. Part V analyzes what the future looks like for undocumented students, particularly in regard to the Development, Relief, and Education for Alien Minors Act (“DREAM Act”) and the new Deferred Action program. Part VI concludes with recent developments and some recommendations for Congress to pass the DREAM Act.

II. A History of Opposition Against Undocumented Students: The *Plyler* Decision

In the early 1980s, the United States Supreme Court decided *Plyler v. Doe*, a landmark case regarding undocumented youth and public education.³⁷ In this case, the Court used the Equal Protection Clause of the Fourteenth Amendment to strike down a Texas statute that denied public education to undocumented immigrant children from Mexico.³⁸ This momentous decision was the first time the Court stated that undocumented immigrants could claim the protection of the Equal Protection Clause, therefore not allowing a state to withhold benefits to immigrants if those same benefits were provided to lawful U.S. residents.³⁹

Plyler was brought on the behalf of school-aged children from Mexico, who could not establish legal permanence in the U.S., and was filed against the Tyler Independent School District, until the

³⁷ *Id.* at 202.

³⁸ *Id.* at 210, 230. The Fourteenth Amendment provides that “no State . . . shall deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

³⁹ *Plyler*, 457 U.S. at 221-22. The Equal Protection Clause prohibits a state from denying any person within its jurisdiction the equal protection of the laws (i.e., a state cannot treat two similarly situated persons differently). U.S. CONST. amend. XIV, § 1.

A Path to Citizenship Through Higher Education

state of Texas intervened as a defendant.⁴⁰ Texas mainly argued that undocumented persons, because of their immigrant status, were not “persons within the jurisdiction”⁴¹ of the state of Texas, despite their physical presence within the state’s boundaries.⁴² Therefore, the argument followed that these individuals had no right to equal protection under Texas law because in order to claim protection under the Equal Protection Clause, the person must be within that specific jurisdiction, or area.⁴³ The Court rejected this argument.⁴⁴ In its reasoning, the Court stated that protection under the Equal Protection Clause of the Fourteenth Amendment “extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State’s territory.”⁴⁵

Upon finding that undocumented immigrants are entitled to equal protection, the Court then determined the appropriate standard of scrutiny for evaluating the Texas statute.⁴⁶ The *Plyler* Court denied a strict scrutiny test⁴⁷ because education is not a fundamental right.⁴⁸ The Court also found that an individual’s undocumented

⁴⁰ *Plyler*, 457 U.S. at 206.

⁴¹ This term, used in the Fourteenth Amendment, defines the individuals that can assert unequal treatment under the Equal Protection Clause. U.S. CONST. amend. XIV, § 1.

⁴² *Plyler*, 457 U.S. at 210.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 215.

⁴⁶ *Id.* at 218-20. The level of scrutiny is important when deciding the constitutionality of a state statute. Equal protection means that legislation that discriminates must bear a reasonable relationship to the attainment of a *legitimate* governmental objective. BLACK’S LAW DICTIONARY 616-17, 1376 (9th ed. 2009).

⁴⁷ A strict scrutiny test is used when examining a state action that impinges a fundamental right, or if a suspect class (national origin, race, alienage) is involved. The test is the most difficult to pass, as it requires a statute to be narrowly tailored to achieve a compelling state interest. BLACK’S LAW DICTIONARY 1558 (9th ed. 2009).

⁴⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). Fundamental rights are those that encompass a significant amount of liberty, such as voting or privacy, and trigger a strict scrutiny test. BLACK’S LAW DICTIONARY 744 (9th ed. 2009).

A Path to Citizenship Through Higher Education

status is not an immutable characteristic as necessary to apply strict scrutiny review because it is the “product of conscious, indeed unlawful, action.”⁴⁹ Instead, the Court applied a heightened rational basis test⁵⁰ to examine the state’s purported interest in upholding the Texas statute that denied public education to undocumented youth.⁵¹

The Court noted that the “inability or lax enforcement” of U.S. immigration laws created a difficult issue in trying to serve this “shadow population” of immigrants, particularly, children.⁵² The Court acknowledged that while immigrant adults make the conscious, willful choice to enter the United States illegally, their children do not.⁵³ Therefore, penalizing the child by withholding an education is “ineffectual and unjust” because there is no significant relationship between the child and the wrongdoing.⁵⁴

Plyler was significant for the immigrant community because the decision effectively required public education to be provided to all students, regardless of their immigration status. Also important was the Court’s acknowledgment of the numerous factors leading families to unlawfully enter the U.S., and additionally how the U.S. is far from having perfect immigration policy.⁵⁵ The Court ultimately stated that because the undocumented minors do not actively partake in the decision-making process to unlawfully enter the U.S., they therefore should not be punished for their parents’ willful wrongdoing by being barred from access to a public education.⁵⁶

⁴⁹ *Plyler*, 457 U.S. at 221, 223.

⁵⁰ A heightened rational basis test is a standard that is between rational basis and strict scrutiny, where the government must show that a statute that discriminates against a quasi-suspect classification (gender or legitimacy) is substantially related to an important government interest. BLACK’S LAW DICTIONARY 833 (9th ed. 2009).

⁵¹ *Plyler*, 457 U.S. at 224.

⁵² *Id.* at 218-19.

⁵³ *Id.* at 219-20.

⁵⁴ *Id.* at 220.

⁵⁵ *Id.* at 218.

⁵⁶ *Id.*

A Path to Citizenship Through Higher Education

Education is not specifically granted as a constitutional right,⁵⁷ however, it is so valued in the United States that the idea of denying children a public education is unfathomable.⁵⁸ The *Plyler* decision represents a victory for the undocumented community, as it provides a means for undocumented immigrant parents to enroll their children in a public school without fear that their children will be denied admission due to their immigration status. *Plyler*'s impact has been limited, however, because states are not required to provide education for undocumented students past the high school level.⁵⁹ Undocumented students who are able to attend public school because of the *Plyler* decision will eventually complete high school, and some of those students will desire to continue their education at a college or university. Attending college not only requires being admitted, but also having the resources available to pay the cost of tuition or to qualify for financial aid.⁶⁰ Some states acknowledge this financial obstacle and have policies that grant undocumented students equal access to higher education opportunities and tuition rates as those provided to American citizens.⁶¹ Other states, however, specifically preclude undocumented students from paying reduced in-state tuition

⁵⁷ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding that education is not a fundamental right).

⁵⁸ *Plyler*, 457 U.S. at 223, 230 (stating "it is doubtful that any child may be reasonably expected to succeed in life if he is denied the opportunity of an education" and "whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation"); *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 493 (1954) ("[Education] is the very foundation of good citizenship.").

⁵⁹ *Plyler*, 457 U.S. at 230.

⁶⁰ See generally Kim Clark, *How to Get In-State Tuition*, U.S. NEWS & WORLD REP. (Dec. 23, 2009), <http://www.usnews.com/education/best-colleges/paying-for-college/savings/articles/2009/12/23/how-to-get-in-state-tuition> (article updated Oct. 31, 2011).

⁶¹ *Table: Laws & Policies Improving Access to Higher Education for Immigrants*, NAT'L IMMIGR. L. CENTER, <http://www.nilc.org/eduaccesstoolkit2a.html> (last visited Jan. 31, 2013).

A Path to Citizenship Through Higher Education

or enrolling in higher education altogether, even if they would otherwise qualify for admission.⁶²

III. An Immigration Reality

Immigration, especially illegal immigration, is an area that the U.S. government is currently struggling to address. There is bi-partisan acknowledgement that comprehensive policy reform is needed; however, there is no agreement as to what that reform should entail.⁶³ As a result of the federal government's inability to address issues regarding undocumented immigrants, many states have taken matters into their own hands. This has had a particularly strong impact on undocumented students.⁶⁴

A. Data on Immigrant Students

Millions of immigrant children call the United States "home."⁶⁵ In 2010, there were approximately 11.1 million school-aged children from immigrant households,⁶⁶ more than half a million increase since 2000.⁶⁷ Of those 11.1 million school-aged children from immigrant households, it is estimated that 10.5 million currently attend public schools.⁶⁸ The numbers of undocumented students are not as concrete as are those for documented immigrants; since there are no questions on national and state surveys that directly inquire about legal status. Therefore, researchers must apply scientific methods to calculate an estimated number of undocumented

⁶² *See id.*

⁶³ *See* Michael Hernandez, Opinion, *For Immigration Reform to Happen, Bipartisanship Must Make a Comeback*, VOXXI NEWS, Dec. 10, 2012, <http://www.voxxi.com/immigration-reform-bipartisanship/> (demonstrating how there has been bi-partisan efforts for immigration reform in the past and how that mindset is once again critical).

⁶⁴ *Id.*

⁶⁵ STEVEN A. CAMAROTA, CTR. FOR IMMIGR. STUD., IMMIGRANTS IN THE UNITED STATES: A PROFILE OF AMERICA'S FOREIGN-BORN POPULATION 2 (2012), <http://www.cis.org/articles/2012/immigrants-in-the-united-states-2012.pdf>.

⁶⁶ *Id.* at 40-41.

⁶⁷ López, *supra* note 16, at 1377.

⁶⁸ CAMAROTA, *supra* note 66, at 40-41.

A Path to Citizenship Through Higher Education

immigrants.⁶⁹ Using such methods, it is estimated that there are 1.1 million undocumented children under the age of eighteen in the United States.⁷⁰ Additionally, it is approximated that 65,000 undocumented students graduate from U.S. high schools each year,⁷¹ and of those, only 10 to 20 percent enroll in higher education.⁷² Many undocumented high school students are successful in high school and are active in athletics, student government, and other organizations, but because of their undocumented status, pursuing higher education is not a realistic option.⁷³

B. Obstacles to Higher Education

⁶⁹ HANS JOHNSON & LAURA HILL, PUB. POL'Y INST. OF CAL., AT ISSUE: ILLEGAL IMMIGRATION 5 (2011),

http://www.ppic.org/content/pubs/atissue/AI_711HJAI.pdf.

⁷⁰ EDUCATORS FOR FAIR CONSIDERATION, FACT SHEET: AN OVERVIEW OF COLLEGE-BOUND UNDOCUMENTED STUDENTS (2012) [hereinafter AN OVERVIEW OF COLLEGE-BOUND UNDOCUMENTED STUDENTS],

http://dsa.csupomona.edu/ab540/files/Fact_Sheet_8073.pdf.

⁷¹ UNDOCUMENTED STUDENTS, *supra* note 1.

⁷² AN OVERVIEW OF COLLEGE-BOUND UNDOCUMENTED STUDENTS, *supra* note 71.

⁷³ See Stephanie Chen, *For Family of High-Achieving Kids, Only One Holds the Keys to College*, CNN LIVING (Oct. 19, 2011), http://articles.cnn.com/2010-10-19/living/illegal.immigration.siblings.divided.dreamact_1_emily-undocumented-students-mixed-status-families?_s=PM:LIVING (explaining the story of Javier, a seventeen-year-old student from Georgia, who took AP classes, was junior class president, captain of his swim and cross-country teams, but says "making good grades? Anybody can do it if you apply yourself. You want to live the dream and do better, but the reality is if you don't have legal status, [going to college is] like winning the lottery."); see also April Corbin, *Citizen of Nowhere: The Story of One Undocumented Student*, LAS VEGAS SUN, Jan. 3, 2011,

<http://www.lasvegassun.com/news/2011/jan/03/citizen-nowhere/> (describing the story of Jessica, a Nevada student who found out she was undocumented upon receiving "Student of the Year" award. Realizing what the status meant for her higher education goals, she felt hopeless and lost, not sure of what to do after high school. "She simply didn't see the point of excelling when all roads seemingly led to a dead end."); see also *Georgia Capitol Coming Out Stories*, CREATIVE LOAFING ATLANTA (June 29, 2011),

<http://clatl.com/images/blogimages/2011/06/29/1309369463->

[georgia_capitol_coming_out_stories.pdf](http://clatl.com/images/blogimages/2011/06/29/1309369463-georgia_capitol_coming_out_stories.pdf) (documenting stories of Georgian students who have realized their status stands in their way of accomplishing dreams of higher education).

A Path to Citizenship Through Higher Education

For many undocumented students, education after high school is not a practical option, even if they have the academic potential to be accepted into colleges and universities.⁷⁴ Not all states grant undocumented students access to higher education, and some will only do so by requiring that they pay out-of-state tuition.⁷⁵ In-state tuition is often a crucial consideration for high school students aspiring to continue their education.⁷⁶ Students who reside and attend high school within the state where their desired college is located will generally be eligible to pay in-state tuition, which is usually significantly lower than the tuition out-of-state students must pay.⁷⁷

For example, residents of Texas who attend the University of Texas as an undergraduate student pay \$4,908 per semester, while students from out of state pay \$16,639 per semester to attend the same school.⁷⁸ Similarly, California residents who attend a University of California school as an undergraduate pay \$12,192 per year in tuition fees, while students from out of state pay an estimated \$22,879 more, totaling \$36,078.⁷⁹ These numbers reflect only tuition fees and do not account for additional expenses such as books, housing, and other living expenses.⁸⁰ Given the difference in cost, it is apparent why in-state tuition may be a critical factor in a student's ability to afford higher education.

⁷⁴ See EUSEBIO & MENDOZA, *supra* note 8, at 2 (describing how undocumented students must rely on private scholarships and pay out-of-state tuition because of their status).

⁷⁵ RUSSELL, *supra* note 33, at 4.

⁷⁶ Clark, *supra* note 61.

⁷⁷ *Id.*

⁷⁸ *Tuition Costs*, U. TEX. AUSTIN, <http://www.utexas.edu/tuition/costs.html> (last updated Dec. 3, 2012).

⁷⁹ *Nonresident Tuition & Fees*, U. CAL., <http://www.universityofcalifornia.edu/admissions/paying-for-uc/cost/out-of-state/index.html> (last visited Jan. 31, 2013).

⁸⁰ *Id.*

A Path to Citizenship Through Higher Education

There are currently only thirteen states that specifically grant undocumented students access to in-state tuition.⁸¹ Three of these states—California, New Mexico, and Texas—take this policy one step further and allow for undocumented students to apply for state-funded financial aid.⁸² States and legislatures against granting in-state tuition to undocumented students argue that this practice rewards illegal immigration, and takes away the opportunity for higher education from U.S. citizens.⁸³ In fact, there are three states—Alabama, Georgia, and South Carolina—that prohibit undocumented students from attending some, if not all, public colleges and universities.⁸⁴ Other states, such as Arizona, Colorado, Georgia, and Indiana, make higher education more difficult to obtain and do not grant undocumented students the opportunity to access in-state tuition.⁸⁵

States that allow undocumented students access to in-state tuition demonstrate greater equality for students, because all students who meet the admission requirements have access to higher education, regardless of immigration status. Granting undocumented students access to in-state tuition and eligibility for state financial aid provides a realistic opportunity for these students to pursue higher

⁸¹ The thirteen states are: California, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Mexico, New York, Oklahoma, Rhode Island, Texas, and Utah. See *Undocumented Student Tuition: State Action*, *supra* note 32.

⁸² CAL. EDUC. CODE § 69508.5 (West 2012) (California's law went into effect Jan 1, 2013); see *Table: Laws & Policies Improving Access To Higher Education for Immigrants*, *supra* note 62; see also Kelsey Sheehy, *States' DREAM Acts Could Deter High School Dropouts*, U.S. NEWS & WORLD REP. (July 27, 2012), <http://www.usnews.com/education/high-schools/articles/2012/07/27/states-dream-acts-could-deter-high-school-dropouts> explaining that in 2012, New York attempted to pass a bill that would do the same, however, that bill failed to pass in the Senate) (article updated Aug. 6, 2012 "to clarify details of the Maryland DREAM Act").

⁸³ RUSSELL, *supra* note 33, at 5.

⁸⁴ *Id.* at 4.

⁸⁵ *Id.*

A Path to Citizenship Through Higher Education

education.⁸⁶ Thus, a student's dreams should not be limited by the state in which they live.

C. Federal Provisions Affecting Undocumented Students

In the mid 1990s, the U.S. saw a large influx of unlawful immigration.⁸⁷ As a result, a Republican-controlled Congress enacted two laws in 1996 imposing new restrictions on immigrants: The Personal Responsibility and Work Opportunities Reconciliation Act ("PRWORA")⁸⁸ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").⁸⁹ Congress' intent for these laws was to deter future illegal immigration, reduce immigrant reliance on public benefits, and to make immigrants self reliant, or promote use of their "own capabilities."⁹⁰ The IIRIRA made a significant impact on U.S. immigration laws and created an additional obstacle for undocumented students attempting to obtain a higher education.⁹¹

Specifically, Section 1623 of the IIRIRA states that "notwithstanding any other provision of law, an alien who is not

⁸⁶ EUSEBIO & MENDOZA, *supra* note 8, at 2.

⁸⁷ See Batalova & Lee, *supra* note 11 (describing immigration patterns and statistics over the last several decades).

⁸⁸ PRWORA's provisions essentially prevented undocumented immigrants from being eligible for any state or local public benefit. For the purposes of this article PRWORA will not be discussed. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

⁸⁹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

⁹⁰ 8 U.S.C.A. § 1601 (West 2012) ("The Congress makes the following statements concerning national policy with respect to welfare and immigration: (1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes. (2) It continues to be the immigration policy of the United States that-- (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and (B) the availability of public benefits not constitute an incentive for immigration to the United States.").

⁹¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; 8 U.S.C.A. § 1623 (West 2012).

A Path to Citizenship Through Higher Education

lawfully present in the United States shall not be eligible on the basis of residence for any postsecondary education benefit without regard to whether the citizen is such a resident.”⁹² The ambiguous usage of the word “benefit” leaves the interpretation open to each state, as the law does not have any formal regulations.⁹³ This ambiguity in the legislation is especially relevant for undocumented high school students looking to qualify for in-state tuition at an institution of higher education.⁹⁴ Some states use Section 1623 of the IIRIRA as a basis to permit undocumented students to qualify for in-state tuition, while others use it to justify withholding access to in-state tuition.⁹⁵ These competing interpretations and applications of Section 1623 have resulted in lawsuits in some states that have granted undocumented students in-state tuition.⁹⁶ The most recent litigation is a 2010 California case.⁹⁷

IV. Undocumented Immigrants in California

As a result of its direct border with Mexico, California has become home to an estimated forty percent of the undocumented immigrant population in the United States.⁹⁸ Thus, the tension of the American public toward the undocumented immigrant community in

⁹² 8 U.S.C.A. § 1623.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*; Compare ARIZ. REV. STAT. ANN. § 15-1803 (2012) (“In accordance with the illegal immigration reform and immigrant responsibility act of 1996 (P.L. 104-208; 110 Stat. 3009), a person who was not a citizen or legal resident of the United States or who is without lawful immigration status is not entitled to classification as an in-state student pursuant to § 15-1802 . . .”), with CAL. EDUC. CODE § 68130.5 (West 2012) (“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 . . .”).

⁹⁶ RUSSELL, *supra* note 33, at 6.

⁹⁷ See *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010).

⁹⁸ UNDOCUMENTED STUDENTS, *supra* note 1.

A Path to Citizenship Through Higher Education

California is palpable, especially in times of financial hardship.⁹⁹ In 1994, almost 60 percent of California voters approved the passage of Proposition 187 ("Prop 187"), a ballot measure that would have eliminated almost all benefits, except essential medical services, for undocumented immigrants.¹⁰⁰ Under Prop 187, undocumented children would be denied the benefit of public education.¹⁰¹ This measure illustrates a state's residents taking drastic action in an attempt to resolve a very complicated issue.

Soon after its passage, a lawsuit was filed to invalidate the measure.¹⁰² Upon examining Prop 187, a California district court held that many of the provisions either conflicted with or were preempted by federal law.¹⁰³ Specifically, the court found that Section 7's denial of public education directly conflicted with the U.S. Supreme Court's decision in *Plyler*.¹⁰⁴ Although the court ultimately struck down the denial of public education to undocumented youth, California and other states are now addressing issues regarding the ability of undocumented youth to access a postsecondary education.¹⁰⁵ In 2010, the California Supreme Court heard *Martinez v. The Regents of the University of California*, which involved undocumented students' access to in-state tuition.¹⁰⁶ This decision has been used by numerous other states to justify both granting and denying in-state tuition for postsecondary education to undocumented students.¹⁰⁷

A. Martinez v. The Regents of the University of California

⁹⁹ Michael A. Olivas, *IIRIRA, The Dream Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 448 (2004).

¹⁰⁰ *Id.*

¹⁰¹ 1994 Cal. Legis. Serv. Prop. 187 § 7 (West 2012) (preempted by federal law).

¹⁰² Olivas, *supra* note 100, at 449.

¹⁰³ Jose C. Villarreal, *District Court Holds Provisions of California's Proposition 187 Concerning Classification, Notification and Cooperation of State and Federal Agencies and Denial of Primary and Secondary Education to Illegal Immigrants Preempted by Federal Law*, 10 GEO. IMMIGR. L.J. 545, 547-48 (1996).

¹⁰⁴ *Id.* at 548.

¹⁰⁵ See *Undocumented Student Tuition: State Action*, *supra* note 32.

¹⁰⁶ See *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 855 (Cal. 2010).

¹⁰⁷ Olivas, *supra* note 100, at 449, 453.

A Path to Citizenship Through Higher Education

Currently, California law allows qualified students, including undocumented students, to pay in-state tuition at California's public universities and colleges if they meet certain criteria.¹⁰⁸ To qualify for in-state tuition, Section 68130.5 of California's Education Code (commonly referred to as, and hereinafter, "AB 540") states that students must: 1) attend a high school in California for three or more years; 2) have a high school diploma, or the equivalent, from a California high school; and 3) if undocumented, file an affidavit with the college or university stating that the student is in the process of adjusting his or her immigration status, or will begin the process as soon as the student is eligible.¹⁰⁹ Since California and Texas¹¹⁰ first implemented these laws in 2001, eleven other states have enacted laws of a similar nature.¹¹¹

In 2005, non-California resident plaintiffs filed a lawsuit against the Regents of the University of California in a California court alleging, among other claims, that AB 540 conflicted with federal law, specifically with Section 1623 of IIRIRA.¹¹² The plaintiffs claimed AB 540's requirement for a student to attend a California high school for at least three years is a *de facto* residency

¹⁰⁸ CAL. EDUC. CODE § 68130.5 (West 2012).

¹⁰⁹ *Id.*

¹¹⁰ Current Texas law requires a person to have lived in Texas the three years leading up to high school graduation or the receipt of a GED and have resided in Texas the year prior to enrollment in an institution of higher education. Alternatively, the person can be a dependent whose parent established and maintained domicile in Texas no later than one year before the academic term in which the dependent is enrolled in an institution of higher education. *See* TEX. EDUC. CODE ANN. § 54.052 (West 2011).

¹¹¹ *See Undocumented Student Tuition: State Action*, *supra* note 32.

¹¹² Section 1623 states "notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a state (or a political subdivision) for any postsecondary education benefit . . . without regard to whether the citizen or national is such a resident." *See* 8 U.S.C.A. § 1623(a) (West 2012); *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 859 (Cal. 2010); Josh Bernstein, *Court Upholds California In-State Tuition Law (AB 540)*, NAT'L IMMIGR. L. CTR. (Oct. 10, 2006), <http://www.nilc.org/ab540c.html>.

A Path to Citizenship Through Higher Education

requirement, which is preempted by Section 1623.¹¹³ In other words, the plaintiffs argued that AB 540 should be struck down as unconstitutional because it conflicts with federal law.¹¹⁴ Further, plaintiffs claimed that AB 540 illegally discriminated against them because it denied the plaintiffs and other U.S. citizens, who are non-residents of California, the benefit of in-state tuition while that same benefit was provided to undocumented students.¹¹⁵

The main legal issue in *Martinez* was whether the AB 540 tuition exemption was based on residency, in violation of Section 1623.¹¹⁶ A California district court dismissed the plaintiffs' complaint, finding that AB 540 did not conflict with Section 1623 because it was not based upon being a resident of California.¹¹⁷ Plaintiffs appealed, and the California Court of Appeals found that allowing undocumented students to pay in-state tuition at public colleges was a post-secondary "benefit" conferred within the meaning of Section 1623; therefore, federal law preempted AB 540.¹¹⁸ The Regents then petitioned the California Supreme Court for review, which was granted.¹¹⁹ Five years after the initial complaint was filed, on November 15, 2010, the Supreme Court of California found that the exemptions of AB 540 were not based on residency in California, but are instead based on mandatory criteria that did not necessarily have anything to do with residency.¹²⁰

The court found that attending a California high school for at least three years was not the same as being a California resident because of the number of other ways a student could qualify for in-state tuition despite not being an actual resident of California.¹²¹ For example, a student could live in a city right outside of California's

¹¹³ *Martinez*, 241 P.3d at 859.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 862-63.

¹¹⁶ *Id.* at 859.

¹¹⁷ *Id.* at 860.

¹¹⁸ *Id.* at 860-61, 862-63.

¹¹⁹ *Id.* at 861.

¹²⁰ *Id.* at 859.

¹²¹ *Id.* at 862-63.

A Path to Citizenship Through Higher Education

border but still attend a California high school.¹²² Alternatively, a student could have lived in the state while attending a California high school for the first three years, but then moved outside of California for his final year.¹²³ Just as some students may be eligible for in-state tuition without living in California, some may conversely be ineligible for in-state tuition, despite living in California.¹²⁴ As a result of the requirement that a student attend high school in California for at least three years, even if a California resident graduated from a California high school by solely attending that school for his final year, the resident may still not be eligible unless he also attended a high school within the state for two other years.¹²⁵ The court used such examples to dispute the plaintiffs argument that this statute created a *de facto* residency requirement, and further, the court exemplified how in addition to undocumented students, other persons who are not residents of California could also qualify for the exemption.¹²⁶

The court concluded that the AB 540 exemption was not based on residency because the exemption was given to all individuals who attended high school in California for at least three years, and not everyone who qualified was necessarily a California resident.¹²⁷ Therefore, AB 540 did not violate Section 1623.¹²⁸

The plaintiffs also argued that California granted undocumented students a "benefit" (i.e., in-state tuition) that was not granted to other U.S. citizens, which was yet another practice prohibited by Section 1623.¹²⁹ The court disagreed, however, and responded that if Congress intended to forbid states from allowing undocumented students to have access to in-state tuition, it could have easily added a clause in the federal statute reflecting that

¹²² *Id.* at 864.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 859.

¹²⁹ *Id.* at 863.

A Path to Citizenship Through Higher Education

intention, or could have just left the statute to state “an alien who is not lawfully present in the United States shall not be eligible.”¹³⁰ Instead, Congress added the qualifying clause “on the basis of residence,” and as the court decided, AB 540 was not based on residence.¹³¹ Accordingly, Section 1623 was created in response to high volumes of illegal immigration, and Congress likely considered the possibility that undocumented immigrants might meet the requirements in the statute.¹³² Nonetheless, instead of making it a definitive rule, Congress opted to let the states make their own decisions.¹³³

The plaintiffs further argued that the Privileges and Immunities Clause¹³⁴ did not apply to people who are not citizens of the United States and any state that gives a public benefit to unlawful aliens within the state’s borders violates the clause unless that benefit is given to all American citizens.¹³⁵ Therefore, granting undocumented students access to in-state tuition, when some U.S. citizens did not themselves have access to it, would be unconstitutional.¹³⁶ The court responded by stating that while the clause does not go so far as to protect undocumented immigrants (meaning an alien cannot invoke protection or claim benefits under the clause), it allows states to treat undocumented immigrants, who qualified, more favorably than nonresident citizens.¹³⁷ The court used *Plyler* to show that it cannot be the case that a state may never give a benefit (i.e., free public education) to an unlawful alien without giving that same benefit to all American citizens,¹³⁸ and further stated

¹³⁰ *Id.* at 864.

¹³¹ *Id.*

¹³² *Id.* at 864-65.

¹³³ *Id.* at 867-68.

¹³⁴ The Privileges and Immunities Clause provides that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV, § 1.

¹³⁵ *Martinez*, 241 P.3d at 869.

¹³⁶ *Id.*

¹³⁷ *Id.* at 869-70. (“It cannot be the case that states may never give a benefit to unlawful aliens without giving the same benefit to all American citizens.”).

¹³⁸ *Id.* at 870.

A Path to Citizenship Through Higher Education

that AB 540 does not treat undocumented students any better or worse than U.S. citizens, as it applies *to all* individuals who meet the requirements.¹³⁹

AB 540 is an exemption based on certain qualifications that a person must meet in order to be deemed eligible for in-state tuition.¹⁴⁰ It grants the same exemption to anyone who qualifies, regardless of his or her residency or immigration status.¹⁴¹ If a person can prove that he or she went to high school in California for three or more years, and has a high school diploma from a California school, then he or she will be eligible for in-state tuition.¹⁴²

When enacting AB 540, the California Legislature recognized that these students, regardless of their citizenship status, have attended elementary and high school in the state, have proven their academic ability by being accepted to a college or university, and are likely to remain in the state upon graduation.¹⁴³ Therefore, undocumented students should be eligible for in-state tuition so they can afford the education that they have worked so hard to attain.¹⁴⁴ The California Supreme Court's decision reaffirms this recognition, as the decision permits *any* qualified student to continue his or her education at a California institute of higher education. Instead of a student working hard only to find out that he is unable to pay for tuition to attend a public institute of higher education because he is not eligible for the lower in-state costs, the *Martinez* decision grants undocumented students in California a realistic opportunity to achieve higher education. There is no longer an educational "cutoff" after high school.¹⁴⁵

¹³⁹ *Id.* at 869.

¹⁴⁰ *Id.* at 863-64.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ LEGISLATIVE COUNSEL'S DIGEST (Feb. 21, 2001), http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0501-0550/ab_540_bill_20010914_enrolled.html; CAL. EDUC. CODE § 68130.5 (West 2012).

¹⁴⁴ LEGISLATIVE COUNSEL'S DIGEST, *supra* note 143; CAL. EDUC. CODE § 68130.5.

¹⁴⁵ Chen, *supra* note 74, at 4.

A Path to Citizenship Through Higher Education

As a result, all California students, including undocumented students, can now be assured that if they are accepted into a college or university, it will be more affordable. According to University of California (“UC”) statistics, since the implementation of AB 540, there has been a steady increase in the number of undocumented¹⁴⁶ undergraduate students using the exemption.¹⁴⁷ The May 2012 UC Annual Report on the AB 540 Exemption found that from the implantation of AB 540 to the 2010-11 academic year the total number of potentially undocumented recipients who qualified more than quadrupled, from 89 students in 2002-03 to 501 students in 2010-11.¹⁴⁸ Moreover, there was a large spike of students between 2006 and 2007, where between 2002-03 and 2006-07 there was an average of 219 AB 540 students, and then in 2007-08 the number increased to 402 students, which has since been the average.¹⁴⁹ The growth disparity from the 2002-2006 average to the 2007-08 numbers could be attributed to a couple of different reasons. First, there simply could have been more eligible students in the first few years of implementation.¹⁵⁰ Second, and more likely, is that the large initial increases could have reflected the number of students beginning to realize their eligibility for lower tuition.¹⁵¹ Therefore, the rate of students using the exemption to enroll in college has now steadied because information about AB 540 has spread and students are sufficiently aware of the option.¹⁵² While this amount is relatively low considering the large number of students who attend a UC school, this report is solely for the UC campuses, as the California

¹⁴⁶ There is no data that clearly identifies every student’s documentation status, so the report uses the category “potentially undocumented,” which consists of students who have no identifiable documentation status and no other indication that they may be documented. UNIV. OF CAL. OFFICE OF THE PRESIDENT, ANNUAL REPORT ON AB 540 TUITION EXEMPTIONS 2010-2011 ACADEMIC YEAR 3-4 (2012), http://ucop.edu/student-affairs/_files/ab540_annualrpt_2011.pdf.

¹⁴⁷ *Id.* at 3.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

A Path to Citizenship Through Higher Education

State University and California Community College systems do not track data on undocumented students.¹⁵³

B. Lawsuits in Other States

California is not the only state with a law that grants undocumented students in-state tuition. Twelve other states have implemented comparable laws.¹⁵⁴ The laws in these states are similar to that of California, in that they require students to have lived within the state for a certain number of years, and to have graduated from a high school within that state.¹⁵⁵ For example, Kansas allows students who have attended a Kansas high school for three years and graduated from a Kansas high school to be eligible for in-state tuition, regardless of their immigration status.¹⁵⁶ In 2004, a group of out-of-state Kansas college students challenged this law in *Day v. Sebelius*, when they claimed that the law was in violation of federal law, specifically Section 1623 of IIRIRA and the Equal Protection Clause.¹⁵⁷ The merits of the case were never heard, however, as a district court judge dismissed the case in its entirety.¹⁵⁸ The court found that the plaintiffs lacked standing to challenge the law on the equal protection claim, and that Section 1623 did not create a private right of action for these plaintiffs because they had failed to demonstrate that they suffered any actual harm.¹⁵⁹ The Kansas law is still intact today.¹⁶⁰

In addition to the Kansas and California cases, there have been only two other lawsuits filed in states that grant undocumented

¹⁵³ CAL. STATE UNIV., LONG BEACH, AB 540 ALLY HANDBOOK 3 (2009), http://www.csulb.edu/president/government-community/ab540/handbook/ab_540_handbook.pdf.

¹⁵⁴ *Undocumented Student Tuition: State Action*, *supra* note 32.

¹⁵⁵ *Id.*

¹⁵⁶ Linton Joaquin, *District Court Dismisses Challenge to Kansas In-State Tuition Law*, IMMIGRANTS' RTS. UPDATE (Oct. 2005), *available at* <http://www.nilc.org/kansas-instate.html>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ KAN. STAT. ANN. § 76-731a (West 2012).

A Path to Citizenship Through Higher Education

students access to in-state tuition: Nebraska and Texas.¹⁶¹ In 2009, both states saw lawsuits, but neither made it to trial.¹⁶² The lawsuit in Nebraska was dismissed for what amounted to a lack of standing,¹⁶³ and the Texas suit was dropped by the plaintiffs in 2011 when the Mexican American Legal Defense and Education Fund (“MALDEF”) filed a motion on behalf of the defendants.¹⁶⁴ Both laws are currently effective, granting undocumented students eligibility for in-state tuition rates.¹⁶⁵

To date, the only court decision on the issue is *Martinez*, and while it is not controlling in other states, this case helps to validate the legality of in-state tuition laws for undocumented students.¹⁶⁶ One state court ruling that an in-state tuition law does not conflict with federal law sets the stage for other states to defend similar laws using the *Martinez* logic.¹⁶⁷ Additionally, the fact that the U.S. Supreme Court refused to hear *Martinez* on appeal provides states with the argument that California’s decision was sufficient for the Supreme Court.¹⁶⁸

In-state tuition laws are beneficial to the students that live in those states; however, there are many undocumented students that

¹⁶¹ RUSSELL, *supra* note 33, at 5-6.

¹⁶² *Id.* at 6; *MALDEF Forces Withdrawal of Legal Challenge to Texas' Instate Tuition Law, HB 1403*, MALDEF, <http://www.maldef.org/news/releases/hb1403/> (last visited Mar. 3, 2013).

¹⁶³ Nebraska requires plaintiffs to seek remedies from the proper authority before taking a claim to court, and in this case a court found that the plaintiffs should have first sought relief from the Department of Homeland Security. RUSSELL, *supra* note 33, at 6.

¹⁶⁴ *MALDEF Forces Withdrawal of Legal Challenge to Texas' Instate Tuition Law, HB 1403*, *supra* note 163.

¹⁶⁵ TEX. EDUC. CODE ANN. § 54.052 (West 2011); NEB. REV. ST. ANN. § 85-502 (LexisNexis 2012).

¹⁶⁶ The U.S. Supreme Court has rejected challenges to the validity of these state laws, making *Martinez* the most relevant decision. *See Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008).

¹⁶⁷ David G. Savage, *Supreme Court Allows California to Grant In-State Tuition to Illegal Immigrants*, L.A. TIMES, June 6, 2011, <http://articles.latimes.com/2011/jun/06/news/sc-dc-0607-court-tuition-20110607>.

¹⁶⁸ *Id.*

A Path to Citizenship Through Higher Education

live in states without these laws, making the dream of college almost unattainable.¹⁶⁹ Until all states pass legislation like AB 540, there will be many undocumented students potentially without the motivation or incentive to excel in high school.¹⁷⁰ However, it may be unrealistic to depend on every state passing similar legislation, given many states' restrictive views on immigration, specifically illegal immigration. Therefore, federal legislation is the only way to create uniform opportunities for access to affordable higher education for undocumented students. This opportunity comes in the form of a piece of legislation called The Development, Relief, and Education of Alien Minors Act ("DREAM Act"),¹⁷¹ which Congress should enact.

V. The Next Step: The DREAM Act and Deferred Action

Martinez was a victory for undocumented students who wish to attend an affordable college or university; however, these students still face an uphill battle once they graduate from higher education.¹⁷² Without lawful citizenship, the chances of undocumented students legally obtaining a job upon graduation from a college or university, other than manual labor or service, remain bleak because federal law prohibits employers from hiring them.¹⁷³ Nevertheless, this fact does not stop many undocumented students from striving to obtain higher education. There are countless stories about undocumented students who came to the United States at a very young age and worked extremely hard in school to be accepted into colleges, universities, and graduate or professional schools.¹⁷⁴ Their will, determination,

¹⁶⁹ See EUSEBIO & MENDOZA, *supra* note 8, at 2.

¹⁷⁰ Sheehy, *supra* note 83.

¹⁷¹ *Basic Information About the DREAM Act Legislation*, DREAM ACT PORTAL, <http://dreamact.info/students> (last modified July 16, 2010).

¹⁷² See Niedowski, *supra* note 24.

¹⁷³ 8 U.S.C.A. § 1324(a) (West 2012); UNDOCUMENTED STUDENTS, *supra* note 1, at 3.

¹⁷⁴ The following are stories of smart and talented undocumented students who excel in high school and succeed in college, but must constantly cope with feelings

A Path to Citizenship Through Higher Education

and hard work are admirable. But upon graduation, the lingering question remains: “what is next?”

A. The DREAM Act

The answer to that question comes in the form of the DREAM Act.¹⁷⁵ The DREAM Act is a bill that, if passed, would grant a path to citizenship for undocumented youth who graduate from college or serve in the military.¹⁷⁶ The Act lists specific requirements that a person must meet in order to qualify.¹⁷⁷ The requirements from the most recent version of the Act state that a person must: 1) have entered the U.S. before age sixteen; 2) have been present in the U.S. for at least five consecutive years prior to the bill's enactment; 3) have graduated from a U.S. high school or have been accepted into a U.S. institution of higher education; 4) be between the ages of twelve and thirty-five at the time of application; and 5) have good moral character.¹⁷⁸ Once it is determined that a person has qualified, he or she must either enroll in an institution of higher education, show that he or she is already enrolled in an institution of higher education, or enlist in one of the branches of the military.¹⁷⁹ Upon completion of school or military service, or after a five and a half year waiting period, the individual will be eligible to apply for Legal Permanent Residency, which would allow the individual to eventually apply for U.S. citizenship.¹⁸⁰

Republican Senator Orrin Hatch of Utah and Democrat Senator Richard Durbin of Illinois first introduced the DREAM Act

of frustration and despair due to their future job prospects. *See* UNDOCUMENTED STUDENTS, *supra* note 1, at 6-14; *see also* Hector Tobar, *Undocumented UCLA Law Grad Is in a Legal Bind*, L.A. TIMES, Nov. 26, 2010, <http://articles.latimes.com/2010/nov/26/local/la-me-tobar-20101126> (describing the story of Luis Perez).

¹⁷⁵ *Basic Information About the DREAM Act Legislation*, *supra* note 172.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

A Path to Citizenship Through Higher Education

in 2001.¹⁸¹ Since its introduction, the Act has gained bi-partisan Congressional support and has been reintroduced in different forms, with the most recent version introduced in December 2010.¹⁸² The 2010 form of the bill was passed by the House of Representatives, but failed in the Senate.¹⁸³ At the end of the 2010 cloture vote, Senator Chuck Grassley of Iowa expressed his thoughts on the bill and provided reasons for his “Nay” vote.¹⁸⁴ He stated that he voted against the bill because of its inability to solve the underlying problem of illegal immigration.¹⁸⁵ Senator Grassley continued to assert that he believed “we should take a hard look at protecting the youth who are forced to come here illegally, unaware of the consequences,” but that the proposed legislation would not be fair to people “all around the world who follow the law and wait their turn to come here legally.”¹⁸⁶

Senator Grassley, alongside many DREAM Act challengers, argued that the proposed DREAM Act leaves too much discretion in the hands of the U.S. Secretary of Homeland Security, which would allow unlawful aliens, or “lawbreakers,” to “jump the line” ahead of immigrants who “played by the rules.”¹⁸⁷ The Act, in their opinion, makes it “too easy” for unlawful aliens to gain citizenship, and would incentivize people to unlawfully cross the border with their

¹⁸¹ Eduardo Garcia, *Federal DREAM Act Would Add \$329 Billion to Economy, Create 1.4 Million New Jobs*, CAMPUS PROGRESS (Oct. 1, 2012), http://campusprogress.org/articles/federal_dream_act_would_add_329_billion_to_economy_create_1.4_million/.

¹⁸² *Id.*

¹⁸³ Once presented in the Senate, the bill was just five votes short of receiving cloture, a procedure that which, if sixty votes are received, will end debates on a bill and invoke a vote on the bill. See *Cloture*, U.S. SENATE, http://www.senate.gov/reference/glossary_term/cloture.htm (last visited Jan. 31, 2013); 156 CONG. REC. S10,665-66 (daily ed. Dec. 18, 2010).

¹⁸⁴ 156 CONG. REC. S10,665-66 (daily ed. Dec. 18, 2010).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (statement of Sen. Chuck Grassley).

¹⁸⁷ Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2087 (2008).

A Path to Citizenship Through Higher Education

children.¹⁸⁸ Challengers have every right to be concerned about the underlying problems of immigration; however, that is not what the Act is being proposed to solve.¹⁸⁹

Instead, the DREAM Act proposes to aid the children of immigrants, who had no part in their parents' decision to enter the country illegally, and who have excelled in school and want to contribute to the country that has provided for their education.¹⁹⁰ As for giving the Department of Homeland Security and its constituents too much discretion, the legislation lists specific requirements that must be met by applicants, and officers must ensure that each individual meets those requirements. If the applicant does not meet the necessary requirements, the person will be denied qualification for the DREAM Act.¹⁹¹ Regarding the concern that the Act will incentivize more people to unlawfully cross the border, it seems rather disingenuous to claim the passage of an act that includes mandatory requirements would singlehandedly entice illegal immigration. Although the Act sets a path to citizenship once a person enrolls in higher education or the military, it is not automatic, and therefore, it is highly unlikely a person would decide to unlawfully enter the U.S. with a child solely as a result of the Act.

As for the claim that the Dream Act is an "easy" way to gain citizenship, a 2011 study conducted by the Census Bureau reported that thirty percent of American adults hold at least a bachelor's degree,¹⁹² indicating that completing college is no easy feat, regardless of one's immigration status. One must put in a significant

¹⁸⁸ 156 CONG. REC. S10, 665-66 (daily ed. Dec. 18, 2010) (statement of Sen. Chuck Grassley); *see also* Motomura, *supra* note 188, at 2087 (explaining criticisms and worries of those against The DREAM Act).

¹⁸⁹ *See The DREAM Act*, IMMIGR. POL'Y CTR. (Nov. 18, 2010), <http://www.immigrationpolicy.org/just-facts/dream-act> (stating the DREAM Act's proposed goals and identifying the persons who would benefit if the DREAM Act were enacted).

¹⁹⁰ *Basic Information About the DREAM Act Legislation*, *supra* note 172.

¹⁹¹ *Id.*

¹⁹² Richard Pérez-Peña, *U.S. Bachelor Degree Rate Passes Milestone*, N.Y. TIMES, Feb. 23, 2012, http://www.nytimes.com/2012/02/24/education/census-finds-bachelors-degrees-at-record-level.html?_r=0.

A Path to Citizenship Through Higher Education

amount of hard work and determination to complete that goal, and undocumented students usually endure twice the amount of struggle as documented students because of their status.¹⁹³ From a young age, undocumented students must fight to beat the odds if they want to go to college.¹⁹⁴ These students face challenges like traveling far distances to go to a good high school, working to help make ends meet while in high school and often during college, all while dealing with feelings of being an outsider in a place where they live and have come to call "home."¹⁹⁵

The DREAM Act provides undocumented students with the best opportunity to succeed because it presents the ultimate incentive for hard work.¹⁹⁶ The Act would reward undocumented students for working diligently through high school, being admitted into college, and obtaining a college degree.¹⁹⁷ It would allow students to have realistic career prospects once they graduate college, and will provide them with the opportunity to gain citizenship in the country they call home.¹⁹⁸ Additionally, it could also reward those who decide to serve the U.S., *their* country, in the military service.¹⁹⁹ The DREAM Act might even serve as an incentive for other undocumented children to

¹⁹³ See generally UNDOCUMENTED STUDENTS, *supra* note 1 (discussing testimonials from students who had to endure unique obstacles at a young age because they were undocumented and in a new country).

¹⁹⁴ An example from Luis Perez, who was brought to the U.S. at the age of eight, and despite hearing many people ask, "Why go to college if you can't get a real job when you graduate?," he pursued a dream of becoming educated, to prove that he belonged here by attending and graduating from UCLA with both a Bachelor's degree and Juris Doctor. Tobar, *supra* note 175.

¹⁹⁵ Luis Perez said he threw himself into his studies to feel less like an outcast and describes waking up at 5:30 every morning to go a high school in an area far from his house, where he would be more likely to succeed and go to college. *Id.*

¹⁹⁶ See *Basic Information About the DREAM Act Legislation*, *supra* note 172.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*; see also Sheehy, *supra* note 83 (explaining how the DREAM Act could encourage students to stay in high school, instead of dropping out for lack of motivation to succeed and go to college).

¹⁹⁹ *Basic Information About the DREAM Act Legislation*, *supra* note 172.

A Path to Citizenship Through Higher Education

stay out of trouble and work hard in school by providing the opportunity to eventually become a U.S. citizen.²⁰⁰

Some individuals who were formerly opposed to the DREAM Act, including former President George W. Bush,²⁰¹ are now reconsidering their position, as potential benefits of passing the DREAM Act are being brought to light.²⁰² In 2007, the Bush Administration opposed the Act because of its failure to address the nation's broken immigration system.²⁰³ Specifically, the administration felt that stronger border enforcement, a temporary worker program, and assistance for new immigrants were more important than consideration of the DREAM Act.²⁰⁴ However, in 2012, former President Bush stated that he hoped policymakers would "revamp" immigration law with a "benevolent spirit and keep in mind the contributions of immigrants."²⁰⁵ Having former leaders who once were opposed, especially a former President, come out in support, is an indicator, even if slight, that the need to address undocumented students is obvious and has risen to a top priority.

During his re-election campaign, President Barack Obama stated that, if re-elected, he would aim to pass the DREAM Act in the next four years.²⁰⁶ One thing is unfortunately certain: there are

²⁰⁰ *Id.*; see also *supra* note 199 and accompanying text.

²⁰¹ Julia Preston, *Praising Immigrants, Bush Leads Conservative Appeal for G.O.P. to Soften Tone*, N.Y. TIMES, Dec. 4, 2012, http://www.nytimes.com/2012/12/05/us/praising-immigrants-george-w-bush-leads-conservative-appeal-for-gop-to-soften-tone.html?nl=todaysheadlines&emc=edit_th_20121205&_r=1&.

²⁰² See *infra* Part V.B.

²⁰³ Elisha Barron, Recent Development, *The Development, Relief, and Education For Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 647 (2011).

²⁰⁴ *Id.*

²⁰⁵ Preston, *supra* note 202.

²⁰⁶ "[F]or young people who come here, brought here often times by their parents. Had gone to school here, pledged allegiance to the flag. Think of this as their country. Understand themselves as Americans in every way except having papers. And we should make sure that we give them a pathway to citizenship." *Second Presidential Debate Full Transcript*, ABC NEWS (Oct. 17, 2012), <http://abcnews.go.com/Politics/OTUS/2012-presidential-debate-full-transcript-oct->

A Path to Citizenship Through Higher Education

currently too many youth living in the U.S. who were educated with U.S. tax dollars and who hold degrees from U.S. colleges and universities, but are unable to put those degrees to use and contribute to society because of their immigration status.²⁰⁷ This must be changed, not only for the sake of hardworking undocumented students, but also for the benefit of the American economy.

B. Benefits of the DREAM Act

Instead of sending undocumented youth back to their birth country, a place that many have little connection to and may know nothing about, the U.S. should allow them to stay in the U.S. and include them in the nation's workforce.²⁰⁸ These students have worked hard to earn advanced degrees, yet are precluded from putting those degrees to use because of their immigration status.²⁰⁹ In addition, some professions are experiencing a lack of qualified individuals to fill needed positions, which has resulted in the U.S. recruiting from other countries.²¹⁰ This employee shortage problem might be alleviated if undocumented students who studied these professions were employable upon graduation.²¹¹ There has already been an educational investment made in each undocumented student who attends primary or secondary school in the U.S., and it would ultimately benefit not only the student, but also the U.S., if the student were eligible to legally work in the United States.²¹² If these

16/story?id=17493848&page=7#.UMJ9QY5em0V (statement by President Barack Obama).

²⁰⁷ See Niedowski, *supra* note 24.

²⁰⁸ See EUSEBIO & MENDOZA, *supra* note 8, at 10 (providing statistics about immigrants' share of the fastest growing occupations).

²⁰⁹ See Niedowski, *supra* note 24.

²¹⁰ One such profession is nursing, and because there is a shortage of American nurses, thousands of nurses are often recruited from Korea. *Comprehensive Immigration Reform: The Future of Undocumented Immigrant Students: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 37 (2007) (statement of Allan Cameron, Ph.D., Retired High School Computer Science Teacher, Carl Hayden High School, Phx., Ariz.).

²¹¹ *Id.*

²¹² RUSSELL, *supra* note 33, at 4.

A Path to Citizenship Through Higher Education

students are not allowed to stay and work in the United States, the country runs the risk of these students taking their American education to another country, thereby costing thousands of dollars in educational investment per student.²¹³

A report published by California's colleges claimed that if another two percent of Californians had associates degrees, and another one percent earned bachelor's degrees and could be legally employed, "174,000 jobs would be created, which would help state and local tax revenues increase by \$1.2 billion per year."²¹⁴ Overall, the report estimated that California's economy would grow by \$20 billion.²¹⁵ This report demonstrates how a slight increase in the amount of people who pursued higher degrees could positively impact a state's economy. Passing the DREAM Act could potentially benefit every state in a similar manner. In addition to allowing undocumented students to use their degrees in a productive career, the U.S. would gain residents who would contribute to society not only in their fields of employment, but also financially in terms of taxes and Social Security.²¹⁶

A recent study estimated the potential impact the DREAM Act could have on the U.S. The Center of American Progress found that an estimated 2.1 million undocumented youth live in the United States and providing them with the ability to join the U.S. workforce by granting them a path to citizenship, through the DREAM Act, could significantly stimulate the U.S. economy.²¹⁷ The study estimated that by giving these youths an incentive to pursue a higher education with the passage of the DREAM Act, 1.4 million new jobs and \$329 billion would be added to the U.S. economy.²¹⁸ If the 2.1 million youth decided to take advantage of the opportunities

²¹³ *Id.*

²¹⁴ Beverly N. Rich, *Tracking AB 540's Potential Resilience: An Analysis of In-State Tuition for Undocumented Students in Light of Martinez v. Regents of the University of California*, 19 S. CAL. REV. L & SOC. JUST. 297, 323 (2010).

²¹⁵ *Id.*

²¹⁶ Garcia, *supra* note 182.

²¹⁷ *Id.*

²¹⁸ *Id.*

A Path to Citizenship Through Higher Education

presented by the DREAM Act, not only would they be on a path to citizenship, they would also be eligible for higher paying jobs within the U.S. workforce.²¹⁹ Higher earning potential could translate to higher spending potential and more tax revenue, which in turn could create more jobs in the economy.²²⁰ This study has caused some economists and politicians to realize and accept the notion that passing the DREAM Act could boost the economy.²²¹ In fact, when the former governor of Arkansas, Republican Mike Huckabee, was asked about his thoughts on the issue, he stated that he felt “the economy will be better when that kid [an undocumented student] is able to fully realize his potential and break the pattern of his parent’s illegal activity.”²²² The DREAM Act will grant undocumented students a path to citizenship, reward them for their hard work, and will provide the United States with a more educated and employable population, ultimately benefiting the nation as a whole.

C. Deferred Action

In June 2012, President Obama announced a new policy created for undocumented students.²²³ This new policy, Deferred Action for Childhood Arrivals (commonly referred to as “DACA” or “Deferred Action”), temporarily defers removal proceedings of young people residing in the United States who meet certain requirements.²²⁴ To be eligible for Deferred Action, a person must:

- 1) Have come to the U.S. before age sixteen; 2) Have continuously resided in the U.S for the past five years; 3) Be currently in school, have graduated from high school, obtained a GED or have been honorably discharged from the

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² Andrea Nill Sanchez, *Huckabee Defends DREAM Act Students as Coulter Compares Legalization to Subsidizing ‘Illegitimacy’*, THINK PROGRESS SECURITY (Oct. 12, 2010, 1:05 PM), <http://thinkprogress.org/security/2010/10/12/176318/huckabee-dream-act/>.

²²³ See *Eligibility for Deferred Action*, U.S. DEP’T HOMELAND SECURITY, <http://www.dhs.gov/eligibility-deferred-action> (last visited Jan. 31, 2013).

²²⁴ *Id.*

A Path to Citizenship Through Higher Education

armed forces; 4) Have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety; and 5) Be under the age of thirty.²²⁵

Deferred action is not a path to citizenship, but rather a form of prosecutorial discretion that allows a person to remain in the U.S. for a two-year period and apply for employment authorization.²²⁶

The provisions of Deferred Action are very similar to the provisions of the DREAM Act. Many have speculated that this policy came about as a result of the DREAM Act's inability to pass through Congress, as well as in anticipation of the November 2012 presidential election.²²⁷ As of January 2013, the government reportedly received almost 408,000 applications and out of this number, had approved 154,404.²²⁸ Even though Deferred Action does not grant residency or provide a path to citizenship, many undocumented youth are praising President Obama for this new policy.²²⁹ Eligibility to apply for work authorization will allow these undocumented youth to get a job and earn money so that they can afford college tuition and simultaneously give back to society by

²²⁵ *Id.*

²²⁶ Policy Ctr., *A Breakdown of DHS's Deferred Action for DREAMers*, IMMIGR. IMPACT (June 18, 2012), <http://immigrationimpact.com/2012/06/18/a-breakdown-of-dhss-deferred-action-for-dreamers/>.

²²⁷ Janell Ross, *How the Deferred Action Immigration Program Went from Dream to Reality*, HUFFINGTON POST, Aug. 19, 2012, http://www.huffingtonpost.com/2012/08/19/deferred-action-immigration-program_n_1786099.html.

²²⁸ U.S. CITIZENSHIP & IMMIGR. SERVS. OFFICE OF PERFORMANCE & QUALITY, DEFERRED ACTION FOR CHILDHOOD ARRIVALS PROCESS (2012-13), <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA%20Monthly%20Report%20Aver%20II%20PDF.pdf>.

²²⁹ See *Undocumented Youth Describe What Deferred Action Means to Them*, HUFFINGTON POST: LATINO VOICES, Aug. 16, 2012, http://www.huffingtonpost.com/2012/08/16/undocumented-youth-deferred-action_n_1791305.html.

A Path to Citizenship Through Higher Education

paying taxes.²³⁰ While not as comprehensive as the DREAM Act, Deferred Action is a significant step along the path of an undocumented youth seeking to accomplish his or her dreams.

D. A Call to Action by Undocumented Students

In the past few years, many undocumented students have come out of the shadows to tell their stories with hopes that they will convince legislators to vote in favor of the DREAM Act. Additionally, these students want to assure the nation that they are not “criminals” or “lawbreakers,” as they are often portrayed.²³¹ These students are extremely courageous for doing this because admitting that they are in the U.S. without documentation puts them at the mercy of the U.S. Citizenship and Immigration Services and in possible danger of deportation.²³² Their bravery and activism has not gone unnoticed.²³³ Some individuals attribute recent undocumented-friendly state legislation and Deferred Action to the efforts made by these students who have taken political action and “come out.”²³⁴ In fact, TIME Magazine nominated undocumented students, as a whole, for the 2012 “Person of the Year” award.²³⁵

²³⁰ *Id.*

²³¹ Leslie Berestein Rojas, *Coming Out Undocumented: How Much of a Political Effect Has the Movement Had?*, S. CAL. PUB. RADIO (Mar. 14, 2012, 7:35 PM), <http://www.scpr.org/blogs/multiamerican/2012/03/14/8223/coming-out-undocumented-how-much-of-a-political-ef/>.

²³² *See id.*

²³³ *Id.*

²³⁴ *See id.* (statement of Frank Sharry of America's Voice) (“The moral power of the undocumented coming out, telling their stories and demanding to be recognized for the full Americans they feel they already are moved the Congress to action in taking up the Dream Act in 2010, moved the White House to adopt new policies in 2011 . . .”).

²³⁵ *See* Howard Chua-Eoan, *Who Should Be TIME's Person of the Year 2012?*, TIME (Nov. 26, 2012), http://www.time.com/time/specials/packages/article/0,28804,2128881_2128882_2129191,00.html. President Obama won the award in 2012. Michael Scherer, *2012 Person of the Year: Barack Obama, the President*, TIME (Dec. 19, 2012), <http://poy.time.com/2012/12/19/person-of-the-year-barack-obama/>.

A Path to Citizenship Through Higher Education

It has been said that “the law is not static,” but ever-changing.²³⁶ The law should be a reflection upon of the changing circumstances of the nation.²³⁷ While there are some tenets that will remain constant, there are other areas of law that lend themselves to adaptation. One of those areas is immigration. America is a nation that prides itself on giving people the opportunity to dream about becoming anything they want to be. Undocumented students *are*, culturally and socially, American.²³⁸ They should not be afraid to stand up and tell society how they have fought to beat the odds stacked against them in order to receive college or post-graduate degrees. Most importantly, their dreams should not be limited because of a decision made by their parents. As the *Plyler* Court stated, penalizing the child is “ineffectual and unjust” as there is no significant relationship between the child and the wrongdoing.²³⁹

VI. Developments from the 113th Congress and Recommendations

The DREAM Act is imperative to the future of undocumented students and the nation as a whole. President Obama pledged to get the Act passed in his second term, however, in order for the DREAM Act to become a reality, there will need to be bipartisan compromise.

A. Legislative and Executive Actions

Before the 113th Congressional session even began, a group of eight bipartisan senators worked on constructing an immigration

²³⁶ Benjamin B. Ferencz, *Will We Finally Apply Nuremberg's Lessons?*, BENFERENCZ.ORG (Sept. 2010), <http://www.benferencz.org/index.php?id=4&article=102>.

²³⁷ *Comprehensive Immigration Reform: The Future of Undocumented Immigrant Students: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 27 (2007) (statement of Rep. William D. Delahunt, Mass., H. Comm. on the Judiciary).

²³⁸ See UNDOCUMENTED STUDENTS, *supra* note 1.

²³⁹ *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

A Path to Citizenship Through Higher Education

reform initiative.²⁴⁰ Part of the initiative included a pathway to citizenship for children brought to the U.S. by their parents, although it was contingent upon other reforms, such as tightening border enforcement.²⁴¹ One day after the group announced its report, President Obama held a press conference where he unveiled his own immigration reform proposal, which also included a pathway to citizenship for children brought to the U.S. by their parents. His proposal, however, made the process much speedier and not contingent upon securing the borders.²⁴² This press conference was likely a tool used to urge Congressional action, as the President stated “if Congress did not move forward ‘in a timely fashion’ on its own legislation, he would send up a specific measure — something the White House has put off for now — and demand a vote.”²⁴³

The time for action is now. Congress is aware that the American people support not only immigration reform, but also a pathway to citizenship for undocumented youth.²⁴⁴ Republican Senator John McCain of Arizona, who is a member of the eight-person bipartisan group that worked on the immigration reform initiative, articulated the motives for acting: “Look at the last election. We [the Republican party] are losing dramatically the

²⁴⁰ See SENATOR CHARLES E. SCHUMER ET AL., BIPARTISAN FRAMEWORK FOR COMPREHENSIVE IMMIGRATION REFORM, <http://apps.washingtonpost.com/g/page/politics/bipartisan-framework-for-immigration-reform-report/27/>.

²⁴¹ *Id.* at 1.

²⁴² Mark Landler, *Obama Urges Speed on Immigration Plan, But Exposes Conflicts*, N.Y. TIMES, Jan. 29, 2013, <http://www.nytimes.com/2013/01/30/us/politics/obama-issues-call-for-immigration-overhaul.html?pagewanted=1>; The White House Office of Press Sec’y, *FACT SHEET: Fixing Our Broken Immigration System So Everyone Plays by the Rules*, THE WHITE HOUSE (Jan. 29, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules> (laying out the exact plans of the President’s proposal).

²⁴³ Landler, *supra* note 243.

²⁴⁴ Terence Burlij & Christina Bellantoni, *Bipartisan Group of Senators Offers Outline of Immigration Reform*, PBS NEWSHOUR (Jan. 28, 2013, 9:07 AM), <http://www.pbs.org/newshour/rundown/2013/01/bipartisan-group-of-senators-launch-immigration-push.html>.

A Path to Citizenship Through Higher Education

Hispanic vote We cannot forever have children who were born here—who were brought here by their parents when they were small children to live in the shadows, as well. So I think the time is right.”²⁴⁵

B. Suggestions to facilitate the passage of the DREAM Act

Now that both Congress and the President have made immigration reform and a pathway to citizenship a priority, the following suggestions can be utilized to gain bipartisan appeal and, perhaps, facilitate a quicker passage to citizenship. Because talks regarding a comprehensive immigration bill that includes DREAM Act have already begun, this Article will only offer general recommendations.

1. Lower the age of The DREAM Act from sixteen to thirteen

Lowering the age of qualification for the DREAM Act from sixteen to thirteen may bolster proponents' argument that these children were brought to the U.S. against their will. At sixteen, while a person is still not an adult, that individual has developed a conscience and typically knows right from wrong.²⁴⁶ A person coming to the U.S. at age sixteen without documentation should be aware that his act is against U.S. immigration policy and, therefore, may not be “blameless.” Lowering the age to thirteen, an age where most states do not even allow a juvenile transfer into adult criminal court,²⁴⁷ further validates the argument that these youth were without fault and were brought here without a choice in the matter.

2. Define the “good moral character” standard

²⁴⁵ *Id.*

²⁴⁶ Many states consider a person under the age of eighteen to be a juvenile, and not have the requisite mental culpability to be tried as an adult. However, some states consider a person to be a juvenile at seventeen or sixteen. Further, the average age of a person that many states allow a judge to transfer a person from juvenile to criminal court is fourteen, depending on the crime. PATRICK GRIFFIN ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUV. JUST. & DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 2, 4 (2011), <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf>.

²⁴⁷ *Id.*

A Path to Citizenship Through Higher Education

One criticism of the Act in its most recent form is that the qualification of “moral character” is undefined, and gives too much discretion to the Department of Homeland Security when processing applications. Therefore, clearly listing provisions of moral character would work to temper abuse of discretion, whether actual or projected.

VII. Conclusion

Many of the parents of undocumented students originally came to the United States because they wanted to give their children an opportunity for a better life. These students often must cope with economic challenges, language barriers, and feelings of inferiority to their native-born, English-speaking classmates. Despite these challenges, some have accomplished what many Americans have not, such as obtaining a bachelor's or graduate degree. Nevertheless, upon achieving these triumphs, they are told that they are prohibited from using their education in an employment setting. This is not right. President Roosevelt once said, “No country, however rich, can afford the waste of its human resources,”²⁴⁸ and a waste of human resources is exactly the effect that restrictive immigration legislation has on American society. The United States has made an investment in each and every student enrolled in a public school, including undocumented students. Consequently, unless every student is eligible to work and give back to society, the U.S. will have wasted valuable money and time.

Undocumented minor students did not choose to unlawfully enter the country; their parents did. The only choice these students made was to push themselves to work hard, to obtain an education, and to grasp onto the array of opportunities associated with living in America. While education may not be a fundamental right,²⁴⁹ it is extremely valued in the U.S. because of the idea that through hard

²⁴⁸ Franklin Delano Roosevelt, 32nd President of the U.S., Second Fireside Chat on Government and Modern Capitalism, Wash. D.C., (Sept. 30, 1934).

²⁴⁹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

A Path to Citizenship Through Higher Education

work, an education will lead to the opportunity for a prosperous and successful life. This is the “American Dream”²⁵⁰ that is taught to students from a young age, but more importantly, it is what young students *learn* to aspire to. Undocumented students know that unlike their U.S. citizen classmates, they must fight an uphill battle to attain the “American Dream,” yet many choose to fight.

Undocumented students, like all students, deserve the *opportunity* to make the most of themselves and work toward the life they have dreamed about. Their dreams should not be limited by a citizenship status and should not be defined by a state’s borders. After all, the torch of opportunity is what brought many to the United States in the first place; it lit the way for the tired and poor to find their way to the golden door.²⁵¹

²⁵⁰ First coined by James Truslow Adams in 1933, he defined “the American Dream” as “that dream of a land in which life should be better and richer and fuller for everyone, with opportunity for each according to ability or achievement . . . a dream of social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position.” JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* xvi (1938).

²⁵¹ Emma Lazarus, *The New Colossus* (part of the inscription written on the plaque from the Statue of Liberty, New York Harbor, 1886).