HIGHER EDUCATION FOR UNDOCUMENTED STUDENTS: THE CASE FOR OPEN ADMISSION AND IN-STATE TUITION RATES FOR STUDENTS WITHOUT LAWFUL IMMIGRATION STATUS

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I. INTRODUCTION

Many undocumented immigrant students in the United States have overcome tremendous barriers in order to excel in academics during their high school education. Some students have been denied access to postsecondary education because of their lack of immigration status. Other undocumented immigrant students have applied to institutions of higher education and have been accepted based on individual merit and academic success, only to find they cannot afford non-resident tuition rates.

This article examines common misconceptions regarding higher education for undocumented immigrant students. First, this article will demonstrate that enrollment and admission of undocumented immigrant students to institutions of higher education is permitted under federal law. Second, it will be shown that offering in-state tuition to students based on a uniformly applied residency requirement or other criteria (rather than residency in a state) is permitted under federal law. Finally, the most common arguments and concerns regarding higher education for undocumented students will be addressed in showing that sound public policy supports open admission and in-state tuition rates for students without lawful immigration status.

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II. UNDOCUMENTED STUDENTS IN THE UNITED STATES

A. *Undocumented Families*

Immigrant families come to the United States for many reasons, such as to search for work, to join family, or to flee dangerous situations in their home countries. Many immigrant families come to the United States without proper immigration documentation or permission, and are commonly referred to as "undocumented" immigrants.[3]

Although no scientifically reliable data has been developed, the U.S. Immigration and Naturalization Service (INS, now a division of the U.S. Department of Homeland Security called U.S. Citizenship and Immigration Services, USCIS) estimated that the total population of undocumented immigrants residing in the United States in January of 2000 was 7 million.[4] This number doubled from 3.5 million in January 1990.[5] An estimated 33% of the 7 million unauthorized immigrants in January 2000 were persons who initially entered the United States with some type of authorization, and remained beyond the expiration of their authorized stay (often termed "overstay").[6] The Urban Institute's estimate of the undocumented immigrant population residing in the United States in the year 2000 was higher at 8.5 million.[7] Other sources say this number now exceeds 10 million.[8]

B. *Undocumented Students*

Immigrant adults often come to the United States with children. The Urban Institute estimates that there are about 1.4 million undocumented children under the age of eighteen residing in the United States, and 1.1 million of them are of school-age (five to nineteen years old).[9] Immigrant children now

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3. These aliens are often times referred to as "illegal." The term "undocumented" is preferred since, in many cases, the alien's status remains undetermined. *See* Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990's*, 30 CASE W. RES. J. INT'L L. 58 (1998).

4. U.S. IMMIGRATION AND NATURALIZATION SERVICE, OFFICE OF POLICY AND PLANNING, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000 (2003), at 1, http://uscis.gov/graphics/shared/aboutus/statistics/Illegals.htm (last visited Mar. 5, 2005).

5. *Id.* at 6.

6. *Id.*

7. MICHAEL FIX & JEFFREY S. PASSEL, THE URBAN INSTITUTE, U.S. IMMIGRATION—TRENDS & IMPLICATIONS FOR SCHOOLS, PRESENTATION PACKET FOR NATIONAL ASSOCIATION FOR BILINGUAL EDUCATION NO CHILD LEFT BEHIND IMPLEMENTATION INSTITUTE 9 (2003) (on file with authors).

8. J. GREGORY ROBINSON, U.S. CENSUS BUREAU, ESCAP II: DEMOGRAPHIC ANALYSIS RESULTS (2001), *at* http://www.census.gov/dmd/www/pdf/Report1.PDF (last visited Feb. 14, 2005).

9. FIX & PASSEL, *supra* note 7.

account for one in five of all children, and one in four low-income children.[10] In the year 2000, the Urban Institute estimated that between 50,000 to 65,000 undocumented immigrants graduate from U.S. high schools every year.[11] These approximately 1.1 million undocumented school-age children in the United States translate into 2% of the total student population.[12]

These school-age children are guaranteed access to primary and secondary education by the 1982 U.S. Supreme Court decision *Plyler v. Doe*[13] and by individual state compulsory school attendance laws.[14] Under *Plyler*, a state cannot deny a free public education from kindergarten through twelfth grade to undocumented immigrant students who are residing in a school district.[15] The Court relied on the Equal Protection Clause of the Fourteenth Amendment and decided that a Texas statute, which authorized schools to deny a free public education to undocumented immigrant children, was unconstitutional.[16] The Court stated that denial of a free public education to these children was unjustified because there was no empirical evidence presented to demonstrate that the policy would further some substantial state interest.[17] Thus, no child should be denied enrollment in public primary or secondary schools because of immigration status.

The holding in *Plyler* does not provide the same protection for these children once they reach college age.[18] Therefore, a college education seems out of reach for most undocumented immigrant students. First, it is often difficult to be admitted or enrolled in a college or university if an individual is an undocumented immigrant.[19] Second, although many of these students have lived in the United States for the majority of their lives, and have graduated from U.S. high schools, many do not qualify for in-state tuition at public

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10. *Id.* at 7.

11. NATIONAL IMMIGRATION LAW CENTER, THE DREAM ACT (2004), *at* http://www.nilc.org/immlawpolicy/DREAM/DREAM_Basic_Info_11-04.pdf (last visited Feb. 14, 2005); *see also* JEFFREY S. PASSEL & MICHAEL FIX, THE URBAN INSTITUTE, DEMOGRAPHIC INFORMATION RELATING TO H.R. 1918: THE STUDENT ADJUSTMENT ACT (2001) (on file with authors).

12. FIX & PASSEL, *supra* note 7, at 16.

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

14. For example, see the compulsory school attendance law in Indiana, found in Sections 20-8.1-3-2 through 20-8.1-37 of the Indiana Code. This law is applicable to any student age seven through eighteen who resides in Indiana, without regard to legal domicile. IND. CODE §§ 20-8.1-3-2, and 17. Administrators of any educational, benevolent, correctional or training institution are responsible for ensuring that any person within their jurisdiction, and of compulsory school attendance age, be enrolled in school. *Id.* § 20-8.1-3-36.

15. *Plyler*, 457 U.S. at 229-30.

16. *Id.* at 230.

17. *Id.*

18. *Id.*

19. In the authors' experiences, the application process can discourage students from applying because most applications ask for immigration status. In addition, some people have the misconception that these students are ineligible for admission. *See also infra* Part III.

colleges and universities.[20] Out-of-state tuition fees can be more than three times the in-state tuition rate.[21] In addition, undocumented immigrant students do not qualify for government sponsored financial aid until they have attained legal residency in the United States.[22]

Given the complexities and narrow categories of eligibility within the law of immigration, many of these students are not currently eligible to become lawful permanent residents (LPR). For those who are eligible for an immigration benefit, the process of obtaining lawful immigration status may take several years.[23] Because they lack immigration status, these students are often times missing an opportunity to further their education beyond high school.

C. *Economic Impact*

Immigrants contribute significantly to the economy of the United States. The majority of undocumented immigrants work and pay taxes in their state of residence, and contribute significantly to the nation's economy.[24] In 1997, the United States acquired a $50 billion surplus from taxes paid by immigrants.[25] Approximately 43% of immigrants make less than $7.50 an hour in their jobs,[26] and only 26% of immigrants have health insurance through their jobs.[27] Data show that immigrant families use public benefits at lower rates than U.S. citizen

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20. This depends on whether the student is considered a resident or nonresident of the state. The term "residence" is defined by each state or state institution and will vary. *See* NATIONAL IMMIGRATION LAW CENTER, GUIDE TO IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 2002 156 (4th ed. 2002) [hereinafter NILC Guide]; *see also infra* Part IV.

21. The average tuition for in-state undergraduates in Indiana in 2002-03 was $4,644 for a public 4-year institution, and $2,393 for a public 2-year institution. Indiana Commission for Higher Education, Indiana Higher Education Facts, *at* http://www.che.state.in.us/overview/facts.shtml (last visited Feb. 14, 2005). The current annual tuition at Indiana University for in-state residents is $6,777 and for out-of-state is $18,590. INDIANA CAREER AND POSTSECONDARY ADVANCEMENT CENTER (ICPAC), INDIANA UNIVERSITY-BLOOMINGTON COLLEGE SNAPSHOT, *at* http://www.learnmoreindiana.org/education/college_profiles/151351.xml (last updated Feb. 8, 2005).

22. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 8 U.S.C. §§ 1611, 1641 (2004); *see also* NILC Guide, *supra* note 20. Discussion of this issue is beyond the scope of this article.

23. Some visa preference categories can have waiting times as long as twelve years. *See* U.S. DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, VISA BULLETIN (2004), *at* http://travel.state.gov/visa/frvi_bulletincurrent.html (last visited Feb. 7, 2005).

24. FIX & PASSEL, *supra* note 7, at 16.

25. NATIONAL ACADEMY OF SCIENCES, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION (1997).

26. MICHAEL FIX, URBAN INSTITUTE TABULATION OF CURRENT POPULATION SURVEY (2001).

27. LEIGHTON KU & SHANNON BLANEY, CENTER ON BUDGET AND POLICY PRIORITIES, HEALTH COVERAGE FOR LEGAL IMMIGRANT CHILDREN: NEW CENSUS DATA HIGHLIGHT IMPORTANCE OF RESTORING MEDICAID AND SCHIP COVERAGE 7-12 (2000), *available at* http://www.cbpp.org/10-4-00health.pdf.

families, and that availability of public benefits is rarely a factor in migrating to the United States.[28]

Unfortunately, many immigrant students drop out of high school, often because there is little hope for them to go on to college. In 2000, only 59.8% of noncitizens had completed high school.[29] While high school completion rates for the entire U.S. population have increased, completion rates for Hispanics/Latinos continue to rank below that of other populations.[30] More than two in five Hispanics living in the United States have not graduated from high school.[31] In 2002, the dropout rate for immigrant Latinos over sixteen attending U.S. secondary schools was estimated at 44.2%.[32] Compared to other groups, fewer Hispanic students complete a four-year college degree after graduating from high school.[33]

According to the U.S. Census Bureau, the foreign-born population accounted for 12.4% of the civilian labor force in 2000.[34] Not surprisingly, in 1999 the average earnings for individuals with a bachelor's degree in the United States was higher ($45,678) than those who had completed a high school education only ($24,572).[35] Studies have shown that immigrants who speak English or improve their English skills have higher earnings.[36] In a recent study, the Comptroller of Texas estimated that more than five dollars is generated into the economy for every dollar invested in immigrant students'

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28. *See* MICHAEL FIX & JEFFREY PASSEL, THE URBAN INSTITUTE, THE SCOPE AND IMPACT OF WELFARE REFORM'S IMMIGRANT PROVISIONS (2002), *available at* http://www.urban.org/UploadedPDF/410412_discussion02-03.pdf.

29. U.S. CENSUS BUREAU, PROFILE OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2000 36 (2001), *available at* http://www.census.gov/prod/2002pubs/p23-206.pdf (last visited Mar. 5, 2005) [hereinafter PROFILE].

30. *See* NATIONAL CENTER FOR EDUCATION STATISTICS, CURRENT POPULATION SURVEYS, 1972-2000 (2000).

31. MELISSA THERRIEN & ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, THE HISPANIC POPULATION IN THE UNITED STATES: POPULATION CHARACTERISTICS MARCH 2000 4 (2001), *available at* http://www.census.gov/population/socdemo/hispanic/p20-535/p20-535.pdf (last visited Mar. 5, 2005).

32. James A. Ferg-Cadima, Mexican American Legal Defense and Educational Fund (MALDEF), Student Adjustment Act of 2003 (H.R. 1684): FAQs, *at* http://www.maldef.org (on file with authors).

33. DEBORAH A. SANTIAGO & SARITA BROWN, PEW HISPANIC CENTER, FEDERAL POLICY AND LATINOS IN HIGHER EDUCATION 3 (JUNE 2004), http://www.pewhispanic.org/site/docs/pdf/Higher ED06.23.04final_afl.pdf (last visited Feb. 16, 2005).

34. PROFILE, *supra* note 29, at 5.

35. ERIC C. NEWBURGER & ANDREA E. CURRY, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES (UPDATE): POPULATION CHARACTERISTICS MARCH 2000 1 (2000).

36. NATIONAL IMMIGRATION LAW CENTER, IMMIGRANTS, EMPLOYMENT & PUBLIC BENEFITS, *at* http://www.nilc.org/immspbs/research/pbimmfacts_0704.pdf (last visited Feb. 7, 2005).

education.[37] The long term cost implications of *not* educating these students in Texas was estimated at $319 billion in 1998 because of an anticipated increase in the need for social services and loss of public revenue.[38] By allowing undocumented students to go to college and obtain legal immigration status in the United States, some of these costs can be offset.

III. ENROLLMENT OR ADMISSION OF UNDOCUMENTED IMMIGRANT STUDENTS TO INSTITUTIONS OF HIGHER EDUCATION IS PERMITTED UNDER FEDERAL LAW.

No federal law prohibits the admission of undocumented immigrant students to state institutions of higher education. If an undocumented student meets the academic admission requirements of the institution, he or she may be considered for admission like any other student.

A. Pertinent Federal Statutes

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[39] and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)[40] are two federal statutes that mention immigration status in the context of higher education. PRWORA is a comprehensive welfare reform plan that emphasizes making welfare a transition to work.[41] Neither IIRIRA nor PRWORA prohibits admission or enrollment of undocumented students. The specific language of the pertinent provisions of the two federal laws is as follows:

IIRIRA section 505 provides:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a state (or political subdivision) for any post-secondary education benefit unless a citizen or national of the United States is eligible for such benefit (in no less amount, duration or scope) without regard to whether the citizen or national is such a resident.[42]

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37. Ferg-Cadima, *supra* note 32.

38. *Id.*

39. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1623(a) (2004) (also known as "IIRIRA section 505").

40. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 8 U.S.C. §§ 1611, 1641.

41. *See* U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996, *at* http://www.acf.dhhs.gov/programs/ofa/prwora96.htm (last visited Mar. 5, 2005).

42. 8 U.S.C. § 1623(a).

PRWORA is more oblique:

> [A]n alien who is not a qualified alien [i.e., not a lawful permanent resident, or lawfully admitted as a refugee or aslyee or alien lawfully present in the U.S. under two other laws] is not eligible for any public benefit . . . .[43]

These laws list two things a state or state-supported college or university cannot do. First, higher education benefits cannot be provided to foreign students "not lawfully present" in the United States "on the basis of *residence* within a state" where the same is not available to U.S. citizens.[44] Second, a public benefit, such as payment of financial assistance, cannot be provided to an alien who is not a "qualified" alien.[45] However, these statutes do not prevent or prohibit an institution of higher education from enrolling or admitting an undocumented immigrant student.

B. SEVIS and the Reporting Obligation of University Personnel

The Student and Exchange Visitor Information System (SEVIS)[46] is a recently established reporting system to monitor student compliance with the terms of their nonimmigrant visas and to keep track of those who are entering and exiting the United States. This program is mandated by 8 U.S.C. §1372,[47] which states:

> The Attorney General, in consultation with the Secretary of State and the Secretary of Education, shall develop and conduct a program to collect from approved institutions of higher education, other approved educational institutions, and designated exchange visitor programs in the United States . . .

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43. *Id.* §§ 1611 and 1641.

44. *Id.* § 1623(a) (emphasis added).

45. Under the PRWORA, "public benefit" includes only "post-secondary education . . . for which payments or assistance are provided to an individual . . . ." *Id.* §§ 1611, 1641. The term "qualified" alien is defined by Congress as:

> an alien who, at the time the alien applies for, receives, or attempts to receive a Federal public benefit, is . . . (1) an alien who is lawfully admitted for permanent residence under the Immigrant and Nationality Act, (2) an alien who is granted asylum under section 208 of such Act . . . , (3) a refugee who is admitted to the United States under section 207 of such Act . . . , (4) an alien who is paroled into the United States under section 212(d) of such Act, (5) an alien whose deportation has been withheld under section 243(h) of such Act . . . .

Id. § 1641(b).

46. Retention and Reporting of Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS), 67 Fed. Reg. 76,256 (Dec. 11, 2002) (codified at 8 C.F.R. Pts 103, 214, 248, and 274a).

47. *Id.*

> information . . . with respect to aliens *who have the status, or are applying for the status, of nonimmigrants under subparagraph (F), (J), or (M) of section 101(a)(15) of the Immigration and Nationality Act [8 U.S.C. §1101(a)(15)(F), (J), or M)].*[48]

The purpose of SEVIS is to facilitate "timely reporting and monitoring of international students and exchange visitors in the United States."[49] SEVIS applies to international students and exchange visitors who are nonimmigrants[50] holding F, J, and M visas.[51] By statute, all foreign nationals (and therefore all alien students) are considered "immigrants" unless they establish eligibility for one of the categories of nonimmigrant aliens.[52] There is no requirement under SEVIS that university personnel report an undocumented immigrant student or any student who is not the bearer of an F, J or M nonimmigrant visa.

According to the Family Education Rights and Privacy Act (FERPA), public schools are prohibited from providing any outside agency with any information from the student's file without obtaining permission from the student or the student's parents.[53] This FERPA regulation does not apply to F, M, and J nonimmigrant visa holders to the extent that the Attorney General determines that waiving FERPA is necessary to implement SEVIS.[54] Although the implementation of SEVIS requires states and institutions of higher education to disclose information regarding entry and exit of nonimmigrant students on F, M, and J visas, SEVIS does not mandate that states or institutions of higher education refuse admission to undocumented students or report them to the Department of Homeland Security.

C. Court Cases Addressing Admission of Undocumented Students

There are very few cases specifically addressing the question of admission for undocumented students into institutions of higher education. In the case of *League of United Latin American Citizens v. Wilson*, the U.S. District Court for the Central District of California struck down, on the basis of federal preemption, California's Proposition 187, which denied higher

48. 8 U.S.C. § 1372(a) (2004) (emphasis added).

49. U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, USER MANUAL FOR SCHOOL USERS OF THE STUDENT AND EXCHANGE VISITOR INFORMATION SYSTEM 5 (2004) [hereinafter USER MANUAL].

50. A "nonimmigrant" is a foreign national who maintains residence in a foreign country, has no intention of abandoning that residence, and seeks temporary admission into the United States. Retention and Reporting of Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS), 67 Fed. Reg. at 76,256.

51. *Id.* 8 U.S.C. § 1372(a).

52. 8 U.S.C. § 1101(a)(15)(A)-(J) (2004).

53. *See* 20 U.S.C. § 1232g-h (2004).

54. 8 C.F.R. § 214.1(h) (2004).

education to aliens not lawfully present in the United States.[55] The Court held that "states have no power to effectuate a scheme parallel to that specified in the [PRWORA], even if the parallel scheme does not conflict with the [PRWORA]" because Congress has expressly occupied the field of regulation of public postsecondary education benefits.[56] The Court further stated that because IIRIRA section 505 regulates eligibility of immigrants for postsecondary education benefits, it shows the intent of Congress to occupy this field.[57] Thus, the Court held that the federal laws oust state power to legislate in this area.[58] It is important to note that since this decision California not only admits undocumented students to institutions of higher education, but also has enacted legislation granting in-state tuition to certain undocumented immigrant students.[59]

Other courts have held that the field of postsecondary education for undocumented aliens is not completely occupied by the federal government, and therefore states can regulate in this area. In *Equal Access Education v. Merten*, the U.S. District Court for the Eastern District of Virginia recently addressed whether states could deny admission to higher education to undocumented immigrant students.[60] This case arose from the Virginia Attorney General's September 5, 2002 memorandum to all Virginia public colleges and universities, which stated that "the Attorney General is strongly of the view that illegal and undocumented aliens should not be admitted into our public colleges and universities at all . . . ."[61] In the opinion, the court stated that states have the discretion to limit admission of undocumented immigrant students to institutions of higher education.[62] However, the court held that, in order for the limitation to be valid under the Supremacy Clause of the U.S. Constitution, admissions policies must adopt federal immigration standards and not create or apply their own standards to determine the immigration status of applicants.[63]

In *Merten,* the court discussed whether PRWORA prohibits admission of undocumented students to institutions of higher education. The court stated that the PRWORA "addresses only post-secondary monetary assistance paid to the students or their households, not admissions to college or university." It concluded that "access to public higher education is not a benefit governed by

55. League of United Latin American Citizens v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997).

56. *Id.* at 1255 (citing 8 U.S.C. § 1642(a)).

57. *Id.* at 1256.

58. *Id.* at 1261.

59. *See infra* section IV.

60. Equal Access Education v. Merten, 305 F. Supp. 2d 585 (E.D. Va. 2004).

61. *Id.* at 591 (citing COMMONWEALTH OF VIRGINIA ATTORNEY GENERAL MEMORANDUM, IMMIGRATION LAW COMPLIANCE UPDATE at 5 (Sept. 5, 2002)).

62. *Id.* at 607.

63. *Id.* at 608.

PRWORA, nor is it a field completely occupied by the federal government."[64] Thus, the court noted, "not only has Congress failed to occupy completely the field of illegal alien eligibility for public post-secondary education, it has failed to legislate in this field at all and thus has not occupied any part of it, completely or otherwise."[65]

This court also addressed whether SEVIS and IIRIRA preempt a state's ability to admit or deny admission to undocumented immigrants. The court stated that "Congress, by creating a category of student visas, has not demonstrated 'a clear and manifest purpose' to oust completely state power to promulgate non-conflicting state laws."[66] The court observed that "IIRIRA says nothing about admission of illegal aliens to post-secondary educational institutions."[67] The court concluded that "it is clear that Congress has left the states to decide for themselves whether or not to admit illegal aliens into their public post-secondary institutions."[68] This case was later overturned by the district court on the basis of the plaintiff's lack of standing.[69]

In upholding Virginia's preclusion of admission of undocumented students to higher education, *Merten* confirms the fact that there exists no federal law which denies or even addresses admission of undocumented immigrant students to public institutions of higher education.[70] Unlike the case *League of United Latin American Citizens v. Wilson*, *Merten* stands for the proposition that states have the authority to make their own determinations whether to admit or deny access to postsecondary education to undocumented immigrant students. In fact, approximately four years after the *League* decision, California passed legislation that grants in-state tuition to certain undocumented immigrant students attending state institutions of higher education.[71] Thus, admission of undocumented immigrant students to state institutions of higher education appears to remain an area left to the states' discretion.

IV. OFFERING IN-STATE TUITION TO STUDENTS BASED ON A UNIFORMLY APPLIED RESIDENCY REQUIREMENT OR GRADUATION FROM A STATE HIGH SCHOOL IS PERMITTED UNDER FEDERAL LAW.

Even if an undocumented immigrant student applies to a college or university and is accepted, in many states, he or she will be classified as a non-resident student for purposes of tuition. Thus, they must pay the out-of-state

64. *Id.* at 605.
65. *Id.*
66. *Id.* at 606 (quoting DeCanas v. Bica, 424 U.S. 351, 358 (1976)).
67. *Id.* at 607.
68. *Id.* at 607.
69. Equal Access Education v. Merten, 325 F. Supp. 2d 655 (E.D. Va. 2004).
70. The Court notes that "defendant's alleged admissions policies cannot conflict with a law that does not exist." *Merten*, 305 F. Supp. 2d at 608.
71. *See infra* Part IV.

tuition rates that are often three (or more) times the in-state tuition rates.[72] In order to increase access to postsecondary education for undocumented immigrant students, many states and public institutions of higher education have revised policies and passed legislation granting in-state tuition to undocumented immigrant students who meet certain criteria. As discussed below, federal law permits states and public institutions of higher education to offer in-state tuition to students based on uniformly applied criteria. Furthermore, offering in-state tuition to students based on a requirement other than residency within the state, such as graduation from a high school within that state, is permitted under federal law.

A. Pertinent Federal Statutes

IIRIRA and PRWORA, the two federal statutes that discuss immigration status in the context of higher education, leave the question of who pays in-state tuition rates to the discretion of the states.[73] While there are no federal regulations concerning these statutes, a plain reading of these statutes shows no prohibition of granting lower tuition rates based on a uniformly applied residency or other requirement. The use of the word "unless" in section 505 suggests that states have the power to determine residency for undocumented immigrant students.[74] In plain language, the statute simply conveys that a state cannot give additional consideration to an undocumented student that it would not give to a U.S. citizen student who is not a resident of that state.[75]

Under the PRWORA, "public benefit" in the context of higher education includes only "post-secondary education . . . for which payments or assistance are provided to an individual . . . ."[76] Thus, as affirmed in *Merten*, the term "benefit" as used in IIRIRA section 505, 8 U.S.C. § 1623, and in PRWORA, 8 U.S.C. § 1611 and § 1621, refers to a monetary benefit and not the granting of in-state tuition.[77] In *Plyler*, the Supreme Court stated that public education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[78] The distinction lies in the importance of education and the "lasting impact of its deprivation on the life of a child."[79]

Where a federal statute does not "completely ouster" the state's power to regulate a matter, the federal law does not preempt the state's ability to exercise

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72. *See supra* note 21.

73. See *infra* Part III.A. for the specific language of relevant portions of these statutes.

74. *See* Michael A. Olivas, *A Rebuttal to FAIR: States Can Enact Residency Statutes for the Undocumented*, 7 BENDER'S IMMIGR. BULL. 652 (2002) [hereinafter *Rebuttal to FAIR*]; *see also* Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004).

75. *See Rebuttal to FAIR, supra* note 74 at 653.

76. 8 U.S.C. § 1621 (2004).

77. *See Rebuttal to FAIR supra* note 74.

78. Plyler v. Doe, 457 U.S. 202,221 (1982).

79. *Id.* at 220.

its discretion in that subject area.[80] PRWORA section 1621(d) grants states the authority to enact state laws to provide for the eligibility of illegal aliens for certain state and local benefits.[81] Thus, even if in-state tuition were considered a "benefit," PRWORA does not completely ouster the state's power to regulate the matter, because it specifically provides states with the authority to do so. It has been argued that the notion of federalism and the Tenth Amendment to the U.S. Constitution provide that the power of discretion to award state benefits should rest with the states and not with the federal government.[82] Therefore, making in-state tuition qualification a question of graduation from a state high school or living in the state for a period of time would be a lawful exercise of power left to the states by IIRIRA and PRWORA.

B. Cases Addressing In-State Tuition for Undocumented Students

There are very few cases that address the issue of in-state tuition for nonimmigrant and undocumented immigrant students. In 1982, the U.S. Supreme Court in *Toll v. Moreno*, decided that resident-tuition status was not to be limited to U.S. citizens and lawful permanent residents alone.[83] The Court held that a Maryland rule violated the Supremacy Clause of the U.S. Constitution insofar as it prohibited G-4[84] nonimmigrant visa holders, who are permitted by law to establish a domicile in the United States, from establishing residency for purposes of in-state tuition.[85]

After several attempts, California passed a controversial law limiting post-secondary education opportunities for undocumented students that withstood state appellate court challenges.[86] This law was reviewed by the California Court of Appeals in *Regents of University of California v. Superior Court*,[87] commonly called the "Bradford Decision." The Bradford Decision and the *Carlson* line of cases uphold the discretion of states to limit eligibility for lower tuition rates to certain aliens with lawful immigration status.[88] However, these two cases do not hold that a state is prohibited from permitting

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80. DeCanas v. Bica, 424 U.S. 351, 358 (1976).

81. 8 U.S.C. § 1621(d).

82. U.S. CONST. amend. X. For further discussion of this argument, see Jennifer Galassi, *Dare to Dream? A Review of the Development, Relief, and Education for Alien Minors (DREAM) Act*, 24 CHICANO-LATINO L. REV. 79 (2003).

83. Toll v. Moreno, 458 U.S. 1, 17 (1982).

84. G-4 visas are issued to nonimmigrant aliens who are officers or employees of certain international organizations and to members of their immediate families. 8 U.S.C. § 1101(a)(15)(G)(iv).

85. *Toll*, 458 U.S. at 17.

86. *See* Regents of Univ. of Cal. v. Superior Court, 225 Cal. App. 3d 972 (Cal. Ct. App. 1990).

87. *See id. See also* Carlson v. Reed, 249 F.3d 876, 882-83 (9th Cir. 2001) (holding that a California statute prohibiting lower in-state tuition rates for holders of certain temporary visas is lawful).

88. *Regents of Univ. of Cal.*, 225 Cal. App. 3d at 980-82; *Carlson*, 249 F.3d at 882-83.

lower tuition rates for undocumented aliens. In fact, since these decisions, California has enacted legislation that grants in-state tuition to certain undocumented immigrant students.[89]

C. State Attempts to Address the Issue of In-State Tuition for Undocumented Students

States such as Texas, California, Utah, New York, Washington, Oklahoma, Illinois, and Kansas have addressed this issue by passing legislation which allows public colleges and universities to grant in-state tuition to undocumented immigrant students who have graduated from a state high school and meet certain uniformly applied criteria.[90] Many other states, including Arizona, Colorado, Florida, Hawaii, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, Oregon, Rhode Island, and Wisconsin,[91] have introduced bills to allow undocumented students affordable access to public colleges and universities. In some states, the trustees of individual public colleges and universities are given the authority to set tuition policy. Several such colleges and universities in these states have addressed the issue of in-state tuition for undocumented immigrant students.[92] Finally, a few states, such as Alaska, have passed legislation requiring a student to be a U.S. citizen or legal resident to qualify as a state resident for purposes of tuition.[93] Laws permitting in-state tuition for certain undocumented students may be enacted by states as long as

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89. A.B. 540, 2001-02 Cal. Sess. (Cal. 2001) (signed into law on Oct. 12, 2001).

90. MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF), SURVEY OF RECENT STATE LAW AND LEGISLATION DURING THE 2003-04 LEGISLATIVE TERM AIMED AT FACILITATING UNDOCUMENTED STUDENT ACCESS TO STATE UNIVERSITIES (2003) [hereinafter MALDEF SURVEY]; *see* H.B. 1403, 77th Leg., Reg. Sess. (Tex. 2001) (signed into law on June 16, 2001); A.B. 540, 2001-02 Cal. Sess. (Cal. 2001)(signed into law on October 12, 2001); H.B. 144, 54th Leg., Gen. Sess. (Utah 2002) (signed into law on Mar. 26, 2002); S.B. 7784, 225th Leg., 2001 Sess. (N.Y. 2002) (signed into law Jun. 25, 2002); H.B. 1079, 58th Leg.; Reg. Sess. (Wash. 2003) (signed into law May 7, 2003); S.B. 596, 49th Leg., 1st Sess. (Okla. 2003) (signed into law May 12, 2003); H.B. 60, 93d Leg., Reg. Sess. (Ill. 2003) (signed into law May 17, 2003); H.B. 2145, 80th Leg., Reg. Sess. (Kan. 2003).

91. MALDEF SURVEY; *see* H.B. 2518, 46th Leg., 1st Reg. Sess. (Ariz. 2003); H.B. 1178, 64th Leg. 1st Reg. Sess. (Fla. 2003); H.B. 873, 22d Leg., 2003 Sess. (Haw. 2003); H.B. 253, 417th Leg., Reg. Sess. (Md. 2003); S.B. 520, 417th Leg., Reg. Sess. (Md. 2003); S.B. 237, 183d Leg., Reg. Sess. (Mass. 2003); S.B. 196, 92d Leg., 1st Reg. Sess. (Mich. 2003); 2633, 210th Leg., 2002-03 Sess. (N.J. 2003); S.B. 909, 46th Leg., 1st Sess. (N.M. 2003); S.B. 10, 72d Leg., 2003 Reg. Sess. (Or. 2003); H.B. 5802, 2003-04 Leg., Jan. Sess. (R.I. 2003); A.B. 95, 96th Leg., 2003-04 Reg. Sess. (Wis. 2003).

92. In Indiana, for example, the definition of "residency" for purposes of qualifying for in-state tuition is not codified in any state statute, nor is it defined by any state agency. Telephone Interview with Kent Weldon, Deputy Commissioner, Indiana Commission for Higher Education (March 2003). According to the Indiana Code, the authority to set fees (including the definition of residency for in-state fees) is given to the trustees of the institution. Thus, the residency policies for purposes of granting in-state tuition at public colleges and universities in Indiana will vary from institution to institution. IND. CODE § 20-12-1-2.

93. H.B. 39, 23d Leg., Reg. Sess. (Alaska 2003) (signed into law on Jan. 21, 2003).

they apply equally to residents and nonresidents, or are not based on residency within a state.[94]

In June of 2001, Texas became the first state to enact legislation to allow undocumented students to qualify for in-state tuition rates.[95] Eligible students under this law include undocumented students who (1) have graduated from a Texas high school or received the equivalent from the state, (2) are enrolled in a state institution of higher education, (3) have resided in Texas for three or more years, and (4) sign an affidavit in which they promise to file a petition to become a lawful permanent resident of the United States at their earliest opportunity.[96] Texas officials believe this law complies with the federal law because it sets a higher standard for undocumented immigrant students to receive in-state tuition than for U.S. citizens.[97] Moreover, it applies equally to nonresidents and residents and bases eligibility, in part, on where a person graduated from high school, rather than on residence within the state.[98] To date, there have been no reported court decisions in lawsuits challenging the Texas law.

The California legislature soon followed the Texas legislature in enacting a similar bill which applies to students who (1) have attended a California high school for three years or more, (2) have graduated from a California high school or attained the equivalent to a high school degree, (3) register as a student after fall of the 2001-02 school year, and (4) file an affidavit promising to apply for permanent residency at their earliest opportunity.[99] California public colleges have been granting in-state resident status to undocumented students since January 1, 2002. Proponents of this legislation indicate that it complies with section 505 of IIRIRA because it bases eligibility for in-state tuition on where a person graduated high school rather than on residency status.[100] Thus, the careful wording of the California law avoids any express or implied federal preemption issue.[101] In addition, anyone, including a U.S. citizen nonresident, who meets the above requirements, would also be entitled to in-state tuition.[102] Therefore, it does not discriminate against U.S. citizens.[103] Finally, the California law does not conflict with federal immigration law according to the

94. *See* NILC Guide, *supra* note 20, at 156; *see also* discussion of federal statutes *supra* Parts III.A. and IV.A.

95. H.B. 1403, 77th Leg., Reg. Sess. (Tex 2001) (signed into law on Jun. 16, 2001).

96. *Id.*

97. Sara Hebel, *States Take Diverging Approaches on Tuition Rates for Illegal Immigrants*, CHRON. OF HIGHER EDUC., Nov. 30, 2001.

98. *See* H.B. 1403, 77th Leg., Reg. Sess. (Tex. 2001), 77th Leg., Reg. Sess. (Tex. 2001) (signed into law on Jun. 16, 2001).

99. MALDEF SURVEY, *supra* note 90; *see* A.B. 540, 2001-02 Cal. Sess. (Cal. 2001) (signed into law on Oct. 12, 2001).

100. Hebel, *supra* note 97.

101. *Recent Legislation*, 115 HARV. L. REV. 1548, 1549 (2002).

102. *Id.* at 1552.

103. *Id.*

three-part test the U.S. Supreme Court established in *DeCanas v. Bica*.[104] Like Texas, there have been no reported decisions in lawsuits challenging this statute.

Utah was the third state to enact legislation allowing undocumented immigrants to be exempt from nonresident tuition.[105] Students are eligible if they (1) attend a Utah high school for three or more years, (2) graduate from a Utah high school or receive the equivalent within Utah, (3) register at an institution of higher education after the fall of the 2002-03 academic year, and (4) file an affidavit promising to apply to become a lawful permanent resident as soon as possible.[106] In a letter to the President of the University of Utah dated October 9, 2002, the Utah Assistant Attorney General concluded that the Utah statute is "valid and currently enforceable" under federal law because the above requirements "can be met by 'a citizen or national of the United States' regardless of whether he or she is a resident of Utah."[107] Thus, the law "does not appear to violate the letter or spirit of 8 U.S.C. § 1623 and appears valid."[108]

The Maryland legislature recently considered legislation with similar language to that of the Utah, Texas, and California statutes benefiting undocumented immigrant students.[109] In support of this legislation, the Maryland Assistant Attorney General concluded that the companion Senate Bill was not "preempted by a Federal Law which forbids encouraging aliens to enter or reside in the country in violation of the law."[110] Another Maryland Assistant Attorney General stated that the House Bill "grants the same benefit to citizens and nationals on the same basis without regard to whether they are residents."[111] Given the fact that "there is no applicable case law, or other interpretive guidance" with regard to 8 U.S.C. § 1623, the proposed House Bill is not clearly unconstitutional.[112] House Bill 253 was passed in the legislature; however, Governor Robert L. Ehrlich, Jr., vetoed it on May 21, 2003.[113] In his

104. *Id.* (citing DeCanas v. Bica, 424 U.S. 351 (1976) and providing a full legal analysis of the *DeCanas* test as it applies to the California legislation)).

105. *See* H.B. 144, 54th Leg., Gen. Sess. (Utah 2002) (signed into law on Mar. 26, 2002).

106. *Id.*

107. Letter from William T. Evans, Assistant Attorney General of Utah, to Bernard Machen, President of University of Utah (Oct. 9, 2002) (on file with authors).

108. *Id.*

109. *See* H.B. 253, 417th Leg. Reg. Sess. (Md. 2003); *see also* S.B. 520, 417th Leg., Reg. Sess. (Md. 2003).

110. Letter from Richard E. Israel, Assistant Attorney General, to Senator Hollinger (D-Md.) (Mar. 14, 2003) (on file with authors).

111. Letter from Kathryn M. Rowe, Assistant Attorney General, to Delegate Hixson (D-Md.) (Mar. 8, 2002) (on file with authors).

112. *Id.*

113. Governor's Veto Message, *at* http://mlis.state.md.us/2003rs/veto_letters/hb0253.htm (last visited Feb. 16, 2005).

veto message, Governor Ehrlich took the position that IIRIRA section 505 preempts the states from acting on this issue, and that the approach used in the legislation violates the spirit of IIRIRA section 505.[114]

State officials in Wisconsin and Virginia believe section 505 of IIRIRA prohibits states from offering in-state tuition to undocumented immigrants unless the same is provided equally to all citizens.[115] For this reason, Governor McCallum of Wisconsin vetoed a law in August of 2001.[116] In Virginia, a law was passed that aims at denying in-state tuition to undocumented students by using similar language to section 505 of the IIRIRA.[117] However, many lawyers and government officials believe this interpretation of section 505 is too narrow and not legally binding.[118] They believe that the federal government cannot decide how states and public colleges grant in-state tuition.[119] Undocumented immigrants that are eligible for these state provisions are not receiving any greater benefits than nonresident U.S. citizens.[120] Moreover, granting them in-state tuition is not based on residency within the state, but rather on attendance and graduation from a state high school. Thus, the state legislation does not run afoul of the federal statutes.

D. Proposed Federal Legislation to Address the Issue of In-State Tuition for Undocumented Students

As discussed above, section 505 of IIRIRA lacks federal regulations to assist in its interpretation and there is a broad disagreement regarding its effect on higher education tuition rates. Although states are able to implement legislation granting in-state tuition to undocumented immigrant students, recent federal legislation has been introduced in Congress that would repeal section 505 of IIRIRA, and put an end to any doubts state officials have about intent and interpretation of this federal law. In 2001, the Development, Relief, and Education for Alien Minors Act (DREAM Act) was introduced in the Senate by Senators Hatch (R-Utah) and Durbin (D-Ill.).[121] It failed to pass in the 107th Congress, and was reintroduced again this past spring in the 108th Congress.[122] In addition to repealing section 505 of IIRIRA, the DREAM Act would create

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114. *Id.*

115. Hebel, *supra* note 97.

116. *Id.*

117. *See* H.B. 2339, 2003 Sess. (Va. 2003).

118. Hebel, *supra* note 97.

119. *Id.*

120. *Id.*

121. *See* Angelo I. Amador, Mexican American Legal Defense and Educational Fund, *107th Congress (2001-2002) Student Adjustment Bills Side-by-Side Comparison* (2002) (Updated by James A. Ferg-Cadima); Development, Relief, and Education for Alien Minors (DREAM) Act, S. 1291, 107th Cong. (2001) [hereinafter DREAM].

122. NATIONAL IMMIGRATION LAW CENTER, DREAM ACT BASIC INFORMATION (2005), *at* http://www.nilc.org/immlawpolicy/DREAM/DREAM_Basic_Info_0205.pdf (last visited Mar. 5, 2005); *see* DREAM Act, S. 1545, 108th Cong. (2004).

an avenue for undocumented immigrant students to secure lawful immigration status in the United States through a process called "cancellation of removal" so that they can legally work and become eligible for educational benefits, such as state and federal financial aid.[123]

In order to qualify for relief under the DREAM Act, an immigrant student must be at least twelve years old on the date of enactment of the Act, and under twenty-one years old at the time he or she applies.[124] Students must have lived in the United States continuously for at least five years on the date of enactment in order to be eligible.[125] An individual must have earned a high school degree before applying for relief; however, some persons who would have qualified within the last four years will qualify if they are recent high school graduates and are now attending college or have graduated from college.[126] Finally, an individual must not have a criminal record and be able to demonstrate good moral character in order to qualify.[127]

The companion bill to the DREAM Act in the House of Representatives is called the Student Adjustment Act (SAA).[128] The SAA was originally introduced in the 107th Congress in 2001.[129] In the 107th Congress, the SAA attracted a bipartisan list of sixty-two co-sponsors.[130] It was reintroduced in Congress as the Student Adjustment Act of 2003 on April 10, 2003.[131] Similar to the DREAM Act, the SAA would also repeal section 505 of the IIRIRA and adjust to Lawful Permanent Resident status certain long-term resident students who (1) have not reached the age of twenty-one at the time of application, (2)

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123. NATIONAL IMMIGRATION LAW CENTER, *supra* note 122; *see* DREAM Act, S. 1545.

124. NATIONAL IMMIGRATION LAW CENTER, SUMMARY OF THE HATCH-DURBIN STUDENT ADJUSTMENT BILL, S. 1291 DEVELOPMENT, RELIEF, AND EDUCATION FOR ALIEN MINORS ACT (DREAM), *at* http://www.nilc.org/immlawpolicy/DREAM/DREAM_Summary.pdf (last visited Feb. 14, 2005) [hereinafter SUMMARY OF HATCH-DURBIN BILL]; *see* DREAM Act, S. 1545.

125. SUMMARY OF HATCH-DURBIN BILL, *supra* note 124; *see* DREAM Act, S. 1545.

126. SUMMARY OF HATCH-DURBIN BILL, *supra* note 124; *see* DREAM Act, S. 1545.

127. SUMMARY OF HATCH-DURBIN BILL, *supra* note 124; *see* DREAM Act, S. 1545. Significant concerns have been raised by pro-immigrant activists regarding the proposed federal legislation and the repeal of section 505. First, the proposals are too narrow and many students would be unable to meet all of the criteria. Students who arrive in the United States after their sixteenth birthday would not qualify. If a student fails to make a timely application, this would preclude the student from obtaining relief. In addition, the proposed benefits would not apply to students who entered the country legally on temporary visas. Beth Peters & Marshall Fitz, *To Repeal Or Not To Repeal: The Federal Prohibition on In-State Tuition for Undocumented Immigrants Revisited,* 168 EDUC. L. REP. 2 (2002), *available at* http://www.ilw.com/search/documentFrame.asp?Request=%22To+Repeal+Or+Not+To+Repeal%22&nPage=1&sort=Date&MaxFiles=25&Fuzzy=&Phonic=&Stemming=Yes&NaturalLanguage=No&HitNum=2&cmd=getdoc&DocId=1714&Index=%5c%5cilw%5cwwwroot%5cdtSearch%5cILW%20Web%20site&HitCount=12&hits=5+6+7+8+9+a+2c+2d+2e+2f+30+31+&hc=30&req=%22To+Repeal+Or+Not+To+Repeal%22 (last visited Feb. 14, 2005).

128. Student Adjustment Act of 2001, H.R. 1918, 107th Cong. (2001) (reintroduced as Student Adjustment Act of 2003 on Apr. 10, 2003) [hereinafter SAA].

129. *Id.*

130. SUMMARY OF HATCH-DURBIN BILL, *supra* note 122.

131. SAA, *supra* note 128.

are physically present in the United States on the date of enactment and have been physically present in the United States continuously for at least five years preceding such application, (3) are of good moral character, (4) are enrolled at or above the 7th grade or actively pursuing admission to a college at the time of application, and (5) have no criminal history.[132] An individual who would have met such requirements in the last four years and who has graduated from or enrolled in a college may also be eligible for such benefits.[133] The SAA legislation only applies to students already residing in the United States at the time of enactment.[134] Under the Act, all information obtained from the student for purposes of obtaining relief under this Act would be confidential and could not be used for any purpose other than to make a determination on the student's application.[135]

Because section 505 of IIRIRA lacks guidance to assist in its interpretation, states have been left with broad discretion to implement their own policies according to their interpretation of the law. The DREAM Act should be passed primarily to provide an avenue for these students to obtain lawful status in the United States, but also in order to settle any disputes regarding the effect of section 505 of IIRIRA on granting in-state tuition rates to undocumented students.

V. ADMISSION AND IN-STATE TUITION FOR UNDOCUMENTED STUDENTS IS SOCIALLY RESPONSIBLE

Many of the arguments against higher education for undocumented students are a mix of legal interpretation with social policy. It has been shown above that federal law prohibits neither admission nor in-state tuition rates for students without lawful immigration status. Further, states have the discretion, either through legislation, agency rulemaking, or education institutional policy to admit undocumented students and permit lower tuition rates for these students. Nevertheless, concerns frequently are voiced that admission and in-state tuition for these students is harmful to society in the United States. These contrary positions are not well founded.

A. The Economic Benefits of Educating the Undocumented Outweigh Any Perceived Harm

Supporters of the proposed legislation in Florida, including Governor Jeb Bush (R), maintain that educating undocumented immigrant students makes

132. *Id.*
133. *Id.*
134. Ferg-Cadima, *supra* note 32.
135. *Id.*

sense financially for the state.[136] Supporters realize that these students will be more productive with a degree, and that without one undocumented immigrant students are more likely to end up needing governmental assistance.[137] However, opponents argue that even if students obtain a college degree, they cannot legally work in the United States.[138] This is not the case because many of these students will be eligible to procure an immigration benefit in the future and become lawful permanent residents of the United States. Students may gain eligibility for an immigration benefit through a change in the law, similar to section245(i) of the Immigration and Nationality Act, which expired on April 30, 2001, that allows immigrants who entered without inspection the opportunity to adjust in certain circumstances.[139] Students may also gain eligibility if there is a future amnesty. In addition, many students may become eligible for a family or employment based immigration benefit in the future.

The U.S. Supreme Court in *Plyler*, examining the District Court's findings of fact, stated: "[T]he illegal alien of today may well be the legal alien of tomorrow," and that without an education, these undocumented children, "[already] disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices . . . will become permanently locked into the lowest socio-economic class."[140] The rationale used by the Supreme Court in *Plyler* applies equally well to higher education:

> This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.[141]

After financially investing in these students' education from kindergarten through the twelfth grade, academically qualified students are unable to continue their education beyond high school. Many U.S. employers are forced to look outside of the United States to fill specialized positions because of a shortage of skilled workers in the United States. It makes better sense for states to educate their residents so they can contribute to society and the nation's economy to their fullest potential.

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136. Saundra Amrhein, *A Future Out of Reach?*, ST. PETERSBURG TIMES, Mar. 23, 2003, *available at* http://www.sptimes.com/2003/03/23/TampaBay/A_future_out_of_reach.shtml (last visited Feb. 7, 2005).

137. *Id.*

138. *Id.*

139. *See* Immigration and Nationality Act § 245(i).

140. Plyler v. Doe, 457 U.S. 202, 207-08 (1982) (quoting Plyler v. Doe, 458 F. Supp. 569, 577 (E.D. Tex. 1978)).

141. *Id.* at 218-19.

B. Admission of Undocumented Immigrants to Higher Education at Reasonable Rates Would Not Draw Illegal Immigrants to the United States and Would Not Drain Tax Funded Public Benefit Programs

Contrary to popular belief, immigrant families use public benefits (i.e., welfare, food stamps, Medicare, and similar assistance programs which are means-tested) less than U.S. citizen families, and availability of public welfare benefits is not what attracts immigrant families to the United States .[142] Even the U.S. Supreme Court has recognized this, noting "the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc [sic]."[143] The Court observed that "few if any illegal immigrants come to this country . . . in order to avail themselves of a free education."[144] The Court concluded that educational benefits do not seem to be a stimulus for immigration to the United States.[145]

Opponents claim that increasing access to postsecondary education for undocumented immigrant students will only increase the numbers of such immigrants that come to the United States because they will find this opportunity very attractive.[146] However, as recognized by the U.S. Supreme Court, there is no evidence that undocumented immigrants come to the United States for education or public assistance benefits. More importantly, a large number of these families are likely to continue to reside in the United States, regardless of access to higher education.[147] These children should not be punished for the mistakes of their parents. It is in the best interest of the nation for them to obtain a college degree.

C. Undocumented Students Will Not Displace Qualified U.S. Citizen Students

Opponents argue that states and taxpayers should not have to subsidize the education of "illegal" immigrants, and that allowing undocumented students to go to college will, in turn, deny opportunities to deserving U.S. citizens.[148] However, undocumented students admitted to higher education do *not* receive a

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142. NATIONAL IMMIGRATION LAW CENTER, IMMIGRANTS, EMPLOYMENT & PUBLIC BENEFITS (2004), *at* http://www.nilc.org/immspbs/research/pbimmfacts_0704.pdf (last visited March 5, 2005) (citing MICHAEL FIX & JEFFREY PASSEL, URBAN INSTITUTE, THE SCOPE AND IMPACT OF WELFARE REFORM'S IMMIGRANT PROVISIONS (2002).

143. *Plyler*, 457 U.S. at 228.

144. *Id.*

145. *Id.* at 229.

146. Federation for American Immigration Reform (FAIR), Taxpayers Should Not Have to Subsidize College for Illegal Aliens, *at* http://www.fairus.org/html/04182108.htm (last updated May, 2003) (last visited Feb. 7, 2005) [hereinafter FAIR Brief].

147. AASCU Special Report: Access for All? Debating In-State Tuition for Undocumented Alien Students, *at* http://www.aascu.org/special_report/access_for_all.htm (last visited Feb. 14, 2005) [hereinafter AASCU].

148. FAIR Brief, *supra*, note 146.

"free ride" and are still required to pay tuition.[149] In addition, it is estimated that only approximately two percent of the student population would be able to take advantage of these policies.[150] Most importantly, increasing access to higher education for undocumented immigrants will improve the ability of colleges and universities to recruit the best qualified, most diverse population of students.[151] Offering in-state tuition to certain undocumented immigrant students would only increase the number of students that are able to go to college. It would provide an opportunity to students who otherwise would not be able to attend college.

D. Federal Statutes Outlawing Assisting Aliens to Enter the United States Do Not Apply to Admission and In-State Tuition for Undocumented Students

College and university personnel may question whether they have an affirmative duty to report undocumented students to USCIS where school officials believe a student is undocumented. Earlier in this discussion, it was explained that SEVIS and PRWORA do not establish an obligation to report undocumented students.

Under 8 U.S.C. § 1324, it is a crime for any person to encourage or induce "an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry or residence is or will be in violation of law . . . ."[152] However, in examining a statute with similar construction, the Supreme Court has held the term "person" does not include a state or its agencies.[153] Moreover, as discussed above, FERPA prohibits a school from disclosing personal information about the student without the consent of the student or the student's parents.[154] In March of 1994 (pre-SEVIS, but post-8 U.S.C. § 1324 and post-*Plyler*), a memorandum from INS stated, "The effect of *Plyler* on post-secondary education is not clear; however, Congress has not adopted legislation which would permit states and state-owned institutions to refuse admission to undocumented aliens or to disclose their records to the Immigration and Naturalization Service."[155]

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149. AASCU, *supra* note 148.

150. FIX & PASSEL, *supra* note 7, at 16.

151. *See generally* Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019 (1995).

152. 8 U.S.C. § 1324(a)(1)(A)(iv) (2004).

153. Letter from Richard E. Israel, *supra* note 110 (citing Vt. Agency of Natural Res. v. United States, 529 U.S. 765, 120 S. Ct. 1858, 1866-67 (2000)).

154. *See supra* note 53 and accompanying text.

155. INS Memorandum, Revised School Approval Policy and Procedures (Jan. 14, 1994), *reproduced in* 71 INTERPRETER RELEASES 361 (Mar. 14, 1994) (emphasis added).

VI. CONCLUSION

The admission of undocumented immigrant students to institutions of higher education and granting of in-state tuition is not only permitted under federal law, but also socially responsible and good public policy. By limiting educational opportunities for these students, they are unable to develop critical skills needed to fully contribute to society and the economy. To deny undocumented students access to higher education would result in a permanent underclass of under-educated and under-utilized persons.

During a visit to Griegos Elementary School in Albuquerque, New Mexico, President Bush recently stated, "The question I like to ask every child in the classroom is, 'Are you going to college?' In this great country, we expect every child, regardless of how he or she is raised, to go to college."[156] In order for immigrant students to meet these high expectations, they must be given an equal opportunity to do so and not be forced to settle for less than what they are capable of achieving.

156. Press Release, Project Vote Smart, Remarks by the President in Q & A with the Travel Pool – Griegos Elementary School (Aug. 15, 2001) (on file with authors).