IIIRIRA,
The DREAM Act, and
Undocumented College Student Residency

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IIRIRA, The DREAM Act, and Undocumented College Student Residency

Michael A. Olivas

In a series of articles twenty years ago, I began to review the complex practices and conflicting policies to track college residency issues. This arcane field of interest has grown into a cottage industry, especially as the stakes have increased: when tuitions were low, the differences between charges to in-state resident students and out-of-state non-resident students were modest in scope, and need-based financial aid programs and fee waivers often made up these differences on a student’s fee bill. However, as tuitions have increased, especially non-resident tuitions, and as need-based assistance has given way to increased use of loans to finance student assistance, these issues of who is eligible to receive resident tuition have ratcheted up.

These issues have become so complex and contentious that I once likened them to the movie “Rashomon”:

This essay is about a Rashomon-like case. It is, alternatively, an admissions case, an immigration matter, a taxpayer suit, a state civil procedure issue, an issue of preemption, a question of higher education tuition and finance, a civil rights case, and a political issue. In addition to being a true story, it is also representative of the stories of many other similarly-situated persons who seek admission to college. From a social science perspective, this case is a subset of admissions cases, and a very specific subset at that: it is an immigration-related admissions case. At bottom, though, it is a story about college aged kids who have lived virtually all their lives in the United States and who want to attend college and enjoy the upward mobility a college degree provides.

This characterization is even more true today, as the issue has taken on national security implications as well. On that fateful 9/11 date, planes piloted by hijackers crashed into the ground and were flown into buildings; these hijackers included international college students, and several of them were undocumented. The extraordinary events that have unfolded since, as chronicled in other articles in this special issue, have affected the entire world, and higher education in the U.S. is a part of that world.

This article reviews the events concerning undocumented college students, college students and applicants to institutions who are out of immigrant status, whose parents brought them to the United States as children and who grew up in this society. To many college administrators and public officials, this is an issue that flew under radar for many years, until it forced itself onto the public agenda. This article reviews this complex issue in three parts: 1) undocumented college residency before the Illegal Immigration Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (2) IIRIRA and residency; and 3) post 9/11 developments: the USA PATRIOT Act, the DREAM Act, and international students. In the conclusion, I summarize the developments, review the research issues that have arisen, and note the current developments at the state and federal levels. In my own personal experience, this
topic of concern, which grew from my experience in Northern Ohio tomato fields, recruiting migrant students, has now assumed international status and national security concerns.\(^5\)

I. **Undocumented College Residency Before IIRIRA of 1996**

As difficult as it is to negotiate the application and admissions process to college, it is even more daunting to navigate the residency process, as thousands of students each year discover. Then, add to this mix the overlay of immigration and nationality law, and you have a patchwork of dissimilarity and injustice, prompting one early commentator to conclude, “this heterogeneity is neither in the interest of the students, of the states, nor of the nation.”\(^6\) In many respects, the residency laws, implementing regulations, and state and institutional practices are often illogical, inconsistent, and confusing; applicants and students forum shop among colleges in the same state and even in the same public college multi-campus system to exploit loopholes and inconsistencies; most domiciliary criteria are difficult to administer and verify and they virtually invite manipulation or deceit.\(^7\) Additionally, these complicated technical requirements almost always work against aliens, especially undocumented aliens, who may have had no reason to know or confront their unauthorized status until they apply for college. Plyler v. Doe, the 1982 U.S. Supreme Court decision allowing undocumented children to attend public elementary and secondary schools, has smoothed the way for many undocumented children to participate in mandatory schooling, but for these children, their lives in the shadows likely meet the sharp light of the college application process, where substantial paperwork and documentation are prerequisites.\(^8\)

Citizen students who have lived in a single state for many years are easily defined as residents. Conversely, a student who moves from State A to State B solely for the purpose of attending State B college is clearly a nonresident, at least at first. The wide space between these two situations, however, is the problem. As a general rule, states will allow a person who moves to a state to become reclassified as a resident after a specified period of time. This time period ranges from ninety days to twelve months, the period used by nearly all the states.\(^9\) In a few states, it is possible to become reclassified immediately upon arrival.\(^10\)

Absent other exceptions or complications, when the specified time passes, states with a simple durational requirement will allow a citizen student to pay resident tuition as a resident. This is usually an objective standard, with evidence about continuous presence required for the reclassification.\(^11\) To be sure, this objective standard is subject to measurement problems, as even the seemingly simple standard of counting a particular number of days can become complicated: Do holidays away from the state count? Does the "clock" begin when the person moves to the state? When s/he applies to college? When s/he obtains employment? When s/he registers to vote? When s/he buys a house? It is easy to imagine many possible variations on these themes, and an experienced registrar is bound to have heard them all; complex cases have arisen in these and other areas.\(^12\) Immigration makes these rules particularly difficult, as it so often does in other areas.

As difficult as this "objective" measurement becomes, a number of states have complicated matters by requiring more than mere duration: these states also require that residents establish domicile, which entails forming the legal intention of making that state their "true,
permanent, and fixed abode." This is a very complicated requirement, both conceptually and operationally. Instead of merely counting days in the requisite waiting period (already noted as deceptively complicated), states that employ domicile also require a legal declaration and evidence to prove that residents consider the state their principal establishment. 13 Confusion frequently arises because the terms "residence" and "domicile" are used interchangeably, or "residence" is measured with language denoting intentionality, which is generally not required for mere residence. 14 In this area of law, "domicile" includes "residence," but has a more specific meaning than does mere "residence." 15

To establish a domicile, students must prove two elements: (1) residence and (2) an intention to make that residence their permanent, fixed abode. 16 Persons may maintain more than one residence, but only one domicile. For example, many students plausibly maintain several residences, some simultaneously (summer state, their divorced mother's and father's states, the state in which they live and vote). Incidentally, the place where students vote is not necessarily their domicile, as mere residence and brief waiting periods are the requirements to register for voting in local or federal elections. 17 As difficult as the concept of domicile is for United States citizens, it is even more difficult in the immigration context.

To make matters worse, most states require the establishment of domicile and a waiting period, while some states require domicile with no specified durational period. 18 Yet other states exact pure durational requirements. 19 Upon closer examination, however, the rationales for the widespread practice of exacting declarations of intention fail to advance any substantial guarantees for establishment of domicile beyond those provided by mere durational requirements. The cost of administering intentions is high, both in dollar terms and in the considerable ill will it exacts. 20 None of the reasons for domiciliary requirements truly guarantees loyalty or tax contributions. In fact, nothing assures states that the newly arrived nonresidents have been transformed into genuine residents. This is as true for citizens or permanent residents as it is for undocumented aliens. First, the fact that students establish a legitimate principal home and abode is no guarantee that as graduates they will remain in the state beyond commencement or contribute to the tax system while they are enrolled in school. In all likelihood, students will move wherever employment is available or the quality of life, family considerations, and circumstances allow. Moreover, a variety of permutations is possible for students, and more than one legal residence can be maintained, which can give sufficient evidence for students to meet residency requirements in more than one state. A greater problem is the possibility that students may have to relinquish residence or domicile in the "home" state to establish sufficient contacts in a new state; this can lead to students having no one state in which they can successfully claim a domicile for tuition purposes, as happened in Frame, where Utah students conducted graduate research in Africa, only to discover they could not prove residence anywhere. 21

Despite the demonstrable defects of domiciliary requirements, particularly those that also include waiting periods, states and institutions persist in requiring them. In addition, more than lower resident tuition lies in the balance, as many other benefits may accrue to state residents in public (or private) colleges, such as preferential admissions, scholarship or loan assistance, inclusion in quota programs, eligibility for consortia or exchange programs, and participation in specialized programs negotiated among states in legislative compacts. 22 It is these stakes,
merely the tuition differentials (which, in certain instances, can be "equalized" by need-based aid formulae)\textsuperscript{23} that have contributed to the overall rise in residency litigation. There is even a residency advantage in some private colleges, who use state residency as a recruiting device.\textsuperscript{24}

To complicate matters, there is an extraordinary number of exemptions, exceptions, and waivers to state residency practices.\textsuperscript{25} The most common areas singled out for special treatment are dependents or minors, marital status, military personnel, and alienage, four areas in which nearly all states make some special mention in their practice.\textsuperscript{26} States also employ special treatment for a wide range of categories, totalling thousands of exceptions to residency requirements. Other groups frequently singled out for special treatment include university employees, families relocating for certain employment, and senior citizens.

 Particularly troubling are the many discretionary means to confer residency upon the advantaged, as in the instance of scholarship recipients or children of employees of choice industries lured to states by such special treatment as exemptions and (for the companies) tax abatements.\textsuperscript{27} As weak a system as has been erected to regulate the migration of out-of-state students, these arbitrary and unprincipled waivers and exemptions undermine the system even further.

Although there had been court decisions on residency reaching back to the 19th Century, the issue first was considered by the U.S. Supreme Court in 1972 in Vlandis v. Kline.\textsuperscript{28} In this important case, the Court struck down the practice of public institutions in Connecticut, which had treated all applicants from out of state as presumptively non-residents, with no opportunity to rebut the presumption, on the grounds that such an irrefutable presumption violated Due Process.

The U.S. Supreme Court first considered the issue of educational residency in the context of immigration in Plyer v. Doe, a case that stands at the apex of immigrant rights in the United States.\textsuperscript{29} With this decision, the Court struck down Texas' attempt to deny free public education to alien children. The Texas Legislature had sought to deny a free public education by charging alien children tuition to attend elementary and secondary schools. Justice Brennan, in his majority opinion striking down the statute, characterized the Texas argument for charging tuition as "nothing more than an assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools."\textsuperscript{30} He employed an equal protection analysis to find that a State could not enact a discriminatory classification "merely by defining a disfavored group as non-resident."\textsuperscript{31}

Justice Brennan dismissed the State's first argument that the classification or subclass of undocumented Mexican children was necessary to preserve the State's "limited resources for the education of its lawful residents,"\textsuperscript{32} This argument had been rejected earlier in Graham v. Richardson,\textsuperscript{33} where the court had held that the concern for preservation of Arizona's welfare resources could not justify an alienage classification used in allocating those resources.\textsuperscript{34} In addition, the findings of fact from the Plyler v. Doe\textsuperscript{35} litigation were that the exclusion of all
undocumented children would eventually result in some small savings to the state, but since both state and federal governments based their allocations to schools primarily on the number of children enrolled, those savings would be uncertain and barring those children would "not necessarily improve the quality of education."

The State also argued that it had enacted the legislation in order to protect itself from a putative influx of undocumented aliens. The court acknowledged the concerns of the state due to any increase in the undocumented population, but found that the statute was not tailored to meet this objective: "Charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration." The Court also noted that immigration and naturalization policy is within the exclusive powers of federal government.

Finally, the state maintained that undocumented children were singled out because their unlawful presence rendered them less likely to remain in the United States and therefore to be able to use the free public education they received in order to contribute to the social and political goals of the United States community. Brennan distinguished the subclass of undocumented aliens who had lived in the United States as a family and for all practical purposes, permanently, from the subclass of adult aliens who enter the country alone and whose intent was to earn money and stay temporarily. For those who remained with the intent of making the United States their home, "[i]t is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."

Prior to Plyer, the Supreme Court had never taken up the question of whether undocumented aliens could seek fourteenth amendment Equal Protection. The Supreme Court had earlier held that undocumented aliens are "persons," and that undocumented persons are protected by the due process provisions of the Fourteenth Amendment. However, the State of Texas argued that because undocumented children were not "within its jurisdiction," they were not entitled to equal protection. Justice Brennan rejected this line of reasoning, concluding that there "is simply no support for [the] suggestion that 'due process' is somehow of greater stature than 'equal protection' and therefore available to a larger class of persons."

Although he rejected undocumented alienage as a suspect class, he concluded that the children were not responsible for their own citizenship status and that treating them as Texas law envisioned would "not comport with fundamental conceptions of justice." However, he was more emphatically concerned with education and elaborating the nature of the putative entitlement. While he reaffirmed Rodriguez in finding public education not to be a fundamental right, he recited a litany of cases holding education to have "a fundamental role in maintaining the fabric of our society." Moreover, he felt that "[l]iteracy is an enduring disability," one that would plague the individual and society. This analysis enabled him to rebut the State's assertions, which Chief Justice Burger's dissent had found persuasive, that the policy was legislatively related to protecting the fiscal economy of the State.

The nature of education seems to have been a more important factor to the Plyer Court than it appears to have been to the Rodriguez Court. Further, while the Court did not reach the claim of federal preemption, it did draw a crucial distinction between what states and the
federal government may do in legislating treatment of aliens. Additionally, while the Court has upheld state statutes governing alien employment and welfare benefits these narrow areas mirrored federal classifications and congressional action governing immigration. In *Decanas v. Bica*, the Supreme Court had held that if Congress had addressed an immigration issue and delegated particular aspects of its administration to states, the states could enact their own legislation to regulate the area. In public education, however, Brennan wrote, "we perceive no national policy that supports the State in denying these children an elementary education."

Also in 1982, the Court decided *Toll v. Moreno*, the first postsecondary residency case construing a state statute affecting non-immigrants, aliens with permission to remain only temporarily in the United States. Justice Brennan also wrote the majority opinion in *Toll*. After reviewing the confusing history of the case, he held that the University of Maryland's policy of denying treaty organization aliens the opportunity to pay reduced, in state tuition constituted a violation of the Supremacy Clause grounds, and therefore did not reach the questions of Due Process or Equal Protection, which had been considered by the District Court and Appeals Court. The opinion follows a simple logic: the Federal Government is preeminent in matters of immigration policy and states may not enact alienage classifications, except in limited cases of political and government functions, or where the states are given such jurisdiction as a feature of the federal scheme.

When the case was first brought, the district court had held that the original policy denying residency was a violation of Due Process and constituted an irrebuttable presumption. In reviewing that case, the United States Supreme Court held in 1978 that G-4 visa holders could be United States domiciliaries, and certified a question to the Maryland Court of Appeals to determine whether G-4 aliens and dependents could be Maryland domiciliaries. The Maryland Court then determined that they were capable of acquiring domicile, rendering erroneous the University's previous reliance upon their inability to establish domicile in the state. Before the Court rendered its opinion, the University's Board of Regents issued a "Reaffirmation of In-State Policy" that actually constituted a substantial retreat from its previous position, although it still did not allow residency tuition for Moreno. The Supreme Court, noting that the University's action had "fundamentally altered" the domicile issue, remanded the case to the District Court.

On remand, the University lost once again. The District Court reaffirmed that even though the University's "paramount consideration" was no longer domicile, the original policy had denied Due Process to G-4 aliens, and the revised policy was also found to be defective on fourteenth amendment Equal Protection and Supremacy Clause grounds. In the Court's view, the "revised" policy concerning alienage (which made domicile only one of several criteria) could not survive strict scrutiny and, further, it impermissibly encroached upon federal immigration prerogatives. The Appeals Court affirmed, rendering both the policies invalid: the original practice on Due Process and irrebuttable presumption grounds concerning the establishment of domicile, and the revised practice on Equal Protection for alienage and preemption grounds. While Justice Brennan's opinion only reached the issue of the Supremacy Clause, his opinion in *Phler v. Doe*, decided upon Equal Protection grounds with less-than-strict scrutiny for undocumented aliens, suggests that he also would have found the revised policy equally invalid under an Equal Protection analysis.
Brennan reviewed earlier immigration cases, *Takahashi*,84 *Graham*,85 and *DeCanas*,86 reading them for the principle that "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress."87 He found both that Congress had allowed G-4 visa holders to establish domicile in the United States,88 and also had conferred tax exemptions upon G-4 aliens "as an inducement for these [international] organizations to locate significant operations in the United States."89 Therefore, he reasoned, it was clearly the congressional intent that G-4 visa holders not bear the "additional burdens" Maryland sought to impose: "The State may not recoup indirectly from respondents' parents the taxes that the Federal Government has expressly barred the state from collecting."90

Read with *Plyer v. Doe*, *Toll* raises several important questions concerning the "residency clock" for the undocumented: Does the proper determination for establishing domicile begin when they enter the country? When they apply for a formal status? When they receive formal, adjusted status?91 What happens if the state has no common law on alien domicile? While *Toll* may have resolved the narrow issue of domiciled G-4 aliens in states that grant tax exemptions, its significance lies beyond this narrow setting,92 as will be seen in IIRIRA, after 1996. In particular, I believe its significance extends to the undocumented.

Soon after *Plyer* and *Toll* were decided, their postsecondary applications were tested in several complex California cases, *Leticia "A" v. Board of Regents of the University of California (Leticia "A" I)*, *Bradford v. Board of Regents of the University of California (Bradford I)*, extended litigation resulting in *Leticia "A" II* and *Bradford II*, and *American Association of Women (AAW) v. California State University*.93 By the time the smoke had cleared, by 1994, the undocumented were not allowed to establish resident status in California's public institutions. Then, lighting struck in Proposition 187, California's ballot initiative designed to eliminate virtually all benefits to undocumented aliens. This draconian measure, which passed by nearly 60% of the state's electorate, would have stripped undocumented aliens from all but the most essential health and medical services, would have overruled *Plyer* and denied educational benefits to these children, and would have required public officials to report aliens thought to be undocumented to police and security authorities.94

Almost immediately, declaratory and injunctive relief was granted by federal courts, and ultimately, almost all 187's provisions were struck down by courts, although the bar on postsecondary benefits was upheld.95 By the mid-1990's, a number of states had also challenged what they considered failed federal immigration enforcement policy, and sought additional federal resources. Six of the major receiver states brought such suits, although all were eventually unsuccessful.96

Although the suits were unsuccessful, the switch to a Republican-controlled Congress resulted in two major 1996 laws restricting immigration and the status of immigrants, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)97 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).98 These omnibus laws dramatically changed the landscape, affecting federal benefits in many areas of health and welfare, and their enactment led the judge in the 187 challenge to determine that the federal government had preempted state actions to do so, expressing the "intention of Congress
to occupy the field of regulation of government benefits to aliens." When the state appealed this decision, the newly elected Governor, Gray Davis, invoked the Ninth Circuit’s special arbitration and mediation provision, which resulted in a July, 1999 settlement.

Even though Proposition 187’s worst provisions were ruled invalid, the provision concerning postsecondary residency was intact, and worse, IIRIRA had included a provision that on its face appeared to strike down postsecondary residency authority:

IIRIRA,CHAPTER 14--RESTRICTING WELFARE AND PUBLIC BENEFITS FOR ALIENS

§ 1621. Aliens who are not qualified aliens or nonimmigrants ineligible for State and local public benefits
(a) In general
Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an alien who is not--

(1) a qualified alien (as defined in section 1641 of this title),

(2) a nonimmigrant under the Immigration and Nationality Act, or

(3) an alien who is paroled into the United States under section 212(d)(5) of such Act for less than one year, is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

(b) Exceptions
Subsection (a) of this section shall not apply with respect to the following State or local public benefits:

(1) Assistance for health care items and services that are necessary for the treatment of an emergency medical condition (as defined in section 1396b(v)(3) of Title 42) of the alien involved and are not related to an organ transplant procedure.

(2) Short-term, non-cash, in-kind emergency disaster relief.

(3) Public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(4) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (A) deliver in-kind services at the community level, including through public or private nonprofit agencies; (B) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (C) are necessary for the protection of life or safety.
(c) "State or local public benefit" defined

(1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term "State or local public benefit" means--

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

(2) Such term shall not apply--

(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States, or to a citizen of a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99-239 (or a successor provision) is in effect;

(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act qualified for such benefits and for whom the United States under reciprocal treaty agreements is required to pay benefits, as determined by the Secretary of State, after consultation with the Attorney General; or

(C) to the issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States.

(3) Such term does not include any Federal public benefit under section 1611(c) of this title.

(d) State authority to provide for eligibility of illegal aliens for State and local public benefits

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

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§ 1623. Limitation on eligibility for preferential treatment of aliens not lawfully present on basis of residence for higher education benefits
(a) In general

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 unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

(b) Effective date

This section shall apply to benefits provided on or after July 1, 1998.\textsuperscript{101}

Whatever these provisions meant in practice, there is no doubt that by 1996, things looked bleak for those who advocated for undocumented college students. By then, Texas and California, the two largest immigrant-receiver states, had banned these students from in-state tuition classification as residents, and federal legislation was in place that appeared to preempt state efforts to enact such a benefit. As it turned out, however, the darkest hour was before the dawn.

II. \textit{IIRIRA} and Postsecondary Residency Benefits

In the interim between the injunction issued to stay Proposition 187's implementation and the appeals court settlement, as requested by Gov. Davis, Congress enacted IIRIRA, which appeared to the court to preempt state efforts to allow the undocumented any residency tuition benefits. The court held that Sec. 505 of IIRIRA had shown that Congress intended to occupy this field, and that intent preempted the states from regulating the residency status of undocumented students.\textsuperscript{102} Others, such as conservative commentator Dan Stein of the restrictionist group the Federation of American Immigration Reform (FAIR), also interpreted this provision in similar fashion.\textsuperscript{103} Other politicians have interpreted this provision similarly,\textsuperscript{104} but I believe that they have mistakenly read the statute, which is by any measure, confusingly worded.

My reading of Section 505 follows this reasoning: state residency is a state benefit, to be determined by states; the one time that the U.S. Supreme Court acted in this area, in \textit{Elkins v. Moreno},\textsuperscript{105} it certified this issue as a state question and adopted the reasoning into its own decision-making; the word "unless" in §1623 can only mean that Congress enacted a condition precedent for states enacting rules in this area; the word "benefit" is defined in §1621 in a way that makes it clear that Congress intended it as a "monetary benefit," whereas the determination of residency is a status benefit, not a "monetary" benefit; §1621 says explicitly that states may provide this benefit only if they act to do so after 8/22/96. Taken together, these form an interlocking logic that points towards only one reasonable conclusion: that IIRIRA, however badly written, allows states to confer (or not to confer) a residency benefit upon the undocumented in their public postsecondary institutions.\textsuperscript{106}

First, in-state residency is entirely a state-determined benefit or status. There are no federal funds tied to this status (as is the case of federal highway programs, where accepting the dollars obligates the state to abide by federal speed limits, for instance). In the one instance
when this matter was considered by the U.S. Supreme Court (the Maryland case of *Elkins v. Moreno*, where the question was whether G-4 non-immigrants could establish postsecondary residency in the state for in-state tuition purposes), the Court certified this question to the Maryland State Court of Appeals. The Maryland State Court of Appeals held that G-4 aliens were not precluded from doing so, and the U.S. Supreme Court then deferred to this finding, and adopted it into its final ruling on the issue, in *Toll v. Moreno*. Had this been a matter of federal law, the U.S. Supreme Court would have decided this issue itself, but it left determination of a state benefit to a state court. While *Toll* concerns nonimmigrants rather than the undocumented, I believe it is instructive on this issue as well.

The provisions of IIRIRA, the 1996 federal statute, do not preclude states' abilities to enact residency statutes for the undocumented. Sec. 505, 8 U.S.C. § 1623 reads: "An alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a state (or political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident." Congress does not have the authority to regulate state benefits, and the Maryland case established this in the area of postsecondary residency/domicile issues. But if Congress does have such authority, § 1623 does not preclude any state from enacting undocumented student legislation, due to the word "unless." A flat bar would not include such a modifier. The only way to read this convoluted language is: State A cannot give any more consideration to an undocumented student than it can give to a nonresident student from state B. For example, California could not enact a plan to extend undocumented students with resident status after they had resided in the state for 12 months, and then accord that same status to U.S. citizens or permanent residents from Nevada or Oregon after 18 months. No state plan does this; indeed, several of the plans require three years of residency for the undocumented, as well as state high school attendance -- neither of which is required for citizen non-residents. This is the only plausible reading of §1623.

Several readers have also misread what constitutes a benefit. In § 1623, the term "benefit" refers to dollars ("amount, duration, and scope"), as if prohibiting state scholarships or fellowships. However, the benefit actually being conferred by residency statutes is the right to be considered for in-state resident status. This is a non-monetary benefit, and this definition lends support to my reading of the statute. Congress has enacted a separate program for federal financial aid, which limits eligibility to certain classes of aliens, including PRUCOL students, those in status such as asylees or parolees, "permanently residing under color of law."

Some commentators have also incorrectly read § 1621 to prohibit residency reclassification. That provision reads, in pertinent part: "[An undocumented alien] ...is not eligible for any state or local public benefit (as defined in subsection (c) of this section)." But a careful reading of subsection (c) confirms my interpretation, by referencing payments. It prohibits "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government."
Thus, the benefit of being reclassified as a resident student in a state does not trigger any of the prohibitions. Sec. (1) (B)'s reference to "postsecondary education" is modified by "or any other similar benefit for which payments or assistance are provided ... by an agency, a state or local government or by appropriated funds of a state or local government." This clearly indicates that what is proscribed is money or appropriated funds, not the "status benefits" confirmed by the right to declare state residency.

Further, (d) provides that states may provide otherwise-prohibited public benefits "only through the enactment of a state law after August 22, 1996 which affirmatively provides for such eligibility." This must allow states to do as I have urged they do. Any fair reading of this statute refutes the FAIR position on this matter. Beginning with Texas, ironically the state where Plyler originated twenty years earlier, a number of states have enacted laws to allow these few students -- who have broken no law themselves -- to enroll in college.

The Table that follows is current through Fall, 2003, and reveals that there has been considerable action by the states: seven have enacted statutes to allow the undocumented to establish residency, while two have acted by statute to preclude the undocumented from receiving such benefits; sixteen other states have considered the matter but have not yet taken final action. Some of the states have followed the California lead by not referring to "residence" in the statute, ostensibly to skirt the 505 provision, but it is difficult to envision how any student, undocumented or not, could attend and graduate from a California high school without actually "residing" in the school district, especially given the holding of Martinez v. Bynum, which allows schools to bar the undocumented from public schools if the students or their parents do not reside in the district. Congress also acted to prevent the practice of "parachute kids," whose parents live outside the country and send their children to attend public schools. This practice now requires the parents to pay for the full tuition costs of their children's school attendance, and this provision has dramatically lessened the pattern of parents engaging in this behavior.

[Table one approximately here]

While the Table indicates that only a few states have changed their practice post-IIRIRA and enacted statutes to allow the undocumented to attend college as resident students, the major receiver states have done so, and it is likely that political pressure will continue to fill in the spots on the map, at least the spots where the undocumented are likely to enroll. In addition, the unlikely scenario of a major conservative Republican U.S. Senator from Utah (Sen. Orrin Hatch) taking on this issue after 9/11 has rendered it more likely that federal action will occur, and not only accord these students federal protection, but a limited amnesty of one form or another. Section III chronicles the rise of the DREAM Act legislation and its unlikely provenance.

III. Higher Education and Residency After 9/11

Of course, 9/11 changed everything. As the articles in this special issue reveal, higher education institutions have been substantially affected by the general rise in security concerns. Literally dozens of statutes have been enacted or amended by Congress to address terrorism since the
attacks against the United States, and several of these either directly implicate higher education institutions or affect colleges in substantial fashion. In addition, new legislative proposals have arisen, in areas that will affect colleges and universities should they become law. Regulations to implement this legislation have cascaded, and many more are in progress. Like an elaborate billiard game, these new statutes cross-reference, compound, and alter existing statutes, including well-established laws.

The primary statutes enacted by Congress to combat terrorism since the 2001 attacks include:

* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA-PATRIOT Act), P.L. 107-56 (October 26, 2001) [major omnibus anti-terrorism legislation, amending several statutes];

* Aviation and Transportation Security Act, P.L. 107-71 (November 19, 2001) [affects flight training schools];


* Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (BPRA), P.L. 107-188 (June 12, 2002) [controls use and distribution of toxins and other biological agents used in scientific research and instruction].

Other relevant legal initiatives include the Student and Exchange Visitor Information System (SEVIS), a comprehensive computerized system designed to track international students and exchange scholars; the Department of State’s Technology Alert List (TAL), an enhanced consular official review process for detecting terrorists who seek to study sensitive technologies; the Visas Mantis, a program intended to increase security clearances for foreign students and scholars in science and engineering fields; the Interagency Panel on Advanced Science Security (IPASS), designed to screen foreign scholars in security-sensitive scientific areas; the Consumer Lookout and Support System (CLASS), a file-sharing program that incorporates crime data into immigration-screening records; the Interim Student and Exchange Authentication System (ISEAS), a transitional program until SEVIS is fully operational, and replacing the previous Coordinated International Partnership Regulating Act of 1996 (IIRIRA) – the major overhaul of the core Immigration and Nationality Act (INA). In addition, there are many Presidential Directives and other federal statutory/regulatory matters that govern the intersection of immigration, national security, and higher education.

As one careful immigration scholar has noted in this area:

Let us be clear: Immigration law does not revolve around national security or terrorism. As you will see, national security is merely one of many policy ingredients in the mix. Moreover, only the most minute proportion of actual
immigration cases present any national security issues at all. Conversely, while many of the policy responses to September 11 have been immigration-specific, most have been generic national security strategies.

A full chapter devoted solely to national security runs the risk, therefore, of lending that subject undue prominence. This must be acknowledged. For two reasons, separate treatment of this material is useful nonetheless. First, in the aftermath of September 11, the inevitable preoccupation with terrorism and war has utterly dominated the public discourse on immigration. Welcome or not, that reality cannot be ignored. Second, Congress and the executive branch have responded with a wave of counterterrorism initiatives. Many of them specifically target either noncitizens or particular classes of noncitizens. Synthesizing these measures makes it easier to describe, digest, and evaluate them in context.\textsuperscript{136}

After the planes crashed, some of these changes would have been enacted, even if some of the hijackers had never been students, enrolled in U.S. flight schools.\textsuperscript{137} The resultant revisions have been accelerated, and breathed life into dormant statutes. For example, the SEVIS initiative had been mandated by IIRIRA in 1996, but had never been implemented.\textsuperscript{138} Concerned generally about overstays, Congress had ordered that an automated entry-exit system be developed, and when it was not developed, enacted two additional statutes in 1998 and 2000 to deal with this issue.\textsuperscript{139} Following September 1, 2001, the USA PATRIOT Act was signed into law, including Section 414, which lent additional urgency.\textsuperscript{140} In 2002, Congress once again acted on this subject, enacting the Enhanced Border Security and Visa Entry Reform Act of 2002.\textsuperscript{141} In June, 2002, the Department of Justice announced the creation of the National Security Entry-Exit Registration System (NSEERS).\textsuperscript{142} The postsecondary corollary is the Student and Exchange Visitor Information Program (SEVIS), a web-based student tracking system, which has been delayed and vexing for colleges required to use it. Both NSEERS and SEVIS will be rolled into a more comprehensive data base called the U.S. Visitor and Immigration Status Indication Technology System (U.S. VISIT), once the technical, legal, and system problems have been resolved.\textsuperscript{143} In the meantime, campus officials have had to spend countless hours tracking and identifying international students and scholars, in an immigration regime that is extraordinarily complex and detailed. The delays have been responsible for disrupting the flow in international students and researchers to U.S. institutions, and the lags in processing the paperwork and technical requirements can require a year in advance of enrollment.\textsuperscript{144}

With regard to residency, the most important development has been the introduction and consideration of federal legislation to deal with the confusion of Sec. 505 of IIRIRA, the Development, Relief, and Education for Alien Minors (DREAM) Act. Senators Orrin Hatch (R-UT) and Richard Durbin (D-IL) reintroduced the DREAM Act, S. 1545, on July 31, 2003.\textsuperscript{145} By Fall, 2003, it had 35 Senate co-sponsors, including a majority of the membership of the Judiciary Committee, and in November, 2003, was passed out of Committee.\textsuperscript{146} In the House, Representatives Chris Cannon (R-3\textsuperscript{rd} UT), Lucille Roybal-Allard (D-34\textsuperscript{th} CA), and Howard Berman (D-28\textsuperscript{th} CA) reintroduced the Student Adjustment Act, H.R. 1684, on April 9, 2003, which mirrors the DREAM Act, but has different provisions.\textsuperscript{147} If the DREAM Act (Appendix I) were passed in its present form, it would have the following effect: 1) it would repeal Section 505 of IIRIRA, which has come to discourage some states from offering in-state, resident tuition
to all students who graduate from their high schools. The repeal would be retroactive, as if Section 505 never existed. 2) It would allow eligible undocumented students (those who entered the U.S. before they were 16 years old) to begin the path toward legalization through a two-step process. In addition, there are special protections, including protection from deportation and work authorization, for certain young students (over the age of 12) who have not yet graduated from high school. Once a student completes high school, Step One of the process would give the student conditional status lasting between 6-8 years. In Step Two, upon completion of college, or military service, an immigrant would apply to remove the conditional status and receive permanent resident status. They could immediately begin to naturalize because the time under conditional status and permanent status would be credited toward the five-year wait for citizenship.

In order to qualify for DREAM Act protection from deportation and work authorization the applicant would have to meet the following requirements: To qualify for the conditional status under the DREAM Act, the applicants would have to meet the following requirements: they must (1) be admitted to a four-year college, two-year college, or non-profit trade school; or (2) have earned a high school diploma; or (3) have obtained a GED. They must reside in the U.S. when the DREAM Act is enacted into law and have lived continuously in the U.S for at least five years. They must have entered the U.S. when they were under 16-years-old and must have “good moral character,” a specific immigration law term meaning not having committed certain criminal offenses.

The immigration laws list a number of grounds that would make a student ineligible for DREAM Act relief. For example, a student who failed to attend removal proceedings could be ineligible. Students cannot have made a false claim of citizenship, or made a misrepresentation about their status to receive a government benefit. There are waivers and exemptions for some of the grounds. 148

To convert from DREAM Act conditional status to DREAM Act permanent relief, the applicants would have to meet the following requirements: they would be allowed to request permanent status 180 days before the six-year wait is finished or no later than two years after the six years of conditional relief; the must maintain “good moral character”; 149 must avoid grounds of inadmissibility and deportability; must continue to live within the U.S.; must (1) have completed a four-year college, two-year college, or non-profit trade school degree; or (2) remain a student in good standing for at least two years in a four-year program; or (3) have served in the U.S. armed forces for at least two years. 150 There are hardship exceptions available if the applicant demonstrates a compelling case.

Additional provisions would create penalties for false statements in applications for DREAM Act immigration relief and would make all information provided in a DREAM Act application confidential and limited to the determination of whether someone qualifies for relief under the Act. Finally, all such students must register with SEVIS. 151
Conclusion

There has been a surprising amount of litigation and recently, legislation on this arcane matter, a subject that affects only a few students, but extremely vulnerable ones. Both immigration advocates and opponents have targeted this issue as an important line in the sand. 135 Ironically, the DREAM Act provisions, introduced by a conservative Republican Senator, are more generous than any of the state laws enacted to ameliorate this problem, and, of course, the amnesty provisions to allow the undocumented students to legalize their status would be generous. The Texas state statute, the first to address this problem, was signed into law by Governor Rick Perry, the Republican who succeeded to Governor George W. Bush’s term, and who was then elected to his own term. 153 It is likely that this issue will be resolved by the combination of state and federal laws, even with the specter of September 11 casting its long shadow.

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exactly six months after they took over the planes. See generally, Laura Khatcherissian, *FERPA and the Immigration and the Naturalization Service: A Guide for University Counsel on Federal Rules for Collecting, Maintaining, and Releasing Information About Foreign Students*, 29 J. C. & U. L. 457, 466-467 (2003). Considering how few of the terrorists were actually students, any reasonable observer will be struck at how far-reaching the response to higher education has been.

4. These persons are EWI's, or persons who "entered without inspection." The second common way to become undocumented is to effect legal entry and then engage in behavior that renders the person removable, such as overstaying a visa, engaging in unauthorized employment, or committing certain crimes. For excellent treatment of these issues, see T.A. Aleinikoff, David Martin, & Hiroshi Motomura, *Immigration and Citizenship, Process and Policy* (Thomson/West, 5th ed. 2003) and Stephen H. Legomsky, *Immigration and Refugee Law and Policy* 110 (Found. Press, 3rd ed. 2002). See also, Andorra Bruno and Jeffrey Kuenzi, *Unauthorized Alien Students: Issues and Legalization* (Report To Congress, Congressional Research Service, April 11, 2002).

5. Olivas, *Storytelling*, *supra* note 2, at 1080-1081 (recounting experience recruiting migrant workers in Ohio). I rely upon this earlier research for much of what follows in Sections I and II of this article.


14. *Id.*

15. *Restatement (Second) of Conflict of Laws* § 11(2) (1971) ("Every person has a domicil [sic] at all times and, at least for the same purpose, no person has more than one domicil at a time.").


22. For example, with fewer than twenty schools of optometry in the United States, the University of Houston School of Optometry reserves a set aside of its places for residents of other states, who "contract" with UH for those places in each year's class. Discussion with UH Optometry Professor Dr. Sam Quintero, Fall, 2003.


24. For a very clever example of this unusual practice, see Ehrenberg, *supra* note 23, at 84, where he describes how the University of Rochester, a private institution, has begun to award scholarships targeted to area students in New York.

26. Id., at app. 2, at Table 2.


30. Plyler, 457 U.S. at 227. It is not surprising that such anti-Mexican legislation would have originated in Texas, a jurisdiction widely regarded to have “a legacy of hate engendered by the Texas Revolution and the Mexican American War.” Guadalupe San Miguel, Let Them All Take Heed: Mexican Americans and the Campaign for Educational Equality in Texas, 1910-1981 (1987); Arnlod De Leon, They Called Them Greasers (1983). According to historians, this history of conflict has generated distrust and dislike between Anglos and Texas Mexicans. Most importantly, it shaped Anglo attitudes towards Mexicans by (a) legitimizing the stereotype of Mexicans as “eternal enemies” of the state, and (c) encouraging their denigration. Additionally this legacy undergirded the historical attitude of Anglo disparagement of Mexican culture and the Spanish language. San Miguel at 32 (citing Rodolfo Acuna, Occupied America (1981)).

31. Id. In this regard, Professor Steven Legomsky has usefully reminded me in personal communications that the starting point for any analysis of this issue is to recognize that the rules that restrict in-state resident status for undocumented students are an exception to the general rule. In every sense of the word, the undocumented are residents of the state. They live in the state, are physically present, and intend to remain. So the question is not whether we should be granting special privileges to the undocumented, which is how restrictionists like to present it. The real question is whether we should carve out a special exception to otherwise eligible state residents simply because their parents have violated federal immigration laws.

32. Id.


34. Id. at 375. The classification involved state welfare benefits. Id. at 366.


36. Id. at 576-77.

38. *Id.* at 229-30.

39. *Id.* at 228 (citing *Plyler*, 458 F. Supp. at 585).

40. *Id.* at 225-26.

41. *Id.* at 229-30.

42. *Id.* at 230.

43. *Id.*

44. "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1.


46. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (stating that Fourteenth amendment provisions "are universal in their application to all persons").

47. *Plyler*, 457 U.S. at 211.

48. *Id.* at 213. In the dissent, Chief Justice Burger concurred that the equal protection clause applies to undocumented aliens. *Id.* at 243.

49. *Id.* at 220 (citing Trimble v. Gordon, 430 U.S. 762, 720 (1977)).


51. *Plyler*, 457 U.S. at 221 (citations omitted).

52. *Id.* at 222.


56. *Id.* at 224.
60. 424 U.S. 351 (1976).
61. Id. at 356.
63. 458 U.S. 1 (1982); Nyquist v. Mauclet, 432 U.S. 1 (1977) was the first postsecondary education case construing a state statute affecting permanent resident college students. Nyquist struck down a New York State statute that prohibited permanent resident aliens from receiving college tuition assistance benefits.
64. Toll, 458 U.S. at 310; See Olivas, Enduring Disability, supra note 8, at 29-33 (reviewing the several Toll v. Moreno cases).
67. Id.
70. Toll, 458 U.S. at 13-17, 20.
73. Id. at 668-69.

75. Toll v. Moreno, 441 U.S. 458 (1979) (per curiam).

76. Id.


79. Id. at 668.

80. Id. at 667-68.


82. Toll v. Moreno, 458 U.S. 1, 9-10 (1982).


84. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (states cannot impose discriminatory burdens on aliens).

85. Graham v. Richardson, 403 U.S. 365 (1971) (states may not impose regulations upon aliens if the burdens are not contemplated by Congress).


87. 458 U.S. at 13 (quoting DeCanas, 424 U.S. 351, 358, n. 6). Justice Brennan allowed that the Court had upheld legislation limiting the "participation of noncitizens in the State's political and governmental functions." Id. at n.17.

88. Id. at 14.


90. 185.458 U.S. 16 (1982). Justice O'Connor dissented from this characterization, but concurred in the opinion "insofar as it holds that the state may not charge out-of-state tuition to nonimmigrant aliens who, under federal law, are exempt from both state and federal taxes, and who are domiciled in the State." (O'Connor, J., concurring in part and dissenting in part, Id. at 24).
91. See e.g., Wong v. Board of Trustees, 125 Cal. Rptr. 841 (1st Dist. 1975) (omitted in official reporter by order of California Supreme Court, 15 January 1976) (denying equal protection challenge to requirement that aliens hold permanent resident status for one year prior to determination of residence).

92. In Texas, as in many states, non-immigrants such as K-visa holders (fiancées or fiancés) and L-holders (intra-company transferees) are more easily accorded residence for tuition purposes, as federal immigration law does not require them to maintain a domicile in their home country. 8 U.S.C.A. § 1101 (a)(15)(K), (L) (West 1995). Non-immigrants on student visas (F), on the other hand, are required to maintain their original domicile in their home country; thus, by the terms of the F-visa application, they are not accorded permission to relinquish this domicile. 8 U.S.C.A. §1101 (a) (15)(F) (West 1995). Therefore, by the terms of the F-visa application, they are not accorded permission to relinquish this domicile. See also Commissioner Don W. Brown, Letter to Registrars, “Update of Visas for Non-Citizen Students,” (July 29, 2002) (TX Coordinating Board memo on file with author); Walfish, supra note 77.


American Association of Women v. Board of Trustees of the California State University, Los Angeles County Superior Court, No. BC 061221, Robert H. O'Brien, J. (Sept. 28, 1992) (AAW), at 7. It is a small world. By this time, Dr. Barry Munitz was Chancellor of the CSU system. I and others urged him not to appeal Judge Kawauchi's clarification. For a detailed study of these cases, see Olivas, Storytelling, supra note 2, at 1051-1061.


96. Charles v. U.S., 69 F. 3d 1094 (11th Cir. 1995) (Florida); Padawan v. U.S., 82 F. 3d 23 (2d Cir. 1996) (New York); New Jersey v. U.S., 91 F. 2d 463 (3d Cir. 1996) (New Jersey); Arizona v. U.S., 104 F. 3d 1095 (9th Cir. 1997) (Arizona); California v. I.N.S., 104 F. 3d 1086 (9th Cir. 1997) (California); Texas v. U.S. 106 F. 3d. 661 (5th Cir. 1997). Notwithstanding these cases, which all the states lost, it was a complex issue. For example, Texas did not even spend all of its federal dollars allocated for alien support, and returned $90 million unspent to the government. James Cullen, Blame the Newcomers, TEX. OBSERVER, August 19, 1994, at 2, 3.


103. Dan Stein, Why Illegal Immigrants Should Not Receive In-State Tuition Subsidies, UNIV. BUS., April 2002, at 64; but see, Michael A. Olivas, Rebuttal to FAIR, UNIV. BUS., June 2002, at 72; reprinted in 7 BENDERS IMM. BULL. (June 1, 2002) at 652.

104. Id. For example, the Virginia Attorney General made the same error. See also infra text accompanying notes 112, 152.

105. Elkins, supra note 72.

106. Id.
107.  Id.


112.  For example, see the Virginia Attorney General Opinion of September 5, 2002, opining that granting assistance would be inconsistent with IRRIRA, at 79 INT. REL. 1750 (November 25, 2002). Although the Virginia legislature passed a bill to grant assistance, the governor vetoed the legislation on April 30, 2003. As Table One notes, subsequent bills have been introduced. MALDEF has sued Virginia over the matter. Mary Schaffrey, Special Report: Changes in the Cards, WASH TIMES, Sept. 6, 2003, 1A, also at www.washtimes.com/specialreport/20030906-11-356-3298r.htm; Lawsuit Challenges Virginia Denial of College Enrollment Due to Immigration Status, 90 INT. REL. 1344 (Sept. 29, 2003).


115.  Id.

116.  Id.

117.  Id.
118. James Ferg Cadima, *Survey of Recent State Law and Legislation During the 2003-04 Legislation Term Aimed at Facilitating Undocumented Student Access to State Universities* (May 18, 2003) (on file with author). He has my thanks for gathering the data that are included in my Table One.


121. IRRIRA bars F-1 visa holders (academic students) from attending public schools without reimbursement for the full, unsubsidized per capita cost of attendance. INA § 214 (M) (1)(A), (B). Discussions with a Houston Independent School District official (Summer, 2003) revealed that fewer than “several dozen” such students now attend HISD schools, of nearly 200,000 students overall.


123. <fortcoming when all papers are edited>


128. IIRIRA, §641. See, ICE Outlines Policy on Entry of Students Following August 1 SEVIS Deadline; Schools React, 80 INT. REL. 1111 (August 11, 2003); Michael Arnone, *Antiterrorism*

129. 9 FAM 40.31 Notes available at www.foia.state.gov/masterdocs/09fam1094003_1N.pdf. See also the Export Administration Regulations, 15 CFR § 772.1 (EAR) and the International Traffic in Arms Regulations, 22 CFR § 120 (ITAR), for other similar higher education research applications, such as biological materials and encryption issues.

130. For a recent Department of State cable outlining MANTIS clearance procedures, see www.nafsa.org/content/publicpolicy/NAFSAontheissues/visamantiscable100703.htm.


132. For a copy of the Memorandum of Understanding, allocating agency functions on the issues between the Departments of State and Homeland Security, see www.nafsa.org/content/publicpolicy/NAFSAontheissues/mou.htm.


Overview of Recent Court Practice With Regard to Free Movement of Persons, 40 COMMON Mkt. L. Rev. 615 (2003) (reviewing EC immigration issues).

137. Supra note 125.

138. Such a program was enacted as Sec. 641 of IRRIRA.


143. See 8 BENDER’S IMMIG. BULL., June 1, 2003.; see also Sean O’Connor, Biometrics and Identification After 9/11, 7 BENDER’S IMMIG. BULL. 150-159 (Feb. 15, 2002).

144. As Associate Dean for Student Life at UHLC, I am responsible for the function of coordinating international students JD/LLM admissions. The immigration/visa processing of paperwork before 2003 took approximately 3-4 months, while at present it takes 10-12 months, a delay that makes it impossible to enroll students on a timely basis. See generally, Jennifer Jacobson, In Visa Limbo, CHRON. OF HIGHER EDUC., Sept. 19, 2003, at A37 (describing delays in visa process, causing decline in U.S. international college enrollments); Jennifer Jacobson, U.S. Foreign Enrollments Stagnate, CHRON. OF HIGHER EDUC., Nov. 7, 2003, at A1 (same).

145. An earlier version of the DREAM Act was introduced in the 107th Congress, while three similar bills were introduced by U.S. Representatives. See generally, American Association of State Colleges and Universities, Access For All? Debating In-State Tuition for Undocumented
Alien Students (AASCU Special Report), available at www.aascu.org/policy/special_report/access_for_all.htm; See also, Romero, supra note 122.

146. Because this is a constantly moving target, observers may wish to consult a website that can help track legislation, available at www.thomas.loc.gov/home/C108query.html, one I find enormously helpful.

147. Id.

148. As an adviser to Texas State Rep. Rick Noriega of Houston, who successfully sponsored the Texas law that accorded in-state residency status to eligible undocumented students, I helped draft the original bill which included two provisions that have become models for both state and federal legislation that has followed: the three year requirement and the provision that the students promise to seek regularization of their status, once they are eligible. Both these provisions arose in the heat of legislative battle that occurred after our original bill, which contained neither provision, was introduced. I credit Rep. Noriega for the courage and tenacity that started this bill rolling.

Although California’s UC and CSU Systems accord in-state tuition to the undocumented, those students in the State’s community colleges are not eligible, as then-Gov. Gray Davis vetoed a bill that would have extended this status to them. See, Michael Gardner, Davis Vetoes Waiver of College Fees for Illegal Immigrants, S.D. UNION TRIBUNE, Oct. 14, 2003, at A-4.

149. The phrase “good moral character” is an immigration term of art. See e.g., INA § 101 (f) [8 U.S.C.A. § 1101]: “for the purposes of this Act – No person shall be regarded as, or found to be, a person of good moral character who...[listing statutory bars].”

150. This is a rarely-used provision already in place. See e.g., Florangela Davila, Soldier Served in Iraq, But May Be Deported, SEATTLE TIMES, Sept. 12, 2003, at U1; Florangela Davila, Army Says Illegal Immigrant-Solider Can Stay, SEATTLE TIMES, Oct. 3, 2003 at A1. See also Margaret Stock, When Your Client Fights For Uncle Sam: “No Card” Soldiers and Expedited Citizenship, Bender’s Immig. Bull. . . . ( , 2003), at . . . Forthcoming

151. These provisions are still fluid, and resulted after the committee bill was marked up in November, 2003. (Discussion with James Ferg-Cadima, December 1, 2003.)

152. For example, advocates of the DREAM Act organized a highly-visible Summer, 2003 “Freedom March to” Washington, while FAIR and other opponents have organized a write-in campaign to throw sand in the gears. See Steven Greenhouse, Riding Across America for Immigrant Workers, N.Y. TIMES, Sept. 17, 2003, at A20. For the FAIR position, see, www.capwiz.com/fair/issues/alert/?alertid=2219951. The California State Legislature passed a non-binding resolution (AJR-9) in Summer, 2003, urging Congress to pass the DREAM Act. For a example of an effort in one state on this issue, see the Virginia Attorney General Opinion of September 5, 2002, opining that granting assistance would be inconsistent with IRRIRA, at 79 INT. REL. 1750 (November 25, 2002). Although the Virginia legislature passed a bill to grant assistance, the governor vetoed the legislation on April 30, 2003. As Table One notes,
subsequent bills have been introduced. MALDEF has sued Virginia over the matter. Mary Schaffrey, *Special Report: Changes in the Cards*, WASH. TIMES, Sept. 6, 2003, 1A, also at www.washtimes.com/specialreport/20030906-11-356-3298r.htm; *Lawsuit Challenges Virginia Denial of College Enrollment Due to Immigration Status*, 80 INT. REL. 1344 (Sept. 29, 2003).

### Table One

**State Legislation Concerning Undocumented College Students (November, 2003)**

States That Allow Undocumented Students to Gain Resident Tuition Status (by Statute):

- Texas, H.B. 1403, 77th Leg., Reg. Sess. (Tex. 2001)
- Utah, H.B. 144, 54th Leg., Gen. Sess. (Utah 2002)
- Oklahoma, S.B. 596, 49th Leg., 1st Sess. (OK 2003)

States That Do Not Allow Undocumented Students to Gain Resident Tuition Status (by Statute):


States That Have Formally Considered Legislation to Allow Undocumented Students to Gain Residency Tuition Status (Statutes introduced by November, 2003):

- Arizona
- California (eligibility for State financial aid)
- Colorado
- Florida
- Hawaii
- Kansas
- Maryland
- Massachusetts
Michigan
Nebraska
New Jersey
New Mexico
North Carolina
Oregon
Rhode Island
Virginia (vetoed by Governor)
Wisconsin
Appendix I: Text of post-markup DREAM Act
(December 1, 2003)

Calendar No. 415
108th CONGRESS
1st Session
S. 1545
A BILL

To amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to permit States to determine State residency for higher education purposes and to authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents.

SECTION 1. SHORT TITLE.
This Act may be cited as the 'Development, Relief, and Education for Alien Minors Act of 2003' or 'DREAM Act'.

SEC. 2. DEFINITION OF INSTITUTION OF HIGHER EDUCATION.
In this Act, the term 'institution of higher education' has the meaning given the term in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001).

SEC. 3. RESTORATION OF STATE OPTION TO DETERMINE RESIDENCY FOR PURPOSES OF HIGHER EDUCATION BENEFITS.
(a) IN GENERAL- Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1623) is repealed.
(b) EFFECTIVE DATE- The repeal described in subsection (a) shall take effect as if included in the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

SEC. 4. CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS OF CERTAIN LONG-TERM RESIDENTS WHO ENTERED THE UNITED STATES AS CHILDREN.
(a) SPECIAL RULE FOR ALIENS IN QUALIFIED INSTITUTIONS OF HIGHER EDUCATION-
(1) IN GENERAL- Notwithstanding any other provision of law and except as otherwise provided in this Act, the Secretary of Homeland Security may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, subject to the conditional basis described in section 5, an alien who is inadmissible or deportable from the United States, if the alien demonstrates that--
(A) the alien has been physically present in the United States for a continuous period of not less than 5 years immediately preceding the date of enactment of this Act, and had not yet reached the age of 16 years at the time of initial entry;
(B) the alien has been a person of good moral character since the time of
application;
(C) the alien--
(i) is not inadmissible under paragraph (2), (3), (6)(B), (6)(C), (6)(E),
(6)(F), or (6)(G) of section 212(a) of the Immigration and Nationality Act
(8 U.S.C. 1182(a)), or, if inadmissible solely under subparagraphs (C) or
(F) of paragraph (6) of such section, the alien was under the age of 16
years at the time the violation was committed; and
(ii) is not deportable under paragraph (1)(E), (1)(G), (2), (3)(B), (3)(C),
(3)(D), (4), or (6) of section 237(a) of the Immigration and Nationality Act
(8 U.S.C. 1227(a)), or, if deportable solely under subparagraphs (C) or (D)
of paragraph (3) of such section, the alien was under the age of 16 years at
the time the violation was committed;
(D) the alien, at the time of application, has been admitted to an
institution of higher education in the United States, or has earned a high
school diploma or obtained a general education development certificate in
the United States; and
(E) the alien has never been under a final administrative or judicial order
of exclusion, deportation, or removal, unless the alien has remained in the
United States under color of law or received the order before attaining the
age of 16 years.
(2) WAIVER- The Secretary of Homeland Security may waive the grounds of
ineligibility under section 212(a)(6) of the Immigration and Nationality Act
and the grounds of deportability under paragraphs (1), (3), and (6) of
section 237(a) of that Act for humanitarian purposes or family unity or when
it is otherwise in the public interest.
(3) PROCEDURES- The Secretary of Homeland Security shall provide a procedure
by regulation allowing eligible individuals to apply affirmatively for the
relief available under this subsection without being placed in removal
proceedings.
(b) TERMINATION OF CONTINUOUS PERIOD- For purposes of this section, any
period of continuous residence or continuous physical presence in the United
States of an alien who applies for cancellation of removal under this
section shall not terminate when the alien is served a notice to appear
under section 239(a) of the Immigration and Nationality Act (8 U.S.C.
1229(a)).
(c) TREATMENT OF CERTAIN BREAKS IN PRESENCE-
(1) IN GENERAL- An alien shall be considered to have failed to maintain
continuous physical presence in the United States under subsection (a) if
the alien has departed from the United States for any period in excess of 90
days or for any periods in the aggregate exceeding 180 days.
(2) EXTENSIONS FOR EXCEPTIONAL CIRCUMSTANCES- The Secretary of Homeland
Security may extend the time periods described in paragraph (1) if the alien
demonstrates that the failure to timely return to the United States was due
to exceptional circumstances. The exceptional circumstances determined
sufficient to justify an extension should be no less compelling than serious
illness of the alien, or death or serious illness of a parent, grandparent,
sibling, or child.
(d) EXEMPTION FROM NUMERICAL LIMITATIONS- Nothing in this section may be
construed to apply against the numerical limitation on the number of aliens
who may be eligible for cancellation of removal under section 240A of the
Immigration and Nationality Act (8 U.S.C. 1229b).
(e) REGULATIONS-
(1) PROPOSED REGULATIONS- Not later than 180 days after the date of
enactment of this Act, the Secretary of Homeland Security shall publish
proposed regulations implementing this section. Such regulations shall be
effective immediately on an interim basis, but are subject to change and
revision after public notice and opportunity for a period for public comment.
(2) INTERIM, FINAL REGULATIONS- Within a reasonable time after publication
of the interim regulations in accordance with paragraph (1), the Secretary
of Homeland Security shall publish final regulations implementing this section.
(f) REMOVAL OF ALIEN- The Secretary of Homeland Security shall not remove
any alien who has a pending application for conditional status under this Act.
SEC. 5. CONDITIONAL PERMANENT RESIDENT STATUS.
(a) IN GENERAL-
(1) CONDITIONAL BASIS FOR STATUS- Notwithstanding any other provision of
law, and except as provided in section 6, an alien whose status has been
adjusted under section 4 to that of an alien lawfully admitted for permanent
residence shall be considered to have obtained such status on a conditional
basis subject to the provisions of this section. Such conditional resident
status shall be valid for a period of 6 years, subject to termination under
subsection (b).
(2) NOTICE OF REQUIREMENTS-
(A) AT TIME OF OBTAINING PERMANENT RESIDENCE- At the time an alien obtains
permanent resident status on a conditional basis under paragraph (1), the
Secretary of Homeland Security shall provide for notice to the alien
regarding the provisions of this section and the requirements of subsection
(c)(1) to have the conditional basis of such status removed.
(B) EFFECT OF FAILURE TO PROVIDE NOTICE- The failure of the Secretary of
Homeland Security to provide a notice under this paragraph--
(i) shall not affect the enforcement of the provisions of this Act with
respect to the alien; and
(ii) shall not give rise to any private right of action by the alien.
(b) TERMINATION OF STATUS-
(1) IN GENERAL- The Secretary of Homeland Security shall terminate the
conditional permanent resident status of any alien who obtained such status
under this Act, if the Secretary determines that the alien--
(A) has violated any provision of subparagraph (B) or (C) of section
4(a)(1);
(B) has become a public charge; or
(C) in the case of an alien who received conditional permanent resident
status under section 4(a)(1)(B), has received a dishonorable or other than
honorable discharge from the Armed Forces of the United States.
(2) RETURN TO PREVIOUS IMMIGRATION STATUS- Any alien whose permanent resident status is terminated under paragraph (1) shall return to the immigration status the alien had immediately prior to receiving conditional permanent resident status under this Act.

(c) REQUIREMENTS OF TIMELY PETITION FOR REMOVAL OF CONDITION-

(1) IN GENERAL- In order for the conditional basis of permanent resident status obtained by an alien under subsection (a) to be removed, the alien must file with the Secretary of Homeland Security, in accordance with paragraph (3), a petition which requests the removal of such conditional basis and which states, under penalty of perjury, the facts and information described in subsection (d)(1).

(2) ADJUDICATION OF PETITION TO REMOVE CONDITION-

(A) IN GENERAL- If a petition is filed in accordance with paragraph (1), the Secretary of Homeland Security shall make a determination as to whether the facts and information described in subsection (d)(1) and alleged in the petition are true with respect to the eligibility of the alien.

(B) REMOVAL OF CONDITIONAL BASIS IF FAVORABLE DETERMINATION- If the Secretary of Homeland Security determines that the facts and information alleged in the petition are true, the Secretary of Homeland Security shall notify the alien and shall immediately remove the conditional basis of the status of the alien.

(C) TERMINATION IF ADVERSE DETERMINATION- If the Secretary of Homeland Security determines that such facts and information alleged in the petition are not true, the Secretary of Homeland Security shall so notify the alien and shall terminate the permanent resident status of the alien as of the date of the determination.

(3) TIME TO FILE PETITION- An alien may petition to remove the conditional basis to lawful resident status during the period beginning 180 days before and ending 2 years after either the date that is 6 years after the date of the granting of conditional resident status or any other expiration date of the conditional resident status as extended by the Secretary of Homeland Security in accordance with this Act. The alien shall be deemed in lawful status in the United States during the period in which the petition is pending.

(d) DETAILS OF PETITION-

(1) CONTENTS OF PETITION- Each petition under subsection (c)(1) shall contain the following facts and information:

(A) The alien maintained good moral character during the entire period the alien has been a conditional permanent resident.

(B) The alien continues to be in compliance with subparagraphs (B) and (C) of section 4(a)(1).

(C) The alien has not abandoned his or her residence in the United States. There shall be a presumption that the alien has abandoned his or her residence if the alien is absent from the United States for more that 365 days in the aggregate during the period of conditional residence, unless the alien demonstrates that he or she did not in fact abandon residence in the
United States. The presumption shall not apply to an alien whose absence is due to active service in the Armed Forces of the United States.
(D) The alien has completed at least 1 of the following:
(i) The alien has acquired a degree from an institution of higher education in the United States or has completed at least 2 years, in good standing, in a program for a bachelor's degree or higher degree in the United States.
(ii) The alien has served in the Armed Forces of the United States for at least 2 years and, if discharged, has received an honorable discharge.
(E) All secondary education institutions attended in the United States.

(2) HARDSHIP EXCEPTION-
(A) IN GENERAL- The Secretary of Homeland Security may, in the Secretary's discretion, remove the conditional status of an alien if the alien--
(i) satisfies the requirements of subparagraphs (A), (B), and (C) of paragraph (1);
(ii) demonstrates compelling circumstances for the inability to complete the requirements described in paragraph (1)(D); and
(iii) demonstrates that the alien's removal from the United States would result in exceptional and extremely unusual hardship to the alien or the alien's spouse, parent, or child who is a citizen or a lawful permanent resident of the United States.

(B) EXTENSION- Upon a showing of good cause, the Secretary of Homeland Security may also extend the validity period of the conditional resident status for the purpose of completing the requirements described in paragraph (1)(D).

(e) TREATMENT OF PERIOD FOR PURPOSES OF NATURALIZATION- For purposes of title III of the Immigration and Nationality Act (8 U.S.C. 1401 et seq.), in the case of an alien who is in the United States as a lawful permanent resident on a conditional basis under this section, the alien shall be considered to have been admitted as an alien lawfully admitted for permanent residence and to be in the United States as an alien lawfully admitted to the United States for permanent residence. However, the conditional basis must be removed before the alien may apply for naturalization. SEC. 6. RETROACTIVE BENEFITS UNDER THIS ACT. If, upon the date of enactment of this Act, an alien has satisfied all the requirements of section 4 and complied with section 5(d)(1)(D), the Secretary of Homeland Security may adjust the status of the alien to that of a conditional resident in accordance with section 4. The alien may petition for removal of such condition at the end of the conditional residence period in accordance with section 5(c) if the alien has complied with subparagraphs (A), (B), and (C) of section 5(d)(1) during the entire period of conditional residence.

SEC. 7. EXCLUSIVE JURISDICTION.
(a) IN GENERAL- The Secretary of Homeland Security shall have exclusive jurisdiction to determine eligibility for relief under this Act, except where the alien has been placed into deportation, exclusion, or removal proceedings either prior to or after filing an application for relief under this Act, in which case the Attorney General shall have exclusive
jurisdiction and shall assume all the powers and duties of the Secretary of Homeland Security until proceedings are terminated, or if a final order of deportation, exclusion, or removal is entered the Secretary of Homeland Security shall resume all powers and duties delegated to the Secretary of Homeland Security under this Act.

(b) STAY OF REMOVAL OF CERTAIN ALIENS ENROLLED IN PRIMARY OR SECONDARY SCHOOL- The Attorney General shall stay the removal proceedings of any alien who--

(1) meets all the requirements for relief under this Act, except that the alien has not yet graduated from high school;

(2) is at least 12 years of age; and

(3) is enrolled full-time in a primary or secondary school.

(c) EMPLOYMENT- An alien whose removal is stayed pursuant to subsection (b) may be engaged in employment in the United States, consistent with the Fair Labor Standards Act (29 U.S.C. 201 et seq.), and State and local laws governing minimum age for employment.

(d) LIFT OF STAY- The Attorney General shall lift the stay granted pursuant to subsection (b) if the alien--

(1) is no longer enrolled in a primary or secondary school; and

(2) fails to maintain prima facie eligibility for relief under this Act. SEC. 8. PENALTIES FOR FALSE STATEMENTS IN APPLICATION. Whoever files an application for relief under this Act and willfully and knowingly falsifies, misrepresents, or conceals a material fact or makes any false or fraudulent statement or representation, or makes or uses any false writing or document knowing the same to contain any false or fraudulent statement or entry, shall be fined in accordance with title 18, United States Code, or imprisoned not more than 5 years, or both.

SEC. 9. CONFIDENTIALITY OF INFORMATION.

(a) PROHIBITION- No officer or employee of the United States may--

(1) use the information furnished by the applicant pursuant to an application filed under this Act to initiate removal proceedings against any persons identified in the application;

(2) make any publication whereby the information furnished by any particular individual pursuant to an application under this Act can be identified; or

(3) permit anyone other than an officer or employee of the United States Government or, in the case of applications filed under this Act with a designated entity, that designated entity, to examine applications filed under this Act.

(b) REQUIRED DISCLOSURE- The Attorney General or the Secretary of Homeland Security shall provide the information furnished under this section, and any other information derived from such furnished information, to--

(1) a duly recognized law enforcement entity in connection with an investigation or prosecution of an offense described in paragraph (2) or (3) of section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182(a)), when such information is requested in writing by such entity; or
(2) an official coroner for purposes of affirmatively identifying a deceased individual (whether or not such individual is deceased as a result of a crime).

(c) PENALTY- Whoever knowingly uses, publishes, or permits information to be examined in violation of this section shall be fined not more than $10,000. SEC. 10.

EXPEDITED PROCESSING OF APPLICATIONS; PROHIBITION ON FEES. Regulations promulgated under this Act shall provide that applications under this Act will be considered on an expedited basis and without a requirement for the payment by the applicant of any additional fee for such expedited processing.

SEC. 11. SEVIS REGISTRATION.
An institution of higher education that enrolls any alien who is a beneficiary under this Act shall register the alien in the Student and Exchange Visitor Information System (SEVIS).

SEC. 12. HIGHER EDUCATION ASSISTANCE.
Notwithstanding any provision of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.), with respect to assistance provided under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.), an alien who adjusts status to that of a lawful permanent resident under this Act shall be eligible only for the following assistance under such title:

(1) Student loans under parts B, D, and E of such title IV (20 U.S.C. 1071 et seq., 1087a et seq., 1087aa et seq.), subject to the requirements of such parts.

(2) Federal work-study programs under part C of such title IV (42 U.S.C. 2751 et seq.), subject to the requirements of such part.

(3) Services under such title IV (20 U.S.C. 1070 et seq.), subject to the requirements for such services.

SEC. 13. GAO REPORT.
Seven years after the date of enactment of this Act, the Comptroller General of the United States shall submit a report to the Committees on the Judiciary of the Senate and the House of Representatives setting forth--

(1) the number of aliens who were eligible for cancellation of removal and adjustment of status during the application period described in section 4(a)(1)(A);

(2) the number of aliens who applied for adjustment of status under section 4(a);

(3) the number of aliens who were granted adjustment of status under section 4(a); and

(4) the number of aliens with respect to whom the conditional basis of their status was removed under section 5.